Case No: C5/2006/0628/0691/1053/1273

Neutral Citation Number: [2006] EWCA Civ 1713
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 14th December 2006

Before :

LORD JUSTICE BUXTON
LORD JUSTICE LATHAM
and
LORD JUSTICE LONGMORE

- -

Between :

HB(Ethiopia)	**Appellants**
FI(Nigeria)	
EB(Kosovo)	
JL(Sierra Leone)	
- and -	
The Secretary of State for the Home Department	**Respondent**

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(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr Richard Drabble QC, Miss Louise Hooper, Mr Duran Seddon and Mr Patrick Lewis (instructed by **Messrs Dare Emmanuel; the Refugee Legal Centre; and the Immigration Advisory Service Solicitors Unit**) for the **Appellants**
Mr Philip Sales QC and Mr Parishil Patel (instructed by **the Solicitor to Her Majesty' Treasury**) for the **Respondent**

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Judgment

Lord Justice Buxton :

Background

1. These appeals were listed as test cases, to clarify the law on the effect of delay by the Secretary of State on claims that rely on article 8 of the European Convention on Human Rights to resist removal from this country. In the event, as I shall demonstrate below, that enterprise failed, first because the effect in law of such delay is already well-settled by authority binding on this court; and second because all of the four cases before us fail on grounds not related to delay.

2. It is important to note that in none of the four cases before us is any claim made that the applicants have rights under the law of asylum, or otherwise under this country's immigration law. All of the applicants however claim that, although they have no right to remain in this country, to remove them would amount to an interference with rights granted by article 8(1) of the European Convention; and the significance of the delay in dealing with their case is that it is said to deprive the Secretary of State of the ability to assert that such removal is justified under article 8(2) of the Convention.

3. In the foregoing summary I have deliberately spoken in general terms of "the delay". How and in what respect the Secretary of State delayed differs significantly between the various cases. In *HB*, *EB* and *JL* the complaint is that the applicant originally had a claim to asylum or other relief. Because of the policy then operated by the Secretary of State with regard to the particular countries from which the applicants came, had those claims been dealt with in a reasonable time by the Secretary of State the applicants would have received some sort of right to remain in this country. Although there is uncertainty in particular cases, I will assume for the purposes of this general exposition that each of them would have been granted Exceptional Leave To Remain [ELR]; which in the normal course, and in the absence of any misbehaviour on the part of the applicant, would eventually become Indefinite Leave To Remain [ILR]. However, while the applications were pending conditions in the applicants' home countries (for instance, in the case of EB, Kosovo) improved, or were perceived to have improved, to the extent that applicants could safely be returned there. So the asylum claims of HB, EB and JL when they eventually came to be considered were all rejected. Those appellants now claim, in applications under article 8, that account should be taken of the delay in handling, and thus failure, of their previous asylum claims. I will refer to these, as they were referred to in argument, as hypothetical decision cases.

4. The case of FI is different. FI originally did make an asylum claim, but that was dismissed as long ago as 1999, and no argument is raised as to the delay that undoubtedly occurred in dealing with it. FI, rather, asserts that there was delay in dealing with what by then was and was only an article 8 claim. That raises different issues from the other three cases, and I will deal with her case separately.

Hypothetical decision cases: some general observations

5. First, the applicant has to establish that he has rights, on the basis of his life in the host state, under article 8(1). That has absolutely nothing to do with the situation in his state of origin on which any asylum or immigration claim would have to be based. And it therefore follows that however gross the delay in dealing with his asylum claim

may have been, and however much that delay may have caused him to lose the award of ELR or ILR that he would have received if the application had been dealt with promptly, he has no way of complaining about that delay unless he has, adventitiously, brought himself within article 8(1). That is quite simply because, in asylum terms, at the time when his case was heard the improvement in conditions in his home country had removed his need for international protection.

6. Second, it is not easy to formulate the status in an article 8 application of a previous delay in dealing with an asylum application. Two explanations may be suggested, both of which rest significantly on policy rather than on logic. It may be argued that if the Secretary of State had dealt with the asylum application promptly the applicant would have obtained the right to stay in this country well before his present article 8 claim arose. It is therefore unfair, granted that he has a potential right to be here under article 8(1), for the Secretary of State not to honour that right. Alternatively, and with more regard for the structure of article 8, the Secretary of State's refusal of the article 8 claim rests upon his assertion of the need to enforce a proper immigration policy. He cannot be heard to make that claim if the history of the case demonstrates that the policy on which the claim relies has not been operated properly.

7. Third, the argument rests upon asserting that there has been undue, unreasonable, or however it may be characterised delay in dealing with the previous asylum claims. As we shall see, the three cases involved delays of some four years between the application for asylum and the Secretary of State's decision. The Secretary of State put in a good deal of evidence explaining the unusual pressures upon his service in the period in question, broadly affecting the early years of this century, in particular from an unforeseen upsurge of applications seeking relief from the then regimes in Kosovo and Iraq; and Mr Sales QC rightly warned us of the dangers of a court passing judgement on the reaction of administrators to such problems. I see the force of that. And I in particular accept that it is no function of this court to discipline or punish the Secretary of State and his department, and that it would not be appropriate to grant a party relief that would otherwise not be available just in order to express concern or censure over administrative failings. All that said, however, there is force in Mr Drabble QC's observation that this country simply has got to make arrangements to deal with its international obligations under the Refugee Convention, whatever the difficulties, and where those arrangements have fallen down difficulty or lack of resources cannot be prayed in aid. In most of the present cases I am therefore prepared to assume that the delays were unreasonable. At the same time, however, where a tribunal has made a specific finding as to the reasonableness of the delay, as did the AIT in *HB(Ethiopia)*, see §28 below, an appellate court may be unwilling to interfere with that finding. If such assumptions or determinations as to the reasonableness of delay were to be crucial to any particular decision, as in the present cases they are not, the difficult issues involved would need much fuller and more anxious consideration than we have given to them in this appeal.

8. Fourth, however, as Mr Sales pointed out, even if it is accepted that delay has occurred, it will be necessary to specify when the decision ought to have been taken. That is because the whole case rests upon the hypothesis that the decision should have been taken before the date on which the policy changed, and the granting of ELR or ILR was withdrawn. That, with respect, must be right. In the event, the point did not

matter in any of the present appeals, but in other cases it might be of considerable significance.

9. Fifth, a different case arises where the application is not under article 8, but under one of the immigration rules, for instance for admission on grounds of marriage. The Secretary of State may seek to apply procedural rules, most conspicuously that a person with no other right to be in this country must return to the country of origin to make the application. If the case involves a hypothetical decision granting leave on non-article 8 grounds, then it may be argued that it is inappropriate for the Secretary of State to rely on his own wrong, in failing to take that decision, to insist under the procedural rule on treating the applicant as a person with no right to be in the United Kingdom.

10. Against that background I now consider the law in relation to delay.

The law in relation to delay: the authorities

11. The claimant has first to establish that he satisfies the requirement of article 8(1) that he has an established family life or (subject to the discussion in §38 below) private life in this country. If he is unable to do that, article 8(2), to which alone the present issues of delay are relevant, simply does not arise.

12. As to article 8(2) in the context of removal from this country of persons who have no right in domestic law to be here, in *Razgar v SSHD* [2004] 2 AC 368[20] Lord Bingham of Cornhill said:

> Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable on a case by case basis.

That principle has black letter status in English immigration law, and has never been suggested to be inconsistent with this country's obligations under the European Convention.

13. The force of that principle was restated in classic terms by this court in *Huang v Home Secretary* [2006] QB 1, where Laws LJ said that the balance between private right and public interest inherent in article 8 could normally be taken to have been struck by national legislation in the Immigration Acts and Rules. Laws LJ continued, at §§ 59-60:

> The Human Rights Act 1998…require[s] the adjudicator to allow an appeal against removal or deportation brought on article 8 grounds if, but only if, he concludes that the case is so exceptional on its particular facts that the imperative of proportionality demands an outcome in the appellant's favour notwithstanding that he cannot succeed under the Rules. [60] In such a case the adjudicator is not ignoring or overriding the Rules. On the contrary it is a signal feature of his task that he is bound to respect the balance between public interest and private right struck by the Rules with Parliament's approval.

> That is why he is only entitled on article 8 grounds to favour an appellant outside the Rules where the case is truly exceptional.

Neither of the foregoing was a delay case. Three such cases were put before us.

14. The first of these was *Shala v SSHD* [2003] EWCA Civ 233; [2003] INLR 349, decided in February 2003, and therefore without the benefit of either *Razgar* or *Huang*. S was an ethnic Albanian from Kosovo who came to the United Kingdom in 1997 and claimed asylum. That claim was rejected by the Secretary of State, but not until 2001. Had the claim been dealt with reasonably promptly the case would have fallen within a policy that granted Albanian Kosovans at least ELR. During the period of delay S had met and established family life with a lady who before the hearing of his case had been given refugee status, and whom he later married. He then sought leave to enter (ie to remain in) the United Kingdom on marriage grounds. The Secretary of State contended that as, by then, in 2001, S would not be at risk in Kosovo he must obey the normal requirement of returning there to apply for leave to enter.

15. This court pointed out that if the asylum claim had been dealt with at the proper time S would, when he made his application on marriage grounds, have been lawfully in the United Kingdom, under his hypothetical ELR, and therefore able to apply from within this country for a variation of that leave on grounds of marriage. Keene LJ said, at §16:

> The whole balancing exercise was conducted without any weight being attached to the fact that the policy being put into one side of the scales would not have been applicable at all but for the delay on the part of the Home Office….To require the appellant now to leave the UK and to apply from Kosovo for leave to enter seems to me to be clearly disproportionate and to fall outside the generous margin of discretion afforded in such cases to the respondent, who does not appear to have reflected adequately, if at all, the significance of his department's delay in the present case.

The application for leave to remain in the UK on marriage grounds was accordingly remitted to the Secretary of State to consider without demanding that the application be renewed from Kosovo.

16. Two comments may be made at this stage. First, the complaint was that it was unfair or inappropriate that the Secretary of State should insist on the *procedural* requirement that applications should be made from outside the UK. The question did not arise of whether delay in itself could affect the *substantive* determination under article 8(2). Second, although the court did speak in terms of exceptional circumstances, the standard that it applied may be thought to have fallen short of the language of a small minority of exceptional cases or truly exceptional circumstances that was employed in *Razgar* and *Huang*.

17. The jurisprudence of *Huang* did however come together with the problem of delay in *Strbac v SSHD* [2005] EWCA Civ 828; [2005] Imm AR 504. S was an ethnic Serb who was a citizen of Croatia, who made an unsuccessful application for asylum.

Relying on *Shala*, he claimed article 8 protection on the basis that he would have been granted at least ELR if his asylum application had been decided within a reasonable time. This court, while accepting the factual premise, rejected the submission. Laws LJ said that *Shala* laid down no general rule, and pointed out in particular that the case could not be used, as for the argument in *Strbac* it had to be used, to establish a substantive violation of an article 8 right. In *Strbac*, as Laws LJ said at p 524:

> There is no analogue to the special feature of *Shala*, namely the loss of a distinct procedural right to apply in-country for an extension of leave.

18. Laws LJ gave further and important guidance at p 521 of the judgment. He referred to a suggestion in a first instance judgment that *Shala* was authority for a wide proposition that a decision maker must have regard to delay in determining an application for asylum (not, it may be observed, the type of application that any of these cases are concerned with), and continued:

> It is of course right that administrative delay in the determination of an application may, at least if it proves to be substantial and to have brought consequences in its wake beyond the bare passage of time, be a factor which the decision-maker is obliged to consider. But as a proposition that does no more, with respect, than identify an actual or potential relevant factor which, I apprehend, must have very substantial effects if it is to drive a decision in an applicant's favour: see *Anufrijeva* [2004] QB 1124.

19. The reference to *Anufrijeva* was important. This court held, at its §46, that where there had been

> culpable delay in the administrative processes necessary to determine and to give effect to an article 8 right, the approach of both the Strasbourg court and the commission has been not to find an infringement of article 8 unless substantial prejudice has been caused to the applicant.

That sets a demanding standard. Mr Drabble said that the case was irrelevant to our problem, thus should have been seen as such by Laws LJ, because it addressed the creation of a right under article 8(1) and not factors that affected the legality of interference with that right under article 8(2). I do not agree. The court in *Anufrijeva* expressed itself in very general terms, and did not confine itself expressly to article 8(1). But, more substantially, the considerations to which the court appealed would seem to apply even more strongly to an attempt to limit a national authority's otherwise proper reliance on administrative policy than they do to a mere casualness or failure to act that places the subject into a position that needs article 8 protection. If "substantial prejudice" is required before the state's inaction creates an article 8 right, something at least as serious would seem to be required before the state is prevented by its inaction from applying a policy that is consonant with article 8.

20. Mr Drabble also said that Laws LJ's observations were obiter, because he had had strong doubts about S's ability to meet the threshold requirements of article 8(1). It is

quite true that that was a further difficulty in the case, stressed by Laws LJ. But it is quite clear from reading the passages set out above, from their expository tone, and from the position that they occupy in the judgment, that they are intended as a general account of the law, driving the decision in the case; and Laws LJ made it quite clear, in his §35, that it was for all of the reasons that he had ventilated that he rejected S's claim.

21. *Akaeke v Secretary of State* [2005] EWCA Civ 947; [2005] INLR 575 was in its basic facts a case similar to *Shala*, though with the important difference that no complaint was made of delay in processing Mrs A's *asylum* application (which failed), and there was no suggestion that when she pursued her article 8 application on marriage grounds she was to be taken to be in notional possession of ELR. But the issue was, as in *Shala*, whether Mrs A should be obliged to return to her country of origin, Nigeria, to make a claim based on her marriage: a claim that, once made, was likely to succeed (see *Akaeke* at §3). Accordingly, although there was a good deal of discussion in the judgment of article 8, and Mrs A had subsequently to the coming into force of the 1998 Act made a claim under that article, her claim was not like those in *HB, EB* and *JL*, which depend on article 8 alone and do not assert any right under this country's specifically immigration processes.

22. Mrs A's in-country application for admission on grounds of marriage took more than three years to be considered by the Secretary of State. The IAT described that fact as a national disgrace, and said that when the system of immigration control had broken down to that extent it could not be said that the fair and firm operation of that system required the application to Mrs A of the rule preventing her from applying from within this country.

23. This court pointed out that that was a matter for the specialist tribunal charged with supervising immigration policy, and the appellate court should not interfere; though it is plain that this court entirely shared the sentiments of the IAT. The order that Mrs A must return to Nigeria before her application could be considered therefore remained quashed. It is however important to note that that procedural order was all that the court was concerned with. Carnwath LJ at §31 emphasised that it did not maintain public confidence in the fairness of the system that, where the system had broken down, "a rigid policy of temporary expulsions" was nonetheless adhered to. And that aspect of the case was underlined in Carnwath LJ's §32, where he said:

> For completeness I should note that I have had regard to the very recent decision of this court in [*Strbac*]. However, the factual context was wholly different, because the applicant had no separate claim to be allowed to enter under the rules.

In other words, rejection in *Strbac* of the attempt to create rights to be in this country out of administrative delay alone is not undermined by the procedural ruling in *Akaeke*.

The law in relation to delay: a summary

24. I draw the following conclusions from the authorities, binding on us, discussed above.

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 §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 §32].

vii) And further, it is not clear that the court in *Strba*c 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 §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*].

25. I now apply those principles to the cases before us. The tribunals below did not in every case have the advantage of the arguments, and certainly not of their skilful development, that we have enjoyed, and a number of difficulties stem from that fact.

HB(Ethiopia)

26. HB arrived in the UK in 1999 and claimed asylum. That application was not rejected by the Secretary of State until 2004, a delay of 4 years and 9 months. In the interim HB had met NA, whom she married by Islamic rite in 2003. An adjudicator sitting in 2004 dismissed HB's asylum appeal. The Adjudicator accepted that HB had established family and private life in the UK, but held that to remove her would be proportionate to the Secretary of State's duty to enforce effective immigration control. The Adjudicator accepted that if HB's application had been dealt with in 1999 she would probably have been granted ELR under the then Home Office policy but, because at the time of her Islamic marriage to NA his immigration status was precarious and HB was able to apply to change her status but had not done so, her case was not one of "exceptional circumstances"

27. On further appeal, the AIT identified various errors in the Adjudicator's determination, in particular in her thinking that there had been a Home Office policy that would have led to the grant of ELR. They held, however, that her decision was nonetheless the only one open to her. The argument presented to the AIT was strongly based on *Shala*; but, as we have seen, *Shala* is irrelevant to a case such as that of HB, where the issue is not one of procedure but of substance; and that is what the AIT held in §15 of its Determination, citing a passage from the judgment of Laws LJ in *Strbac* part of which is set out in §17 above.

28. More fundamentally, however, the AIT considered that even if HB's application had been handled with due diligence it would not have been determined until 2002. That was largely because of the unforeseen influx into the system of many refugees from Kosovo. By that time the situation in Ethiopia had changed to the extent that the AIT thought that in 2002 HB would not have been granted asylum by the Secretary of State, and that any appeal to an adjudicator against such a decision would not have been successful. Both of those judgements were matters for the AIT. Mr Drabble sought to show that the finding that asylum would not have been granted was inconsistent with two tribunal decisions to the contrary effect that were recorded in 2002. The AIT was however shown those cases, and did not accept that they represented a clear pattern of decisions to that effect: a view to which, as a specialist tribunal, it was entitled.

29. For those reasons, therefore, this case never reached the stage at which the delay in determining HB's asylum claim entered into the equation at all. That was because the AIT concluded that even if that claim had been determined within what it thought would have been a reasonable time there would have been no decision favourable to HB.

30. For completeness, the AIT found that HB had no right to apply under the marriage rules, and so the issues as to procedure addressed in *Shala* and *Akaeke* could not arise either. I did not understand that conclusion to be seriously challenged before us. But even if this point had been put in issue the claim would have failed on the same ground as the main case failed, that if a timely determination would not have given HB any sort of right to be in the United Kingdom she could not found any claim to make an in-country application for the extension of that (hypothetical) right.

EB(Kosovo)

31. EB, then aged thirteen, entered the UK and claimed asylum in 1999. He has been treated throughout as an unaccompanied minor, though it seems that for much of his early stay here he may have been living with an uncle. His asylum application was rejected by the Secretary of State in October 2000, on procedural grounds that are now accepted to have been unfounded. After pressure from his solicitors his application for asylum was finally refused in 2004. Mr Drabble referred us to government guidance that said that claims from unaccompanied minors should be dealt with within six months. While awaiting a decision EB met his now partner, LQ, a Somali lady who had been granted ELR. She was pregnant with another man's child, whom EB has accepted as part of his family. The couple wish to remain together.

32. EB appealed to an Adjudicator, not pursuing his asylum claim but relying on article 8 on the basis of his partnership with LQ. The Adjudicator noted that he had not had representation at the hearing from the Secretary of State, as he thought excusably because EB had not raised his relationship with LQ at his asylum interview in 2004, despite his being by then well into his partnership with her. That may well be why although the Adjudicator recorded the submission, apparently on the basis of *Shala*, that EB would have been granted ELR, if not ILR, if his case had been decided in 2000, he made no finding that developed that point. Rather, the Adjudicator found, as a fact, that EB and LQ could safely return to Kosovo and continue family life there.

33. The argument for EB before the AIT was largely directed at that last decision, about the reasonableness of return to Kosovo. The AIT said, at its §14, that while it would not necessarily have reached the same conclusion as the Adjudicator that was a matter for him. As to the matters with which this appeal is concerned, the AIT held first that EB had no claim under the marriage policy because LQ had no settled status, and therefore that *Shala* was not relevant: AIT at §11, and see § 24 (iii) and (iv) above. Second, as to what would have happened had EB's own asylum application been heard promptly, the AIT held that ELR was discretionary, and it could therefore not be assumed that it would have been granted to EB; and that even if such leave had been granted to EB it would not have given him "status" to remain in the UK.

34. These conclusions are criticised before us. As to what the outcome would have been of a timely determination, we were told that until 9 November 2001 the Secretary of State had a policy, which there was no reason to think would not have been applied to EB, of granting ELR in such cases, which could then be expected to be converted to ILR. I am therefore prepared to proceed on the basis, contrary to the assumption of the AIT, that the same assumption can be made in this case as was made in *Strbac*, of a hypothetical earlier decision favourable to EB. While delay is in general a factor that must be taken into account in considering the article 8 application, provided that the delay has had very substantial effects (see §24(v) above), the mere fact that the applicant would at an earlier time have achieved ELR on asylum grounds cannot be conclusive in an article 8 application, and may not even be relevant: see § 24(vi) and (vii) above. The AIT did not address this delay issue, mainly because it was never properly put to it. The Grounds of Appeal to the AIT made a general reference to the possibility of an earlier grant of ELR, but only as one factor amongst very many in the article 8 balance, and not with the specific impact that the argument now under consideration asserts.

35. I would therefore in any event be very reluctant to accede to the submission that the case should be remitted to the AIT for it to review an argument based on *Strbac*. Not only is the appellant only very doubtfully able to raise the point at all, but also there is no reason to think that, if confronted with this argument, the AIT would, or should, alter its original decision, by holding that this factor was truly exceptional or had a very substantial effect on the merits of the case. There is, however, a more fundamental reason, pointed out by Mr Sales, why the appeal must fail. It is a necessary pre-condition to these arguments under article 8(2) that the claimant can establish that removal from this country would interfere with his rights under article 8(1). But the Adjudicator held, and the AIT properly upheld the finding, that on the facts removal would not interfere with EB's family life with LQ: see §33 above. The arguments about *Strbac*, interesting as they are, do not therefore arise.

JL(Sierra Leone)

36. JL made an asylum claim in November 1999. That was rejected in June 2004, a delay of 4 years and 7 months. At the time of the application it was the policy of the Secretary of State to grant four years ELR to applicants from Sierra Leone who did not qualify for asylum, and it was said to be open to such applicants to apply for settlement towards the end of that period. That policy was withdrawn in September 2001. While she was waiting for a decision JL met, and later had a child with, MB, who had ELR.

37. Before the Adjudicator the appellant's then representative advanced the case solely on article 8 grounds, despite no representations on that basis having ever been made to the Secretary of State. Because the issue is of some importance, I set out how the Adjudicator dealt with the evidence on this point, at §§ 13-14 of his Determination:

> I find that the appellant has established private life in the light of her relationships with her aunt, brother and [MB], with whom she has a child. I also take into account her successful studies and that she is enrolled on a course at Kingston University…I find that family life between herself and her son has been established. I have greater difficulty with the relationship with her partner. They have not shown the commitment of living together but they see each other regularly. While they lived together for a short time in 2002 [MB] applied for his own accommodation and moved in when he was given it. I accept that [MB] sees his son regularly ands helps with his care, as does the appellant's aunt. In *Kugathas* [2003] INLR 170 Sedley LJ held that generally the protection of family life under Article 8 involves cohabiting dependants such as parents and their dependant minor children, and whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults would not necessarily acquire the protection of Article 8 without evidence of dependency involving more than the normal emotional ties. I am not satisfied that the relationship between the appellant and her aunt is in the nature of a family life relationship nor is that between the appellant and his partner because of the absence of real commitment. [14] If I

> am wrong and family life has been established would removal interfere with the appellant's private and family life?

38. The Adjudicator answered that question in the negative, as he found that the family, if it was one, could return to Sierra Leone as a family unit. He then, at the end of his §14, said:

> If I am wrong and removal would interfere with the appellant's private and family life it would be lawful and would pursue the legitimate aim of an effective immigration policy.

The Adjudicator held, referring to the observation of Lord Bingham in *Razgar*, set out in §12 above, that return would be reasonable and lawful, not least because MB as well as JL came from Sierra Leone. He was shown *Shala;* found that if JL's case had been considered timeously the applicant would probably have been granted some form of leave to remain in the UK; but held that the case before him was distinguishable from *Shala*, and that the delay did not alter the general conclusion as to lawfulness under article 8(2). Although the Adjudicator did not specifically so state, he was with respect clearly correct in distinguishing *Shala*, because in *JL* it was sought to use the factor of delay to create a substantive right and not merely a procedural protection (see § 24 (iii) and (iv) above); and the Adjudicator could not be criticised for finding that on the facts the delay did not reach the standard of true exceptionality (*Huang*) or had a very substantial effect on the outcome (*Strbac*).

39. JL appealed to the AIT, relying on *Shala* for the proposition that account should be taken of the fact that family life had only become established during the period after a timeous decision should have been taken on the previous asylum claim. The misconception of that argument does not need to be stated. However, the AIT, generously to the appellant, reviewed the Adjudicator's decision, accepted that unreasonable delay was a factor in assessing proportionality, but held that that was a matter for the Adjudicator, who had not erred in his conclusion. For the reasons that I have stated while reviewing the Adjudicator's decision in §38 above, that finding was plainly open to the AIT.

40. There is again, however, a reason why the case did not need to reach that stage. In its §8 the AIT pointed out that the Adjudicator had made a clear finding that family life had not been established: on which see §37 above. It had not therefore been necessary for him to go on and consider whether JL's removal would be an interference with a right protected by article 8(1). That approach was contested before us because the Adjudicator had held that JL had established *private* life in the UK, as to which see the first part of §13 of his Determination also set out in §37 above; and neither tribunal had considered whether removal would interfere with that right. That argument was at best artificial. It was always assumed, not least by those who settled the terms of JL's appeal to the AIT, that on the facts of this case private life marched with family life, and the Adjudicator's Determination should be so read, as it was by the AIT. The passing reference to JL's university studies does not displace that dependence. Nor, if the matter came into issue, would it be easy to fit the life of JL absent her family into the sphere of the personal and sexual autonomy that Lord Bingham of Cornhill in *M v Secretary of State* [2006] 2 AC 91[5] saw as the essence of private life. And, in any event, there is absolutely no reason to think that, if the matter were remitted to him to consider whether removal to Sierra Leone would

be an undue interference with JL's studies and her non-family relationships, the Adjudicator would reach any conclusion different from that which he reached in respect of JL's hypothetical family relationships.

41. JL's case accordingly properly fails by reason of inability to establish a right under article 8(1).

FI(Nigeria)

42. As already indicated, FI's case differs from that of the other appellants. That is because her claim is to remain under the immigration rules as a dependent of her husband, GO. She makes no substantive complaint as to the handling of her own claim for asylum, which was rejected as long ago as January 1997. Rather, her case on delay is based on the failure between July 2000 and July 2003 to give any ruling on her dependency claim.

43. I say that her case is so based, but that is only true of the case as it is promoted in this court. Nothing was said as to delay in either of the lower tribunals. Mr Drabble was therefore reduced to arguing that the appeal should be allowed because of the Adjudicator's failure to apply the law on delay, and the application should be remitted to him for that purpose. That submission could only avoid this court's lack of jurisdiction to entertain the argument if it could be said that the law on delay that had been overlooked was *Robinson*-obvious. Mr Drabble did not so argue, nor could he have done.

44. The appeal accordingly fails on that ground alone. Quite apart from that formal point, however, it is impossible to see how the delay in considering the application for leave to remain as a dependent could have affected the determination, except perhaps in the appellant's favour. Despite the point not having been raised before the AIT, Mrs Gleeson, the Senior Immigration Judge who rejected the application to appeal to this court, pointed out that *Akaeke* did not apply because no right had been lost by the delay. If anything, therefore, the delay strengthened JL's case, by giving her a longer time to found her claim to family life under article 8.

45. The most powerful part of that case was that GO was in very poor health, physically and psychologically dependent on JL, and not able to cope either if she left him to return to Nigeria or if he had to accompany her there. The Adjudicator held that if GO were left in the UK there would be adequate social service provision for his needs; and if he went to Nigeria there would be adequate medical services. It is now objected that there was no reasonable basis for those conclusions. That complaint does not seem to have been made in the Grounds of Appeal to this court; and, even more to the point, was not made in the Grounds of Appeal to the AIT. Mr Drabble's attempt to conjure the issue out of the very general complaints in those Grounds was, I fear, a gallant failure.

46. In this case, therefore, the "delay" issue affecting the other appeals before us not only was not raised at the appropriate time, but also could not arise on the facts of the case.

Disposal

47. I would dismiss all of the appeals, in each case on grounds other than the delay issue which was the reason for permission being granted to appeal to this court.

Representation

48. All of the appellants had the great advantage, to the court as well as to them, of representation by Mr Drabble. He was supported by three juniors, distributed amongst the various appellants. None of them had appeared in any of the tribunals below, so their presence was not necessary to inform the court about those proceedings. There were present in court experienced solicitors who had had the conduct of the cases for some or all of their process. FI was not publicly funded, her Counsel and Solicitors acting pro bono. The other three applicants were publicly funded. Whilst the appeal was current it was not appropriate for the court to enquire into the representation. The court will however now ask the Legal Services Commission for an explanation of why four counsel were instructed in these appeals.

Lord Justice Latham:

49. I agree.

Lord Justice Longmore:

50. I also agree.