HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 41

on appeal from: [2006]EWCA Civ 1713

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

E B Kosovo (FC) (Appellant) v Secretary of State for the Home Department

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

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Respondents:
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LORD BINGHAM OF CORNHILL

My Lords,

1. The appellant, a Kosovar, arrived in this country from Kosovo, via Macedonia, on 2 September 1999. He was then aged 13. He claimed asylum four days later. It was refused on 27 April 2004, a delay of over four and a half years. Conditions in Kosovo having changed, the appellant now has no ground for claiming asylum. But had his application been decided before 10 December 2003, when he became eighteen and so ceased to be an unaccompanied minor, he would, depending on the date of the decision, under the policies in force, from time to time, have been granted exceptional leave to remain in this country for four years or until his eighteenth birthday, with at least the chance of obtaining indefinite leave to remain thereafter. The respondent Secretary of State now seeks to remove him to Kosovo. The appellant resists removal, relying on his rights under article 8 of the European Convention on Human Rights, the right to respect for private and family life. It is not suggested that four and a half years is a reasonable time for the respondent and his officials to take to resolve an application for asylum. Thus arises the question at the heart of this appeal: what (if any) bearing does delay by the decision-making authorities have on a non-national's rights under article 8?

2. In March 1999 the appellant's family was forced out of its home by Serb forces. He and his cousin, a boy about a year older, were separated from their respective families and directed, with other children, to join a convoy to Macedonia. They were there accommodated in a series of refugee camps until the opportunity offered to come to this country, which they did together. The appellant has had no further contact with his family. It seems likely that the cousin, like the appellant, applied for asylum almost immediately on arrival.

3. After seven months in the care of foster parents, the appellant, with his cousin, were taken in by an uncle living in this country and lived as members of his family. He went to school and entered the sixth form. In June 2003, when he was nearing eighteen, the appellant met Latifa Quresh. They began a relationship and Latifa moved in to live with the appellant and his uncle a month later. Latifa is a Somali national. She had entered this country with her mother in about 2000, was granted four years' exceptional leave to remain in January 2002 and now has indefinite leave to remain.

4. When the appellant met Latifa she was five weeks pregnant by another man, who had abandoned her. A daughter was born in February 2004 and the appellant has treated her as his own child. Later Latifa became pregnant by the appellant, but she miscarried. They have expressed an intention to remain together and marry.

5. The appellant's application for asylum provoked no immediate response and in March 2000 his solicitors wrote to the respondent, enclosing a copy of the original application. In April they submitted, in time, a form required by the respondent. Six months later, in October 2000, the respondent refused the appellant's application on the ground of his non-compliance in failing to return the form. The appellant's present solicitors did not receive a copy of this decision, and in April and June 2002 they wrote to the respondent seeking a decision and (on the latter occasion) permission for him to work. They received no response. Then, in September 2002, the respondent acknowledged that an incorrect refusal had been issued, and it was withdrawn. The solicitors, who had not received the refusal decision, pressed for an answer on the substantial application, but received no reply. There was further inconclusive correspondence. Not until 27 April 2004 was the appellant interviewed about the substance of his claims. A letter informing him of the respondent's intention to remove him was sent on 10 May 2004.

6. The appellant appealed to an adjudicator on asylum and human rights grounds, but it seems that he virtually abandoned the asylum claim and in a decision dated 13 September 2004 the adjudicator (Mr Peter Telford) found against him on both grounds. A further appeal to the Asylum and Immigration Tribunal (Mr T B Davey, Immigration Judge, Mrs L R Schmitt and Mr G F Sandall) was mounted on article 8 grounds only, but was rejected in a decision dated 27 January 2006. Because issues concerning the effect of delay were arising with some

frequency and giving rise to some differences of judicial approach, it was decided to list four appeals to be heard by the Court of Appeal as test cases. The present case was one of the four. In the event, as Buxton LJ (giving the leading judgment in the Court of Appeal: [2006] EWCA Civ 1713, [2007] Imm AR 396, para 1) put it, "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". Only the present case is now before the House.

Appeals on article 8 grounds

7. In *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, para 17, the House summarised, in terms to which all members of the committee assented and which are not understood to be controversial, the questions to be asked by an adjudicator hearing an appeal against removal on article 8 grounds. It said:

> "In a case where removal is resisted in reliance on article 8, these questions are likely to be: (1) will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life? (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (3) If so, is such interference in accordance with the law? (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

In practice the fourth and fifth questions are usually, and unobjectionably, taken together, but as expressed they reflect the approach of the Strasbourg court which is (see *Boultif v Switzerland* (2001) 33 EHRR 1179, para 46; *Mokrani v France* (2003) 40 EHRR 123, para 27; *Sezen v Netherlands* (2006) 43 EHRR 621, para 41) that

> "decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued."

8. In *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, the House made two significant decisions. First, it unambiguously endorsed the decision of the Court of Appeal in the same case ([2005] EWCA Civ 105, [2006] QB 1) that the task of the appellate immigration authority on an appeal on a Convention ground against a decision of the primary decision-maker refusing leave to enter or remain in this country is not a secondary, reviewing, function but calls for the authority to make its own decision: see para 11. Secondly, it differed from the Court of Appeal's view expressed in the same case (paras 59, 60, 63) that an appeal should be allowed only if the case was found to be "exceptional" or "truly exceptional": see para 20.

9. In seeking to give guidance to appellate immigration authorities, the House emphasised the importance of careful investigation of the relevant facts: para 15. The reason for this was well put by Wall LJ for the Court of Appeal in *Senthuran v Secretary of State for the Home Department* [2004] EWCA Civ 950, [2005] 1 FLR 229, para 15:

> "In our judgment, the recognition in *Advic* [(1995) 20 EHRR CD 125] that, whilst some generalisations are possible, each case is fact-sensitive places an obligation on both adjudicators and the IAT to identify the nature of the family life asserted, and to explain, quite shortly and succinctly, why it is that Art 8 is or is not engaged in a given case."

As Owen J observed in *Mthokozisi v Secretary of State for the Home Department* [2004] EWHC 2964 (Admin), para 28, "of course all will turn on the facts of the individual case".

10. In *Huang*, para 16, the House acknowledged the need, in almost any case, to give weight to the established regime of immigration control:

> "The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on."

There was of course nothing novel in this. In *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, [2001] INLR 1, para 23, Laws LJ had recognised that "Firm immigration control requires consistency of treatment between one aspiring immigrant and another". In a complex and overloaded system perfect equality of treatment between applicants similarly placed will be impossible to achieve, but startling differences of treatment between such applicants, or anything suggestive of randomness or caprice in decision-making, must necessarily give grounds for concern.

11. In *Huang*, para 18, it was recognised that decisions under article 8 may, depending on the facts of the given case, involve the weighing of multifarious considerations:

> "It is unnecessary for present purposes to attempt to summarise the Convention jurisprudence on article 8, save to record that the article imposes on member states not only a negative duty to refrain from unjustified interference with a person's right to respect for his or her family but also a positive duty to show respect for it. The reported cases are of value in showing where, in many different factual situations, the Strasbourg court, as the ultimate guardian of Convention rights, has drawn the line, thus guiding national authorities in making their own decisions. But the main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human

> beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. Proportionality is a subject of such importance as to require separate treatment."

With reference to proportionality it was said (para 20):

> "In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality."

12. Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.

Delay

13. In *Strbac v Secretary of State for the Home Department* [2005] EWCA Civ 848, [2005] Imm AR 504, para 25, counsel for the applicant was understood to contend, in effect, that if the decision on an application for leave to enter or remain was made after the expiry of an unreasonable period of time, and if the application would probably have met with success, or a greater chance of success, if it had been decided within a reasonable time, and if the applicant had in the meantime established a family life in this country, he should be treated when the decision is ultimately made as if the decision had been made at that earlier time. For reasons given by Laws LJ, the Court of Appeal rejected this submission, for which it held *Shala v Secretary of State for the Home Department* [2003] EWCA Civ 233, [2003] INLR 349 to be no authority. While I consider that *Shala* was correctly decided on its facts, I am satisfied that the Court of Appeal was right to reject this submission. As Mr Sales QC for the respondent pointed out, there is no specified period within which, or at which, an immigration decision must be made; the facts, and with them government policy, may change over a period, as they did here; and the duty of the decision-maker is to have regard to the facts, and any policy in force, when the decision is made. Mr Drabble QC, for the appellant, did not make this submission, and he was right not to do so.

14. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may

during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in *R (Ajoh) v Secretary of State for the Home Department* [2007] EWCA Civ 655, para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status". This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time when he or she entered into a family relationship" see *Boultif v Switzerland* (2001) 33 EHRR 1179, para 48; *Mokrani v France* (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.

16. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. In the present case the appellant's cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it took the respondent to correct its erroneous decision to refuse the appellant's application on grounds of non-compliance. In the case of *JL (Sierra Leone)*, heard by the Court of Appeal at the same time as the present case, there was a somewhat similar pattern of facts. JL escaped from Sierra Leone with her half brother in 1999, and claimed

asylum. In 2000 her claim was refused on grounds of non-compliance. As in the appellant's case this decision was erroneous, as the respondent recognised eighteen months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be "predictable, consistent and fair as between one applicant and another" or as yielding "consistency of treatment between one aspiring immigrant and another". To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an applicant to apply from out of country. As Carnwath LJ observed in *Akaeke v Secretary of State for the Home Department* [2005] EWCA Civ 947, [2005] INLR 575, para 25:

> "Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal"

The adjudicator's decision

17. Given his important fact-finding role, the adjudicator's decision is always important. In this case he said (para 21):

> "I find that he had not made a claim for article 8 protections by mentioning in his interview that he had a girlfriend or that she was pregnant or that he did not wish to leave. I find – following withdrawal of the claim for asylum – the appellant even on the low standard of proof I apply has failed to establish there is for him an objective risk in this case of serious harm for a convention reason. I find that the removal of the appellant at this stage would not be disproportionate and would be a lawful pursuit of the policy of effective immigration control."

The adjudicator observed in para 26 that there was nothing to indicate that articles 2 or 3 would be breached if the appellant were returned to Kosovo, and he continued:

> "27. The situation is such that he has on this evidence a family life. He has chosen not to make any attempt to

contact his family in Kosovo but he no doubt has a family life with his uncle and his girlfriend here. Article 8 is engaged. It would suffer if he returned. He would no longer be with his uncle. Article 8 would be breached. However it would not be breached fundamentally. He could return with his girlfriend. She is Somali. She looks at least Asian he says by relatively light skin tone. She could return with him. He says she would receive racist treatment. I am not referred to any cogent evidence of that. It may be that she may receive such racist treatment here if it amounted to verbal abuse. It may not. All of this is to be frank speculation on the part of the appellant. It does not establish that she cannot return with him. No doubt they would economically be worse off but that is not the point.

28. Even were she not able to return with him she has family in the UK including mother and brother. She has their support as well as the uncle of the appellant and a home and some income. The issue then becomes one of whether it would be proportionate to return him given the need for an effective immigration policy. He would also as I understand it have to show that the breach if anticipated would be a serious one – some say as serious as to make it inhuman and degrading treatment contrary to article 3. He cannot do that. He would be able to telephone. He would be able to write. He is not married. He can apply to come in to the country in the normal way. The child of the witness Miss Qureshi is young and cannot have yet bonded with him at one year old.

29. There is a child to the family. There is another on the way. However that does not mean he should not be returned according to the laws of the UK.

30. There are no exceptional grounds for allowing the appellant to remain although he has been here nearly 5 years and has a family life of sorts. The fact of the matter is that the girlfriend could go with him to Kosovo. Even though she prefers not to for entirely understandable reasons, those reasons do not amount to a risk of human rights abuse arising in either her case or his."

18. This reasoning is not easy to follow. Some references suggest that the appellant had to show a risk of persecution, or of conduct which

would almost engage the application of article 2 or 3, if he were returned to Kosovo. That would not be correct. Otherwise, the adjudicator appears to have been willing to accept either that the appellant would be returned to Kosovo leaving his girlfriend and her child and expected child here, or that he would be returned and she and the children would follow. On the former hypothesis it was necessary to consider the proportionality of separating the appellant from his girlfriend, informally adopted child and expected child. On the latter hypothesis he had to consider whether it was reasonable to expect the girlfriend, who had exceptional leave to remain here and the prospect of indefinite leave, to move to a country which was entirely unfamiliar and whose language she could not speak. The adjudicator did not address these problems adequately or attempt to assess the strength of the appellant's relationship with his girlfriend.

The AIT decision

19. The AIT (para 10) regarded the delay in this case as "unsatisfactory" but considered that "there is nothing in the nature of anything the appellant did or was done on his behalf by those representing or advising him to press for an earlier resolution of his claim" and found (para 12) that the adjudicator had not ignored the issue of delay. They rejected (para 15) a submission that the findings of the adjudicator were perverse, although saying that "We do not necessarily or would not have taken the same view as the Adjudicator". It was unimpressed (para 17) by the complaint that the appellant's cousin had been treated differently. It found no error of law in the adjudicator's decision (paras 18, 20) and therefore upheld it.

The Court of Appeal decision

20. The Court of Appeal gave judgment after that court's decision in *Huang*, which was of course binding on it, and before the decision of the House. That had the unfortunate consequence that the court founded its judgment on the proposition, rejected by the House, that effect may be given to an article 8 claim only if the case is found to be exceptional or truly exceptional.

21. Accepting that premise, as he was bound to do, Buxton LJ sought in a series of nine propositions set out in para 24 of his judgment to reflect the effect of authority as it then stood. With some of these

propositions I can readily agree: for example, that delay in dealing with an application may increase an applicant's ability to demonstrate family or private life bringing him within article 8(1) (para 24(i)) and that decisions on proportionality made by tribunals should not, in the absence of legal error, be disturbed by an appellate court (para 24(ix)). I do not, however, think it necessary to recite or comment on all these propositions because, as I have endeavoured to show, the consideration of an appeal under article 8 calls for a broad and informed judgment which is not to be constrained by a series of prescriptive rules.

22. The Court of Appeal was prepared to assume (para 34) that had an earlier decision been made in this case it would probably have been favourable to the appellant, but considered that this could not be conclusive and might not even be relevant. It considered that the issue of delay had not been addressed by the AIT mainly because it had never been properly put to it. The court was accordingly reluctant to remit the matter to the AIT for reconsideration, since there was no reason to think (para 35) that if confronted with this argument the AIT would find this factor was truly exceptional or such as to have a substantial effect on the merits of the case. But in any event there was a more fundamental reason why the appeal must fail: it was a pre-condition of the arguments under article 8(2) that the appellant could establish that removal from the country would interfere with his rights under article 8(1), but the adjudicator had held, and the AIT had properly upheld the finding, that on the facts removal would not interfere with the appellant's family life with his girlfriend. Thus the argument on delay did not arise.

Conclusion

23. I cannot, for my part, accept that the adjudicator accurately or adequately addressed the human problem raised by the appellant's appeal to him, for reasons given in para 18 above. The judgment of the AIT did nothing to make good this deficiency. Plainly, the respondent's delay in resolving the appellant's application is relevant in the first way considered above, in para 14. That is agreed. Whether, and to what extent, the delay in resolving the claim, and the manner of its handling, are relevant when considering the overall proportionality of ordering the removal of the appellant have yet to be considered. This, as Laws LJ observed in *Strbac*, above, para 26 "requires a judgment in the round".

24. Such a judgment has not yet been made and it should be made, whatever the outcome may turn out to be. I would allow the appeal and

remit the matter for a fresh hearing by the AIT. I would invite the parties to make written submissions on costs within 14 days.

LORD HOPE OF CRAIGHEAD

My Lords,

25. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. I agree with it, and for the reasons he gives I would allow the appeal and make the order that he proposes.

26. A striking feature of this case, on its facts, is the extent to which the delay was compounded by the mishandling of the appellant's application by the Immigration and Nationality Directorate ("IND"). His cousin, Amir Trota, arrived with him in this country on 2 September 1999. He was granted exceptional leave to remain in 2001. The appellant, having claimed asylum four days after his arrival, submitted a statement giving his reasons for his claim on 20 April 2000, one day before the expiry of the relevant deadline. On 26 October 2000 the IND issued an incorrect refusal of the application. It alleged, erroneously, that the appellant had failed to co-operate with the determination process. It was not until 10 September 2002, after two reminders from the appellant's representatives to which there was no response and at least nine months after his cousin's claim had been dealt with, that the IND withdrew the non-compliance decision and said that a fresh decision would be given. There was then a further delay of 18 months before the appellant was informed on 10 May 2004 that his claim had been refused.

27. I draw attention to this history in order to emphasise my noble and learned friend's point that the weight which would otherwise be given to the requirements of firm and fair immigration control may be reduced if the delay is shown to be due to a system which is dysfunctional. There is, of course, no right to a decision within any given period of time. Article 8 claimants ought not to be advantaged merely because of deficiencies in the control system, as my noble and learned friend Lord Brown of Eaton-under-Heywood points out. Allowance must also be made for the administrative burden that is unavoidable if the system is to be fair, and a case ought not to succeed

merely because it might have been stronger if it had been determined earlier. But the shortcomings that have affected the appellant's case cannot be explained or excused on these grounds. On the contrary, the balance in the appellant's favour is significantly strengthened by the fact that the explanation for the delay is so unsatisfactory.

LORD SCOTT OF FOSCOTE

My Lords,

28. I have had the advantage of reading in draft the opinions of all your Lordships and gratefully adopt the account given by my noble and learned friend Lord Bingham of Cornhill of the background to this appeal. Your Lordships are agreed that the appeal should be allowed and the case remitted for a fresh hearing by the AIT. I am in respectful agreement that for the reasons given by your Lordships the appeal should be allowed but I would, for my part, conclude here and now that no decision maker acting reasonably and proportionately could order the removal of the appellant to Kosovo. I can explain my reasons quite briefly.

29. The appellant arrived in this country in September 1999. He was accompanied by a male cousin. Both had fled from Kosovo as a result of action taken by Serbs against Albanian Kosovans. Both had come to this country via Macedonia. The appellant, who was born on 10 December 1985, was 13 years old and his cousin was much the same age. They claimed asylum shortly after arriving in this country. Both were unaccompanied minors. The policy at that time in relation to Kosovan asylum seekers who were unaccompanied minors was that such asylum seekers would be granted exceptional leave to remain in this country, with the prospect after four years of being granted exceptional leave to remain.

30. The cousin's application was dealt with unexceptionally and he was granted exceptional leave to remain. Your Lordships were given so to understand by counsel although no details were available. We were given to understand, also, that subsequently the cousin was granted indefinite leave to remain. Not so the appellant. His asylum application was woefully mishandled by the immigration authorities. The details are set out by Lord Bingham in paragraph 5 of his opinion and I need

not repeat them. The consequence of this mishandling was that the application was not properly dealt with until April 2004, by which time the appellant was eighteen years of age and no longer a potential beneficiary of the policy relating to unaccompanied minors.

31. In the circumstances it seems to me grossly unfair for the appellant to be deprived of the benefit of the policy that had been applied to his cousin and would have been applied to him had his application been properly dealt with. Your Lordships have dealt with the issue of delay and I am in full agreement with what has been said. But the appellant's complaint, legitimate as it seems to me, is not simply of delay. It is that he has been deprived of the benefit of a policy specifically designed for the category of asylum seekers into which he fell. The doctrine of "legitimate expectations" is much in vogue where allegedly unreasonable administrative decisions of the executive are under challenge and if ever there were a case in which a complaint based on legitimate expectations could be justifiably raised this seems to me to be that case. The unfairness of depriving the appellant of the benefit of the unaccompanied minors policy seems to me overwhelming. I would not remit the case to the AIT.

BARONESS HALE OF RICHMOND

My Lords,

32. For the reasons given in the opinions of my noble and learned friends, Lord Bingham or Cornhill and Lord Hope of Craighead, with which I agree, I would allow this appeal and make the order which Lord Bingham proposes. In particular, I agree that prolonged and inexcusable delay on the part of the decision-making authorities must, on occasion, be capable of reducing the weight which would normally be given to the need for firm, fair and consistent immigration control in the proportionality exercise. That is a legitimate aim which will normally carry great weight in immigration cases. The heavy administrative burdens which such a system entails are well understood. But in article 8 cases, one is always concerned with whether the correct balance between the legitimate aim and the means employed has been struck on the facts of the particular case. Where the aim has failed as spectacularly as it did here, the general importance which is normally attached to it must to some extent be diminished. But it has still to be weighed in the balance along with everything else.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

33. I have had the opportunity of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. With most of it, and not least my Lord's proposed disposal of the appeal, I am in full agreement. As I shall come to explain, however, there is one matter about which I find myself in respectful disagreement.

34. The important question of principle arising on this appeal is what effect delay has in the determination of an alien's article 8 claim to remain in the UK. Delay, of course, can mean either of two things: either the mere passage of time—the relevant period in this context being between the date when the article 8 claim is made and the date of its determination (ex-hypothesi by a decision to remove); or it can mean such part of that period as exceeds a reasonable time for the decision-making process, for the passage of which, therefore, the immigration authorities are open to criticism.

35. With regard to the mere passage of time, I agree entirely with what Lord Bingham says at paras 14 and 15 of his opinion. Clearly in so far as the passing months or years result in the creation or strengthening of family or private life ties in the UK (or, indeed, the weakening of such ties abroad), this will be relevant to the applicant's situation at the time the decision is taken. So too, of course, will be any developments which may militate against the applicant's claim: the collapse of his marriage or the easing of the situation in his home country so as to allow the family to live together there rather than here. All this hardly needs saying.

36. Equally it seems clear to me that the Court of Appeal was right in *Shala v Secretary of State for the Home Department* [2003] EWCA Civ 233, [2003] INLR 349 to decide that the delay in that case was such as to make it disproportionate to require the appellant to return to Kosovo to apply there for entry clearance so as to be allowed to rejoin his refugee wife here—facts somewhat similar to those in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 although with the additional feature of delay. But it is of course one thing for delay to preclude the Secretary of State from insisting on the procedural requirement that applications on marriage grounds be made from outside

the UK, quite another to suggest that delay (even if blameworthy) should by reason of that fact alone affect the substantive determination of the application. As my Lord observes at para 13 of his opinion, Laws LJ was clearly right in *Strbac v Secretary of State for the Home Department* [2005] EWCA Civ 848, [2005] Imm AR 504, to hold that there is no question of the Secretary of State being required to make a hypothetical decision having regard to the likely strength of the claim at some earlier date, whether by reference to the facts or to the policies as they then were.

37. I have no doubt too that Mr Sales QC was right to concede that the passage of time may well weaken the argument ordinarily available to the Secretary of State based on precariousness. As Lord Bingham points out at para 15, as time passes the applicant's expectations of the permanence of his relationships grows. Or, putting essentially the same point a little differently, it is unreasonable to expect the applicant to put his life on hold and not to develop or deepen relationships whilst he remains here.

38. This consideration, however, should not be taken too far. Two recent decisions of the ECtHR bear on the point. I confine myself to the most directly relevant passages in the judgments. In *Konstatinov v The Netherlands* (Application 16351/03, 2007), para 49, the Court said this:

> "[T]he Court notes that the applicant has never held a Netherlands provisional admission or residence title and that the relationships relied on by her were created at a time and developed during a period when the persons involved were aware that the applicant's immigration status was precarious and that, until Mr G complied with the minimum income requirement under the domestic immigration rules, the persistence of that family life within the Netherlands would remain precarious. This is not altered by the fact that the applicant's second request for a residence permit to stay with Mr G filed on 1 November 1991 was left undetermined for a period of more than seven years because her file had been mislaid by the responsible immigration authorities . . ."

In the yet more recent case of *Nnyanzi v The United Kingdom* (Application No. 21878/06, 8 April 2008) the applicant submitted in support of her article 8 private life claim that "the State was responsible for several instances of delay during the processing of her asylum claim

and subsequent human rights appeal, which rendered her case exceptional. She had been living in the United Kingdom for almost ten years". (para 70). In rejecting the claim the Court said:

> "Her stay in the United Kingdom, pending the determination of her several asylum and human rights claims, has at all times been precarious and her removal, on rejection of those claims, is not rendered disproportionate by any alleged delay on the part of the authorities in assessing them." (para 76).

39. The one point at which I respectfully differ from Lord Bingham is with regard to the relevance of delay "in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control". In para 16 of my Lord's opinion (and in the supporting opinion of my noble and learned friend Lord Hope of Craighead) the term delay is used in the second of the two senses I outlined earlier: blameworthy "delay" resulting from a "dysfunctional system".

40. I recognise, of course, that delay, blameworthy or not, may lead to differences of result between the claims of one aspiring immigrant and another (as here between the appellant and his cousin). But that may happen whenever facts and policies change. The imperative to my mind is that there be consistency of treatment between applicants, namely that the claims of all applicants are decided on the basis of their substantive merits at the time when the respective claims are decided. It is not that all claims of equal merit when made shall be decided in the same way. As time passes, some claims may get stronger, others weaker, as the facts and policies change.

41. In short, I cannot accept that delay may be relevant in reducing the weight to be accorded to the requirements of fair and firm immigration control. Ideally, of course, immigration should be controlled efficiently and expeditiously and not be subject to long delays and repeated mistakes as in the present case. But the general public interest in the application of the Secretary of State's substantive legal rules and policies (which include only allowing article 8 claims when they are substantively made out on the facts) is not diminished and should not be overridden because the system is sometimes incompetently operated. I respectfully agree with May LJ's judgment

on this issue in *R (Ajoh) v Secretary of State for the Home Department* [2007] EWCA Civ 655 at paras 37 and 38:

> "[I]t is not the function of the Court to discipline or punish the Secretary of State and his Department. The Court's task is not, I think, to pass a judgment on the nature and characterisation of the delay, but on the nature and strength of [the appellant's] rights under article 8 including those resulting from the delay. Because the balance to be struck is between the nature and strength of the applicant's article 8 rights as they have become and the need to maintain consistent and fair immigration policy and procedure which remains broadly constant notwithstanding delay in individual cases, I am not personally convinced of the logic of the proposition that extreme individual cases of delay may for that reason alone diminish the balancing strength of the policy and procedure."

42. I accept, as stated, that the longer the passage of time before the decision is taken, the more likely it is that the strength of the article 8 claim will be affected: family or private life ties may be created, lost, strengthened or weakened and it will become increasingly difficult for the Secretary of State to rely upon the precariousness of the applicant's immigration status when bonds are formed and relationships entrenched to discount their strength. But I cannot accept that it is necessary or appropriate to investigate the reasons for the delay, to characterise it as excusable or blameworthy, to decide when the decision should ideally or could reasonably have been taken, or, as my Lords' approach would require, form a judgment on whether in any particular case the system was "dysfunctional" (still less, as earlier cases put it, "a public disgrace" or "a national disgrace"). These matters should not be relevant to the striking of the proportionality balance. Article 8 claimants ought not to be advantaged merely because of deficiencies in the control system. If the public interest otherwise requires that a claim fails, it should not succeed merely because it might have been stronger had it been determined earlier or because the control system should have been better administered.

43. Subject to these observations there is nothing I wish to add to Lord Bingham's judgment and, as already indicated, I too would allow this appeal and remit the matter for re-determination by the AIT.