MB (Huang – proportionality – Bulletins) Croatia [2005] UKIAT 00092

IMMIGRATION APPEAL TRIBUNAL

Date: 9 March 2005
Date Determination notified:
25/04/2005

Before:

The Honourable Mr Justice Ouseley (President)
Mr G Warr (Vice President)
His Honour Judge G Risius CB (Vice President)

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Appearances:
For the Appellant: Mr G Lee, instructed by Sutovic and Hartigan
For the Respondent: Mr J Gulvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the determination of an Adjudicator, Professor A Grubb, promulgated on 14 April 2004. He dismissed the Appellant's appeal against the refusal by the Secretary of State of leave to enter the United Kingdom on asylum grounds, and the refusal of the claim to remain on Articles 2 and 3 ECHR grounds.

2. For the reasons we come to, this appeal is dismissed. We consider it appropriate to say that this is a model determination. Save for an immaterial error of law induced by the Tribunal through M* (Croatia) [2004] UKIAT 00024 and by earlier Court of Appeal decisions, as later exposed by Razgar [2004] UKHL 27, [2004] Imm AR 381, and by Huang [2005] EWCA Civ 105, it could be studied, and emulated with advantage with the availability of time, by all working judicially in this area.

3. The Appellant is a citizen of Croatia of Serbian ethnicity born near Vukovar in Eastern Slavonia, Croatia, in 1978. He left Croatia with his fiancée, now his wife, on 23 September 1999 and he claimed asylum in the United Kingdom on the same day. His wife now claims as his dependant. The basis of his claim

was his fear of discrimination and physical violence from Croatians and that he would be forced to undertake military service in the Croatian Army to which he had a conscientious objection. The Appellant was not interviewed until 16 December 2003, over four years later. The refusal letter followed quite swiftly.

4. The Adjudicator considered the current position of Serbs from Croatia in the light of a number of guiding IAT decisions and concluded that there were no general or specific circumstances which meant that the return of the Appellant to Croatia would breach the Refugee Convention or Article 3 ECHR. He then rejected the separate claim that his objection to military service gave him a basis for asylum or an Article 3 claim.

5. The Adjudicator next considered Article 8, accepting that the Appellant had established an extant private and family life in the United Kingdom. There would be some change in the quality of family life on return to Croatia and said:

> "89. There is, in my judgment, no insuperable obstacle to the Appellant and his family returning to their home village in Croatia and maintaining their existing family life together. There would, of course, be some change in the quality of their family life given the different social circumstances that exist here and in Croatia. There would also be some interference with aspects of the Appellant's private life in respect of his work and friendships. I do not, however, regard those as significant enough to amount to an interference with his Article 8 right.
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> 90. Taking all these matters into account, I am not satisfied that the Appellant's right under Article 8.1 would be engaged by his return to Croatia. However, in case I am wrong in taking that view, I go on to consider whether any interference is justified under Article 8.2"

6. In the light of the then state of the law, the Adjudicator correctly directed himself in accordance with Edore v SSHD [2003] EWCA Civ 716, [2003] INLR 361, Djali v SSHD [2003] EWCA Civ 1371 and M* (Croatia). To him the crucial aspect was the delay in the Secretary of State's decision-making. He said:

> "97. I have already set out the evidence, which I accept, about the Appellant's situation in the UK and that which he and his family will face on return to Croatia. I refer to and adopt the material at paragraphs [60]-[61], [84] and [86]-[87]. I do not regard his return to Croatia with his family to entail insuperable obstacles, despite the difficulties that they will surely face. They have been here 4½ years and to their credit, they have 'got on with life' and made a go of things: studying, working, making friends and, most recently, deciding to have a baby which is due next month. They are not, so far as I can tell, anything other than good citizens and are not a drain on the public purse. The Appellant's 'private and family life' in the UK has arisen at a time when he and, of course, his wife were aware that their status was uncertain. It seems to me that apart from the issue of delay – the so-called 'Shala point' – the Appellant's removal to his own country from which he and his wife originate, in the circumstances that I have previously rehearsed, would not be disproportionate in furtherance of maintaining an effective and fair immigration policy. The crucial issue is, in my judgment, that of delay."

7. The Adjudicator then referred to various decisions on delay, notably Shala v SSHD [2003] EWCA Civ 233, [2003] INLR 349, J (Serbia and Montenegro) [2004] UKIAT 00016, and M* (Croatia), where Shala and the facts concerning Home Office Bulletins 2/99 and 4/99 were considered. The Appellant in M* (Croatia) had arrived at almost the same time as this Appellant. The Tribunal there, and the Adjudicator here, concluded that it could not say that there was a good prospect of a favourable decision from the Secretary of State within a reasonable time of the Appellant's entry into the United Kingdom in September 1999. There was no particular advantage which the Appellant had been denied as a result of the delay in making a decision, unlike the position in Shala where a reasonably prompt decision would have enabled him to make an in-country marriage application.

8. Nonetheless, the Adjudicator correctly did not treat the delay in decision-making as irrelevant. He said:

> "111. Context here is everything. The Appellant has not suffered any specific detriment by the delay. Indeed, it could be argued that he has had an opportunity to develop his relationship with his (now) wife and to gain experience at work and in the English language. He has, in that sense, gained from the delay when otherwise he might already have been returned to Croatia. I also note, and gratefully adopt, the Tribunal's observation in J that over the relevant period to that case, and to this appeal, it is well recognised that the Home Office has had to process a 'high volume of asylum applications'. In these circumstances, I do not consider the delay in processing this Appellant's claim to be excessive and to be a decisive factor in determining whether the Secretary of State's decision is a disproportionate interference with the Appellant's right to 'private and family life'.
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> 112. In my judgment, taking account of all the circumstances of the Appellant and his family both in the UK and on return to Croatia, the decision is not disproportionate bearing in mind the area of discretion reposed in the Secretary of State. It is not outwith the range of reasonable decisions that he could make."

9. The grounds of appeal contended first that the Adjudicator had erred in finding that there would be no interference with the Appellant's rights under Article 8(1) and that he erred in finding that the Appellant's rights were not engaged. The second point was that there were circumstances in which delay in decision-making could be determinative of proportionality issues: the 1998 White Paper allowed some whose decisions had not been dealt with in two years seven months to qualify for exceptional leave to remain. It hoped that by April 2001, decisions would be made within two months of receipt. Pre-July 1993 applications, if not decided by 1998, would normally attract indefinite leave to remain. For lesser delays, that would be a factor. This case fell between the "*determinative*" and the "*presumptive*". It was wrong for the Adjudicator not to treat the delay as determinative and even more so for it to be treated as a windfall benefit for the Appellant. There were parallels with the October 2000 family "*amnesty*" or backlog clearance exercise.

10. The IAT refused permission to appeal, but the Appellant contended that there were similarities with Shala including a written policy in force at the time of entry, which was said to be the May 1999 Bulletin, which it was said contained the words that there was a general presumption that Serbs from Eastern

Slavonia, and certain other areas of Croatia, "*will be able to substantiate a claim to asylum on the grounds of their ethnicity*". The Court of Appeal's decision in Janjanin v SSHD [2004] EWCA Civ 448, which had considered the wording and effect of the various Bulletins issued by the Secretary of State in 1999 about Serbs from Croatia resulted from its being misled about the wording of the Bulletin of May 1999. Those arguments were being brought back before the Court of Appeal. It was also suggested that Janjanin had left open the question of a "*quasi-Shala*" argument based on delay.

11. Statutory Review was granted, reversing the IAT's decision. Two bases were given. The first was that the Tribunal had failed adequately to address the issues which we have set out as the first contention in the appeal; this was said to have a real prospect of success. The second was that it was possible that the Shala/Janjanin point needed consideration but more importantly these arguments should be considered after the Court of Appeal's consideration of the proportionality issue in Huang.

12. The judge, Munby J, added and we note the comments for they are important to the way in which the case was prepared before the IAT:

> "4. It is a matter of considerable concern to me that the Bundle lodged with the AC contains neither (i) the correspondence with the Home Office referred to in para 6 of the Grounds for Statutory Review nor (ii) copies of any of the key authorities nor (iii) any materials to enable the AC to see precisely what the facts and issues are in the various cases dealt with by Laws LJ on 13 August 2004. This places the AC in an almost impossible position. (This is not the first time that criticism has had to be made about the handling of this case: see para 103 of the Adjudicator's Determination.)
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> 5. These deficiencies must be remedied in time for the hearing of the appeal before the Tribunal."

13. We can deal shortly with the first ground of appeal, for there was little elaboration in argument. The Adjudicator's reasoning is clear and correct; the first ground of appeal was based on a misreading of what he said. He had carefully set out the circumstances to which they would return in Croatia (paragraph 89) and concluded, and there is no challenge to it, that they would return as a family to their home village, maintaining their family together. He then considered the Appellant's private life, recognising that it existed and that it would be interfered with. But that interference would not be significant enough to amount to a contravention of Article 8(1), which then would require justification. It is well known that interference has to reach a degree of significance to constitute such a contravention. The context of the private life is set out in paragraph 85, but although that work and those friendships could not continue in Croatia, paragraph 60 points out that other work and, implicitly the sort of friendships which work and residence bring, would be available in Croatia. There was nothing of such significance that removal would constitute an interference with private life for the purposes of Article 8(1). This ground of challenge raised before the IAT on the permission application does not appear to have been pursued on Statutory Review, although it was a part of the reasoning for the grant of Statutory Review.

14. In any event, the Adjudicator considered the position were he wrong about that. And for the reasons we come to, the error of law he made in his approach to proportionality could not affect the result of the appeal.

15. We turn to the second point in the appeal which concerns the issue of whether some argument based on Shala could be raised on the basis that the Appellant, when he entered the United Kingdom in September 1999, had a legitimate claim to international protection as a refugee. This argument appeared to have been closed by the decision of the Court of Appeal, post Shala, in Janjanin [2004] ECWCA Civ 448, which considered the effect of the various Bulletins issued by the Secretary of State in 1999.

16. A dispute had subsequently arisen between Sutovic and Hartigan, solicitors who act for many Croatian Serbs, and the Treasury Solicitor over whether accurate information had been given to the Court of Appeal by the Secretary of State about the text of one of the Bulletins. This was an issue which Mr Lee for the Appellant said had been or was shortly to be considered by the Court of Appeal in Strabac. We were provided with the skeleton arguments. Mr Lee sought an adjournment so that we could deliberate in the light of the Court of Appeal's decision.

17. We refused the adjournment. It seemed to us quite likely that the particular issue raised by Mr Lee would not be decided by the Court of Appeal anyway, and we could not see from the papers that it might be relevant, let alone decisive here. It is not unknown for adjournments to be sought on the basis that some case may decide an issue of wider application, and if in fact it does so, for it then to be contended that those adjourned cases are different from the "*test*" case or have been overtaken by events. Indeed, it turned out here that the Bulletin issue could not affect the result.

18. It is worth pointing out, in the light of the validity of what Munby J said about the absence of documentation before the Administrative Court to support the Bulletin point, that the Adjudicator was faced with an argument about the terms of these Bulletins without being provided with them, although they must have routinely been used by Sutovic and Hartigan. Nor was he supplied with the CIPU statement from Mr Carlyle used in Janjanin which had been heard before the Adjudicator's appeal in this case, though not decided until a date which fell between the Adjudicator's hearing and the promulgation date.

19. The Adjudicator pointed out that the absence of evidence about Home Office policies was regrettable in view of the Shala argument, and made do with the description and analysis of those materials in M* (Croatia), a case very similar to this one in the timing of arrival in the United Kingdom. Mr Lee could not assist us as to why this material was not before the Adjudicator. The Tribunal, when refusing permission, was no better placed, nor was Munby J in dealing with the Statutory Review. It is difficult to see how, presented with the full material, it could have been thought an issue arose which would benefit the Appellant, which had not been fully dealt with in Janjanin.

20. We were taken through extensive correspondence between the Treasury Solicitor and Sutovic and Hartigan about the state of the Bulletins. We

pressed Mr Lee as to the evidence that the Appellant came from one of the areas referred to in the 1999 Bulletins as potentially giving rise to favourable consideration for protection. Eventually, a map was provided which showed that Vukovar was within Eastern Slavonia. We pressed Mr Lee as to the answer to the points in the Treasury Solicitor's letter of 28 May 2004; in particular as to whether he accepted that whatever was the true version of Bulletin 2/99 of May 1999, there had been a change made to it on 3 August 1999. That change had been from advice, that although each case was to be determined on its merits, there was a "*general presumption*" that Serbs from specified war-affected areas of Croatia including Eastern Slavonia "*will be able to substantiate a claim to asylum on the grounds of their ethnicity*", to "*may*"; our underlining. In November 1999, Bulletin 4/99 was issued embodying that later language; further qualifications were made in 1/00.

21. After conclusion of the argument, Mr Lee very properly returned to inform us that he accepted that this was indeed the position. Although M* (Croatia) did not attribute to the change in language the significance which Mr Lee contended for, the suggestion that, at the end of September 1999 and allowing for any reasonable decision-making period, the Appellant had an expectation of a grant of asylum was doomed to fail. M* (Croatia) offered it no support and Janjanin made the position clear for those such as the Appellant. Mr Lee acknowledged that by April 2000, a claim for asylum in the light of Tudjman's death was very unlikely to succeed.

22. Although Mr Lee sought to argue that "*may*" as from August 1999 still enabled his case to succeed, we do not accept that. We did not attribute in M* (Croatia) the significance to the change in wording which Mr Lee did. And the original May 2/99 wording, if such it was, was simply a not wholly accurate attempt to reflect the UNHCR February 1998 position paper which it reported in paragraphs 10.1 and 10.2. Serb Croats from Eastern Slavonia "*did not automatically warrant protection en masse*"; each case should be examined individually, Serbs from there "*may well be able to substantiate an individual claim*". The August 1999 change reflects that continuing position in more accurate language. But an argument that someone "*may well be able*" to substantiate a claim is a very long way from an argument that there was anything akin to a policy that such individuals should generally be granted asylum and enter the United Kingdom with such an expectation.

23. We are not concerned, nor is this case, with the question of what the May 1999 version said.

24. We can then turn to the final issue, which persuaded Munby J to grant Statutory Review for some compelling reason other than an arguable error of law. This concerns what is clearly now an erroneous approach to proportionality. The correct approach for an Adjudicator considering this issue, here the proportionality of any interference with private life together with delay, is set out in Huang and others v SSHD [2005] EWCA Civ 105, especially at paragraphs 59, 60 and 62.

> "59. ... The true position in our judgment is that the HRA and s.65(1) require 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. This, not *Wednesbury* or any revision of *Wednesbury*, represents the real restriction which the law imposes on the scope of judgment allowed to the adjudicator. It is not a question of his deferring to the Secretary of State's judgment of proportionality in the individual case. The adjudicator's decision of the question whether the case is truly exceptional is entirely his own. He *does* defer to the Rules; for this approach recognises that the balance struck by the Rules will generally dispose of proportionality issues arising under Article 8; but they are not exhaustive of all cases. There will be a residue of truly exceptional instances. In our respectful view such an approach is also reflected in Lord Bingham's words in *Razgar*, which we have already cited:

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

62. In summary, where in a human rights challenge the court is called upon in any respect to judge the weight or the merits of government policy, it will in deciding the outcome allow a margin of discretion to the policy maker. So much is required by the democratic principle: the principle of respect for the democratic powers of the State. In such a case, consistently with its obligations under the HRA, the court's decision is more intrusive than *Wednesbury*, being subject to the disciplines described by Lord Steyn in *Daly*. But there are cases, exemplified by these appeals, in which the court or adjudicator is not at all called upon to judge policy. In that case no question of respect for the democratic powers of the State arises: save in the sense, again exemplified here by the Immigration Rules, that prior decisions of the executive or legislature may have fixed, and narrowed, the territory across which the adjudicator's autonomous judgment may operate."

25. Mr Lee submitted that all factors including policy, family and private life and delay in decision-making itself were all grist to the mill; conditions on return were relevant here. The case should be remitted for all the facts to be investigated. The Tribunal could not step in if significant facts were unknown. But, if it were to do so, it should recognise that this was, or could be seen as, a truly exceptional case.

26. He drew our attention to Mthokozisi v SSHD [2004] EWHC 2964 (Admin) in which Owen J held that the Secretary of State had wrongly ignored the four year delay in making a decision on a thirteen-year-old's application when that had caused him not to be granted either exceptional leave to remain or quite possibly indefinite leave.

27. Mr Gulvin relied in Alihajdaraj v SSHD [2004] EWCA Civ 1084 to say that there was no case in which delay of itself had been determinative of any proportionality issue. It was instead necessary to look to any consequences

which any delay might have had. Applying Huang, it was inevitable that the Adjudicator would have come to exactly the same conclusion.

28. We make this observation about the effect of delay. Delay in decision-making may cause an individual to lose specific advantages or opportunities which timeous decision-making would have conferred; Shala is an example. There, the procedural requirements of immigration control were invoked disproportionately where the individual was only made subject to those requirements because of very substantial decision-making delays. It was not a case in which he had no substantive merits to his claim and no sound prospects of satisfying the substantive requirements for entry clearance. The effect of delay may also be to create circumstances eg marriage or parenthood, which strengthen an individual's claim to a family life or to a private life through work, friendships, community ties, the need for medical treatment and a host of other considerations. But in each such case it is the effect of delay which assists the claimant's proportionality argument. It is very difficult to envisage a case in which the removal of someone who had no claim to enter and no claim for international protection would be disproportionate merely because of a delay in decision-making, which had had no disadvantage as in Shala or which had not led to the creation of circumstances which themselves made removal disproportionate. It is the effects of delay to which an Adjudicator should look rather than to the fact or extent of delay itself. Delay by itself would be not so much rarely determinative as rarely ever significant.

29. What we draw from Huang about the approach of Adjudicators to proportionality is as follows. The Immigration Rules are the starting point for the assessment. If an individual has no substantive claim within the Rules, it will be a truly exceptional case on its particular facts, in which an Adjudicator could lawfully conclude that removal was disproportionate. If an individual falls outside the Rules only for procedural reasons, the same applies save that as in Shala, it is more difficult to insist on procedural requirements where the need for compliance has arisen because of procedural failings by the Secretary of State. An example of exceptional circumstances may be where the procedural requirements could not be complied with for want of accessible relevant diplomatic facilities in the country of return.

30. In holding that the Immigration Rules are to be regarded as the proportionate response of the executive, approved by Parliament, to the many and varied circumstances which individual immigration cases present, the Court of Appeal must also have had regard to the way in which those Rules are also supplemented by policies or extra-statutory concessions. Where an individual may fall within such policies but they have not been considered by the Secretary of State, the decision may be unlawful, because a relevant consideration has been ignored, though it is not for the Adjudicator directly to apply the policy. Such a policy offers a further guide as to what is the proportionate response of the executive: if provision has been made through policy or concession for a further class of cases, it will be yet the more difficult for an Adjudicator to hold a decision disproportionate which falls outside the scope of the Rules and any policy concession.

31. This was foreshadowed in relation to entry clearance, in cases such as SS (Malaysia) [2004] UKIAT 00091, paragraphs 30-32. We mention that to point out that paragraph 31 needs to be qualified because it refers in part to the reasonableness approach now overruled by Huang.

32. Where a Rule or extra-statutory provision covers the sort of circumstance upon which an individual relies eg entry for marriage, study, medical treatment or delayed decision-making, but the individual falls outside the specific requirements or limits of the otherwise applicable Rules or policy, that is a very clear indication that removal is proportionate. It is not for the judicial decision-maker, except in the clear and truly exceptional case to set aside the limitations set by the executive, accountable to Parliament, and, in the case of the Immigration Rules, approved by Parliament.

33. Where Rules or extra-statutory provisions do not make provision at all for circumstances which an individual may rely on for the purposes of overcoming to the qualification to an ECHR right which is provided by the legitimate interests of immigration control, his case cannot rationally be considered more favourably than one whose circumstances are covered in principle by some provision of the Rules or of an extra-statutory policy but whose circumstances do not meet the detailed requirements of the Rules or policy.

34. The starting point for the consideration of proportionality is the Rules and then the effect of extra-statutory policies. It will be necessary in each case where an exception is made in respect of an individual who has no basis to enter or remain in the United Kingdom to state clearly why those approved and qualified provisions in the Rules or policies should not be regarded as the conclusive negative answer to that claim.

35. Compassionate circumstances are often invoked in Article 8 cases, though they may involve in reality no significant aspect of family or private life. A removal decision may be harsh. There are Rules and policies which deal with a variety of compassionate circumstances for entry or remaining in the United Kingdom. If a particular case does not fall within them, the normal conclusion of an assessment of proportionality should be that those circumstances mean that the legitimate interests of immigration control favour removal. A truly exceptional case would have to be made out. Article 8 is not a general provision justifying the overriding of immigration control on general compassionate grounds or where there may be harshness and misfortune from removal. It is a provision which creates rights on specific grounds and only applies where those rights exist; it only precludes the effectiveness of immigration control, as embodied in the Rules and extra-statutory policies or concessions, where the individual circumstances are so powerful and exceptional that those considered provisions should not be allowed the effect which would normally be accorded to them.

36. Shala and Edore [2003] INLR 361 continue on their facts to exemplify what can constitute a truly exceptional case. By contrast, the actual facts of Huang and Kashmin exemplify what cannot be such a case, and Abu-Qulbain illustrates what possibly might be such a case. Huang and Kashmin also illustrate Adjudicator decisions in which seemingly the Adjudicators simply

thought that the proportionality issue involved a question of harshness or unfairness, which is a misguided view of Article 8. Those factors may assist a claim but cannot be its sole content.

37. Although Huang has held that, following Razgar in the House of Lords, the M* (Croatia) reasonableness approach is wrong in law, it would be a complete misinterpretation of Huang to read it as containing an approach significantly different in its likely effect on the result in individual cases. Read with Razgar in the House of Lords, it clearly envisages successful disproportionality cases under Article 8, for those who fall outside the Rules or policies, as rare or truly exceptional. We do not see the difference in legal approach as likely to lead to a different answer in practice, and it is far from clear that any difference which might exist would favour the claimant.

38. On the facts of this case, it could not do so. The application of the correct legal approach could not possibly have led to a different outcome. There is nothing comparable to Shala or Edore. It is at least as weak a case as Huang's or Kashmin's. It amounts to little more than an insignificant interference with modest components of private life, allied to an unduly delayed decision. The Appellant had no other claim to stay, no claim within the Rules or under any concession. Even at its highest, it was no more than a possible claim for refugee status on arrival and there was no policy which was in force saying that he should have been accepted as a refugee. He has suffered no real detriment through delay other than uncertainty and has been able to take advantage of his time here in other respects.

39. This appeal is dismissed. It is reported for what we say about the Bulletins and Huang.

MR JUSTICE OUSELEY
PRESIDENT