Asylum and Immigration Tribunal

AA (DP3/96 – Commencement of Enforcement action) Pakistan [2007] UKAIT 00016

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 November 2006	**On 13 February 2007**

Before

SENIOR IMMIGRATION JUDGE MATHER
SENIOR IMMIGRATION JUDGE LANE

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

1. *For the purposes of DP3/96, service of a notice of intention to deport or service of illegal entry papers amount to decisions that 'stop the clock'. Time spent in the United Kingdom following such service will not be counted for the purposes of applying that Policy. (This list may be regarded as essentially the same as that in paragraph 276B(i)(b) of HC395).*
2. *Withdrawal of an adverse asylum decision does not of itself amount to withdrawal of a consequential removal decision (see s77 of the 2002 Act).*

Representation:

For the Appellant: Mr D Lemer, Counsel instructed by Mitre House Chambers
For the Respondent: Mr P Tranter, a Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan. He was born on 19 January 1970. He arrived in the United Kingdom on 31 October 1999 and claimed asylum on 2 November 1999. Following two refusals on non-compliance grounds his asylum application was eventually refused on its merits on 1 July 2005. In the meantime the appellant also made a marriage application which was refused on 3 June 2005. In both cases the respondent's decision was to remove the appellant to Pakistan as an illegal entrant. The decisions were served on forms ISI51B (asylum) and ISI51A pt 2 (marriage). The appellant appealed both decisions and the appeals were heard together by

Designated Immigration Judge Coleman on 21 September 2005. She dismissed his appeal against the 'asylum decision' on both asylum and human rights grounds. The appellant did not have the right to appeal the refusal of the marriage application on immigration grounds from within the United Kingdom because he did not have leave to enter or remain at the time that he made it. The Designated Immigration Judge did not expressly say so in her decision but it is clear that she rejected the assertion that the refusal of the marriage application was not in accordance with the law because the respondent had not properly considered his policy known as DP3/96.

2. The appellant applied for review. The order for reconsideration said:-

> "The appellant argues that enforcement action did not commence in 2000 as the Home Office withdrew it. Reliance is placed on Akaeke [2005] EWCA Civ 947. I consider the grounds arguable. All the grounds of the application may be argued."

At the outset of the hearing before us Mr Lemer said that the appellant did not propose to challenge the asylum decision.

We are concerned with issues arising out of DP3/96 and Article 8 ECHR.

Chronology

3. It may be of assistance here to set out a chronology:-

Dates	Events
19 January 1970	Appellant born
31 October 1999	Appellant arrives in UK
2 November 1999	Appellant claims asylum
17 April 2000	IS151A served on appellant
7 April 2001	Asylum application rejected – non-compliance – failure to return Statement of Evidence Form
30 August 2001	Appellant marries and shortly thereafter makes an application to remain on the basis of that marriage
5 September 2001	Respondent's decision to refuse asylum withdrawn
9 November 2001	Appellant's asylum interview – did not attend
16 November 2001	Asylum claim again rejected
Unknown date	Second refusal of asylum withdrawn
22 January 2004	Appellant's daughter born
3 June 2005	Marriage application refused
15 June 2005	Notice of appeal of refusal of marriage application

1 July 2005	Asylum claim refused
29 July 2005	Notice of appeal against asylum refusal
21 September 2005	Appeal hearing

The Designated Immigration Judge's Determination

Asylum and Articles 2 & 3 ECHR

4. As the appellant did not wish to pursue the reconsideration on asylum grounds there is no need for us to deal with it. That is relevant in as much as there is now no proper basis upon which the appellant can assert that he is at real risk of serious harm if he returns to Pakistan.

5. The Designated Immigration Judge rejected the appeal on human rights grounds insofar as the appellant relied on Articles 2 or 3 upon the same basis as his asylum claim. There was no challenge to that.

Marriage and DP 3/96

6. Referring to the claim under DP3/96 and the appellant's marriage, the Designated Immigration Judge recorded (at paragraph 22(a)) that the respondent

> "….firstly considered the claim under his policy DP 3/96. The appellant's situation was not covered by that policy as the marriage had not predated enforcement notice by two years because the appellant had been served with the IS151A form notifying that he was an illegal entrant on 17 April 2000".

Article 8 ECHR

7. The respondent refused the application under Article 8 on the basis that, although he accepted the appellant had family life in the United Kingdom, it would not be interfered with because there were no insurmountable obstacles to his wife and child going with him to Pakistan and continuing family life there. He said that returning him would not be disproportionate even if the appellant's wife did not go back with him, because the appellant entered the United Kingdom unlawfully, had married and started a family knowing of the possibility that he would be unable to stay in the United Kingdom, and his child is young enough to adapt to life in Pakistan. He also took into account the fact that the appellant could apply for entry clearance to re-enter the United Kingdom as a spouse, meaning that any disruption would be temporary. He said there were no compelling reasons for regarding the case as exceptional.

8. Dealing with Article 8, the Designated Immigration Judge noted that, following the marriage in July 2001, the appellant and his wife had a daughter. She was born on 22 January 2004 and they all live together. The appellant's wife's family has supported them since the birth of their child because the appellant, having sought permission to work in the United Kingdom, was refused the right to do so. The appellant and his wife accepted that they were aware of his immigration status when they married. The Designated Immigration Judge rejected their assertion that because the respondent had withdrawn two asylum refusal decisions the appellant was likely to be granted leave to remain. The appellant and his wife, when giving evidence, referred to the appellant's wider family having fallen out with him because he had been engaged to marry a cousin. He failed to do so and married his wife in the UK instead.

9. The Designated Immigration Judge, in coming to her conclusions, referred to the alleged disagreements with the appellant's family because of the failure to honour the engagement. She noted that the appellant is not in contact with any close family in Pakistan. She found there was no reason why disagreement with family members with whom he has no continuing contact should interfere with the appellant's family life if he and his wife chose to reside in Pakistan. She accepted the appellant's wife has been in the United Kingdom for a long time and has family here, but noted that she is of Pakistani origin, visited there in 2000, speaks Urdu and understands the culture. She also noted that the appellant's wife married him knowing that he had no right to remain here. She concluded that it was not unreasonable to expect her, and their child, to return to Pakistan with her husband. She accepted that the IS151A was served on the appellant in April 2000, saying that would be normal procedure.

10. She then said that if there were no interference with protected family life she did not need to consider the matter further, though she did go on to do so in case she was wrong about there not being any interference. She considered whether it would be disproportionate to expect the appellant to return if it was unreasonable to expect his wife and child to return to Pakistan with him. She said he entered the United Kingdom unlawfully and she noted Counsel's argument that the appellant should have been granted leave to remain under "DP3/96" because the enforcement notices and IS151As were not served until "1995 which post-dated the marriage by over four years". (She must have meant 2005). She then said:-

> "However that ignores the previous service of such a notice in April 2000 which I have accepted. Furthermore on the basis of my arguments above it would not have been unreasonable to expect the appellant's wife to return with him to Pakistan. Therefore the appellant does not come within the respondent's published policy relating to marriage".

11. She looked at the question of delay and referred to Akaeke [2005] EWCA Civ 947. Having taken that case into account she said that, whilst there had been a delay of four years, she did not regard the appellant as having made continuous or strenuous efforts to press for a decision until 2004. She said the appellant was responsible for considerable delay earlier in the procedure by his two failures; first to submit a Statement of Evidence Form in time and, second, failing to attend an interview. She said there was no evidence of strong private life, the appellant has no property in the United Kingdom, there was no evidence that he has been studying, he has been unable to work and, although he has been here for a considerable time, it is not so long that it would be unreasonable to require him to leave. She concluded, as a secondary finding, that any interference with the appellant's family life would not be disproportionate.

DP3/96

12. The policy known as DP3/96 was introduced to be applied when considering deportation cases under paragraph 364 of HC 395. At the time, deportation was the sole method of removal of those who remained without authority or who had failed to comply with, or had contravened a condition of their leave. Since that time the regime for the removal of illegal entrants and immigration offenders has changed and it is now largely achieved through administrative removal. It has never been suggested that DP3/96 does not apply equally to administrative removal. It

potentially benefits those who are liable to administrative removal but who have married before enforcement action was taken. The policy says:-

> "As a general rule, deportation action under 3(5)(a) or 3(5)(b) (in non-criminal cases) or illegal entry action should not normally be initiated in the following circumstances (but see notes below):
>
> (a) where the subject has a genuine and subsisting marriage with someone settled here and the couple have lived together in this country continuously since their marriage for at least two years before the commencement of enforcement action;
>
> and
>
> (b) it is unreasonable to expect the settled spouse to accompany his/her spouse on removal."

13. The notes referred to are as follows:-

> "(i) In this instruction, 'settled' refers to British citizens who live in the United Kingdom or to nationals who have indefinite leave to enter or indefinite leave to remain here.
>
> (ii) In considering whether or not, under paragraph 5(b) above, it would be unreasonable for a settled spouse to accompany the subject of enforcement action on removal the onus rests with the settled spouse to make out a case with supporting evidence as to why it is unreasonable for him/her to live outside the United Kingdom. Factors which caseworkers should take into account, if they are made known to them, will include whether the United Kingdom settled spouse:
>
> (a) has very strong and close family ties in the United Kingdom such as older children from a previous relationship that form part of the family unit; or
>
> (b) has been settled and living in the United Kingdom for at least the preceding ten years; or
>
> (c) suffers from ill-health and medical evidence conclusively shows that his/her life would be significantly impaired or endangered if he/she were to accompany his/her spouse on removal.
>
> (iii) In this instruction commencement of enforcement action is to be taken as either:
>
> (a) a specific instruction to leave with a warning of liability to deportation if the subject fails to do so; or
>
> (b) service of a notice of intention to deport or service of illegal entry papers (including the service of papers during a previous stay in the United Kingdom where the subject has returned illegally); or
>
> (c) a recommendation by court that a person should be deported following a conviction.
>
> (iv) The commencement of enforcement action 'stops the clock' in terms of the two year qualifying period referred to paragraph 5(a) above in which a marriage must have subsisted. No further time can then be accrued to meet this criterion, e.g.,

whilst making representations, appealing against a decision or applying for judicial review.

(v) This notice contains guidance as to the approach to be adopted in the generality of cases but it must be remembered that each case is to be decided on its individual merits and, for instance, a particularly poor immigration history may warrant the offender's enforced departure from the UK notwithstanding the factors referred to above."

14. In order to determine whether the Designated Immigration Judge erred in law in relation to DP 3/96 it is necessary to establish whether the marriage took place at least two years before the commencement of enforcement action. In order to decide that, it is necessary for us first to consider what amounts to the commencement of enforcement action. Enforcement action is not commenced only by the service of illegal entry papers, but it is that mechanism we consider in this determination. Note (iii)(b) addresses the issue in part but does not wholly answer the question. It has not been challenged that the appellant was served with an IS151A in April 2000. The Designated Immigration Judge was correct to say that it would be normal procedure, and the appellant has not sought to argue that that did not happen.

15. The form IS151A, headed "Notice to a Person Liable to Removal", is addressed to an individual and the person signing the form has to tick one of two boxes. The first box, "A", refers to an illegal entrant as defined in section 33(1) of the Immigration Act 1971, or a member of a family of such a person on whom removal directions have been served. Box "B" refers to a person subject to administrative removal in accordance with section 10 of the Immigration and Asylum Act 1999. The form then goes on to give notice of liability to detention. It says

> "You are therefore a person who is liable to be detained pending the completion of arrangements of dealing with you under the Immigration Act 1971. I propose to give directions for your removal from the United Kingdom in due course and details will be given to you separately".

16. The appellant was served with a form IS151B on 1 July 2005. This form is frequently, but wrongly, described as removal directions. It is headed "Decision to Remove an Illegal Entrant/Other Immigration Offender or a Family Member of such a Person – Asylum/Human Rights Claim Refused." In the appellant's case, the form addressed to him says:-

> "You were served with form IS151A on 06/04/2005 informing you of your immigration status and your liability to detention and removal.
>
> As a consequence, a decision has been taken to remove you from the United Kingdom.
>
> You have made an asylum and/or human rights claim. The Secretary of State has decided to refuse your claim for asylum and/or human rights for the reasons stated on the attached notice."

The form then goes on to tell the appellant of his appeal rights before removal. It refers to the One-Stop Procedure and the Statement of Additional Grounds. It confirms that the person cannot be removed while the appeal is in progress. It concludes by saying: -

"Directions will be given for your removal from the United Kingdom to Pakistan".

17. For the sake of completeness, we should mention the similar, but different, form "IS151A Part 2". The difference between ISI51A Pt 2 and ISI51B is in relation to appeal rights. IS151A Part 2 is the appropriate form to be served where the right of appeal only arises after removal. It is otherwise similar to the IS151B. It recites the service of an earlier IS151A, and concludes with the same indication that directions are to be given for removal from the United Kingdom.

18. It is therefore clear that there is a two stage process. The first is to give notice of liability to removal. The second is the notice of decision to remove.

19. It is apparent in this case that the appellant was served with two IS151As, one in April 2000 and the other in April 2005.

20. The appellant's marriage took place in 2001. If the enforcement action only started on service of the IS151B on 1 July 2005 then it clearly pre-dated enforcement action by two years. The appellant contends first that service of the IS151A does not comprise enforcement action. Second, if it does, it was withdrawn when the decision to refuse the asylum application was withdrawn. The respondent contends that the enforcement action started with service of the IS151A in April 2000 (i.e. before the marriage) and that an IS151A cannot be withdrawn. Our attention was drawn to two earlier decisions of the Tribunal. The first is AA (Shala – DP3/96) Sudan [2004] UKIAT 00240. Counsel in that case argued that DP3/96 had not been properly considered. The Immigration Appeal Tribunal said this:-

> "Though the notice of 1 October 2000 was no longer effective to bring about the appellant's removal, once the Home Office had recognised they had wrongly refused him asylum on non-compliance grounds, and withdrawn that decision, it had most certainly given him notice that he was liable to removal. The Home Office were entitled to take the view, in their letter of 9 September 2002 that his marriage on 29 August 2000 did not pre-date such notice by at least two years".

21. That is the extent of the Tribunal's consideration of the issue. It does not help, in this case, because the question we have to consider is not whether the appellant had been given notice that he was liable to removal, but whether enforcement action had commenced. The Tribunal in that case did not address the meaning of commencement.

22. The second decision is MA (DP3/96 – Interpretation) Algeria [2005] UKAIT 00127. At paragraph 23 of that decision the Tribunal said this:-

> "When one looks at the wording of IS151A, IS151A Part 2 and IS151B, it is in our view sufficiently clear that the purport of those documents is entirely consistent with the concept of commencement of enforcement action, albeit not within the specific terms set out in paragraph 5(iii)(a) of DP3/96. It is clear for example, from IS151A Part 2 that a decision has been taken to remove the appellant from the United Kingdom. The implication must clearly be that if he does not leave voluntarily he will be removed. The use of the word 'deportation' should not in our view be taken to be purely a reference to the technical process of deportation, but rather more broadly to the process of removal of a person who in this case was subject to administrative removal in accordance with Section 10 of the Immigration and Asylum Act 1999 as set out in IS151A".

23. We also find that unhelpful when considering the point at which commencement action is deemed to commence. It is unhelpful to us because the Tribunal has "rolled up" the two stages of the process and referred to them together as commencing enforcement action. The decision begs the question as to whether the IS151A is the commencement of enforcement proceedings or just a notice telling an appellant that that is a likely event.

24. Before we go on to draw conclusions on that issue we also need to look at whether an IS151A can be withdrawn. The answer seems to appear in chapter 7 of the Immigration Directorate Instructions. The instructions start by referring to two stages. Those are not the two stages represented by IS151A and IS151B (or IS151A part 2) but, rather, the decision making process giving rise to the issue of an IS151A. Those stages are to consider first, whether the person is in fact an illegal entrant and second, whether to treat him as such. The second stage requires the decision maker to consider whether the service of a notice of illegal entry (IS151A) "would disadvantage the individual in question in some way". The instruction says that if it would not disadvantage a person then it should be issued and the reasons recorded. It also says that if it is concluded that prejudice would be caused, and there are no countervailing reasons why it is nevertheless fair and appropriate to serve the notice, then it is not to be issued. That part of the IDI does not go directly to answering the question that we have to deal with but the next section does. After the heading:-

> "After papers have been served",

it says:

> "In the course of enquiries, the level of information available to officers changes – perhaps through interview, further interview, or representations from legal representatives and other bodies, etc. Officers should bear in mind that they have a continuing discretion as to whether to maintain or withdraw the notice of illegal entry. If as a result of information obtained at a later stage or as a result of a change of circumstances, it becomes apparent that an individual is being prejudiced as a result of the notice of illegal entry and that it is unfair on them to maintain it, then the notice should be withdrawn."

25. Thus it is clear that an IS151A can be withdrawn. The question of whether it actually has been withdrawn still arises. The guidance says that, whenever a notice of illegal entry is withdrawn:-

> "It is essential that all parties involved in a case are informed in writing as soon as practicable."

We have seen no written notification in this case that the IS151A served in April 2000 has been withdrawn at any time. Withdrawal of the notice clearly does not automatically occur when an adverse decision on an asylum claim is withdrawn, for whatever reason. We have not considered, because it was neither relevant, nor argued before us, whether the withdrawal of illegal entry papers pursuant to the IDI is effective for the purpose of calculating the two years referred to in DP 3/96.

26. For the sake of completeness we mention the following parts of the IDI. Where an IS151A has been served, and an immigration decision to remove is then made, the decision maker is told to:-

> "Serve the immigration decision to remove, either
>
> IS151A Part 2 (where the appeal right is 'out of country'); or
>
> IS151B (where asylum or human rights claim has been refused)
>
> If asylum or human rights or HR is claimed after serving the IS151A Part 2, withdraw this notice, prepare an undated IS151B for the file ready to be served to be served with the RFRL if the claim is refused."

27. We quote the above because it emphasises the distinction between the IS151A Part 2 and IS151B and the respondent's procedure. It does not have any direct relevance to this appeal.

28. The appellant cannot take advantage of the policy in DP3/96. He was served with an IS151A in April 2000. It was not withdrawn. The notes to DP3/96 expressly say that commencement of enforcement action is to be taken as one of several actions, which include "service of a notice of intention to deport or service of illegal entry papers". We find that the expression "Illegal entry papers" is clearly capable of covering form ISI51A.

Article 8

29. The challenge to the Designated Immigration Judge's findings under Article 8 arises out of the delay which the appellant asserts has occurred in his case.

30. In her determination the Designated Immigration Judge's primary finding on Article 8 was that there will be no interference with the appellant's family life because his wife will accompany him back to Pakistan. That is plainly wrong. The appellant's wife is a British citizen, who was living in the United Kingdom before the appellant arrived and married her. It is not therefore a question of the appellant and his spouse being removed together as would be the case if they had both arrived from Pakistan. Whilst it is the appellant's human rights with which we are concerned, it must be the case that there will be an interference with his protected family life if he is removed to Pakistan. It cannot be automatically assumed that a British citizen, with her family in the United Kingdom and who is settled here, in both the legal and social meaning of the word, would simply go to Pakistan without a second thought. In the situation where an appellant has married a British citizen who has not said she will return with him, the question of whether she can be expected to accompany him back is to be considered when looking at Article 8.2 and the question of proportionality.

31. Mr Lemer put it another way: he said the Designated Immigration Judge misapplied Mahmood [2001] INLR 1. The question of whether or not there are insurmountable obstacles to a spouse accompanying a returning failed asylum seeker is not an issue which goes to the question of the existence of family life but to proportionality. The Designated Immigration Judge was wrong to find that there would be no interference with the appellant's protected family life.

32. However, in her alternative findings the Designated Immigration Judge did address the question of the insurmountable obstacle in relation to proportionality. She concluded that removal would not be disproportionate for the reasons she gave

(paragraph 10 & 11 ante). In that part of her determination she also considered the question of delay and that was the appropriate point for delay to be considered. The grounds deal with delay and say that, following the marriage in August 2001, the appellant made enquiries of the respondent in May 2002 because he wished to have permission to work. The grounds assert that it took one and a half years for him to be refused that permission. In that time the appellant referred the issue to his Member of Parliament who was told that the respondent had no record of a marriage application. The respondent later accepted one had been made, but only when evidence was presented to him through the MP. The Designated Immigration Judge is criticised for saying the delay was caused by the appellant in the early part of the period. The grounds assert that was wrong, saying that the respondent would not have withdrawn those two early procedural refusals if they were not his own fault. The grounds assert the appellant could not attend the interview for genuine reasons. The grounds also assert that although the judge said there have been "no continuous or strenuous efforts to press the HO", the appellant did start to press the respondent after a reasonable time. The grounds accept the appellant did not write on a monthly basis but complain that the Designated Immigration Judge did not consider a six year delay was inexcusable whereas, in contrast, in Akaeke three years' delay was considered "a public disgrace".

33. Mr Lemer dealt with the issue of delay in paragraph 5 of his skeleton argument. He recited the Immigration Judge's reasons and then asserted that she was wrong because she irrationally concluded the respondent's delay was four years rather than five and erroneously placed blame on the appellant for contributing towards the delay. He said that no findings of fact were made as to why the non-compliance decisions were withdrawn, or why the appellant was said to be at fault. In his skeleton argument he asserted that the Immigration Judge failed to have regard to the guidance in Akaeke and went on to quote paragraph 23 of MM (Serbia and Montenegro) [2005] UKAIT 00163. In MM there had been no action on the appellant's file until six years after his application when his MP intervened. The Tribunal said:-

> "While there was no repeated form of pressure for a decision until then (as in Akaeke) the fact that a claimant should, after so long should have to enlist the help of his parliamentary representative to get the executive to make the decision which they claim the public interest demands is in our view quite enough (again as in Akaeke) to entitle the appellate authority to take a somewhat diluted view of what that public interest now requires".

34. In this case although the appellant complains that it is wrong to say that he caused the delay in the early stages of his asylum process, and that the respondent must have conceded it was his own fault that the two non-compliance decisions were made, it is not in our view quite that simple. First it is clear that the respondent was not failing to deal with the appellant's asylum application. We have no idea why the appellant failed to submit his Statement of Evidence Form in time, or why he failed subsequently to attend an interview. Whatever the reason, it cannot be said that the respondent was not taking any action. We do not regard the application for permission to work following a marriage application to be an action designed to prompt the respondent to deal with the asylum application. Even if the Designated Immigration Judge did mistakenly say the delay caused by the respondent was four years, when the appellant argues that it was five, that was not an error of law. It is not a fundamental fact upon which the entire decision was built, which was

demonstrably wrong, or gave rise to an erroneous decision. The Designated Immigration Judge considered the question of delay, and in particular referred to Akaeke during the course of her reasoning. She came to the conclusion that it was not disproportionate to remove the appellant, having taken into account the relevant factors including delay. She bore in mind that the appellant will be entitled to apply for entry clearance upon his return to Pakistan. The decision is one she was entitled to make.

35. Given all the factors identified and addressed by the Designated Immigration Judge, including both the ability of the appellant to apply for entry clearance from abroad and delay, it cannot properly be argued that it was irrational or perverse to find it is not disproportionate to remove the appellant, an illegal entrant.

36. Although the Immigration Judge looked at delay from the earlier date, the decision was not made in error of law and there is no possibility that the Tribunal would decide the appeal differently on reconsideration. Since the hearing of this reconsideration, the Court of Appeal has handed down its Judgement in HB (Ethiopia) [2006] EWCA Civ 1713. At paragraph 24, Buxton LJ drew together the various earlier decisions and summarised the law in relation to delay. There is nothing in that summary to suggest that the Designated Immigration Judge erred in law in her approach to delay.

37. The Immigration Judge not having made an error of law in relation to DP3/96, and not having made any material error of law in relation to Article 8 the following decision is confirmed.

    The asylum appeal is dismissed.

    The human rights appeal is dismissed (both in relation to Article 3 and Article 8).

    The claim that the respondent's decision was not in accordance with the law is dismissed.

Signed Date

Senior Immigration Judge Mather
Approved for electronic distribution.