Case No: C1 2002/2059

Neutral Citation No: [2003]EWCA Civ 233
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 27 February 2003

Before :

LORD JUSTICE SCHIEMANN
LORD JUSTICE RIX
and
LORD JUSTICE KEENE

- -

Between :

Arben Shala	Appellant
- and -	
Secretary of State for the Home Department	Respondent

- -

(Transcript of the Handed Down Judgment of
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Nicholas Blake QC & Rafeef Dajani (instructed by Fitzgrahams, St Leonards on Sea TN37 6PH) for the Appellant
Samantha Broadfoot (instructed by Treasury Solicitor) for the Respondent

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Judgment
As Approved by the Court

Lord Justice Keene:

1. This case raises the issue of whether the Immigration Appeal Tribunal ("IAT") was entitled to reject an appeal brought under section 65 of the Immigration and Asylum Act 1999 ("the 1999Act") on the ground that the interference with the appellant's right to respect for his family life, an interference involved in returning him to Kosovo, was proportionate and justified under Article 8(2) of the European Convention on Human Rights ("ECHR"). The matter came before this court as an adjourned application for permission to appeal from the decision of the IAT. We granted that application during the hearing and the case therefore comes to be dealt with as a substantive appeal.

2. The appellant, who is now aged 27 years, is a citizen of the Federal Republic of Yugoslavia. He is an ethnic Albanian from Kosovo. He arrived in the United Kingdom by lorry on 25 June 1997 and claimed asylum the same day. Nothing was then done about his asylum claim for some time. Eventually, his solicitors wrote to the Home Office in June 2001, requesting information about his current status. That led to him being interviewed on 17 July 2001 and to a letter from the respondent dated 25 July 2001 refusing his claim. In the letter, the respondent dealt not only with the application for asylum but also, albeit briefly, with the appellant's position under the ECHR. The letter stated that the threat of persecution in Kosovo had been removed with the establishment of an international peacekeeping force and, on the human rights aspect, it concluded that the United Kingdom's obligations under the ECHR did not justify allowing him to remain in this country.

3. An appeal against that decision was dismissed by an adjudicator in November 2001. The adjudicator concluded that the appellant would not be at risk if returned to Kosovo and consequently the asylum appeal failed. But there was also a human rights appeal under section 65 of the 1999 Act, relying upon Article 8 of the ECHR. That appeal arose in the following way.

4. Although technically the appellant had not been granted leave to enter the United Kingdom, he had been granted "temporary admission" to this country pending the determination of his asylum claim. During the period of just over 4 years between his claim and the respondent's decision on it, the appellant had met a woman, BF, a Czech national who was also an asylum seeker. They first met in October 1998 and in December 1998 they began cohabiting. She had two sons by a previous relationship, and she and her sons were granted refugee status in May 2000. The appellant was still living with BF and her sons at the date of the hearing before the adjudicator, having done so for about 3 years by then. At his interview in July 2001 he spoke of his intention of marrying BF and he explained that they had not married by then because the Home Office might have thought that he had done so for personal advantage. In fact, he and BF married in October 2001.

5. BF herself gave evidence before the adjudicator, describing the appellant as being like a father to her sons. She had never been to Kosovo and spoke no Albanian. She had been in the United Kingdom since October 1997 and her sons were settled here.

6. The adjudicator seems to have accepted her evidence. He accepted that the appellant was a devoted husband and a very good stepfather. He also found that it was

> "quite impossible to expect the appellant's wife and her sons to move to Kosovo and rebuild their lives there."

However, he emphasised the respondent's duty to enforce a reasonable immigration policy and he noted that the appellant had married his wife when his future in the United Kingdom was unclear. He concluded that, while there would be an interference with family life if the appellant were removed to Kosovo, the appellant would be able to apply for entry to the United Kingdom from there on the basis of his marriage. Given the need for immigration control, there would be no breach of Article 8 in his removal to Kosovo.

7. The appellant appealed to the IAT. It was argued that it was unfair and unreasonable to apply to the appellant the immigration control policy applicable to those without leave to enter when the respondent had not taken any steps for over 4 years to process his asylum claim. It was in particular contended that the adjudicator had not properly dealt with the issue of proportionality when considering the human rights appeal in relation to Article 8. The IAT in its determination referred to a number of decisions, including that of this court in *R. (on the application of Mahmood) –v- Secretary f State for the Home Department* [2001] UKHRR 307. It noted that, at the time when the respondent made his decision, the appellant was unmarried and it could not be said with any degree of certainty that the relationship with BF would develop into a strong family life. The appellant would be able to lodge an application with the United Kingdom Immigration Authorities in Kosovo, which

> "places him in the same position as every other applicant in an immigration situation wishing to obtain leave to enter as the spouse of a British national or person with indefinite leave to remain in this country."

The IAT concluded that, given the objectives of immigration control, there would not be "a disproportionate breach" of Article 8 if the appellant were returned to Kosovo.

8. That conclusion is now challenged by the appellant. On his behalf, Mr Blake Q.C., emphasises that the adjudicator had found in effect that there existed in this case a genuine family life. Moreover, he had also found that that family life could not realistically be enjoyed in Kosovo, because it was impossible to expect BF and her sons to move there. Consequently it is only in this country that such a family life could be maintained. The balance struck by the IAT had therefore attached considerable weight to the appellant's ability to apply from Kosovo for entry as the spouse of BF, but in so doing the IAT had ignored the difficulties which the appellant would face in Kosovo, and seems to have left out of account the evidence that his home there had been destroyed, his parents had left and his prospects of earning the necessary money in Kosovo for a return to this country were very uncertain. There could be no confidence that the separation of the appellant from BF and her sons would be a short one.

9. It is also submitted that the appellant should not have been treated by the IAT as if he were merely yet another spouse seeking leave to enter. The respondent's delay in dealing with the appellant's asylum application had meant that the appellant had been physically in this country for over 4 years before any decision was made, a period of such length that it is not surprising that he had formed an

enduring relationship. Yet because of the delay he was treated as not having entered the United Kingdom but as merely having temporary admission. Had his application been dealt with reasonable promptness, he would as a refugee from Kosovo been granted refugee status or at least exceptional leave to remain. This was the respondent's policy up until mid – 1999 as the decision letter in this case shows. In that case the appellant would not have been required to leave this country and to apply from Kosovo but could have made his application for a variation in his leave from within the United Kingdom. There would then have been no interference with his family life. The delay on the respondent's part in dealing with his asylum claim has disadvantaged the appellant and rendered the decision to remove him disproportionate.

10. On behalf of the respondent, it is contended that the 4 years delay does not render the interference with the appellant's family life so disproportionate as to take the decision outside the discretionary area of judgment accorded by the courts to the respondent. As was said in *Secretary of State for the Home Department –v- Isiko* [2001] Imm.AR 291 at para. 31(1),

> "In cases involving immigration policies and rights to family life, it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose decision is said to be incompatible."

Miss Broadfoot submits that the Secretary of State is in the best position to strike the balance between the need to maintain effective immigration control and the rights of the individual. It is important that those without leave to enter or remain should not be able to exploit the procedures so as to be able to prolong their stay in the United Kingdom by making in-country applications for such leave. As *Mahmood* shows, even with a subsisting marriage, a person only here on temporary admission will be required to return home to seek entry clearance, unless there are exceptional circumstances. Moreover, in the present case the appellant's wife's position in this country had been precarious until May 2000. When all the circumstances are taken into account, it cannot be said that the decision under challenge was so disproportionate that it fell outside the respondent's margin of appreciation.

11. It will be clear from what I have said earlier in this judgment that this case turns on the human rights issue. The asylum arguments have been overtaken by events. It is equally clear that the removal of the appellant from this country would give rise to an interference with his right to respect for his family life under Article 8. That, of course, does not mean that there is necessarily a breach of that Article. Such an interference may be justified by the public authority in question, as provided for by paragraph 2 of the Article. There is no issue as to the decision in the present case being one taken in accordance with the law and in pursuance of a legitimate objective, namely the maintenance of control over immigration. But what is in issue is whether the decision met the requirement of proportionality, so that it struck a fair balance between that legitimate objective and the appellant's right under Article 8.

12. The legal principles concerning the approach to be adopted by the courts on proportionality in cases such as this have been considered on a number of occasions. The House of Lords in *R (Daly) –v- Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532

has made it clear that proportionality requires the court to do more than merely apply the traditional *Wednesbury* test. While its task is still that of review, rather than one of remaking the decision on its merits, the review will, when human rights issues are involved, be a more intensive one. As Lord Steyn said at para. 27 of *Daly*:

> "First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review insomuch as it may require attention to be directed to the relative weight accorded to interests and considerations."

But it needs to be borne in mind that what both Lord Steyn (at para 28) and Lord Cooke of Thornton (at para. 32) emphasised was that the intensity of review depends on the subject matter. In some areas of decision-making, the courts will allow the decision-maker a greater degree of deference or discretion than in others. I myself would endorse the principles enunciated by Laws LJ in *International Transport Roth GmbH –v- Secretary of State for the Home Department* [2002] EWCA Civ 158; [2002] 3 WLR 344 at paras 83-87, where he sought to give guidance on how the degree of deference was to be determined in various situations. His third principle (para. 85) was that:

> "greater deference will be due to the democratic powers where the subject matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts."

He went on to express the view, with which I concur, that the former category includes the security of the state's borders, including immigration control: para. 86.

13. That is a standpoint which has been adopted by this court in a number of cases involving immigration control, such as *Mahmood* and *Isiko*. In short, therefore, in deciding whether or not the Secretary of State has struck the balance fairly between this appellant's right to respect for his family life and the proper maintenance of immigration control, this court will recognize that the Secretary of State is to be allowed a significant area of judgment. He is entitled to a significant margin of discretion before the court will conclude that he has gone wrong in the relative weight which he has attached to the conflicting interests. I therefore approach the facts of this case and the IAT's decision with those principles in mind.

14. What is striking about both the decision of the IAT and that of the Secretary of State is that in each the position of the appellant has been equated with that of any normal applicant who wishes to obtain leave to enter on marriage grounds. This comes through very clearly in the passage from the IAT's determination quoted earlier in this judgment. But, as Mr Blake has rightly pointed out, the appellant's case has an exceptional feature, namely that had his asylum application been dealt with reasonably efficiently, he would have been likely to have obtained at least exceptional leave to remain as a Kosovo refugee, thereby giving him the ability to apply from within the United Kingdom for a variation in that leave on the grounds of his marriage. The IAT does not appear to

have considered that submission, which was clearly put before it as paragraph 11 of its determination indicates. In other words, but for the remarkable delay on the part of the Home Office in dealing with his asylum claim, the appellant would not have fallen into the category where the applicable policy requires an application for leave to enter to be made from outside this country.

15. The facts of this case bear a marked similarity with those of *Xhacka*, an IAT decision [2002] UK IAT 03352, where the Tribunal was presided over by Collins J. There the appellant was also an ethnic Albanian from Kosovo whose claim for asylum was not dealt with for some two and a half years. During that time, he met and married a British woman, though the adjudicator found that that there were no insurmountable obstacles to the family living together in Kosovo. The IAT took the view that the claim under Article 8 should have been allowed, Collins J. saying at paragraph 3:

> "In the circumstances of this case, the fact is that the appellant did have a legitimate claim to enter, namely that he was at that time a refugee, and that coupled with the delay in dealing with his claim as an unaccompanied minor until the situation changed, is capable of amounting to exceptional circumstances and does in the circumstances of this case justify a decision that he is entitled to remain here because to remove him would be a breach of Article 8 of the European Convention on Human Rights."

That reference to "a legitimate claim to enter" derives from a passage in *Mahmood*, where at para. 23, page 318, Laws LJ said this:

> "Firm immigration control requires consistency of treatment between one aspiring immigrant and another. If the established rule is to the effect – as it is – that a person seeking rights of residence here on grounds of marriage (not being someone who already enjoys a leave, albeit limited, to remain in the UK) must obtain an entry clearance in his country of origin, then a *waiver* of that requirement in the case of someone who has found his way here without an entry clearance and then seeks to remain on marriage grounds, *having no other legitimate claim to enter*, would in the absence of exceptional circumstances to justify the waiver, disrupt and undermine firm immigration control because it would be manifestly unfair to other would-be entrants who are content to take their place in the entry clearance queue in their country of origin." (Emphasis added).

The significance is that, both in *Xhacka* and in the present case, the appellant *did* have a legitimate claim to enter at the time when, on any reasonable basis, his claim should have been determined. Put another way, the fact that the delay by the Home Office has deprived him of that advantage should be seen as an exceptional circumstance which takes the appellant's case out of the normal run of cases where a person with no leave to enter seeks such leave on the basis of marriage: see *Mahmood*, para. 26.

16. I fully accept that some weight was to be attached in the decision-making process to the fact that the appellant began his relationship with BF and married her while his status in this country was

undetermined. This is a relevant factor, and not an unimportant one: see *Abdulaziz –v- United Kingdom* [1985] 7 EHRR 471. But the whole balancing exercise was conducted without any weight being attached to the fact that the policy being put into one side of the scales would not have been applicable at all but for the delay on the part of the Home Office. While it may be uncertain when the appellant would more normally have been granted refugee status or exceptional leave to remain, it is unfair that he should suffer because of an uncertainty arising from the Home Office's failings. Nor can it be said that allowing him to apply in-country would encourage others to exploit the established procedures. To require the appellant now to leave the United Kingdom and to apply from Kosovo for leave to enter seems to me to be clearly disproportionate and to fall outside the generous margin of discretion to be afforded in such cases to the respondent, who does not appear to have reflected adequately, if at all, the significance of his Department's delay in the present case.

17. I conclude that the IAT was wrong to regard the respondent's decision as a proportionate one. I would allow this appeal.

Lord Justice Rix :

18. I agree with both judgments.

Lord Justice Schiemann :

19. I agree that this appeal ought to be allowed for the reasons given by my Lord.

20. Much of the argument on behalf of the Secretary of State before us was on the lines that, although there was indeed a genuine family life and although there would indeed be interference with it, and although indeed the family could not be expected to live in Kosovo, the interference would only be for a matter of a few months whilst the application was being dealt with by the usual channels in Kosovo. Meanwhile the rest of the family could remain here. It was, so it was said, important to go through the usual procedures but there was no reason to suppose that the application would not swiftly be granted in which case he would be back here within a few months. So the interference would only be temporary and therefore did not require much by way of justification.

21. I am of course conscious of the importance of having uniform policies consistently enforced and the difficulties in giving decision takers at a relatively lowly level a wide discretion. However, I would wish to emphasise the need for Adjudicators to bear in mind the *reasons* for the policies which they are enforcing and not just the *wording* of the policies.

22. It is clearly necessary to have procedures which ensure as best as we can that those wishing to settle here are screened by those whose function it is to decide whether they should be allowed to settle. There are strong policy reasons for making people who wish to come to this country apply from abroad : the local representatives of this country are often best placed to form a view as to the

merits of the application. Where someone has, without excuse, smuggled himself into this country without obtaining a visa and without permission and then forms a relationship one can see strong policy arguments for making him go abroad and go through the normal procedures, notwithstanding that relationship: to do otherwise may well encourage other would-be immigrants to come first and apply for permission afterwards and this would subvert the whole system.

23. Equally, successive Home Secretaries have recognised that there can come a time when it is no longer appropriate to insist that a particular individual who has established a family relationship in this country leaves that family and returns home.

24. The present case however is distinguishable from the mass of cases because the applicant came here at a time and in circumstances where his failure to apply for a visa was accepted by the Home Office as wholly explicable and where he applied for permission on the day he arrived from Kosovo which was in the middle of a dreadful civil war. He could not have done more. In short he was, at the time that he came, a meritorious applicant for permission to remain here, at any rate for a while. It was not until more than four years later that the Home Office, after chivvying by his solicitors, got round to arranging an interview to test the genuineness of his asylum application. Automatically to apply to a person in his position a policy designed to discourage both meritorious and unmeritorious applicants from jumping the queue is a wrong approach to the difficult problem of deciding whether the interference with a person's rights under Article 8 is necessary in a democratic society.

25. As I understand it, had his application been dealt with in the appropriate timescale as it ought to have been then his application for permission to stay would in all probability have been granted. The fact that it was not was not his fault. Had that been granted, a further application to remain with his wife would also in all probability have been granted. It was during this period that the family relationship was established. These factors should have been considered by the decision taker as well as the interests of his wife and the two boys who have now found a father.

26. The difficulties in a case such as the present arise from the fact that the relevant procedures were designed to take a few months and yet have in practice, through no fault of the applicant, taken the Home Office several years. In such circumstances one must be careful before one allows policies designed for procedures operating in different conditions to become automatically determinative of the fate of a family.

27. I agree that this appeal should be allowed. We would welcome submissions as to the form of order which is appropriate.

Order: Appeal allowed; case to be remitted to the secretary of state; respondent do pay appellant's costs of the appeal, such costs to be assessed in accordance with the community legal funding service regulations; any application for permission to appeal to the House of Lords must be in writing within 7 days.

(Order does not form apart of the approved judgment)