Neutral Citation Number: [2008] EWCA Civ 753

Case No: C5/2007/2062/AITRF

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM and IMMIGRATION TRIBUNAL
HR001142006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2008

Before:

LORD JUSTICE PILL
LORD JUSTICE SCOTT BAKER
and
LORD JUSTICE RICHARDS

- -

Between:

R U (SRI LANKA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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

- -

Miss Charlotte Bayati (instructed by **Messrs. S. Satha & Co.**) for the **Appellant**
Mr Jonathan Auburn (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 13 May 2008

- -

Judgment

Lord Justice Scott Baker :

1. The appellant, who is aged 38, appeals with the leave of this court against the decision of the Asylum and Immigration Tribunal on 4 July 2007 rejecting his Article 8 claims on a redetermined appeal. The case has a long history and it is regrettable from everybody's point of view that it was not resolved long ago.

History

2. The appellant is a citizen of Sri Lanka. He arrived in the United Kingdom on 30 December 1993 and claimed asylum on arrival. His claim was rejected by the Secretary of State on 2 May 1996 and an adjudicator dismissed his appeal on 27 August 1997. On 10 October 1997 leave to appeal was refused and just 19 days later, on 29 October 1997, he made a fresh claim for asylum. An internal minute records that this was received by the respondent and that the appellant was given temporary admission until 5 May 1998. This included, in accordance with the practice at the time, permission to work.

3. Nothing of any significance happened thereafter until the Norfolk Enforcement Office served a form I.S.96 NW on the appellant which was dated 10 March 2005 and granted him temporary admission subject to a condition of residence and a requirement to report to the Immigration Officer on 10 May 2005. It also contained a restriction on any employment.

4. For reasons that are not explained, the fresh claim made in October 1997 was never dealt with and there is no documentary evidence that any action was taken on it by the respondent before 10 March 2005. It was only after the hearing before us had concluded that the respondent provided us with the I.S.96 NW form of that date. We are told by Ms Bayati, who appeared for the appellant, that it was before the original immigration judge; indeed he refers to it in his determination. We had been provided at the hearing with a later version of the I.S.96 NW dated 10 July 2005. The question is: what if any communication was there between the appellant and the respondent between the autumn of 1997 and 10 March 2005? I shall return to this shortly.

5. Following service of the I.S.96 NW on 10 March 2005, the appellant's solicitors wrote to the Secretary of State on 7 May 2005 requesting a grant of indefinite leave to remain due to the appellant's length of residence, his affiliations in the United Kingdom and on compassionate grounds. It is said that the appellant's solicitors (who had been instructed in place of his previous solicitors) had written an earlier letter of 24 March 2005 but neither side has provided us with a copy of that letter or the letter 7 May 2005 or indeed of a further letter from the appellant's solicitors to the respondent dated 27 May 2005. A minute on the respondent's file suggests the appellant was seeking reinstatement of the right to work which was granted by the further I.S.96 NW on 10 July 2005.

6. On 15 July 2005 the appellant's solicitors wrote to the appellant's Member of Parliament asking him to make representations for the appellant to be given indefinite leave to remain under "the new Home Office concession". The Member of Parliament wrote promptly to the Secretary of State. Nearly 8 months later, on 6 February 2006, the appellant was refused leave to remain.

The appellant's circumstances.

7. On 6 April 2002 the appellant married a Sri Lankan national who had been refused asylum and whose appeal rights had been exhausted on 22 January 2002. They had met in 2000 when he was working at a petrol station. A serious relationship developed and they began living together in August 2000. The appellant has been running his own business since 2001. It is a petrol station in Norwich that is open all day every day. The business employs six people, three full-time and three part-time. The appellant's wife helps in the business which produces an annual income in the region of £38,000. She is employed as a library clerk in the records department of the Norfolk and Norwich University hospital.

8. The appellant and his wife bought a 3 bedroom house in 2002. Neither has been a burden on the State.

9. Following attendance at a fertility clinic, an IVF child was born to the appellant and his wife on 10 March 2006. The appellant has a brother in Sri Lanka, to whom he has not spoken for 6 years, and also a sister. His wife's mother is elderly and likewise lives in Sri Lanka. Both families come from the North East of the country and both were affected by the 2005 tsunami.

10. The appellant has a brother in the United Kingdom who has been granted British Citizenship. He sees his brother twice a week and his family provide some care for the child.

The appellate history.

11. The appellant appealed against the Secretary of State's decision of 6 February 2006 and the appeal was heard by Immigration Judge Oliver on 16 March 2006. Judge Oliver allowed the appeal on Article 8 grounds. On 3 April 2006 a senior immigration judge Mr Andrew Jordan, on the respondent's application, ordered reconsideration. On 15 February 2007 a panel presided over by Immigration Judge Blandy heard the first stage reconsideration and concluded that Judge Oliver had made material errors of law and directed that the appeal be set down for full reconsideration before any immigration judge other than Judge Oliver. That hearing took place before Immigration Judge Omotosho on 5 June 2007. She concluded that any interference with the appellant's Article 8 rights would be proportionate and that the respondent's decision under appeal would not put the United Kingdom in breach of the law or its obligations under the ECHR.

12. Ms Bayati puts the appeal before us under two heads. First she says that Judge Oliver made no material error of law and the Asylum and Immigration Tribunal had no basis for ordering a reconsideration. Secondly she submits that the second immigration judge (Omotosho) made material errors of law in dismissing the Article 8 appeal.

Immigration Judge Oliver's decision

13. The judge having correctly identified the questions he had to ask himself said at para 27:

> "I find on the facts that there is very close family life in view of the marriage and a child has been born and private life because of the industriousness of the appellant. Obviously if he was removed there would be an interference. It must be said that his wife and child are dependants and, as has been stated above, they do not have any status in the U.K. The interference would be in pursuit of a legitimate aim and obviously in accordance with the law because he is an overstayer and has no right to remain. Thus the appellant states it is not proportionate to remove him. Therefore the burden of proof shifts to the Secretary of State on the balance of probabilities."

14. He then went on in the following paragraphs to consider proportionality. In the opening paragraph of his determination Judge Oliver had set out the question he had to decide as "whether it would be proportionate or not to allow the appeal on Article 8 of the ECHR on the grounds, as it was submitted, that the Secretary of State took an unreasonable amount of time to make a decision and of course of the appellant's own personal circumstances."

15. The first point made by Mr Jonathan Auburn, for the respondent, is that Judge Oliver wrongly concluded that if the appellant was removed there would be an interference with family life as well as with private life. There would, he submits, be no interference with family life because neither his wife nor child have any right to remain in the United Kingdom and they would be removed with him. There is no doubt that the real focus of the judge's decision was on proportionality and he was certainly entitled to concluded that there would be an interference of sufficient gravity with the appellant's *private* life as potentially to engage Article 8. It is unfortunate that he elided family life and private life in paragraph 27 in the way that he did. But he made clear in the very next sentence that the appellant's wife and child, although his dependants, had no status in the United Kingdom. Further, as Sedley L.J observed in *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 80 para 28, while an interference with private or family life must be real if it is to engage Article 8(1), the threshold of engagement is not an especially high one. There can be no doubt that that threshold was crossed in respect of the appellant's private life. Nevertheless the judge did not identify how removal would interfere with family life and Mr Auburn submits there would in reality be no interference.

16. The judge addressed the issue of proportionality by reference to the Court of Appeal's decision in *Huang* [2005] EWCA Civ 105, [2006] 1 QB 1 and whether the circumstances were truly exceptional. The law has, of course, moved on since then and following the House of Lords decision in *Huang* [2007] U.K. HL [2007], 2 WLR 581, exceptionality is no longer the benchmark. However, it is impossible to envisage that if the judge had applied the law as clarified by the House of Lords the result would have been different as the test is, if anything, less strict.

17. Judge Oliver directed his attention to the delay that had occurred referring to the two authorities to which he had been referred, *MM (Serbia and Montenegro)* [2005] UK IAT 00163 and *Akaeke* [2005] EWCA Civ 947, [2005] INLR 575 and concluded that delay by the Secretary of State is a factor which can carry more weight the longer it progresses from the date of an application by a claimant which has not been dealt with by the Secretary of State.

18. He went on to point out that the appellant was entitled to make a new claim for asylum and that it should have been dealt with. This is, of course, correct but he did not go on to say that there was no indication that the new claim had the slightest merit.

19. At paragraph 36 Judge Oliver found that the appellant had done nothing beyond making the renewed claim for asylum until the Immigration officer served the I.S.96 NW. The judge said this was in April 1995 but this must be a mistake for 2005 as the form is dated 10 March 2005 as he had earlier mentioned in paragraph 7. The judge then referred to the further representations made by the appellant's solicitors, that there was no reply and that he then turned in desperation to his Member of Parliament.

20. In paragraph 37 Judge Oliver said that perhaps the appellant should, through his solicitors or by himself, have made earlier attempts to contact the Secretary of State but added that: "he has conformed to the guidance given by the two Court of Appeal judgments in not acquiescing in the delay."

21. The evidence before Judge Oliver did not disclose any contact between the appellant and the respondent between the Autumn 1997 and 10 March 2005, save that in a witness statement of 15 March 2006 the appellant referred to repeated reminders to consider his Human Rights claim. His Article 8 claim was not launched until 2005 after the respondent had precipitated action by serving the I.S.96 NW. Notably the appellant does not refer to any reminders to consider his asylum claim. In any event, the reference to "repeated reminders" is completely unparticularised and unsupported by any documents.

22. Judge Oliver had evidence that the long period of inactivity was broken by the service of the I.S.96 NW dated 10 March 2005. In my judgment it is important, and Judge Oliver made no express reference to this, that the long period of inactivity was broken not by the appellant but by the respondent. He does not appear to have considered or inquired what it was that caused the service of this document on the appellant. It was only after this that the Article 8 claim was made in the letter of 7 May 2005. We are now told, although Judge Oliver did not have this information, that the I.S.96 NW was served by the respondent as a result of a tip off. Be that as it may, the only evidence the judge had was that it was the respondent who precipitated the end of the period of inactivity between the autumn in 1997 and March 2005, and there was no evidence that the appellant had done anything to try and end the respondent's inactivity in the meantime.

23. Following the hearing before us, the appellant through his solicitors has provided four documents. I should point out that he changed to his present solicitors in the spring of 2005 just before his Article 8 claim was made. The four documents, it is argued, are evidence that there was some activity on the part of the appellant during the 1997 – 2005 period. The first document is a backsheet bearing the date 7 March 2002 indicating that representations had been drafted by counsel but that no steps were to be taken until the appellant re-attended with further information. The other documents illustrate the appellant notifying his solicitors of changes of address and his solicitors notifying him that a copy of his marriage certificate had been sent to the immigration authorities. However, there is no evidence that his former solicitors M. K. Sri & Co. ever advanced any Article 8 claim to the respondent or indeed communicated with the

respondent at all. Neither the appellant nor the respondent has produced any document establishing such contact.

24. Judge Oliver concluded that this was an exceptional case on the basis that the appellant had not acquiesced in the lengthy delay by the Secretary of State and apparently also because he was happily married, had set up his own business and employed 6 others.

25. In my judgment the fundamental error made by the judge was in concluding that the appellant had not acquiesced in the delay. He could not have reached this conclusion if he had taken into account that the long period of inactivity between the autumn of 1997 and 2005 was terminated by the respondent's service of the I.S.96 NW dated 10 March 2005 and that there was no evidence the appellant had done anything to inquire about his renewed asylum claim. It was only after the I.S.96 NW was served that the appellant made his human rights claim. This was in my judgment a material error of law that entitled the Asylum and Immigration Tribunal to order a redetermination.

26. The reasoning of Immigration Judge Blandy in concluding that Judge Oliver had made an error of law is far from satisfactory. It is fair to say he was given little assistance in the respondent's grounds of appeal which were directed to misdirections of law on family and private life, the argument being that Article 8 was not engaged at all and therefore the question of proportionality did not arise. Judge Blandy identified errors of law in failing to make any finding whether the removal of the appellant would interfere with (1) any right to family life and (2) any right to private life (see paragraph 5). He went on to say (paragraph 7) that the judge failed to give any reason for saying the appellant had a legitimate right to ask the Secretary of State to accept a new claim for asylum and that he failed to give proper weight to the various periods of inactivity since the appellant first came to the United Kingdom. As to the first point the appellant was plainly entitled to make a fresh claim for asylum, but whether the claim had any merit is another matter. As to the second point, this was not a rationality challenge.

27. Judge Blandy concluded that Judge Oliver had drawn his eventual conclusions in an illogical manner that was not consistent with a proper approach to an appeal on Article 8 grounds only, and that his material errors of law combined to affect his decision. What Judge Blandy in my view did not do was to identify the one critical error on the part of Judge Oliver. Be that as it may I am satisfied that Judge Oliver's decision should not have been allowed to stand and that a second stage redetermination was necessary.

Immigration Judge Omotosho's decision.

28. I turn therefore to Ms Bayati's second ground of appeal, that Immigration Judge Omotosho made an error of law in the redetermination.

29. Judge Omotosho noted that the reconsideration was of the appellant's Article 8 appeal. However, because of the changed circumstances in Sri Lanka, she felt consideration ought also to be given to Article 3. She proceeded to go on and do so, concluding that he had not established a real risk of treatment contrary to his Article 3 rights on return. Nothing in the present appeal turns on this.

30. As to Article 8, Judge Omotosho found that the appellant had family life in the United Kingdom in that he was married and had a child. She went on to conclude, rightly in my view, that his family life would not be interfered with by his removal in the sense envisaged by Article 8 in that neither his wife nor child had any legal status in the United Kingdom. The family would be returned to Sri Lanka together and would be able to continue with their family life.

31. It was not, however, disputed that the second limb of Article 8 was engaged. The appellant had clearly forged private life in the United Kingdom. He had lived here for about 13½ years, and he was well settled. Removal would interfere with his private life. She went on to say:

> "…the issue is now whether the interference identified would have consequences of such gravity as potentially to engage the operation of Article 8 and whether such interference can be regarded as proportionate in all the circumstances. In considering this I have noted the appellant's personal circumstances in the United Kingdom as well as in Sri Lanka. As identified above, the appellant left Sir Lanka over 13 years ago and he now has a well established business in the United Kingdom."

She then said with regard to the issue of delay:

> "Whilst there is no dispute that the appellant through his then representatives, made further representations to the Home Office in 1997 following the dismissal of his asylum appeal and the exhaustion of his appeal rights. However, his case is distinguishable from those in *MM* and *Akaeke* as these dealt with delay by the respondent in handling proper application(s) for asylum or entry clearance/leave to remain. The mere failure of the respondent to acknowledge further representations and delay in actually removing a person like the appellant who has no right to remain in the United Kingdom cannot be said to afford the appellant more right or legitimate expectation. There is no reason to believe that even if the representation made on behalf of the appellant was acknowledged and properly handled by the respondent he would have obtained some leave to remain. The appellant chose to remain in the United Kingdom after his appeal rights were exhausted, and as a result was able to forge considerable private life. I am satisfied on the totality of the evidence before me that the private and family life forged in the United Kingdom by the appellant, was forged in the full knowledge that his immigration status is precarious and he was liable to be removed."

She went on to say that any interference with his Article 8 rights would be proportionate and in pursuit of the legitimate aim of maintaining effective immigration control.

32. Although Judge Omotosho makes no mention of the fact that it was the service by the respondent of the I.S.96 NW in March 2005 that ended the long period of inactivity it is plain she had in mind the Article 8 claim was not made until May 2005. There is some confusion in the papers due to erroneous reference in Home Office letters to representations having been received from the appellant's solicitors dated 7 May 2002 when the correct date was 7 May 2005. This error was repeated in paragraph 2 of Judge Omotosho's redetermination although it is clear from reading the whole document, that she was aware the correct date was 7 May 2005. That the fresh representations were indeed made in May 2005 and not 2002, and that the Home Office were the perpetrators of a clerical error is clear from their reference to the solicitors who sent the representations being Satha & Co. In 2002 M.K Sri and Co. were still acting for the appellant.

33. In *HB (Ethiopia) and others v Secretary of State for the Home Department* [2006] EWCA Civ 1713 Buxton L.J. summarised the law on the effect of delay by the Secretary of State on claims that, as in the present case, rely on Article 8. He set out at para 24, inter alia, the following conclusions, (I omit reference to those conclusions that have no relevance to the present case).

- Delay in dealing with an application may, increasing the time the claimant spends in this country, increase his ability to demonstrate family or private life bringing him with Article 8(1). That, however, is a question of fact, and to be treated as such.

- The application to an Article 8 case of immigration policy will usually suffice without more to meet the requirements of Article 8(2) [*Razgar*] Cases where the demands of immigration policy are not conclusive will be truly exceptional [*Huang*].

- Where delay is relied on as a reason for not applying immigration policy, a distinction must be drawn between persons who have some potential right under immigration policy to be in this country (for instance, under marriage policy, as in *Shala* and *Akaeke*); and persons who have no such right.

The appellant falls into the latter category because he has no right under immigration policy to be in this country and relies solely on Article 8(1).

- Where an applicant falls into this category, delay in dealing with a previous claim for asylum will be a relevant factor under Article 8(2), but it must have very substantial effects if it is to influence the outcome [*Strbac* at para 25].

- Decisions on proportionality made by tribunals should not, in the absence of errors of principle, be interfered with by an appellate court [*Akaeke*].

34. This latter point has been emphasised by Carnwarth L.J. in *Mukarkar v Secretary of State for the home Department* [2006] EWCA Civ 1045 whose words were repeated by this court in *A G (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801 para 30.

> "In normal circumstances interference with family life would be justified by the requirements of immigration control.

> However, it is recognised that a different approach may be justified in 'a small minority of exceptional cases identifiable only on a case by case basis'…..The House of Lords declined to lay down a more precise legal test. Accordingly whether a particular case falls within that limited category is a question of judgment for the tribunal of fact, and normally raises no issue of law."

35. It is true that there was very long delay in the present case between the appellant's fresh asylum claim in October 1997 and the spring of 2005. There is no evidence that it was ever dealt with by the Secretary of State, but on the other hand nor is there any evidence that it was ever pursued by the appellant, even when he launched a fresh claim to remain in this country in May 2005 on other grounds. The plain inference is that the fresh asylum claim contained nothing of substance.

36. The Article 8 claim was not made until the spring of 2005. The delay in dealing with that claim, although regrettable, was only 9 months. The fact that the earlier delay was terminated by the respondent's service of the I.S.96 NW in March 2005 rather than by any action on the part of the appellant diminishes any weight that can be attached to it. In any event, delay itself does not give rise to an Article 8 claim; it simply increases the appellant's ability to demonstrate family or private life and thus bring him within Article 8(1).

37. As the respondent pointed out, had the appellant been able to demonstrate 14 years' continuous residence in the United Kingdom he would have qualified for indefinite leave to remain. Having arrived in this country on 30 December 1993, 14 years would have expired at the end of 2007. It might be inferred therefore that he had good reason to stand by and do nothing to precipitate action on the part of the Secretary of State. As Judge Omotosho pointed out, the appellant chose to remain in the United Kingdom after his appeal rights had been exhausted; delay by the Secretary of State give him no additional rights or legitimate expectation. Indeed he had no potential right under immigration policy to be in this country.

Conclusion.

38. Judge Oliver was wrong to conclude that the appellant had not acquiesced in the delay. The evidence is that he stood by and did nothing until his Article 8 claim was made in the spring of 2005. It now appears, although this was not referred to by either of the immigration judges, that the appellant's Article 8 claim was precipitated by service of the I.S.96 NW in March 2005.

39. Judge Omotosho was entitled to find that interference with the appellant's Article 8 rights would be proportionate. She had in mind that he had forged a considerable private life albeit in the context he knew he was liable to removal at any time. As is now well settled, decisions on proportionality are matters of judgment on which an appellate court will only interfere if there is a material error of law. Such matters do not normally raise any issue of law and I can detect none here.

40. It not infrequently happens in Article 8 cases, and this is an example, that arguments are advanced that the claimant has in some way contributed to the community during the time he has been in the United Kingdom. In the present case the appellant has set

up a business that employs a number of people. In my judgment contribution to the community is not a freestanding factor falling to be taken into account when weighing the proportionality test in Article 8. It may, however, have some relevance if it forms part, for example, of the private life forged by the appellant whilst here. It should, however, be noted that before a decision to remove is made under s.10 of the Immigration and Asylum Act 1999 the Secretary of State has to have regard to all relevant factors known to him. These include the individual's personal history including his character, conduct and employment record (see para 395C of the Immigration Rules (HC 395). Thus any positive contribution an illegal entrant or overstayer has made to society would fall to be taken into consideration at that stage. The appellant was, of course, neither because he was a port applicant and refused leave to stay.

41. Judge Oliver made a material error of law in concluding the appellant had not acquiesced in the Secretary of State's delay and in taking this into account in his favour when considering proportionality. Judge Omotosho made no error of law on the reconsideration. She properly concluded that removal would be an interference with the appellant's private life. However she was fully entitled to conclude that his removal from the United Kingdom would be a proportionate response notwithstanding the length of time he has been here. I would dismiss the appeal.

42. Lord Justice Richards:

I agree.

43. Lord Justice Pill:

I also agree and for the reasons given by Scott Baker LJ.

I agree with the finding that there was interference, subject to Article 8(2), with the right to respect for the appellant's private life (Article 8(1)). I wish to express agreement, however, with Scott Baker LJ's finding, at paragraph 40, that the appellant's contribution to the community is not a freestanding factor when a breach of Article 8 is alleged. It may throw light on the private life of an applicant, and be relevant in other ways, but the respect due under Article 8 is not to be judged by reference to the success, or lack of success, of the applicant in the United Kingdom.

Postscript:

Since preparing these judgments and providing them in draft to the parties we have read the speeches of their Lordships in *E.B. Kosovo (F.C.) Appellant v Secretary of State for the Home Department* [2008] UK HL 41 and the references therein to the relevance of delay in Article 8 cases. Nothing said by their Lordships affects the outcome of the present appeal.