IN THE ASYLUM AND IMMIGRATION TRIBUNAL

MM (Delay – reasonable period – Akaeke – Strbać) Serbia and Montenegro [2005] UKAIT 00163

Heard: 07.11.2005
Signed: 09.11.2005
Sent out: 23.11.2005

NATIONALITY, IMMIGRATION AND ASYLUM ACTS 1971-2004

Before:

John Freeman (a senior immigration judge)
Mrs W Jordan and
Dr JO de Barros

Between:

[ ]
appellant

and:

Secretary of State for the Home Department,
respondent

Mr J Adler (counsel instructed by Gupta & Ptnrs) for the appellant
Mr S Ouseley for the respondent

DETERMINATION AND REASONS

This decision is reported for

a) what we say (at §§ 7-8) about the reasonable limit for delay in reaching a decision;
b) the principles set out at § 17; and
c) our conclusions on the requirements for a "family life" point at §§ 20-21 (so far as they involve general principles).

This is a case where the Tribunal has ordered reconsideration of a decision of an immigration judge (Mrs C Bart-Stewart), sitting at Hatton Cross on 8 April 2005, allowing on article 8 human rights grounds only an appeal by an Albanian citizen of Kosovo. The Tribunal thought the judge might have made the following errors of law:

a) misapplying **Shala [2003] EWCA Civ 233**;
b) not explaining how she had distinguished **N (Sri Lanka) [2004] UKIAT 00069;** and

c) not giving any reasons for finding any such "truly exceptional" circumstances in the appellant's private or family life as would make removal disproportionate to the legitimate purpose of immigration control in terms of **Huang [2005] EWCA Civ 105**.

2. The appellant, in common with many thousands of his fellow-countrymen, had fled to this country in 1998, arriving and claiming asylum on 10 August; but it took the Home Office till 2005 even to interview him, giving reasons for refusal on 18 January, with notice of refusal on the 25th. There is no dispute but that even then this only happened because of an intervention by Michael Portillo MP on the appellant's behalf. After making findings of fact on the appellant's family circumstances (to which we shall return) at § 30, the immigration judge began her § 31 with the Portillo intervention, and went on:

*I find it difficult to see what pressing social needs can then be addressed by requiring this appellant to now leave the United Kingdom. The Secretary of State cannot have had immigration control to the fore in ignoring this application for so many years. [*The presenting officer before her*] conceded that there were family ties between the appellant, his grandmother, his sister and his nephew. I consider that this appellant's case can be distinguished from* ***N (Sri Lanka)****. In the case of this appellant, there are further elements of dependency involving more than normal emotional ties. The Secretary of State has failed to show why he has not applied his own policy in the case of this appellant. He has failed to give any explanation for the substantial delay in determining the application. I find that the circumstances are truly exceptional and that no reasonable Secretary of State would remove the appellant in these circumstances.*

3. The only criticism that can possibly be made of the first two sentences is that the immigration judge appears to regard failure to make a decision till badgered to do so as necessarily leading to the conclusion that removal would be disproportionate to the legitimate purpose of immigration control. Perhaps this part of her conclusions was a little short on inductive reasoning; but the fact remains that we saw such a feature (considerably more pronounced than here) as one of those leading in all the circumstances to such a conclusion in **Akaeke** (where we were upheld by the Court of Appeal: see **[2005] EWCA Civ 947**).

4. The immigration judge's reasons for distinguishing **N [2004] UKIAT 00069** [we wish she – and others – would follow the normal convention of giving at least that much of the citation when a case is mentioned for the first time, which enables it to be found by anyone interested] appear in the next two sentences, which refer back to her § 30. We shall consider in due course how far the reasoning at § 30 supports her decision on the point; but Mr Adler realistically conceded that the appellant's family life alone (without the points on policy and delay) could not amount to such "truly exceptional" circumstances in the appellant's private or family life as would make removal disproportionate to the legitimate purpose of immigration control in terms of **Huang [2005] EWCA Civ 105**.

5. The last two sentences of the immigration judge's § 31 deal with the (related) questions of Home Office policy and delay. Taking the **policy** (on asylum-seekers from Kosovo) first; Mr Ouseley put a document before us (under the heading of 'FRY and Kosovo: policy development chronology') to show what it actually was at the time in question. Till 15 June 1999, most were given either asylum or exceptional leave to remain, in some cases indefinite. From then till 13

September, all those who had arrived before March were to be given 12 months' exceptional leave to remain: afterwards each was to be dealt with on his individual merits. This represents a rather more accurate version of the picture given the immigration judge by citations from **Gashi [1999] INLR 276** and **Shala [2003] EWCA Civ 233**, which should no longer be relied on for this purpose. She made no mistake of law in doing so, however, as the presenting officer did not give her the material we have had; and she gave the essential feature of the policy in the last sentence of her § 24: "The grant of one year exceptional leave to remain ceased in a policy announcement on 13 September 1999".

6. On **delay**, the immigration judge again cannot be faulted for finding it substantial (nearly 6½ years from claim to decision) and unexplained. What she failed in our view to do was to consider the consequences of the Home Office failing to follow their policy or decide the case in a reasonable time. We first need to consider, as she should have done, what this appellant's reasonable expectations would have been in terms of the policy in force at the time. While we understand his annoyance at fellow-countrymen who arrived at a similar time having got a favourable answer from the Home Office in 1999, in our view only a general policy could create any legitimate expectation (as was the position in **Bakhtear Rashid [2005] EWCA Civ 744**).

7. The reasonable time-limit for a decision on a asylum claim has been taken in a number of cases by the Tribunal as 12 months. Mr Adler challenged us (politely) to produce any specific authority for that; but he was certainly able to point to no other period with any judicial authority behind it; and again we do not regard the experiences of the appellant's friends as setting any general standard. Asked to propose an alternative period, Mr Adler suggested one of about ten months; but he quite candidly acknowledged that the only basis for that was that it would have put this appellant, arriving in August 1998, within the more generous policy prevailing till June the next year. Again, taking a general standard from what would have helped an individual claimant seems to us to be wrong in principle.

8. It seems to us then that the Home Office ought to have got round to doing something about the appellant's case at latest by 12 months after his arrival. At that point, in August 1999, their policy would have led to a grant of 12 months' exceptional leave to remain, while they dealt with the influx of asylum-seekers from Kosovo which had taken place up to then. The question the immigration judge did not ask herself was what would have happened when that exceptional leave to remain ran out in August 2000. By then there was no legitimate expectation of the appellant's being dealt with other than on his individual merits: on these, so far as his asylum/articles 2 and 3 claim were concerned, the immigration judge found against him, without any challenge to that (by way of an answer under r. 30.1 of the Procedure Rules).

9. It may be that the immigration judge was either misled by, or misunderstood Mr Adler's submissions: see § 15, where she quotes him as referring (correctly) to the effect of the 12-month exceptional leave to remain policy: interestingly Mr Adler had himself begun that point "*Even if there had been a delay of one year after he applied …*". Then however the judge has him go on: "*Had he been granted asylum or exceptional leave to remain, this would have precluded the need to apply for a variation.*" As Mr Adler frankly acknowledged before us, that is a mistake: only asylum or indefinite leave to remain would have had that

consequence. Whether it was an error of the immigration judge's own, or one into which she was led by Mr Adler, we need not decide: it certainly was a mistake of law, and one which led the immigration judge not to consider what difference the failure to grant 12 months' exceptional leave to remain in August 1999 would have made in the long run.

10. **Authorities** While there have been cases (most notably **Bakhtear Rashid**) where the mere failure to follow a published policy led to a claim being allowed, none of them, as Mr Adler acknowledged, involved the mere failure to grant a temporary status, without more being involved. **Bakhtear Rashid** should have got asylum under the policy in force at the relevant time: because of the Home Office's failure to give it him, or to explain why not, the Court of Appeal said he should have indefinite leave to remain, even though he no longer qualified for asylum. It cannot in our view be argued that this appellant, simply because he should have got 12 months' exceptional leave to remain in 1999, should now get any form of indefinite leave to remain.

11. What more is required is set out in **MM [2004] UKIAT 00016**, a decision of Storey and Warr VPP. Dealing with delay at § 23, they say that "… *given the high volume of applications for asylum which the Home Office has had to deal with in the past decade or so, we do not think that periods of delay even several years could be considered excessive, unless accompanied by other special circumstances which disclose particular prejudice to a claimant*." After analysing **Shala [2003] EWCA Civ 233**, they conclude at § 27 (repeated in their summary at § 38) that there are three conditions precedent to any finding of special circumstances:

a) the fact that the appellant had a legitimate claim to enter at the time when, on any reasonable basis, his claim should have been determined;

b) the fact that, had his asylum application been dealt with reasonably efficiently, he would have been likely to have obtained at least exceptional leave to remain;

c) the fact that his private or family life had only become significantly established as a result of the time spent by him in the UK where he formed a relationship. Accordingly possession of ELR, if it had been granted when it should have been, would thereby have given him the ability to apply from within the UK for a variation of leave on the grounds of his relationship.

12. We should have found some difficulty in finding that this appellant had a legitimate claim to enter this country in August 1999, when the conditions which had led him to flee Kosovo the year before had already been brought to an end by the NATO intervention. However we do not think we need to do that, because at § 31 of **MM 04-16** the Tribunal give this reason for that appellant meeting the first condition:

… it is not in dispute that when the appellant left Kosovo he was fleeing from persecution … In the circumstances we consider we should assume that the appellant did have a legitimate claim to enter when he arrived.

That is certainly true of this appellant; so he meets condition a). He meets b) too, in the terms set by **MM 04-16**; but the reference there to the likelihood of an appellant having got exceptional leave to remain if dealt with at the right time assumes that this would have given him the advantage set out at c).

13. In the context of this case, that would require that this appellant should have been able to put forward some claim to remain during the period August 1999 – August 2000. As Mr Adler accepted, the Human Rights Act 1998 was not brought into direct application for immigration purposes till 2 October 2000; so that meant this appellant would have needed to be able to make a claim under the Immigration Rules at the relevant time. We pressed Mr Adler as to what that might have been; but the only suggestion he could make as to any such claim which might have continued to date was based on the appellant's relationship with his British girl-friend: this did not enter into the immigration judge's consideration of the case, as (for whatever reason) the girl-friend did not give evidence before her. However, there are more fundamental objections to taking this as satisfying condition c): first, at the relevant time the appellant and his girlfriend had not been together for the two years required by the Rules; and then, as we pointed out to Mr Adler, they did not get together till 2002 in the first place: see interview Q61.

14. It follows that this appellant is ineligible for special consideration on a **Shala** basis, if **MM 04-16** represents the last word on the subject. There is however now **Akaeke [2005] EWCA Civ 947**. This much-abused decision (written by Carnwath LJ, with whom Rix and Chadwick LJJ agreed) involved a failed asylum-seeker allowed by the Home Office to stay in this country for many years after she lost her appeal, during which time she married a British citizen, and applied for leave to remain on that basis. This application was not dealt with by the Home Office for over three years, and only then because her solicitors wrote repeated letters pressing them to do so. This was described (by the present writer) as "a public disgrace", which the Court of Appeal took (see § 25) as enough to satisfy the requirement for exceptionality later laid down in **Huang [2005] EWCA Civ 105**. They went on:

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

15. There is a brief reference in **Akaeke** at § 32 to the then very recent decision in **Strbać [2005] EWCA Civ 848** (written by Laws LJ, with the agreement of Longmore and Scott Baker LJJ: we should like to express our appreciation of the practice of giving a single judgment in immigration cases). We have had more opportunity to consider that. The facts in **Strbać** were that the appellant, a Croatian Serb who had served in the Serbian army, finally left Croatia in January 1999. It was decided to refuse him asylum in November that year, though he was not given notice of refusal of leave to enter till November 2000: appeals to an adjudicator and the Immigration Appeal Tribunal were dismissed. The argument for the appellant on the **Shala** point was that he would have been granted asylum if his claim had been dealt with in a reasonable time; but the Court of Appeal held at § 26

The fact (if it be such) that a claim might have more likely prospered had it been decided two years earlier does not necessarily tend to show that the claimant's removal now would be disproportionate to the aim of immigration control.

They went on to make the same point about **Shala** as we have already seen in the Tribunal's condition c) in **MM 04-16**: after reviewing at § 27 the effect of the decision in **Janjanin [2004] EWCA Civ 448**, they concluded at § 28:

Shala, *then, establishes no particular, free-standing principle. It was a case on its own facts.*

16. What the Court of Appeal in **Akaeke** said about **Strbać** (at § 32) was this: "… *the factual context was wholly different, because the applicant had no separate claim to be allowed to enter under the rules.*" Presumably they were not referring to the situation on arrival, or even at the date of the decision to refuse asylum, because the appellants in both cases were at that stage failed asylum-seekers and no more. They must have meant that Mrs Akaeke was married to a British citizen by the date of the hearing before the appellate authorities, whereas in **Strbać** the Court of Appeal (at § 34) described the facts of the case as "…*marked by the circumstance that there is in any event no claim of interference with family life, and the claim based on private life is at most tenuous*". We have to try and distil a set of principles out of the two decisions, together with **Bakhtear Rashid** (and with **MM 04-16**, so far as it has survived whatever we find to be their combined effect), and then look at the result for the present case.

17. **<u>Principles</u>**

a) The first thing to be said is that, following **Strbać**, delay without more cannot be determinative on its own: in other words, status should not be granted merely to compensate the appellant or punish the Home Office. **Bakhtear Rashid** may look very much like a case of this; but the facts were found to go as far as abuse of power by the Home Office. Pill LJ (at § 29) set out the reasons for that, with the caveat "*I am very far from saying that administrative errors may often lead to a finding of conspicuous unfairness amounting to an abuse*". Even on the facts of that case, where the Home Office should have granted the appellant asylum at the relevant time, the Court of Appeal thought it wrong to give him more than indefinite leave to remain, since he no longer qualified for asylum under the international Convention.

b) Next, delay which deprives the appellant of a legitimate expectation (such as being able to make an in-country application for leave to remain) which he had at the time a decision should have been made may, as in **Shala**, be enough on its own to make removal disproportionate to the legitimate purpose of immigration control even at a later date, when the situation giving rise to that expectation is no longer in being.

c) Delay itself, if sufficiently gross, may take a case which would not otherwise be "truly exceptional" (either because it fell foul of the "anti-queue jumping rule" in **Amjad Mahmood [2002] Imm AR 229**, or for any other reason) into that category (following **Akaeke**); but it will only lead to a conclusion that removal is disproportionate if there is some free-standing claim to be allowed to stay on the basis of current family or private life, which together with the circumstances of delay could lead to a "truly exceptional" finding.

d) Delay will rarely, if ever, appear gross enough to bring a case within the last principle unless, as in **Akaeke**, there is evidence to show it was not acquiesced in by the appellant. A claimant is not entitled to sit back and enjoy whatever this country has to offer, relying on no more than the administrative incompetence of its authorities, amazing as this may sometimes be. Evidence of some formal pressure on the Home Office (either

by way of solicitors' (or other representatives') letters (as in **Akaeke**), intervention by an MP (as here), or personal appearance at the Home Office, resulting in an attendance note recorded on the file by an official) is likely to be required to show that an appellant has not acquiesced in delay.

18. **Conclusions** In this case, there was a **delay** of 6½ years between claim and decision, which the immigration judge was fully entitled to find exceptional. We bear in mind Mr Ouseley's point about the number of applications from natives of Kosovo at the time in question; but the Home Office had a perfectly reasonable policy in force to give themselves more time to deal with the influx, by way of the 12 months' exceptional leave to remain to be given to those who had arrived by March 1999, but had not been dealt with before 15 June. They did not follow it in the present case, and have never given any explanation to dispel the inference that the reason was no more than administrative incompetence.

19. While there is no specific acceptance by the immigration judge of the appellant's account (see § 8) that he "*kept calling the Home Office*", and claimants would be well advised to do more than that, if they wish to show that they have not acquiesced in delay, the judge does specifically find (at § 20) that, following the appellant's submission of his statement of evidence form [SEF] in September 1998 "*For reasons the respondent is unable to explain, nothing was then done on his file until six years later after his MP intervened*". While there was no repeated formal pressure for a decision till then (as in **Akaeke**), the fact that a claimant should, after so long, 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 authorities to take a somewhat diluted view of what that public interest now requires.

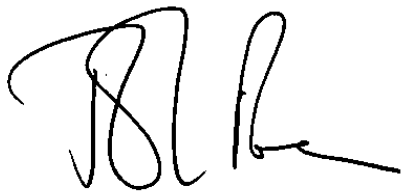
20. That as we have seen can only be done if the appellant's **family** (or other private) **life** which could together with the delay amount to "truly exceptional" circumstances. The requirement in **N 04-69** that family ties of the second degree (for this purpose, other than those between spouses or dependent parents or children) should include "*elements of dependency involving more than normal emotional ties*" we regard as the threshold for their entering into an article 8 consideration at all. The immigration judge found that the appellant's care for his grandmother, and the paternal rôle he filled for his four-year old nephew did involve more than such ties. Mr Ouseley objected that the appellant's help to his grandmother (with whom he lived) was no more than ordinary family co-operation; while the fact that he did not live with his sister and nephew took his rôle there out of article 8 family life.

21. We disagree: while many people who share accommodation do things for each other without that amounting to article 8 family (or even private) life, the immigration judge saw the grandmother in this case and found her frail. While it may sometimes be possible for a sexual relationship to be discounted for article 8 purposes on the basis that the parties do not live together, so that it lacks the permanent quality required, that consideration can have little or nothing to do with a relationship such as this appellant's with his nephew. The immigration judge gave proper thought to the possibility that what the appellant said about it was exaggerated, and after considering what others had added, decided that it was not. In our view, on both the grandmother and the nephew, the immigration judge

was entitled to take the view that there were "*elements of dependency involving more than normal emotional ties*".

22. The final question is whether her conclusion that these, taken together with the delay, were enough to amount to "truly exceptional" circumstances is invalidated as a matter of law by her mistaken failure (see § 9) to consider what the effect of the Home Office making a decision at the right time under their own policy would have been. If the law had remained as it was thought to be before **Akaeke**, then we might have had to say that the appellant had lost nothing by the delay, so that it could not make a family life "truly exceptional" which otherwise was not so. Even **Bakhtear Rashid** would not have helped this appellant, since the status he would have got if the policy had been applied when it should have been was not a permanent one. However, though **Akaeke** was not available to the immigration judge when she made her decision, we think it would have fully justified her, taking the gross delay together with her findings about the appellant's family life, in regarding this as a "truly exceptional" case where removal would now be disproportionate, regardless of the limited effect of the policy in question.

The original Tribunal did not make a material error of law and the original determination of the ap



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