IN THE IMMIGRATION APPEAL TRIBUNAL

OK (Russia - Exercise - Article 8) Russia [2004] UKIAT 00082

(1) Home Office polices - "in accordance with the law" in Article 8(2)
(2) Delay – false asylum claims

Heard at: Field House
Heard on: 26th March 2004
Date typed: 4th April 2004
Date promulgated: 23 April 2004

Before:

MS D. K. GILL (VICE PRESIDENT)
MR. F. T. JAMIESON
MR. G. F. SANDELL

Between:

Appellant

And

The Secretary of State for the Home Department — Respondent

DETERMINATION AND REASONS

Representation:

For the Appellant: Mr. A. Slatter, of Counsel, instructed by Hammersmith & Fulham Community Law Centre.
For the Respondent: Ms. K. Evans, Senior Home Office Presenting Officer.

1.1 The Appellant is a national of Russia, born on 5th April 1973. She appeals, with leave, against the determination of J. Simpson Esq., an Adjudicator, who (following a hearing on 11th July 2003 at Croydon) dismissed her appeal on asylum and human rights grounds against the Respondent's decision of 26th January 2001 to refuse to vary leave to remain in the United Kingdom and to refuse her asylum and human rights claims. Her son, Master Feodor Khorochilov, claims as her dependant in this appeal.

1.2 **This decision is being reported because:**

(a) We consider the relevance of an application for consideration under the announcement in October 2003 of "an audit exercise of all family applications for asylum lodged before 2nd October 2003" (hereafter referred to as the October Exercise) to the phrase "in accordance with the law" as that phrase is used in Article 8(2).

Our consideration of this argument is set out at paragraphs 14.1 to 14.13 below.

(b) We consider the relevance of a false asylum claim to the delay of the Secretary of State in reaching a decision on that claim. We also consider the relevance of long residence in the United Kingdom in the case of an Article 8 claim to private and family life, where the private and family life

arrangements have been entered into whilst awaiting a decision from the Secretary of State on the false asylum claim and whilst pursuing an appeal against the refusal of the asylum claim.

Our consideration of this is set out at paragraph 15.14(a) below.

2. The grounds of application challenge the Adjudicator's decision on two grounds:

   (a) with regard to the Article 8 claim. This challenge was brought only with regard to the Adjudicator's decision on proportionality.

   (b) with regard to the Adjudicator's assessment of credibility.

   Permission to appeal was granted only with regard to Article 8 claim.

3. However, at the hearing before us, Mr. Slatter sought to widen the ambit of the grant of permission, contending that the Secretary of State's decision to remove the Appellant was “not in accordance with the law”, as is required under Article 8(2) of the ECHR. We expand on his argument below. Of course, the concept of proportionality is part of the requirement that any interference with the rights under Article 8(1) must be “necessary in a democratic society” and is separate from the requirement in Article 8(2) that any interference must be “in accordance with the law”.

4. The following summarises the immigration history of the Appellant, the date of her marriage and birth of her children:

19th May 1996:	The Appellant arrived in the United Kingdom. She was granted limited leave to remain for 3 months subject to certain restrictions. On an application for an extension of her leave, she was granted further leave to remain, subject to the same restrictions until 19th November 1996.
19th Nov 1996:	She applied for asylum.
7th Jan 1997:	She submitted her completed “Statement of Evidence Form”.
3rd Oct 1997:	She met her husband. He is a fellow Russian national. At this stage, her husband did not have leave to remain in the United Kingdom.
7th Sept 1999:	Their first child was born. He is now about 4 ½ years old.
3rd Feb 2000:	The Appellant’s partner was granted 4 years’ exceptional leave to remain in the United Kingdom.
19th Jun 2000:	The Appellant and her partner married.
20th Sept 2000:	The Appellant applied for variation of her leave, as a spouse.
19th Oct 2000:	The Appellant was interviewed about her asylum and human rights claims.

25th Jan 2001: The Respondent refused her asylum and human rights claims.

Aug 2001: The Appellant's and her husband's second child was born. He is now 2 years 7 or 8 months old.

5.1 **The Adjudicator's Determination:** The Adjudicator heard oral evidence from the Appellant, her husband and two other witnesses.

5.2 The Adjudicator did not find the Appellant credible. He found that she had fabricated her accounts of the basis of her asylum claim. He found that he could not rely on anything she had told him. This means that the Appellant made a false asylum claim. This is an important point, to which we will return later. The Adjudicator's assessment of credibility was not challenged. He considered that her most surprising claim was that she had not discussed her immigration status with her husband or discussed with him what might happen if her appeal proved unsuccessful. She initially told the Adjudicator that her husband did not know about her immigration status even as at the hearing date but then changed her story, saying that they had discussed the possibility of her returning to Russia and that he did know of her correct status. The Adjudicator considered that the Appellant's oral evidence conflicted with common sense as well as with the written statement of her husband in which he impliedly admits knowledge of her immigration status (paragraph 5(g) of the Determination).

5.3 In considering the Article 8 claim, the Adjudicator noted that the Appellant had undertaken study whilst in the United Kingdom and had gained a recent examination pass in English. She had an offer of a university place. Her university studies were due to commence in the autumn following the hearing before him. She is married to a Russian national who was refused asylum but who has leave to remain in the United Kingdom until the beginning of 2004. The Adjudicator noted that they have two children, aged 4 and almost 2 years. He was satisfied that the Appellant and her husband have always known of the Appellant's precarious immigration status and despite this had decided to produce two children. He considered that there is no certainty that the Appellant's husband will be permitted to remain permanently in the United Kingdom and that, apart from his lack of desire, the Adjudicator could see no valid reason why he should not return to Russia with the Appellant if he wished to keep his family intact. If the Appellant's husband gains permanent residency in the United Kingdom, the Adjudicator could see no valid reason why the Appellant could not return to Russia and make either a student or spouse application to return to the United Kingdom. Although this would involve some disruption to her family life, this must have been a factor contemplated by her when embarking on her family arrangements. The Adjudicator could see no reason why she should receive preferential treatment over those who follow the rules. He considered that the children are very young and will be quite capable of adjusting easily to life in Russia on either a permanent or temporary basis if they go with the Appellant. The Adjudicator therefore decided that removal was proportionate to the Appellant's right to her family life or private life.

6. **Grounds of application:** The grounds of application challenge the Adjudicator's decision on proportionality, on the following grounds:

(a) That the Adjudicator had failed to take into account the delay on the part of the Respondent in making a decision on the Appellant's application for asylum. Reliance is placed on **Arben Shala v. SSHD [2003] EWCA Civ 233**.

(b) That the Adjudicator had attached undue weight to the Appellant's precarious immigration history pending resolution of her asylum claim. In **Mahmood v. The Secretary of State for the Home Department [2001] INLR 1, [2001] IAR 229**, the Court of Appeal enunciated the principle that knowledge of the precarious immigration status on the part of the other party to the marriage at the time of the marriage militates against a finding that removal violates Article 8. The grounds of application contend that the instant appeal is distinguishable in that the Appellant had not been refused leave to enter or remain at the time of her marriage. Further, or in the alternative, it is asserted that, before the decision was made in this case, the Appellant had met her husband, had a child and been married.

(c) In stating that he could see no valid reason why the Appellant could not return to Russia and make an entry clearance either as a student or a spouse, the Adjudicator had not taken into account the difficulties which she would face in Russia or the uncertainty over the length of separation between the Appellant and her family members. Women in Russia face discrimination. There is bribery and corruption in the propiska regulation system which is required for access to the most civil, social and economic rights.

7.1 At the commencement of the hearing before us, Mr. Slatter sought an adjournment of the hearing. On 11th December 2003, the Appellant's husband applied for indefinite leave to remain (page 140 of the Appellant's bundle). This application is outstanding the Secretary of State. On 16th February 2004, the Appellant was invited by the Secretary of State to make an application for consideration under the October Exercise. The Appellant's application has been lodged. In Mr. Slatter's submission, prima facie, the Appellant has a legitimate expectation that she might fall within the terms of the October Exercise. Mr. Slatter informed us that he understood that the Appellant's application would be decided the following week, to which Ms. Evans responded that that could not be correct, as she had the file with her in the hearing room. If we were to proceed with the hearing, Mr. Slatter submitted that this would prejudice the Appellant. This is because, following a refusal, there would be further Article 8 issues which would need to be determined. When we asked Mr. Slatter to explain what other Article 8 issues would need to be determined, he said that the issue of proportionality would need to be determined.

7.2 We refused to adjourn the hearing. Mr. Slatter could not explain what further issues would arise if the Appellant's application under the October Exercise is refused, save only to say that proportionality would arise. However, the issue of proportionality was before us for determination. We could see no valid reason for not determining that issue. The Appellant is only eligible for consideration under the October Exercise. It is for the Secretary of State to decide whether he was prepared to exercise his discretion and grant the Appellant indefinite leave to remain under the terms of the October Exercise.

8.1 Mr. Slatter then commenced his substantive submissions. In addition, to elaborating on the grounds of application, he raised the additional point we have already referred to – namely, that the Secretary of State's decision is "not in accordance with the law" under Article 8(2), applying the Court of Appeal's judgement in **Abdi** by analogy to the same phrase in Article 8(2). The decision would not be in accordance with the law because the Appellant has a legitimate expectation that she would be granted indefinite leave to remain under the terms of the October Exercise.

8.2 We informed Mr. Slatter that there was no mention in the grounds of application of this point. In response, Mr. Slatter informed that this could not have been raised in the grounds of application, because the October Exercise was only announced in October 2003, whereas the grounds were lodged on 7th August 2003. We agreed to hear his submissions on the "in accordance with the law" point, so that we could consider the relevance (if any) of the submissions he wished to make to the substantive appeal before us. Mr. Slatter contended that the Appellant "will" qualify under the October Exercise, although he then retracted from this assertion, by saying that "we are not sure" (meaning, presumably, himself and his instructing solicitors) that the Appellant would qualify but that there are clear dangers in prejudging that issue by proceeding with the hearing. However, we had already decided to refuse the adjournment request. Mr. Slatter relied on paragraph 14 of the Tribunal's Determination in **Entry Clearance Officer, Tehran v. Arezi [2002] UKIAT 07694**. The Tribunal stated in that case that the legitimate expectation of the applicant in that case that he would be granted entry clearance under the family reunion policy was a substantive and not a procedural benefit.

8.3 In **Mahmood**, the Court of Appeal enunciated the principle that knowledge of the precarious immigration status on the part of the other party to the marriage at the time of the marriage militates against a finding that removal violates Article 8. Paragraphs 23 and 26 of the judgement of the Court of Appeal in **Mahmood** explains the mischief which this principle addresses. In the instant appeal, the Appellant had arrived in the United Kingdom with entry clearance as a visitor. The appeal in this case is one against a refusal to vary leave. Mr. Slatter did not seek to suggest that anyone who arrives in the United Kingdom as a visitor and who then enters into a marriage in the United Kingdom is entitled to succeed under Article 8. However, she is in a better position than someone who arrives in the United Kingdom without leave and who jumps the queue.

8.4 In Mr. Slatter's submission, the Adjudicator attached undue weight to the knowledge of the parties as to the Appellant's precarious immigration status. At the time the Appellant's relationship with her husband began, the date of her marriage and the birth of her first child, the Appellant's husband could not have known that the Appellant was unlikely to be granted leave because her application for asylum had not been refused. This case was therefore distinguishable from **Abdulaziz** and **Poku**. The Appellant's husband had a legitimate expectation that the Appellant would be granted variation of leave as a spouse. She would have been able to make such an application when he was granted indefinite leave to remain. He had a legitimate expectation that he would be granted indefinite leave to remain at the end of his period of exceptional leave. Indefinite leave to remain is normally granted at the end of a period of 4 years' exceptional leave to remain unless the continued presence of an individual is not conducive to the public good. In Mr. Slatter's submission, no such factors exist in this case. This is distinguishable from **Poku** and **Abdulaziz**, because in those cases the spouses knew that their partners would not be granted any form of leave.

8.5 In deciding proportionality, Mr. Slatter asked us to take into account the length of the Appellant's residence in the United Kingdom and her conduct, by which he meant that she had no criminal convictions and was not receiving any financial support from the state. He also relied on the factors listed at paragraph 15 of the Skeleton Argument on page 120 of the Appellant's bundle. The situation in Russia is also relevant. He relied on paragraphs 6.30 to 6.31 of the CIPU report dated April 2003, which show the difficulties in moving and living in another part of Russia. We asked Mr. Slatter to explain why the Appellant would have to move elsewhere, given that the Adjudicator had found that she had fabricated her asylum claim. Mr. Slatter

submitted that there is bribery and corruption. Women are discriminated against, according to paragraph 6.39 of the same report.

8.6 Mr. Slatter submitted that the Respondent had not discharged the burden to show that the interference with the Appellant's right to her family life is "in accordance with the law" and would be proportionate. The Appellant would have to return to Russia on her own without her children, not knowing how long an entry clearance application would take.

9.1 In relation to Mr. Slatter's contention that the Appellant "will qualify" under the October Exercise, Ms. Evans asked us to note that the October Exercise only applies to families who do not have any form of leave. In this case, the Appellant's husband has exceptional leave to remain. Furthermore, it cannot be said that the Appellant "will" qualify because the decision is one for the Secretary of State to make, after considering the inclusion and exclusion criteria. In the judgement in **Abdi**, the Court of Appeal stated that the Secretary of State should have regard to his polices. The Secretary of State is having regard to the relevant policy in this case. The announcement by the Minister in relation to the October Exercise sets out inclusion criteria, exclusion criteria and then a paragraph by which it is clear that the most which can be said is that an individual is "eligible" for consideration. When the Appellant's representatives lodged an application for variation of her leave as spouse, they must have known that the application could not succeed because her husband only had exceptional leave to remain in the United Kingdom at that time. Nevertheless, they still lodged an application.

9.2 No reasons have been forwarded which show that the Appellant's husband cannot reasonably be expected to return to Russia with the Appellant to live. He is not a refugee. If the Appellant were to return to Russia to make an application for entry clearance, the success or otherwise of such an application cannot be considered. There are 3 entry clearance posts in Russia – one in St. Petersburg, one in Moscow and one in Ekatrinberg. The Appellant's husband comes from St. Petersburg. The section in the CIPU report entitled: "Freedom of Movement" relates to individuals who have difficulties with the Russian authorities. This Appellant has a passport, although this may have expired. There is no reason why she would not be able to obtain such facilities again.

10. In response, Mr. Slatter submitted that the Secretary of State was taking a contradictory stance in relation to the Appellant. On the one hand, he has invited her to lodge an application under the October Exercise and, on the other hand, he is seeking to remove her. It is unreasonable to expect her to return to Russia to make an application for entry clearance when she has two outstanding applications in the United Kingdom. She has a legitimate expectation that she would be granted leave to remain. Mr. Slatter did not know whether the Appellant's husband had lodged an appeal against the refusal to grant him asylum. He did not know whether the husband still maintains that he has a well-founded fear of persecution. Mr. Slatter submitted that it would be unreasonable to expect him to return to Russia with the Appellant. Mr. Slatter did not know whether the Appellant's husband would or would not be willing to return to Russia.

11. We reserved our determination.

12. We have decided to dismiss the appeal, for reasons which we now give.

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13. Before giving our reasons, it is appropriate for us to address one matter. During his submissions, Mr. Slatter contended that we appeared to have made up our minds about the appeal, to which we responded that we were merely pointing out to him the difficulties with his submissions, so that he would be able to address them. We would state that we consider ourselves entitled to raise difficulties with representatives. On many occasions, representatives have been able to adequately address the difficulties; on many other occasions, they have not. Mr. Slatter was not able to, save that he was able to explain why there was no mention in the grounds of application of his "in accordance with the law" argument. Given his explanation, we agreed to hear his submissions on this argument. We now turn to giving our reasons for dismissing this appeal.

14.1 It is not disputed that the Appellant and her family unit have formed private and family life in the United Kingdom. It is not disputed that the reasons for the interference comes within one of the (exhaustive) list of reasons in Article 8(2).

14.2 For the reasons we have already given (see paragraph 8.2 above), we agreed to hear Mr. Slatter's submissions as to why the Secretary of State's decision is "not in accordance with the law". This was in order to enable us to decide whether the points he wished to make were relevant to the substantive issues before us.

14.3 Mr. Slatter argues that the reasoning of the Court of Appeal in **Abdi (Dajui Saleban) v. The Secretary of State for the Home Department [1996] Imm AR 148** with regard to the meaning of the phrase "in accordance with the law" in what is now paragraph 21(1) of Schedule 4 of the 1999 Act can be applied by analogy to the same phrase as used in Article 8(2). We do not agree. We drew Mr. Slatter's attention to the fact that it is clear from Strasbourg jurisprudence that the phrase "in accordance with the law" in Article 8(2) means whether there is in place a legislative framework for the decision which gives rise to the interference with the rights protected under Article 8(1) and that this is published in a form which is accessible to those likely to be affected. We see no justification for extending the meaning of the phrase in Article 8(2) in the way Mr. Slatter seeks to do. In essence, he seeks to persuade us to allow the Appellant's appeal outright simply because the Secretary of State has not yet reached a decision on her application for leave to remain under the October Exercise. There are two problems with this:

(i) firstly, the jurisdiction of an Adjudicator (and the Tribunal) in a Section 65 appeal is limited to considering whether the decision is contrary to the ECHR. There is simply no scope for the Tribunal to allow the Appellant's appeal simply because the Secretary of State has not reached a decision on her application for consideration for leave to remain under the October Exercise;

(ii) to allow the Appellant's appeal outright would effectively confer on her a benefit which she does not have under the October Exercise (for the reasons we give in paragraphs 14.9 to 14.12 below).

14.4 The other alternative would be for the Tribunal to allow the Appellant's appeal to the limited extent that we direct the Secretary of State to consider his policy as set out in the October Exercise. But that is something which the Secretary of State is already doing in this case. He has invited the Appellant to make an application under the October Exercise and is considering her application.

14.5 Even if the legislative framework under which the Secretary of State's decision has been made includes the October Exercise, it is only necessary for us to be satisfied

that the Secretary of State is aware of his policy and is addressing his mind to it in the Appellant's case. That is all which is necessary in order to satisfy the "in accordance with the law" issue in Article 8(2).

14.6 In this particular case, the Secretary of State has invited the Appellant to make an application under the October Exercise. If in any particular appeal being dealt with by an Adjudicator, the Secretary of State has not yet extended an invitation to the claimant who might potentially be eligible, the fact that an invitation has not been extended does not render the decision not "in accordance with the law" for the purposes of Article 8(2). This is because it is clear from the then-Minister's announcement that the Secretary of State will write to those who appear to qualify. That undertaking is sufficient to show that the Secretary of State is aware of his policy and is addressing his mind to whether an individual may or may not qualify.

14.7 It is clear that the Secretary of State's decision to refuse to vary leave has been made under a legislative framework (which phrase covers primary as well as subordinate legislation). Mr. Slatter did not seek to argue otherwise. It is clear that the relevant law under which the Secretary of State's decision has been taken was "accessible" to the Appellant. Mr. Slatter did not seek to argue otherwise.

14.8 What we have said above concerns whether a decision to remove (or, in this case, to refuse to vary leave) is "in accordance with the law" for the purposes of Article 8(2). This is not to say that Home Office polices are always wholly irrelevant to an Article 8 claim. A policy may be relevant when one comes to consider the State's interest in the aim of immigration control – i.e. in considering proportionality. Whether it is relevant or not will depend on whether it can be shown that the claimant is entitled (as opposed to being eligible for consideration) under a particular policy. If a claimant is clearly entitled to be granted leave to remain under a policy, then this could render the Secretary of State's decision unlawful or, put another way, his decision to remove the Appellant (or, in this case, to refuse to vary leave) may well be one which is not within the range of permissible responses or one which no reasonable Secretary of State (operating such a policy) could reach. However, it must be clear that the person is entitled to leave under the policy. In many cases (including the present one), it will not be possible for an Adjudicator or the Tribunal to conclude that a person will be bound to succeed under a policy; hence the reason why in **Abdi** the claimant succeeded only to the extent of having his claim considered by the Secretary of State in accordance with the relevant policy. Adjudicators and the Tribunal are often asked to place less weight on the state's interest in immigration control simply because the claimant in question *nearly* qualifies, albeit that they do not actually qualify, under a particular policy. The fact that a person nearly qualifies does not detract from the state's interest in immigration control. The Secretary of State has a discretion to operate polices outside the Immigration Rules for any persons or categories of persons, in his absolute discretion. If we were to decide that we are entitled to pay less deference to the state's legitimate interest in the aim of immigration control because an individual "nearly" qualifies under a policy, this would make a completely unwarranted inroad into the executive's right to control immigration and formulate policies. It is not for the Adjudicators and the Tribunal to effectively extend the application of an announced policy to persons who do not qualify by paying less deference to the state's right to control immigration simply because they "nearly qualify".

14.9 In the instant appeal, the Appellant is not *entitled* to a grant of leave under the October Exercise. Mr. Slatter's contention that the interference with the Appellant's right to her family life is not "in accordance with the law" is based on the assertion that the Appellant has a legitimate expectation that she would be granted leave

under the October Exercise. We have already rejected his attempt to expand the **Abdi** principle to the phrase "in accordance with the law" in Article 8(2). That leaves his second point – that the Appellant has a legitimate expectation that she would be granted leave to enter under the October Exercise. We reject the assertion that she has such a legitimate expectation. It is clear, from the terms of the letter dated 29th October 2003 from the then-Minister of State that persons who satisfy the inclusion criteria and are not within the exclusion criteria:

> "will be eligible for the concession".

14.10 The phrase "will be eligible for the concession" does not mean that the grant of leave *will* follow. Furthermore, the final sentence of the penultimate paragraph of that letter states that the concession does not cover families who have been granted any form of leave. The Appellant's husband had exceptional leave to remain in the United Kingdom at the date of the announcement of the October Exercise. This may or may not disqualify her from succeeding in her application under the October Exercise. This would depend on the meaning given to the last sentence of the penultimate paragraph (of the letter announcing the October Exercise) by the Secretary of State.

14.11 For these reasons, the assertion that the Appellant has a legitimate expectation that she would be granted leave under the October Exercise is unarguable.

14.12 Mr. Slatter also asserts that the legitimate expectation of the Appellant that she would be granted leave under the October Exercise is a substantive benefit, and not merely a procedural one. In this respect, he relied on paragraph 14 of the Tribunal's Determination in **Azeri**. There are two difficulties with this contention. Firstly, we have already given our reasons for concluding that the Appellant does not have a legitimate expectation that she would be granted leave under the October Exercise. Secondly, we noted paragraphs 2 and 11 of the Tribunal's Determination in the **Azeri** case. It is clear in that case that the applicant had been sent a letter by the British High Commission stating that there was no problem in processing his application for family reunion. The letter suggested that the applicant *would* be granted entry clearance under the family reunion policy. It was principally for this reason that the Tribunal was satisfied that, "*on the facts of [that] appeal*", a legitimate expectation arose that the Appellant would be granted entry clearance and that that [the legitimate expectation] was a substantive benefit and not a procedural benefit. The Tribunal did not say that in all cases where an applicant is being considered under a policy, the benefit is a substantive one and not a procedural one. The Appellant in this case is only entitled to be considered under the October Exercise. She *is* being considered.

14.13 For all of the above reasons, we reject the assertion that the decision to remove is not "in accordance with the law" as that phrase is used in Article 8(2). We also reject the assertion that the determination of this appeal prejudges the Appellant's application for considering under the October Exercise. We are not prejudging her application at all. We are determining her Article 8 claim. The two are entirely separate. The October Exercise, unlike for example the 7-year child policy or the long residence policy, is not a policy that is intended to guide Home Office decision-makers on how to approach proportionality issues under Article 8(2), but is merely a pragmatic exercise to deal with a particular category of persons who the Secretary of State considers are difficult to remove.

15.1 We now turn to consider the proportionality issues which arise in this particular case.

15.2 The first point we should note is the fact that, in this case, the Secretary of State had considered the Appellant's Article 8 claim. The essential facts are not in dispute. We must decide whether, on the facts as a whole, the decision to remove is a lawful one. In accordance with the guidance of the Tribunal in **[2004] UKIAT 00024 M** (presided over by the President), our approach is to consider whether the Respondent's decision to remove the Appellant is within the range of permissible responses as to whether removal would be proportionate to the interference with private and family life.

15.3 The Appellant has now lived in the United Kingdom for nearly 8 years. This is a long period. Her husband arrived in 1995 (paragraph 15.11 of the Skeleton Argument, on page 121 of the Appellant's bundle). He has lived in the United Kingdom for even longer. Set against their long residence is the fact that both of them spent the larger parts of their lives in Russia. There is another factor which has to be set against the Appellant's long residence. We refer to this, and explain our reasoning, in paragraph 15.14(a) below. The Appellant and her husband are both Russian nationals. They have been living together as husband and wife in the United Kingdom for 4 ½ years. Their children, who were born in the United Kingdom, have never lived in Russia. Set against this is the fact that both of the children are young enough to adapt to life in Russia; the older child is about 4 ½ years old and the younger about 2 years 8 months old. The Appellant has gained an examination pass in the English language (paragraph 20 of the Adjudicator's Determination) and she has an offer of a place at the University of Westminster which was due to commence in September 2003 (paragraph 15.10 of the Skeleton Argument). Mr. Slatter informed us that the Appellant is not receiving any financial support from the state. Whilst it may be that she is not receiving any direct financial assistance, we note that page 99 of the Appellant's bundle refers to an application for re-housing in June 2003 and page 101 of the same bundle refers to an application for nursery funding. However, we are prepared to proceed on the assumption that any indirect financial assistance is a neutral factor in this particular case.

15.4 Paragraphs 15.8 and 15.9 of the Skeleton Argument refer to the Appellant's health and that of her younger son. According to pages 98 to 102 of the Appellant bundle, their health problems are as follows:

(a) the Appellant suffers from eczema and asthma (page 98 of the Appellant's bundle). In 1997, she was diagnosed with an ovarian cyst (page 102 of the Appellant's bundle). According to the letter dated 16th October 2001 on page 101, she had a previous history of post-natal depression. The letter dated 18th June 2003 states that she suffered an episode of depression following the loss of her job in 1998 and a 6-month episode of post-natal depression following the birth of her first son in 1998 (we assume that this is a mistake and that the year of the birth of the first son was in fact 1999).

We note that there is nothing in these letters which indicates that the Appellant is now suffering from any depression, nor is there any indication that she is receiving any treatment for depression. Accordingly, it appears that, at present, she suffers from eczema and asthma. There is no indication in these documents of the severity of either condition.

(b) The Appellant's second son (Master Anton Sukonkin) has suspected atopic eczema. This is a skin condition which is often linked to allergies. According to the letter dated 2nd June 2003, he has been referred for allergy skin patch testing. Dr. T. Strommer of the Staunton Group Practice has a strong suspicion that the child may be allergic to house dust mites living in carpets.

Our attention was not drawn to the results of any such skin patch testing. There is a strong family history of atopy and asthma. The Appellant is worried that her son may develop asthma in the near future.

There is nothing to suggest that the Appellant's second son is actually suffering from asthma. He suffers from atopic eczema. In May 2003, he was suffering from severely infected eczema. We have not been told what his condition is now and whether the eczema is under control.

15.5 Mr. Slatter relied on paragraphs 6.30 and 6.31 of the CIPU report. His argument was that this shows that the Appellant would have difficulties in registering herself if she were to move somewhere to live. The difficulties in registering would mean that she would be deprived of most civil, social and economic rights. She may not be admitted to public services such as free medical services. There are some problems with Mr. Slatter's contentions in this respect. Firstly, the Appellant would only experience difficulties in registering herself elsewhere *if* she moves elsewhere. Paragraph 6.30 states:

> *People who have a well-founded fear of persecution from the local authorities in one of the regions of the Russian Federation, without the involvement of or the complicity of the federal authorities, may, in principle, find effective protection elsewhere in Russia.*

The CIPU report then goes on to mention the difficulties in settling elsewhere, including the difficulties in registering oneself elsewhere.

15.6 The Appellant was found to have fabricated the basis of her asylum claim. Accordingly, she does not need to relocate. Accordingly, the general difficulties in registering elsewhere are academic in this case. Secondly, she has a passport, although it has expired. There is no reason to suppose that she would not be able to obtain an internal passport again. Thirdly, the medical evidence before us falls far short of showing that the Appellant and her son are receiving any treatment at the present time which would not be available to them in the Appellant's home area in Russia. In reaching this conclusion, we have taken into account paragraph 5.30 of the CIPU report dated April 2003 which refers to difficulties with medical services in Russia. For example, there is a shortage of vitamins and medicines and insufficient inoculations.

15.7 Whilst there is discrimination against women, bribery and corruption in Russia, we do not see that this renders it unreasonable for the Appellant to return to Russia either permanently or temporarily to make an entry clearance, with or without her family. If she returns to Russia on her own to make an entry clearance application, we have no reason to suppose that any separation from her family would be a protracted one or such which renders removal unlawful. Whether the application would ultimately be successful or not is irrelevant to the consideration of the Article 8 claim now. To decide otherwise would effectively place the Appellant in a better position than those whose spouses have settled status in the United Kingdom.

15.8 In **Mahmood**, the Court of Appeal enunciated the principle that knowledge of the precarious immigration status on the part of the other party to the marriage at the time of the marriage militates against a finding that removal violates Article 8. Mr. Slatter referred us to paragraphs 23 and 26 of the judgement in that case which explains the mischief which this principle is intended to address. We quote from the relevant part of paragraph 23 of the judgement of Laws LJ:

> *23. This reasoning ..... within it there is in my view to be found an important truth which bears generally on cases such as 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.*

(our emphasis)

15.9 Mr. Slatter relied on the words in bold. In his submission, the Appellant in the instant appeal had arrived in the United Kingdom with entry clearance as a visitor. The appeal in this case is one against a refusal to vary leave. In his submission, she is in a better position than someone who arrives in the United Kingdom without leave and who jumps the queue.

15.10 At first sight, it appears that the Appellant is in a better position than someone who enters the United Kingdom illegally. However, on closer examination, we concluded that there is little substance in Mr. Slatter's submissions in this regard. The Appellant's position is to be distinguished from a person who enjoys limited leave and who enters into a marriage during the currency of that leave. At no material time did the Appellant have any leave. By "material time", we refer to the commencement of her relationship with her husband, the dates of birth of her first child and the date of her marriage. She had an application to vary her leave on asylum grounds. We emphasise the fact that she did not have any leave at any material time. Accordingly, we are of the view that the mischief which the principle to which we have been referred is intended to address is also a factor in this case.

15.11 For the reasons we have given above, we are satisfied that there are no exceptional factors in this case which excuse the Appellant from having to return to Russia to make an entry clearance.

15.12 In any event, Mr. Slatter was not able to tell us why the Appellant's husband could not reasonably be expected to return to Russia with the Appellant and his children, except only to say that her husband might maintain that he has a well-founded fear of persecution. Even if he does maintain that he has a well-founded fear of persecution in Russia, it does not follow that he has. Whilst we can appreciate that he might not wish to give up his chance of being granted indefinite leave to remain in the United Kingdom, he is free to choose whether to remain here or keep his family intact by returning to Russia with the Appellant and his two children.

15.13 It cannot be said (as contended by Mr. Slatter) that the Appellant's husband had a legitimate expectation that the Appellant's application for variation of her leave as a spouse would be granted, since that application was lodged by her representatives (Hammersmith & Fulham Community Law Centre) in September 2000, when her husband only had exceptional leave to remain in the United Kingdom. That application was bound to fail, as the Appellant's representatives can reasonably be expected to have known.

15.14 The Tribunal has stated on several occasions in the past that the interests of the state in the legitimate aim of immigration control is a very weighty consideration indeed. In this case, there has been a long delay (4 ½ years) on the part of the Secretary of State in reaching a decision on the Appellant's asylum claim. This is a relevant factor. It is not so much a factor in the Appellant's favour as one which

relates to the other side of the scales – namely, the weight to be given to the legitimate aim of immigration control. However, there are two important points we make concerning this delay:

(a) The Appellant was only granted two short periods of limited leave. On the last day of her lawful leave, she made a false asylum claim. During the period of the delay of 4½ years when her false asylum claim was being considered by the Secretary of State, she knew she had made a false asylum claim and yet she entered into her private life and family life arrangements. The state's interest in legitimate aim of immigration control is not merely a reference to the fact that claimants are normally expected to be return to their own countries and make entry clearance applications and that exceptional factors have to be shown to excuse them from having to do so. Where an Article 8 claim is based on arrangements entered into whilst a false asylum claim is being considered by the Secretary of State and/or an appeal against that the refusal of that false asylum claim is being pursued, Adjudicators must give deference to the state's interest in deterring false asylum claims. The abuse of the system by persons who make false asylum claims clog up the system and reduce the state's effectiveness in dealing promptly with genuine claims. Whilst it may be asserted that the pursuit of an appeal on Article 8 grounds is separate from the pursuit of the appeal on asylum grounds, the inescapable fact is that, if that individual had never made the false asylum claim in the first place, it is highly unlikely that they would have been able to "clock up" their residence in the United Kingdom and/or establish their private and family life – in other words, they would not have had an Article 8 claim at all, if they had not made a false asylum claim. In cases where a false asylum claim has been made, Adjudicators should therefore consider not only the state's interest in preventing queue jumping but also the state's interest in deterring the abuse of the asylum system. For these reasons, we concluded that, whilst the delay of the Secretary of State in reaching a decision on the Appellant's asylum claim and the long residence of the Appellant in the United Kingdom (nearly 8 years) are relevant factors, they do not detract to any significant extent from the weight which is normally given to the state's interest in immigration control.

(b) The facts of this case are distinguishable from **Shala**. In the **Shala** case, the claimant was married to someone who had been granted indefinite leave to remain as a refugee. The applicant in that case would not have fallen into the category of persons who are required to apply for entry clearance from abroad but for the delay in reaching a decision in his case. In the instant appeal, the Appellant has no other basis for remaining in the United Kingdom. She has a chance (that is the most we can say) that she might be granted indefinite leave to remain under the October Exercise. When she met her husband in October 1997 and when her first child was born, neither she or her husband had leave to remain in the United Kingdom. Her husband was granted exceptional leave to remain only in February 2000. He has made an application for indefinite leave to remain but the grant of indefinite leave to remain is by no means a forgone conclusion. He has only recently become eligible for consideration for the grant of indefinite leave to remain.

15.15 We do not see any merit in the assertion that the Secretary of State is taking a contradictory stance in this case. The Appellant has lodged an appeal against the Secretary of State's decision to refuse her human rights claim. Her Article 8 claim is being determined by us. The October Exercise is an entirely separate matter. If the Appellant succeeds in her appeal, there will be no need to progress her application

under the October Exercise. If she fails in this appeal, the Secretary of State would still consider her application under the October Exercise. He may decide to exercise his discretion in her favour and grant her leave. He may not. If he does, he would not seek to remove her. If he does not, then he will.

15.16 Considering all of the circumstances as a whole, we are satisfied that the Respondent's decision to remove the Appellant is lawful as it is within the range of permissible responses as to whether removal would be proportionate to the interference with private and family life. We agree with the Adjudicator's conclusion that removal is proportionate to her rights to her private life and her family life under Article 8 claim.

16. Accordingly, the Article 8 claim fails.

17. It follow that we must dismiss this appeal.

Decision

The appeal is DISMISSED.

Ms. D. K. GILL
VICE PRESIDENT Date: 19th April 2004