ar NM (Effect _ Delay) Croatia [2004] UKIAT 00029

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 2 February 2004

Date Determination notified:

20 February 2004

Before:

Mr P R Lane (Chairman)
Dr A U Chaudhry

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representation
For the appellant : Mr G. Lee, counsel, instructed by Sutovic and Hartigan
For the respondent : Mr J. Morris, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, an ethnic Serbian citizen of Croatia, appeals with permission against the determination of an Adjudicator, Mr B. Dawson, sitting at Taylor House, in which he dismissed on asylum and human rights grounds the appellant's appeal against the decision of the respondent on 13 June 2001 to refuse him leave to enter the United Kingdom.

2. There was no appeal before the Tribunal in relation to the Adjudicator's dismissal of the appeal on asylum grounds. The Vice President who granted permission to appeal has, in addition, limited the grounds so as to exclude any argument that removal of the appellant to Croatia would

be a violation of Article 3 of the ECHR. Since permission to appeal was granted in July 2003, the Tribunal in ***K*** (Croatia) [2003] UKIAT 00153, in which the determination was written by the President, has found that the current situation for ethnic Serbs in Croatia is not such as to engage that Article. Quite rightly, Mr Lee did not seek to permission to expand the grounds, so as to encompass Article 3.

3. Accordingly, the question for this Tribunal to determine is whether the Adjudicator was wrong to find that Article 8 of the ECHR would not be violated by removing the appellant from the United Kingdom.

4. Mr Lee accepted that his client's case rested entirely upon the Court of Appeal judgment in ***Shala*** [2003] EWCA Civ 233.

5. The Adjudicator in the present case has, in the Tribunal's assessment, given inadequate attention to the Article 8 issue. Paragraph 30 of his determination is rightly to be criticised.

6. That said, however, the Tribunal is in no doubt but that the appellant is not entitled to succeed in his appeal under section 65 of the Immigration and Asylum Act 1999, by reference to Article 8.

7. In order to bring himself within the scope of Article 8, the appellant must first show that his removal from the United Kingdom would interfere with his right to respect for family or private life. As regards family life, there would plainly be no such interference. The only family member of the appellant in the United Kingdom to which reference has been made is the appellant's wife. She is also from Croatia and it is not disputed that, in the event of the appellant's removal from the United Kingdom, she would be removed with him.

8. The Tribunal enquired of Mr Lee as to the appellant's circumstances in the United Kingdom, so that we might ascertain whether he has a private life and, if so, whether that private life would suffer interference by his removal. Having taken instructions, Mr Lee informed the Tribunal that the appellant has never been in any employment in the United Kingdom. Although, at paragraph 16 of his statement of 7 February 2003, the appellant says that when he first arrived in the United Kingdom he 'attended college ... to learn English', Mr Lee confirmed that the appellant was not at present engaged in any course of

study. In short, apart from the appellant's contention at paragraph 16 that he and his wife feel settled in the United Kingdom, there is nothing to show that the appellant has a private life here which would be interfered with were he to be removed. His private life would, thereafter, continue to be pursued in Croatia.

9. In the light of this, it is, in the Tribunal's view, difficult to see how the appellant brings himself within Article 8 at all. Unless he can, the proportionately test inherent in Article 8(2) never arises. Since ***Shala*** is all about the application of that test, it follows that that case is likewise of no relevance.

10. Even if the appellant can be said to be carrying on in the United Kingdom a private life which would suffer interference by reason of removal, we do not consider that ***Shala*** entitles the appellant to succeed in his appeal.

11. The appellant arrived in the United Kingdom in July 1999. Bulletin 4/99, published by the respondent on 25 November 1999, acknowledged that whilst each application for asylum by Croatian Serbs had to be considered carefully, ethnic Serbs had been found to be 'very likely to suffer persecution and discrimination based on ethnicity'.

12. In the present case, the appellant's application for asylum was determined by the respondent in June 2001, just under two years after the application was submitted. The contention on behalf of the appellant is that this delay was excessive and that if one assumed a prompt response by the respondent had taken place in relation to the appellant's application, it is likely that, having regard to Bulletin 4/99, the appellant would have been granted four years exceptional leave to remain in the United Kingdom.

13. At paragraph 28 of his determination, the Adjudicator found that the appellant's account of his experiences in Croatia, insofar as they could be believed, did not amount to a persecution. Accordingly, even if the respondent had reached an extremely rapid decision on the facts of the appellant's case, it is unlikely that the appellant would have been granted asylum, even bearing in mind the situation in 1999.

14. Even if one accepts that a decision taken in 1999, even if adverse to the appellant in terms of asylum, would have resulted in his being granted four years exceptional leave to remain, this does not bring him any closer to succeeding in his appeal.

15. Leaving aside the fact that, compared with ***Shala***, the delay in processing the appellant's application in the present case, whilst regrettable, is less than two years (compared with over four years in ***Shala***), the key distinction between ***Shala*** and the present case is to be found at paragraph 14 of the judgment of Keene LJ. There, the 'exceptional feature' identified by the learned Lord Justice is that if Mr Shala's 'asylum application [had] been dealt with reasonably efficiently, he would have been likely to have obtained at least exceptional leave to remain as a Kosovo refugee, thereby giving him the ability to apply from within the United Kingdom for a variation in that leave on the grounds of his marriage'.

16. Contrast the position here. The appellant is not basing his claim upon having married a British citizen or other person who is settled in this country. On the contrary, as we have already noted, he and his wife would return to Croatia together. Assuming the appellant had been granted four years exceptional leave to remain in 1999, it is to say the least highly unlikely that the respondent would have granted him any further leave in 2003, based upon his personal circumstances. The appellant himself was not doing anything particular in the United Kingdom. The only degree of connection with it was through the appellant's wife, who had managed to obtain on the National Health Service an operation to remove scar tissue injury, occasioned to her as a child. According to a letter of 21 July 2003 from Mid-Essex Hospital Services NHS Trust, the appellant's wife suffered 'some minor problems with the skin graft and the scarring' which have resulted in her being 'followed up' by way of periodic visits to the hospital, to see if all is well.

17. Mr Lee submitted that, in carrying out the relevant balancing exercise, account should be taken of the potentially difficult circumstances in which the appellant and his wife, as ethnic Serbs, would find themselves upon returning to Croatia. Whilst a reading of ***K*** (Croatia) makes it plain that the position of ethnic Serbs in Croatia, despite the significant improvements which have taken place since 1999, is far from ideal, the Tribunal in that case was plainly unattracted by the argument that Article 8 was relevant in that case (see paragraph 95). The appellant in the present case is a twenty-five year old, apparently able-bodied man who, whilst in Croatia, has worked both as a brick maker and in a bar (see statement of 7 February 2003, paragraphs 6 and 10). His wife has had her operation and, whilst she is subject to ongoing monitoring, no evidence

has been supplied to indicate that such monitoring would be unavailable to her in Croatia (albeit at a cost).

18. In conclusion, although the Adjudicator should have dealt with the matter more fully, he was plainly right to conclude that removal of the appellant would not violate Article 8 of the ECHR.

19. This appeal is accordingly dismissed.

P.R. LANE
VICE PRESIDENT