Heard at Field House
On 21 January 2004
Written 21 January 2004

DN (Article 8 - Balancing - Delay - *Shala* - Concession) Kenya [2004] UKIAT 00008

IMMIGRATION APPEAL TRIBUNAL

Date Determination Notified

29 January 2004

Before

Mr S L Batiste (Chairman)
Mr A A Lloyd JP
Mrs S I Hewitt

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

This determination relating to the balancing exercise under Article 8 has been made reportable for its consideration of Shala, in the context of the Home Office's 7 year concession policy for young children.

DETERMINATION AND REASONS

1. The Appellant, a citizen of Kenya, appeals, with leave, against the determination of an Adjudicator, Mrs S M Thew, dismissing her appeal against the decision of the Respondent on 16 November 2001 to refuse to vary leave to enter or remain and refuse asylum

2. Ms S Osman represented the Appellant. Mr G Phillips, a Home Office Presenting Officer, represented the Respondent.

3. Permission to appeal has been granted only in respect of the rejection by the Adjudicator of the Appellant's Article 8 claim on the basis that the Tribunal should review the Adjudicator's balancing exercise in the light of the observations of the Court of Appeal in Shala where there has been a substantial delay by the Home Office.

4. There is no dispute that the Adjudicator correctly summarised the relevant facts relating to the Article 8 claim in paragraphs 30-32 of the determination. They show that the Appellant came to the UK on 4 November 1995 with her young daughter on a valid visitor's visa. She has a sister living in UK. The Appellant is estranged from her daughter's father who remains in Kenya. The Appellant claimed asylum on 17 January 1996. However she was not interviewed until 2001 and, as stated above, her asylum

appeal was not refused until 16 November 2001, by which time she and her daughter had been in the UK for some six years. By the time the appeal came to the hearing before the Adjudicator on 20 May 2003, they had been in the UK for a further 18 months, making 7½ years in all. In that time they had established a substantial private and family life in the UK. The Appellant was by then aged 32 and her daughter was 11, having spent only the first 4 years of her life in Kenya. The Appellant has some educational qualifications and is an experienced beauty therapist, though there is no evidence that there would be a lack of employment opportunities in her country. The Appellant was very concerned about her daughter's education and about political unrest in Kenya and a difference in social values and lifestyle there. She said that it would be very difficult for daughter to adjust, and she herself would have nowhere to go to on return. She said that it was no fault of hers that had taken so long to call her for interview and reach decision on her appeal. It should be mentioned that the Appellant represented herself at the hearing before the Adjudicator.

5. The Adjudicator's conclusions, having correctly directed herself to the need to pay due deference to the necessity of maintaining effective immigration controls and to the guidance of the Court of Appeal in Mahmood, are set out in paragraph 32 of the determination as follows.

> "I find that whilst there would inevitably be some disruption to her daughter's education, that is not an insurmountable obstacle to the Appellant and her daughter living together in Kenya. It may not be the education that the Appellant would ideally wish for her daughter to have, but the CIPU report shows that an education would be available for her daughter and I bear in mind that the Appellant herself obtained educational qualifications in her own country. Weighing all the factors, I do not find there is any insurmountable obstacle to the Appellant and her daughter returning to Kenya and having a family life there. I conclude that her removal would not be disproportionate in the light of all the circumstances brought before me and the interference with her family rights would be justified."

6. In **Razgar [2003] EWCA Civ 840,** the Court of Appeal assessed the balancing exercise under Article 8 in the following terms.

> 36. But what is the position in relation to the balancing exercise called for by Article 8(2)?
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> 39. We recognise that if the Adjudicator finds the facts to be essentially the same as those which formed the basis of the Secretary of State's decision, there will be no difficulty in adopting the approach enunciated by Moses J. and Simon Brown LJ
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> > "Where the essential facts are not in doubt or dispute the Adjudicator's task on a human rights appeal under section 65 is to determine whether the decision under appeal was properly one within the decision maker's discretion, i.e. was a decision which could reasonably regarded as proportionate and striking a fair balance between the competing interests in play. If it was, then the Adjudicator cannot characterise it as a decision "not in accordance with the law" and so, even if he personally would have preferred the balance to be struck differently, he cannot substitute his preference for the decision in fact taken."
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> 40. But what if the Adjudicator finds the facts to be materially different. It would remain open to the Adjudicator to decide that the conclusion reached

by the Secretary of State was lawful (and did not breach the claimant's human rights) because it was in fact a proportionate response even on the facts as determined by the Adjudicator.

41. Where the essential facts found by the Adjudicator are so fundamentally different from those determined by the Secretary of State as substantially to undermine the factual basis of the balancing exercise performed by him, it may be impossible for the Adjudicator to determine whether the decision is proportionate or otherwise than by carrying out the balancing exercise himself. Even in such a case when it comes to deciding how much weight to give to the policy of maintaining an effective immigration policy, the Adjudicator should pay very careful deference to the view of the Secretary of State as to the importance of maintaining such a policy. There is obviously a conceptual deference between (a) deciding whether the decision of the Secretary of State was within the range of reasonable responses, and (b) deciding whether the decision was proportionate (paying deference to the Secretary of State so far as is possible). We hold that the correct approach is (a) in all cases except where this is impossible because the factual basis of the decision of the Secretary of State has been substantially undermined by the findings of the Adjudicator. Where (a) is impossible, then the correct approach is (b). But we doubt whether in practice the application of the two approaches will often lead to different outcomes

7. In this appeal, the Article 8 claim was never considered by the Respondent and therefore the Adjudicator was properly entitled to undertake her own balancing exercise. However in so doing, and in deciding how much weight to attach to maintaining an effective immigration policy, she had to pay very careful deference to the expressed views of the Respondent. For its part, the Tribunal is constrained from interfering with the Adjudicator's asessment by the guidance of the Court of Appeal in **Oleed**, and can only do so if they are plainly wrong or unsustainable.

8. Ms Osman has submitted that the Adjudicator's conclusion at the end of her balancing exercise is plainly wrong and unsustainable because she failed to take into account the guidance given by the Court of Appeal in **Shala [2003] EWCA Civ 233**, concerning the impact of substantial delay by the Home Office in reaching its decision in the light of its published policies.

9. We should say at once that Shala relates to very different circumstances to this appeal. We are frequently invited by representatives to extend its scope with the implication that we should punish the Respondent for delay in decision making by adding delay in itself to the factors in favour of a claimant in the balancing exercise. We do not agree, as that is not what Shala says. The principles described in Shala are narrow in scope and we should be very cautious about applying them to other situations, as indeed Schiemann LJ was, as can be seen in the passage from his judgement that we set out below.

10. In Shala, the claimant came from Kosovo during the conflict in that country when the Respondent's policy was to grant leave to claimants of Albanian ethnicity. There was however a four year delay in reaching a conclusion about his asylum application by which time the conflict was over and the policy had lapsed. During this time the claimant had married. If he had been granted leave to remain in line with the Respondent's published policy, he would have had an in-country right to make a marriage application under the Immigration Rules. However as a consequence of the

Home Office delay, he did not have an in country right of appeal and in accordance with the guidance of the Court of Appeal in Mahmood concerning queue jumping, would have to return to Kosovo in order to make an application under the Immigration Rules from there. The Court of Appeal in Shala however made the following points in the context of the Article 8 assessment in respect of family life.

> 16. But the whole balancing exercise was conducted without any weight being attached to the fact that the policy being put into one side of the scales would not have been applicable at all but for the delay on the part of the Home Office. While it may be uncertain when the Appellant would more normally have been granted refugee status or exceptional leave to remain, it is unfair that he should have to suffer because of an uncertainty arising from the Home Office's failings. Nor can be said that allowing him to apply in-country would encourage others to exploit the established procedures. To require the Appellant now to leave the United Kingdom and to apply from Kosovo for leave to enter seems to me to be clearly disproportionate and to fall outside the generous margin of discretion to be afforded in such cases to the Respondent, and does not appear to have reflected adequately, if at all, the significance of his department's delay in the present case."

11. As we have said the facts in this present appeal are quite different. There is no marriage application and queue jumping does not arise. However the Home Office has had a long-standing and well-known policy relating to removal where there are children with long residence in the UK. It is known as the seven-year concession. It states that

> "Whilst it is important that each individual case must be considered on its merits, there are specific factors which are likely to be of particular relevance when considering whether enforcement action should proceed or be initiated against parents who have children who have lengthy residence in the United Kingdom. For the purpose of proceeding with enforcement action in a case involving a child, the general presumption is that we would not usually proceed with enforcement action in cases where a child was born here and has lived here continuously to the age of seven or over, or where having come to the United Kingdom at an early age they have accumulated seven years or more continuous residence. However there may be circumstances in which it is considered that enforcement action is still appropriate despite the lengthy residence of the child, for example in cases where the parents have a particularly poor immigration history and have deliberately seriously delayed consideration of their case. In all cases the following factors are relevant in reaching a judgment on whether enforcement action should proceed.
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> - the length of the parents' residence without leave; whether removal has been delayed through protracted and often repetitive representations or by the parents going to ground;
> - the age of the children;
> - whether the children were conceived at a time when either of the parents had leave to remain;
> - whether return to the parents country of origin would cause extreme hardship for the children or put their health seriously at risk;
> - whether either of the parents has a history of criminal behaviour or deception.

12. It was conceded by Mr Phillips that none of the adverse factors described in this published concession applied in the present appeal. The Appellant has a blameless

character and has not sought to delay her appeal in any way. The delay is entirely the responsibility of the Home Office. It follows therefore, as the Appellant's daughter came to the UK at a young age and was 11 by the time of the hearing before the Adjudicator, as the direct consequence of the delay in decision making by the Respondent, that she fell within the scope of this policy and as a consequence there was a general presumption that the Respondent would not usually proceed with enforcement action against them.

13. Ms Osman submitted that this was a material factor that the Adjudicator should have weighed in the balancing exercise. The Adjudicator did not consider this matter and as a consequence her balancing exercise was unsustainable.

14. Mr Phillips asserted that the policy was a concession, which was at the disposal of the Respondent and could not be applied by the Adjudicator. However he acknowledged that the published policy of the Respondent was a factor, which should properly be taken into account in the balancing exercise under Article 8 and, with his customary fairness, acknowledged that he was in difficulties in making any further submissions in this regard.

15. We conclude that the Adjudicator, when assessing the weight to be given to the Respondent's policy, should have taken into account the fact that his own policy was a general presumption that enforcement action would not be taken in cases of this kind. We should stress that this is not a factor to be added to those in favour of the Appellant by reference to the established factors in her private and family life. It is a matter that relates to the other side of the scales in the balancing exercise, ie establishing what the policy of the Respondent actually is on the facts of this appeal. The Adjudicator was plainly in error in failing to take this into account and consequently her balancing exercise must be set aside. However the Adjudicator properly recorded all the relevant facts as we have described above and we are able to make our own balancing exercise on that basis.

16. For the reasons described above, we conclude, in the light of the Respondent's own seven-year concession and the fact that none of the adverse factors in that policy apply to the Appellant, that the Respondent's policy of maintaining fair and effective immigration control does not in fact require the removal of the Appellant and her daughter, and would not be undermined by allowing them to remain in this country. Indeed, her remaining in this country with her daughter would appear to be in line with the Respondent's own published policy.

17. In those circumstances, given the substantial private and family life that has been developed by the Appellant and her daughter, who have now been in the UK for some 8 years, we hold that it would be disproportionate under Article 8 to remove them.

18. Accordingly for the reasons given above this appeal is allowed in respect of Article 8 only.

Spencer Batiste
Vice-President