ZM (Article 8 - Shala - Delay - Distinguished) Croatia[2003] UKIAT 00179

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 1st December 2003
Date Determination notified:
....10/12/2003.....

Before:

The Honourable Mr Justice Ouseley (President)
Mr H J E Latter
His Honour Judge G Risius CB

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

For the Appellant: Mr M Malik, instructed by Sutovic and Hartigan
For the Respondent: Ms J Bracken, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal from the determination of an Adjudicator, Mr S S Chohan, dated 9th April 2003. He dismissed the Appellant's appeal against the refusal of the Respondent to grant him leave to enter and to refuse to grant him asylum. The appeal was dismissed on both Refugee Convention and ECHR grounds.

2. The Appellant is a Serb from Vukovar in Croatia. He left Croatia with his wife, arriving in the United Kingdom on 28th June 1999 where he claimed asylum. He said that many relatives had been killed by the Croatians, that he received constant threatening telephone calls that he would be killed if he did not leave Croatia, that he had fought in the RSK Army and had been harassed by the police. There was evidence before the Adjudicator to the effect that the family house had been badly damaged and that for some time no-one has lived there, although he said that members of his family had lived there for a while after it had

been damaged. He said he did not have the money to repair the house. Although there was some confusion about children, it appeared that the Appellant had step-children who lived with his wife's mother in Croatia.

3. The Adjudicator generally accepted the credibility of the Appellant's account. He considered whether there would be a sufficiency of protection in Croatia and whether there would be a breach of Article 3 if the Appellant were to be returned there. He referred to the extensive objective material which had been submitted and to the decision of this Tribunal in S&K [2002] UKIAT 05613 Starred, the determination in which was notified on 3rd December 2002. Having considered both his own analysis of the background material and the decision in S&K, the Adjudicator concluded that there were no particular circumstances justifying a different approach from the general one set out in S&K and accordingly he dismissed the appeal.

4. There were two grounds of appeal in respect of which permission was granted. The first was that there was a renewed application for permission to appeal to the Court of Appeal pending in S&K. Plainly, it was hoped that if the Court of Appeal allowed an appeal in S&K that would affect the approach of the Tribunal or Adjudicator on a remittal to the situation in Croatia for Serbs. The second ground related to Article 8 and contended that leave to appeal should be given, pending the final determination of Ullah [2002] EWCA Civ 1856 in the House of Lords. In effect, neither of those grounds have been pursued in front of us. The Court of Appeal refused permission to appeal in S&K, and although Ullah is still pending in the House of Lords, it was not suggested that that was a reason why this appeal should be allowed.

5. Additionally, Mr Malik, who appeared for the Appellant, recognised that it was extremely difficult for him to pursue any argument now in relation to this Appellant and the background circumstances in Croatia in the light of the further consideration which the Tribunal had given to the matter in DK v SSHD [2003] UKIAT 00153K (Croatia). Although Mr Malik did not formally abandon the appeal on those grounds in order to retain such further appeal rights as might be open to him, he did not argue them in front of us. We have considered the circumstances in this case nonetheless, but we do not consider in the light of the two decisions to which we have referred and the background material that there is any basis for allowing the appeal on those grounds.

6. Mr Malik, however, sought to introduce a further ground of appeal which bore a very tenuous connection to the Article 8 point raised in the original grounds of appeal. We gave him

permission to vary his grounds of appeal by the addition of this third ground. He contended that it would be a breach of the Appellant's Article 8 rights and a disproportionate interference with them, notwithstanding the need for consistent and firm immigration control, for the Appellant to be returned to Croatia. He said that the Appellant and his wife now enjoyed family life within the United Kingdom. They had done so since June 1999, now for some 4½ years. The Respondent had taken 2½ years to reach his decision on the asylum application. Had the Appellant's application been considered within a reasonable time of his arrival in the United Kingdom, and it would have been reasonable to expect a decision within one year, the Appellant would have benefited from the way in which asylum applications from Serbs from Croatia were being considered. Although Mr Malik accepted that he could not in reality say that there was a policy of granting asylum in 1999 through to June 2000, nonetheless the odds were that the decision taken within one year of his arrival in the country would have been favourable to the Appellant, whereas the delayed decision was not. He accepted that the position of the Appellant's wife was dependant upon the Appellant's own position and gave rise to no separate consideration. But Mr Malik pointed out that in addition to the interference with their life here if they had to return to Croatia, they would also experience the difficulties of life in Croatia in terms of accommodation, employment, discrimination and they would have to start from scratch, whereas in the United Kingdom they had sought to work to maintain themselves until they were prevented by law from doing so.

7. Mr Malik referred us to a number of authorities in support of his propositions. He relied upon the decision in Shala v SSHD [2003] EWCA Civ 233 for the proposition, when considering proportionality in Article 8 ECHR, that it was relevant to consider the effect of the time taken by the Secretary of State to reach his decision and the consequences which such a delay had on the prospects of someone receiving the benefit of a policy or exception. In that case, the period between claim and the Respondent's decision was four years. During that period, the Appellant in that case, who was an ethnic Albanian from Kosovo, had met a Czech national who was also an asylum seeker and they had begun co-habiting. She and her two sons had been granted refugee status just over a year before the decision in respect of that Appellant. They had been co-habiting for some 2½ years before the Home Office decision in respect of the Appellant and were married three months after it. The Appellant's wife had never been to Kosovo, spoke no Albanian and she and her sons had been in the United Kingdom for some four years by the time she married the Appellant. Had the Appellant's application been dealt with with reasonable promptness, he would have been granted refugee status or at

least exceptional leave to remain. This was described as the Respondent's policy up until the middle of 1999, some two years before the decision letter. He would not then have been required to leave the United Kingdom and to apply from Kosovo as somebody who merely had temporary admission; he would have been able to make his application for a variation in his leave from within the United Kingdom. The Court of Appeal concluded that the Tribunal ought to have seen the fact that the delay by the Home Office in determining his case had deprived him of the advantage of making the application for variation in his leave from within the United Kingdom as an exceptional circumstance, unlike the normal run of cases where a person with no leave to enter sought leave on the basis of marriage. It was said to be unfair that he should suffer because of an uncertainty arising from the Home Office failings; they were concerned that allowing him to apply in-country would encourage others to exploit the established procedures. However, to require the Appellant to leave the United Kingdom and apply from Kosovo would be clearly disproportionate. Mr Malik said that that general point applied to the circumstances of this Appellant.

8. Shala had been applied in relation to a case certified by the Secretary of State as manifestly unfounded by Moses J in Ala v SSHD [2003] EWHC 521 (Admin). Finally, we were referred to the fact that Dyson LJ had regarded the Shala point as one which had a real prospect of success in granting permission to appeal from a decision of the Tribunal in another case. We were shown the skeleton argument which had persuaded him to grant permission on paper. What was submitted was that the decision on the claim in that case had been delayed, there had been a change in circumstances and had the case been decided by the Secretary of State within a reasonable time, the Appellant would have been granted refugee status and it was disproportionate to require the Appellant to be returned. As to the latter case, we find no assistance in a skeleton argument and a short comment granting permission. It carries no authority beyond to suggest that the point was seen as arguable. We are not considering whether this case is arguable. We are considering what the decision in it should be. Insufficient facts have been provided about that third case for any parallels to be drawn in any event.

9. Mr Malik also submitted that the references in R v SSHD ex parte Mahmood [2000] EWCA Civ 315, to the removal of one family member from a state where other members of the family are lawfully resident not necessarily infringing Article 8 "*provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded*" (para 55(3) per Lord Phillips MR), had been taken as imposing a test that was harsher than was intended. It did not require the difficulties to be such that they were simply incapable of being

overcome. They covered difficulties which should not have to be overcome, even though it might be possible at some significant cost to do so.

10. We do not accept these submissions. First, there was no group policy towards Serbian asylum seekers from Croatia in 1999 and each case had to be determined on its own merit, as the then advice to caseworkers showed in Bulletin 2 and 4 of 1999. There was no more than a general presumption that Serbs from certain identified war-affected areas "*may be able to substantiate a claim to asylum on the grounds of their ethnicity*".

11. Second, there would be no significant interference with private or family life if the Appellant and his wife were returned to Croatia. They were married before they arrived in the United Kingdom; both are of the same nationality; there is nothing from the Appellant's wife's circumstances which gives rise to any separate considerations of asylum or human rights because her position is entirely dependant on his, as Mr Malik accepted. There are no insurmountable barriers to the return of any family member, therefore, however much the bar is lowered by the Appellant's submissions. There is no more interference here than is involved in the impact of the removal itself and the undoubted hardships which would be faced on return to Croatia. We recognise those difficulties and the feeling of stability gained in the United Kingdom through their time here. However, we do not regard that as a significant interference with their private or family life.

12. The Appellant's position is no different from the many failed asylum seekers whose cases have been dealt with too slowly in a congested decision-making system, and in respect of which circumstances have changed in their country of nationality or habitual residence during that process. Indeed, the Refugee Convention itself recognises that even if someone had been granted refugee status, changed circumstances permit the return of refugees conformably with the Convention. We do not say that the delay in the decision-making process is irrelevant, and we recognise that had the claim been dealt with rather more expeditiously, there is a real likelihood that either indefinite or exceptional leave to remain would have been granted. However, we see nothing disproportionate in relation to the degree of interference with the Appellant's private or family life with the return of him and his wife to Croatia for all its hardships. They will still be together as a couple. They can be reunited with the children of the family in Croatia and with the Appellant's wife's parents, who are also in Croatia. Their personal links in this country are to the friends whom they have made in their time here. The Appellant's family, except for his wife and her children, have been killed.

13. This case is very different from both Shala and Ala. In Shala, the private or family life relied on had only become established as a result of the time spent by the Appellant in this country when he met someone here; not so here. That person and her children had refugee status; not so here. He was a Kosovan, but his wife and her children were Czechs and had no connection with Kosovo; very different from here. The issue was whether the family should be split up while he alone went to Kosovo to apply for entry clearance, an application quite likely to be granted, in circumstances where had his application for asylum been dealt with reasonably quickly he would have been able to make an in-country application for variation of leave. That is wholly different in the degree of interference and the disproportionate nature of the consequences of delay as the Secretary of State would have had it.

14. Again in Ala, the circumstances were different. The Kosovan asylum seeker whose case, determined in time, would probably have led to some form of leave to remain, married a British citizen with a child whom he met here. Before the Secretary of State's decision on his claim, they also had a child of their own. Again, the Secretary of State required him to leave the United Kingdom so as to apply abroad for entry clearance. The degree of interference was obviously very significantly greater and the object being achieved by requiring the departure less clear from the immigration control point of view as, like Shala, the Secretary of State was not so much concerned with the position of the particular family but more with maintaining the integrity of the entry clearance system and discouraging others from jumping the queue. It is to be remembered also that the actual issue in that case was only whether the Secretary of State's approach to or ignoring of delay in the decision-making process in relation to Kosovo made his certifying of the asylum claim as manifestly unfounded unlawful, rather than any ultimate decision on his claim.

15. The degree of interference in those cases was markedly greater than that involved here because each case involved the splitting up of the family, even if only for a temporary period. That does not arise here. The family would be reunited with their children if they returned to Croatia. The object of removal in those cases was also of less importance for immigration control. It was expected in both cases that entry clearance would be granted and so the purpose of the removal was not to exclude the Appellants from the United Kingdom, but to require them to go through the required procedures for the purposes of maintaining the integrity of the system without regard in reality to the particular needs of the family in question. Here, the family would not be split up: indeed, it would be closer to being united and the purpose of the enforcement of immigration control here is

not merely to inflict on a family the procedural requirements for the maintenance of an effective immigration control system, which arise only because of that same system's earlier failings.

16. The question of whether the delay in the decision-making process made the Secretary of State's decision disproportionate was not considered by him. It does not appear to have been raised for his consideration. It was not suggested by any party that the matter should be sent back in order for his views on the matter to be obtained, leading to a further round of decision-making. It is not for us to attempt to anticipate or guess at what his views might be: it is for us to reach a conclusion as to whether removal would be proportionate here.

17. For the reasons which we have given, we do not consider that removal would be disproportionate notwithstanding the delay in the decision-making process and accordingly this appeal is dismissed.

MR JUSTICE OUSELEY
PRESIDENT