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Heard at Field House

RJ (Article8 - Proportionality - Inability to Comply) Serbia and Montenegro [2003] UKIAT 00151

On 20 October 2003
Prepared 21 October 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

19 November 2003

Before:

Mr H J E Latter (Chairman)
Mrs J A J C Gleeson

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

Representation
For the appellant: Mr G Saunders, Home Office Presenting Officer
For the respondent: Mr R Scannell, Counsel, instructed by Birnberg Peirce & Partners, Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of an Adjudicator (Mrs A K Simpson) who allowed the respondent's appeal against the decision made on 6 June 2002 refusing his application for leave to remain on the basis that removal would be a contravention of his rights under Article 8. In this determination the Tribunal will refer to the respondent to this appeal as the applicant.

2. The applicant made a clandestine entry into the United Kingdom on 23 December 1997. He was discovered by the police and the following

day he made a claim for asylum on the basis that he was an ethnic Albanian from Kosovo.

3. The way in which the asylum application was dealt with is relevant to this appeal and can briefly be summarised as follows. On 27 December 1997 a third country interview was conducted at Rochester police station. Although the applicant denied claiming asylum in any other EU country it was established that he had entered Germany on 3 December 1997 and had made an application for asylum there. A formal request was made to the German authorities under the Dublin Convention for them to accept responsibility for the consideration of his asylum claim and on 23 March 1998 Germany accepted responsibility for the claim. However, as there was a pending case in the Court of Appeal on third country removals to Germany, no ethnic Albanians from Kosovo were being removed at that stage. In August 1998 the applicant's representatives applied for judicial review. The application was not pursued pending the lead case.

4. In November 2000 the Third Country Unit invited the applicant to withdraw his judicial review application following the changing situation for Kosovan Albanians. His representatives replied that he had now married a UK citizen and asked that he be granted leave to remain on the basis of his marriage. On 18 March 2002 the applicant's claim for judicial review was dismissed by the Court of Appeal. On 6 June 2002 the claim made under the Human Rights Convention was refused and on 11 June 2002 the applicant appealed to the Adjudicator under Section 65 of the 1999 Act.

5. The Adjudicator accepted (and it is not in dispute) that the applicant met his future wife in March/April 2000. He introduced himself as Nicol and that is the name the family has used for him ever since. They began to go out together and the applicant became an important part of the lives of her three children. They began to live together in June or July 2000 and were married on 29 September 2000. The applicant's wife has three children by her previous marriage, David born in 1986, Leanne 1998 and Craig in 1999. There is now a fourth child, Paige, who was 15 months at the date of the hearing before the Adjudicator.

6. The Adjudicator accepted that there was family life between the applicant, his wife and children. Removal whether to Germany or Kosovo would amount to an interference. It would be pursuant to a legitimate aim. The substantive issue before the Adjudicator was whether removal would be a proportionate response to the legitimate aim within Article 8(2). The Adjudicator noted that the Immigration Rules required that a person seeking rights of residence on grounds of marriage must obtain entry clearance first. In the absence of exceptional circumstances she commented that it would be manifestly unfair to would-be entrants who are content to take their place in the entry clearance queue in their country of origin to allow others to bypass this rule. She accepted that the applicant's wife and family

could not reasonably be expected to join him in Kosovo. They would not have accommodation or any means of obtaining a home. Neither would be able to find employment.

7. The Adjudicator went on to consider whether the applicant could be expected to return to Germany or Kosovo and apply for entry clearance as a spouse. She noted that there was no visa issuing post within Kosovo, the nearest posts are Belgrade, Tirana and Skopje. The waiting time in Belgrade is about four weeks, Tirana nine weeks and Skopje four weeks, although the applicant may also need to apply for and obtain an UNMIK travel document which could delay the process by a further two or three weeks. The decision was likely to be made on the same day if the requirements of the Immigration Rules were met. The Adjudicator rightly took the view that delays of about nine weeks were not excessive.

8. However, she went on to comment that the applicant was the breadwinner in the family. If he had to leave the United Kingdom he would have to give up his employment and it would be more likely than not that he would then be unable to show that he could be maintained and accommodated in the United Kingdom without recourse to public funds. He might well be refused a visa and this would lead to a lengthy delay before his wife was able to obtain suitable employment to satisfy the Immigration Rules. She took the view in these circumstances that the applicant's circumstances could be distinguished from those in Mahmood (2001) Imm AR 229 and Baljit Singh (2002) UKIAT 06660. In the light of the lengthy delay that might well result before entry clearance was issued and the detrimental effect that the delay might have on the future development of the applicant's relationship with his infant daughter and the cessation of his financial support for his wife and children, the Adjudicator was satisfied that the interference to his right to family life was not justified and would be disproportionate. Accordingly she allowed the appeal.

9. In the grounds of appeal it is argued that the Adjudicator erred by finding that it would not be proportionate to expect the applicant to make an application for entry clearance from abroad. She should not have given weight to the fact that the applicant might not be able immediately to satisfy the maintenance and accommodation requirements. Inability to comply with the Immigration Rules in any subsequent application should not be weighed when considering proportionality. In any event it is argued that the applicant's employment history was such that he would be able to show that he would resume employment on his return to the United Kingdom and so any delay in having his application considered would not be as prolonged as the Adjudicator suggested. There were no exceptional circumstances making an application from abroad disproportionate.

10. At the hearing before the Tribunal Mr Scannell indicated that he wished to rely on the judgment of the Court of Appeal in Shala [2003] EWCA

Civ 233. There was some debate about whether he should have submitted a respondent's notice under Rule 19 on the basis that he was asking the Tribunal to uphold the determination for reasons different from or additional to those given by the Adjudicator. In the event, the Tribunal took the view that the sensible course was to permit Mr Scannell to file a respondent's notice. The case was put back for a short time to enable Mr Saunders to consider this notice and the judgment in Shala.

11. Mr Saunders submitted that the facts of this appeal were properly distinguishable from the facts in Shala. This was not a case where there had been an undue delay in determining the application. By 23 March 1998 the German authorities had indicated that they would accept the application under Article 8 of the Dublin Convention. The subsequent delay was caused by the progress of litigation in the Court of Appeal and House of Lords. The applicant had not been deprived of any substantial benefit which he could legitimately have expected to receive.

12. Mr Scannell submitted that the principles set out in Shala were of direct relevance to this appeal. He referred to the judgment of Keene LJ who had identified the error in the Tribunal's approach as equating the position of the appellant in that appeal with that of any normal applicant who wished to obtain leave to enter on marriage grounds. However, if his claim had been dealt with reasonably efficiently, he would probably have obtained at least exceptional leave to remain as a refugee, thereby giving him the ability to apply from within the United Kingdom for a variation of that leave on the grounds of his marriage. The appellant did have a legitimate claim to enter at the time when, on any reasonable basis, his claim should have been determined. The delay had deprived him of that advantage and this should be seen as an exceptional circumstance taking his claim out of the normal run of cases where a person with no leave to enter seeks such leave on the basis of marriage. Keene LJ came to the view that it would be disproportionate to require the appellant to leave the United Kingdom and to apply from Kosovo for leave to enter.

13. In paragraph 24 of his judgment, Schiemann LJ commented that the appellant had arrived in the United Kingdom at a time when Kosovo was in the middle of a dreadful civil war. He had applied for asylum on arrival. He could not have done more. His was a meritorious application for permission to remain but it was not until more than four years later that the Home Office, after chivvying by his solicitors, got round to arranging an interview to test its genuineness. It was a wrong approach to apply automatically to a person in his position a policy designed to discourage both meritorious and unmeritorious applicants from jumping the queue.

14. Mr Scannell submitted that this applicant could not have done more. He had come to the United Kingdom by way of Germany and had

properly challenged his removal to Germany. In 1998 the German authorities were taking an irrational approach to the assessment of claims from Kosovo. He could not have been lawfully returned there at that time. The applicant could not be categorised as a queue jumper or someone whose presence in the United Kingdom was not properly justifiable. In the circumstances to require him now to return to either Kosovo or Germany to make an application from abroad was disproportionate. Mr Scannell also referred the Tribunal to the seven year policy relating to children. He was now a member of a family where three of the children had lived in the United Kingdom for over seven years. Nothing should be done to upset that family unit. The Adjudicator had been right to consider whether there were special circumstances to show that removal would be disproportionate. It was for her to assess the consequences of the applicant's removal from the United Kingdom and the effect on the family arising both from his absence and from the lack of financial support. The consequences of the applicant being separated from his young daughter were particularly relevant in the light of the importance of young children forming a good and strong attachment to both parents: see the article by Dr Joan Kelly at B128.

15. There is no doubt as the Adjudicator found that the applicant enjoys family life within Article 8(1) with his wife and children. Removal would be an interference with that right. However, it would be lawful and pursuant to a legitimate aim. The issue is whether removal would be proportionate to that legitimate aim. The Adjudicator accepted that it would be unreasonable to expect the applicant's wife and children to join him in Kosovo. The issue turned on whether the applicant should return to Kosovo and apply for entry clearance as a spouse. It is clear that the Adjudicator took the view that generally this was the proper course. In paragraph 24 she considered the time such an application would make. She accepted and it is not challenged, that an application might reasonably be processed within about nine weeks, although taking into account the need to travel to Belgrade, Tirana or Skopje in reality the period would be longer. However, she rightly took the view that any such delay would not be excessive.

16. The problem which concerned her was whether the applicant would be able to apply with the Immigration Rules when he made the application. He would need to show that he and his family could be maintained and accommodated without recourse to public funds. At present the applicant is working and is the breadwinner. If he were to be removed, he would lose his job. As the Adjudicator comments in paragraph 25 of her determination, although the applicant's wife was optimistic that she could obtain some part time employment, this would not generate sufficient income to maintain herself and her children without reliance on public funds. There was a risk of a lengthy delay before the family were able to obtain suitable employment to satisfy the Immigration Rules. It was on this basis that the Adjudicator took the view that the facts could properly be distinguished from Mahmood and Baljit Singh.

In the light of the lengthy delay that might result before entry clearance was issued, the detrimental effect of the delay on the future development of the applicant's relationship with his infant daughter and the cessation of his financial support for his wife and children, the Adjudicator held that the interference to his right to family life was not justified and would be disproportionate.

17. This reasoning is based on an assumption that the applicant would not be able to satisfy the Immigration Rules. However, in the light of the applicant's employment record in the United Kingdom the Tribunal are not satisfied that he would be unable to comply with the Immigration Rules. When assessing maintenance and recourse to public funds, an Entry Clearance Officer will take into account not only whether an applicant is employed at the date of decision but what his employment prospects are. The applicant has shown that he has good employment prospects. He has obtained a job in the past and there is no real reason to believe that he would not obtain a job in the future if need be. In our judgment there is no reason to believe that there would be an undue delay in obtaining entry clearance. The Tribunal are not satisfied that the applicant's loss of job, temporary separation from his family and his employment prospects or lack of them, amount to exceptional circumstances making removal disproportionate.

18. Mr Scannell argues that the Adjudicator's decision should be upheld on the basis that it is wrong to equate the applicant with a normal applicant seeking to obtain leave to enter on marriage grounds. He submits that it is wrong to apply automatically to him the policy requiring entry clearance to be applied for from abroad.

19. In Shala the appellant arrived in the United Kingdom on 25 June 1997 and claimed asylum the same day. Nothing was done about his claim for some time. Eventually, after letters written by his solicitors, he was interviewed on 17 July 2001 and his claim was refused on 25 July 2001. Meanwhile the appellant had met a Czech national who was also an asylum seeker. They began living together in December 1998. In May 2000 she was granted refugee status. They married in October 2001. The Court of Appeal were satisfied that the Tribunal had erred in law by equating the appellant's position with that of any normal applicant who sought to obtain leave to enter on marriage grounds. His case had an exceptional feature: if his claim had been dealt with efficiently, he was likely to have obtained exceptional leave to remain which would have given him the ability to apply within the United Kingdom for a variation of that leave on the ground of his marriage. When the appellant arrived in the United Kingdom he did have a legitimate claim to enter. The subsequent delay by the Home Office deprived him of that advantage and that should be seen as an exceptional circumstance taking his case out of the normal run of cases when a person with no leave to enter seeks leave on the basis of marriage.

20. In the present appeal the application was dealt with on Third Country grounds. Germany accepted responsibility for assessing his claim. The applicant sought to challenge the Secretary of State's decision to remove him to Germany: he was fully entitled to take that course but the fact remains that his claim was finally dismissed by the Court of Appeal in March 2002. Whatever the position in 1997 or 1998 by 2002 it was safe for the appellant to be returned to Germany and indeed to Kosovo. Even assuming that the appellant was fully justified in the light of the situation in Kosovo in coming to the United Kingdom rather than remaining in Germany in 1997, the situation in Kosovo significantly changed in 1999 and had certainly changed completely by March/April 2000 when he first met his wife. In our judgment the facts in this appeal are properly distinguishable from the facts in Shala.

21. In our view it is invidious when assessing proportionality to attach too much weight to an assessment of what the position might have been if a claim had been assessed at an earlier date. The policy of the Secretary of State has been to grant indefinite leave to those entitled to refugee status. He has chosen to go beyond the requirements of the Convention which only require protection to be given when there is a current well-founded fear of persecution. The Tribunal are not saying that when assessing proportionality the circumstances in which an applicant arrived in the United Kingdom and any delay in dealing with a proper claim should not be taken into account. Clearly they are relevant factors. In Shala, the Court of Appeal were satisfied that the Tribunal left out of account these relevant factors: the circumstances of the appellant's arrival and the delay in determining his claim. When assessing proportionality these factors must be assessed together with all other relevant factors including the reasons that the applicant is seeking to remain in the United Kingdom and, when the application is based on marriage, the situation when the relationship formed and the situation then in the applicant's home country.

22. When this applicant arrived in the United Kingdom he would have been in considerable danger if he had remained in Kosovo. He cannot be categorised as someone who did not have a properly arguable legitimate claim to enter and remain in the United Kingdom at that time. However, by the time of his marriage the situation had changed for the better in Kosovo.

23. The factor which has caused the Tribunal most concern is the effect on Paige of a period of separation from her father. This is an important factor to which the Tribunal would attach considerable weight. The seven year policy to which we were referred is a factor of limited relevance given Paige's age and the length of time the applicant has been part of the older children's lives. However, the Tribunal must also take into account the importance of maintaining an effective immigration policy. In the explanatory statement it is made clear that the Secretary of State attaches the greatest weight to the mandatory requirement that a foreign national seeking settlement in the United

Kingdom as a foreign spouse should hold prior entry clearance for that purpose. It is the Secretary of State's view that this requirement should only be waived in the most exceptional of circumstances. This is a view properly open to the Secretary of State in the light of the Immigration Rules.

24. Since the hearing before the Adjudicator the law has moved on. The Adjudicator did not have the benefit of the judgments from the Court of Appeal dealing with the approach to be adopted when considering appeals on Article 8 grounds. In Blessing Edore [2003] EWCA Civ 716 Simon Brown LJ held that an Adjudicator's task on a human rights appeal under Section 65 was to determine whether the decision under appeal was properly within the decision-maker's discretion, i.e. was a decision which could reasonably be regarded as proportionate and striking a fair balance between the competing interests in play.

25. This approach was confirmed by the Court of Appeal in Razgar [2003] EWCA Civ 840 where the Court also dealt with the proper approach if the facts found by the Adjudicator were fundamentally different from those determined by the Secretary of State. In such cases it would be for the Adjudicator to determine whether the decision was proportionate by carrying out the balancing exercise himself but he should pay considerable deference to the view of the Secretary of State as to the importance of maintaining his policy.

26. Looking at the facts of the present case, the Tribunal are unable to say that the Secretary of State's decision fell outside the range of responses open to him on the basis of the facts which are not substantially in dispute. When all the circumstances are taken into account it cannot be said that this decision was so disproportionate that it fell outside the area of decision properly open to the Secretary of State.

27. In these circumstances the appeal by the Secretary of State is allowed.

H J E Latter
Vice President