Neutral Citation Number: [2020] EWCA Civ 634

Case No: C5/2019/1951

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE WARR
PA/06172/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2020

Before:

LORD JUSTICE FLAUX
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE DINGEMANS

- -

Between:

SINDUJAN CHANDRAN	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Andrew Gilbert (instructed by **Sriharans Solicitors**) for the **Appellant**
Zane Malik (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 5 May 2020

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Approved Judgment

Covid-19 Protocol:
This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunal Judiciary website (press.enquiries@judiciary.uk). The date and time for hand-down is deemed to be 10:30am on Thursday 14 May 2020.

Lord Justice Flaux:

Introduction

1. The appellant appeals, with the permission of Newey LJ, against the decision of the Upper Tribunal (Immigration and Asylum Chamber) promulgated on 13 June 2019, which dismissed the appellant's appeal against the decision of the First-tier Tribunal promulgated on 15 February 2019, dismissing the appellant's appeal against the decision of the respondent refusing him discretionary leave to remain.

Factual background

2. The appellant was born on 31 July 1990 in Bahrain to Sri Lankan parents. He entered the United Kingdom clandestinely with his mother Ledchumi Chandran on 8 March 2007. She made an asylum claim on 12 March 2007, with the appellant included as a dependant since he was under 18 at the time. The claim was refused by the respondent on 10 April 2007 and her appeal from that decision was dismissed by the Asylum and Immigration Tribunal on 22 May 2007, with a finding that her account was fabricated.

3. On 28 August 2008, the solicitors who act for both the appellant and his mother made further representations on behalf of the appellant's mother, highlighting deteriorating country conditions in Sri Lanka. The case was moved to the Older Live Cases Unit under the Legacy criteria. Both the appellant and his mother were given permission to work in 2015. On 26 January 2016, the respondent sent a Further Submissions Decision to the appellant's mother concluding that she did not qualify for leave on any basis. No direct mention was made of the appellant as a dependant. On 8 February 2016, the appellant's mother was granted Discretionary Leave to Remain in the UK until 26 July 2018 but he was not granted leave in line with his mother.

4. Accordingly, on 18 February 2016, the solicitors wrote to the Secretary of State, pointing out that when the appellant's mother first made her application he was a dependant minor and asking that he be given leave to remain in line with her. On 1 March 2016, the respondent replied that since the appellant was no longer a minor, he would need to make an application in his own right.

5. On 18 April 2016, the appellant lodged an asylum claim in his own right claiming that if returned to Sri Lanka he would be viewed as someone trying to revive the LTTE. That claim was refused and certified with no in-country right of appeal. He issued Judicial Review proceedings and on 7 August 2017, Upper Tribunal Judge Kekić granted permission on the grounds, inter alia, that it was arguable that, given the wording of the respondent's policy on discretionary leave, the appellant should have been treated as a dependant when his mother's further submissions were considered, even though he was 18 at the time. The respondent agreed to reconsider the decision and the application was again refused on 27 April 2018. It is that decision which was the subject of the appeal with which we are concerned.

The decisions of the Tribunals

6. At the outset of the hearing before the First-tier Tribunal, counsel for the appellant, Mr Andrew Gilbert (who also appeared before this Court) told the judge that the asylum claim was not being pursued and the appeal would proceed on the basis of Article 8 only, both within and outside the Immigration Rules. The First-tier Tribunal judge considered first the claim under paragraph 276ADE. She noted at [25] that applicants of 18 and above who have lived in the UK for less than 20 years must show that there would be very significant obstacles to their integration into the country to which they are to be sent. Having considered the evidence in detail, the judge concluded at [35] that there were no very significant obstacles to the appellant's integration into Sri Lanka so he did not meet the requirements for leave to remain on the grounds of private life in the UK in paragraph 276ADE.

7. The judge turned to consider the Article 8 claim outside the Rules. She noted that the appellant had been in a relationship with Dhiviya Thangabelu but was no longer because her father had sent her abroad when he became aware the appellant had no status in the UK. There had been no contact since.

8. The judge also noted at [38] that Mrs Chandran now had limited leave to remain until 14 June 2021. At [39] the judge said that she was prepared to accept the appellant was more than normally emotionally dependent on his mother and they had a family life which engaged Article 8. At [41] the judge said the respondent's decision furthered the legitimate aim of proper and effective immigration control and that, for the decision to be disproportionate, the consequences for the appellant needed to be more than mere hardship or difficulty.

9. At [42] the judge made an important finding that there was no reason why Mrs Chandran could not accompany her son to Sri Lanka, if he was required to return there. The effect of the rejection of her asylum claim is that she was merely an economic refugee. She had lived in Sri Lanka until she was 35 and worked as a housemaid which she could utilise to find employment. There was no basis for a finding that family life could not reasonably be pursued in Sri Lanka.

10. The judge then took account of the public interest considerations under section 117B of the Nationality, Immigration and Asylum Act 2002 and made findings about the appellant's private life, concluding at [44] that there was no indication that the appellant was currently engaging in any meaningful way with the community and his private life was not of such a quality as to weigh heavily in the balancing exercise.

11. At [45] the judge quoted the first two paragraphs of paragraph 3.8 of the Asylum Policy Instructions ("API"): Dependants and Former Dependants (May 2014):

> "Any dependant, who is currently under 18 and was included in the original asylum or human rights claim, should continue to be treated as a dependant until any further submissions are concluded.
>
> Any dependant included in the original asylum or human rights claim, who reaches 18 before the further submissions are decided, should normally continue to be treated as a dependant for the purposes of the further submissions application. See

> section 3.7 above for details on serving immigration paperwork to dependants over 18."

12. The judge said that she was aware of what UTJ Kekić had said about it being arguable that on this wording the appellant should have been treated as a dependant when his mother's further submissions were considered, even though he was 18 at the time. However, the judge disagreed with that analysis, saying:

> "I consider that the dependant in question needs to be under the age of 18 as at the date that the further submissions are lodged. The second paragraph of 3.8 refers to "the further submissions" not "any further submissions" and so must relate to the further submissions alluded to in the first paragraph i.e. those submitted when the dependant was under 18. When Mrs Chandran's further submissions were lodged on 28 August 2008…her son had already attained the age of majority. In my judgment the appellant did not fall within the ambit of the respondent's policy."

13. The judge then went on to consider the question of delay. On behalf of the appellant it was submitted that the seven-year delay in considering the further submissions had permitted the appellant to develop deeper ties both in the UK and to his mother and further distanced him from Sri Lanka. This mitigated against the weight to be attached to immigration control. Mr Gilbert for the appellant relied upon *Jeunesse v Netherlands* (2015) 60 EHHR 17. The judge noted that in *Jeunesse* the European Court had found that "exceptional circumstances" existed. The judge noted that the use of that phrase by the European Court had been considered by this Court in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 from which she cited [42] of the judgment.

14. At [50] the judge said delay is not determinative and is merely a relevant factor, citing the decisions of this Court in *Strbac v SSD* [2005] EWCA Civ 848 and *S, H & Q v SSHD* [2009] EWCA Civ 142, noting that in the latter case the Court found that arguments based on "unfairness" based on administrative delay did not give jurisdiction to intervene. The initial asylum claim was dealt with expeditiously in 2007 and when it was refused, the appellant had no justification in regarding himself as settled in the UK. The judge said there was some merit in the argument that the respondent showed acquiescence in the appellant remaining in the UK when he was given permission to work in 2015, but this was limited to shortage occupations. UTJ Kekić had referred to absence of enforcement action when he was seen by an immigration officer in 2009, but there was no evidence of this and in her witness statement Mrs Chandran said she could not remember the incident. The judge concluded that the appellant had not suffered any specific detriment in consequence of the delay in making a decision on his mother's application, even assuming he believed himself to be a dependant on that application. Whilst he had entered a relationship, that was in full knowledge that his immigration status was precarious. That relationship had been over for some time and the appellant had no especially strong links of the kind that would create relationships that are hard to disrupt.

15. At [51] the judge said that in *Agyarko* [2017] UKSC 10, Lord Reed emphasised that the critical issue will generally be whether, giving due weight to the strength of the public interest in removal, the Article 8 claim is sufficiently strong to outweigh it. Taking

account of all relevant considerations and weighing the public interest considerations in the balance, it was not shown that there were any "very compelling reasons" outweighing the legitimate interests in immigration control. The appeal was dismissed.

16. On appeal to the Upper Tribunal, it was argued that the appellant should have had the benefit of the same API as his mother and that the appellant had been prejudiced by delay. The Upper Tribunal judge quoted [45] to [51] of the First-tier decision. He referred to counsel's argument that the second paragraph of 3.8 could not mean what the First-tier judge had found because it would be wholly otiose. He also submitted that if 3.8 was ambiguous it should be resolved in favour of the appellant. In relation to delay the First-tier judge had not taken full account of it in the proportionality exercise and had been wrong to say dismissively that delay was not determinative and only a relevant factor.

17. The Upper Tribunal Judge decided that, in relation to the API, the First-tier judge was entitled to conclude as she did. The policy could have been clearer but in the circumstances, the appellant's mother had made an application when he was under 18, which concluded on 22 May 2007 when the appeal was dismissed. By 28 August 2008 he was no longer under 18. The Upper Tribunal judge reached his decision independently of a later asylum policy instruction dated 19 February 2016 upon which the respondent had relied. He rejected the claim that the policy was ambiguous.

18. He said that he was not satisfied that the First-tier judge erred in her careful consideration of the issue of delay. Her approach was not unduly narrow or dismissive. She had in mind all relevant matters including the appellant's relationship. The appeal was dismissed.

The grounds of appeal

19. The grounds of appeal pursued before this Court were the same as before the Upper Tribunal:

    (1) The Upper Tribunal erred in its conclusion that the appellant was not entitled to the benefit of the respondent's policy towards dependants;

    (2) The Upper Tribunal erred with respect to the effect of the respondent's delay upon the public interest in removal and/or as to the precariousness of private and family life.

Ground 1

20. Mr Andrew Gilbert on behalf of the appellant submitted before this Court that, on the construction of 3.8 adopted by the Tribunal judges, the second paragraph was otiose and that the paragraph was ambiguous. He resisted the suggestion from the Court that "the further submissions" in the second paragraph was a reference back to the first paragraph. In relation to the asylum policy instruction dated 19 February 2016 he noted that this made it clear that what he called the concession in the second paragraph of 3.8 (i.e. that someone in the position of the appellant would continue to be treated as a dependant) was not provided, but he submitted that the policy at the time of the decision was broader. He was clearly proceeding on the assumption that the document dated 19 February 2016 was a successor to the May 2014 API he relied upon, which prompted

some discussion with the Court as to whether the decision he was really seeking to attack was that of 1 March 2016 saying the appellant would have to make an application in his own right, which was made after the 19 February 2016 policy document came into effect.

21. However, it emerged at the appeal hearing that Mr Gilbert was proceeding under a misapprehension in two respects. First, the 19 February 2016 asylum policy document was not a successor policy document but a different policy document altogether, version 9.0 of "Asylum and Human Rights Policy Instruction: Further Submissions". The confusion may have arisen because the provision on which the respondent had relied in that document was also numbered 3.8. It provided:

> "Where a spouse, civil partner, unmarried or same-sex partner or minor child of the principal claimant was treated as a dependant on the initial asylum or human rights claim and still wishes to be treated as such, they should continue to be considered as a dependant on the further submissions. See paragraph 349 of the Immigration Rules for the definition of a dependant in asylum cases. Where a minor child was treated as a dependant on the initial asylum claim but turns 18 before further submissions are submitted, they will need to make a first protection claim or apply for leave to remain in their own right. See the Dependants and former dependants: instruction for further guidance."

22. The second aspect of the misapprehension emerged when the Court asked for a copy of the previous version of that document. Version 8.0 was then produced by the respondent dated 30 March 2015. It contained a provision in identical terms to 3.8 in version 9.0 quoted above, save that it was numbered 3.7.

23. What thus emerged at the hearing is that, whether on 8 February 2016 (when the appellant's mother was granted discretionary leave to remain without any regard for the position of the appellant) or on 1 March 2016 (when the appellant was informed he would have to make his own application), there were always two relevant APIs, Further Submissions and Dependants and Former Dependants. The former expressly refers to the latter. Critically, the latter says expressly in paragraph 1.1 that it must be read in conjunction with the former. So they were clearly intended to be read together. The penultimate sentence of 3.7 (now 3.8) in the former: "Where a minor child was treated as a dependant on the initial asylum claim but turns 18 before further submissions are submitted, they will need to make a first protection claim or apply for leave to remain in their own right", makes it clear beyond argument that the construction placed on the second paragraph of the latter by the First-tier judge was correct. There is no doubt or ambiguity. If, at the time that the further submissions are submitted, the former dependant has turned 18 (as was the case here since the appellant was 18 when his mother's further submissions were submitted on 28 August 2008), the former dependant must make his or her own application in their own right.

24. It is unfortunate that the respondent did not produce version 8.0 of the Further Submissions API until half-way through the appeal hearing or clarify at an earlier stage that there were two APIs to be read together. I suspect that if this information had been available at the permission to appeal stage, permission would not have been granted. As it is the first ground of appeal is without merit and must be dismissed.

Ground 2

25. Mr Gilbert submitted that the First-tier judge had erred in saying delay was not determinative. It could be, which would depend upon the circumstances. Cases need to be considered on a case by case basis. There had been no explanation for the delay which was egregious. If, as now appeared to be the case, the appellant was not entitled to be treated as a dependant, he had been entitled to notice from the Home Office that he should apply in his own right. He was left ignorant of his immigration status, in effect he was treated as having absconded. His lack of education and work was a matter for which the respondent was partly responsible through her delay.

26. Mr Gilbert accepted that the appellant's immigration status was precarious throughout, but submitted that the weight to be attached to that factor would change. He relied on [52] of *Agyarko v SSHD* [2017] UKSC 10; [2017] 1 WLR 823 where Lord Reed said:

> "It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish - or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase - if there is a protracted delay in the enforcement of immigration control."

He submitted that the conspicuous lack of enforcement here was such that the weight to be given to the appellant's private life was greater and outweighed the diminished public interest in the appellant's removal.

27. I agree with Mr Zane Malik for the respondent that there was no error of law here by the First-tier judge. She was quite correct that delay in itself is not a determinative factor in favour of an appellant and she clearly took account of *Agyarko*. She considered the question of whether the delay had caused any detriment to the appellant, making a finding at [50] that it had not, which is not open to challenge on appeal. Given the other findings of fact she made, which again are not open to challenge on appeal, this was always a weak case under Article 8 and the delay did not tilt the balance in the appellant's favour. The judge carried out a careful balancing exercise and the fact that the appellant may disagree with it is not the basis for a successful appeal. This ground of appeal is also dismissed.

Conclusion

28. In my judgment, this appeal must be dismissed.

Lord Justice Popplewell

29. I agree.

Lord Justice Dingemans

30. I also agree.