Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11666/2014

THE IMMIGRATION ACTS

Heard at Taylor House	**Decision & Reasons Promulgated**
On 20 October 2015	**On 12 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

MR. SAMSON OJIYOVWI EMEKARHE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. P. Turner of Counsel
For the Respondent: Ms. E. Savage, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Ruth promulgated on 10 April 2015 in which he dismissed the Appellant's appeal against the Secretary of State's decision to refuse to grant him leave to remain on the grounds of private life under Article 8 ECHR.

2. Permission to appeal was granted on the ground that it was arguable that the judge erred in the manner in which he directed himself in relation to section 117B of the 2002 Act and EB (Kosovo) v SSHD [2008] UKHL 41.

Although there were other grounds put forward by the Appellant, his representative acknowledged that this was the only ground on which permission to appeal had been granted, and was the only ground on which he sought to rely.

Submissions

3. Mr. Turner submitted that there was nothing in section 117B which indicated that, where the fault for the delay lay with the Respondent, EB (Kosovo) was "trumped". He submitted that the judge found that the Appellant was "about to get" to a period of 20 years residence. I was referred to Chapter 53 of the Respondent's guidance, which dealt with the discretion under paragraph 353B. It was accepted that this discretion was not justiciable in the Tribunal, but that the exercise of discretion lay with the Respondent. Chapter 53 was a last chance for those who could not succeed in an application. The guidance acknowledged that six years delay on the part of the Respondent could lead to a grant of leave to remain. This was a highly relevant factor. It was not possible to infer that section 117B "trumped" EB (Kosovo), or made EB (Kosovo) bad law. I was referred to the case of Jaku [2014] EWHC 605 (Admin) for a discussion of six years delay.

4. It was submitted by Mr. Turner that the judge had found that EB (Kosovo) was not good law [72] and [73]. Section 117B did not distinguish between the two types of delay, that which was the fault of the Respondent and that which was the fault of the Appellant. EB (Kosovo) provides that where the Respondent has delayed, this of itself can lead to a grant of leave. The Respondent was wrong in the reasons for refusal letter where she stated that the delay was four years [60].

5. He submitted that the judge had erred in failing to distinguish between the periods of delay. Nothing in section 117B said that administrative errors and mishandling of an application should be overlooked. On the judge's reading of section 117B, if the Respondent lost an application, or failed to deal with it, this would be irrelevant. Had the judge not erred in failing to distinguish between the types of delay, it was not possible to say that the decision would be the same. The Appellant had been in the United Kingdom for 19 years.

6. For the Respondent, Ms Savage relied on the Rule 24 response dated 18 August 2014. There was no error of law but, even if there was, it was not material. I was referred to the case of Dube (ss. 117A-117D) [2015] UKUT 90. In paragraph [74] of the decision, where the judge found that the law had "markedly changed", by reference to Dube, this was not an error. The law had altered since 117B came into force and there was now a statutory duty on the Tribunal. I was referred to paragraph 1(a) of the headnote to Dube. The Upper Tribunal had considered the issue of delay and EB (Kosovo) in Dube. The majority of the delay in Dube had been caused by the appellant, which was the same here. The Appellant had been here for 12 years unlawfully prior to the application being made.

7. It was submitted that the judge had not found that section 117B "trumped" EB (Kosovo). He had given limited weight to the Appellant's private life as required under section 117B [74]. In [76] he had found that private life could not weigh heavily. He did not say that either the delay, or the Appellant's private life could not be considered, but the weight to be given to his private life was limited. The Appellant's circumstances were considered in the light of section 117B.

8. Even if there was an error of law, it was not material. I was referred to the refusal of permission to appeal from First-tier Tribunal Judge Kelly. This states at paragraph 2:

"Much of the argument in this application is predicated upon the premise that the respondent's delay in removing the appellant was the cause of him establishing a private and family life in the United Kingdom [see paragraph 18 of the application] whereas the true position is that it was the result of the appellant's failure to return to Nigeria voluntarily once he had exhausted his appeal rights against refusal to grant him asylum in November 1996."

In EB (Kosovo) there had been an immediate delay of some four and a half years. Here the circumstances were materially different. The Appellant had been in the United Kingdom unlawfully for 12 years. He put forward an asylum claim which was found to lack credibility, and which he is not now pursuing. He was well aware that he was living here illegally. His wife had precarious leave when he met her, and is now here unlawfully. Irrespective of the delay, there was no expectation that leave to remain would be granted. The judge was correct to find that private life could not weigh heavily against the public interest [77].

9. The policy document provided was of little relevance. The judge could not be criticised for failing to consider a policy document which was not before him. The case of Jaku pre-dated the Immigration Act 2014.

10. In response, Mr. Turner referred to paragraphs [33] and [34] of Dube. EB (Kosovo) was still relevant in the context of section 117B. At [25] Dube found that section 117B was not a "radical departure". The facts were different in Dube. In summary, the judge had failed to have regard to the difference in the delay caused by the Appellant and by the Respondent. Where delay was exceptional, as the Respondent acknowledged six years was, delay did carry weight.

Error of law decision

11. At the hearing I reserved my decision which I now give with reasons.

12. Paragraphs [72] to [76] of the decision state as follows:

"72. There is certainly the question of the very significant delay by the respondent in reaching a decision on the application made in 2008. Counsel for the appellant is quite right to rely upon the case of *EB*

(Kosovo) which establishes that delay can lead to a strengthening of private and family life connections to the UK and lessen the public interest in removal.

73. Before the passing of the 2014 Immigration Act it may very well have been that this long delay by the respondent, including twice withdrawing the decision, would have represented a very significant element in this case and would have led to a reduction in the public interest in removal of this appellant and particularly an increase in the weight to be given to his established private life in the six years of delay by the respondent.

74. In my view, however, the situation has markedly changed as a result of the passing of the 2014 Immigration Act. The interest of the respondent in immigration control is now set out clearly in the statute and, of much more significance, so is the requirement that I give limited weight to a private life established when a person is in the UK without leave.

75. Since there is no question of an interference with established family life, I am unable to give significant weight to the private life the appellant developed during the period of six years when the respondent delayed making a decision in his case. That is because of the statutory requirements set out above and is not a matter of discretion.

76. In those circumstances, despite the fact that the appellant's private life and that of his family members came about and was deepened and strengthened during the six years after his application in 2008 and before the decision in late 2014, it cannot weigh in the balance heavily against the interests of the respondent."

13. I find that the judge has not said that EB (Kosovo) is "bad law". In paragraph [72] he states "Counsel for the Appellant is quite right to rely upon the case of *EB (Kosovo)*". The judge acknowledges that delay on the part of the Respondent "can" lead to a strengthening of private life connections to the UK.

14. The judge then goes on to state that before the passing of the 2014 Act, this "long delay" would have represented a "very" significant element in this case and would have led to a reduction in the public interest in removal.

15. The judge then proceeds rightly to consider section 117B. He correctly states that "the interest of the respondent in immigration control is now clearly set out in statute, and of much more significance, so is the requirement that I give limited weight to a private life established when a person is in the UK without leave" [74].

16. The judge correctly states what he is required to do under section 117B. In [75] he states that he is unable to give "significant" weight to the private life the Appellant has developed in the six year period of delay. He does not say that he attaches no weight to it, but that he cannot give

"significant" weight to it, which is right. Section 117B(iv) and (v) provide as follows:

"(4) Little weight should be given to—
(a) a private life, or
(b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious."

17. In [77] he acknowledges that the Appellant's private life was deepened and strengthened during the six years, but states that this cannot weigh in the balance "heavily" against the interests of the Respondent. He does not say that it cannot be given any weight at all, but that it cannot weigh "heavily". The judge then goes on to consider the interests of the Respondent [77], finding them to be "particularly strong" for reasons which he sets out. These include the asylum claim which was not found to be credible, and which grounds were not pursued before the judge, and importantly, the fact that the Appellant "must have known that he was living in the UK illegally and had no right to be here." These are relevant considerations. In paragraph [80] he finds that the "interests of the Respondent in this case are strong and those of the Appellant limited". He does not say that there are none, but that they are limited.

18. I have considered carefully the case of Dube. It is relevant to set out paragraph 34 in full. This states:

> "We need not decide whether he is right about the ratio of EB (Kosovo) being unaffected by ss. 117A-117D because even if delay remains as relevant to an Article 8 proportionality assessment in the three ways identified by Lord Bingham, it can only do so if the judge's assessment also takes into account s.117B considerations. That is so for two reasons, one being the basic verity that if EB (Kosovo) stands for any proposition of law inconsistent with statute, the latter must prevail; the other being that Lord Bingham clearly saw the proportionality assessment as one that had to be made in light of any changes in government policy: "….the facts, and with them government policy, may change over a period, as they did here; and the duty of the decision-maker is to have regard to the facts, and any policy in force, when the decision is made" [13]. It follows that if the government has enacted statutory provisions governing Article 8 proportionality assessment, that change must be taken into account. Renvoi to EB (Kosovo) is not enough."

19. It is clear that the judge was aware of the difference between the delay caused by the Respondent and that by the Appellant. He refers specifically in paragraphs [72] to [76] to the six year period. He does not bunch this all together with the 12 years delay caused by the Appellant. It

is clear that he is considering the extent to which weight can be given to the six year period in paragraphs [72] to [77]. He correctly applies the provisions of section 117B.

20. I find that the Appellant had already been in the UK unlawfully for 12 years when he made his application, over which the Respondent delayed for six years. The majority of the time that the Appellant has been in the United Kingdom was when he had no leave to be here and had made no application for leave to remain. His asylum appeal had been dismissed. He knew he had no right to be here. His wife has no right to be here, and his children have never had leave to be here. They are all citizens of Nigeria. The judge took all of these circumstances of the Appellant and his family into account when coming to his decision. He gave reasons for his findings. He took into account the period of delay as a result of the Respondent's inaction on the Appellant's application, but quite correctly found that the weight that could be attached to this was limited.

21. It is now submitted that a period of delay of six years is considered "exceptional" by the Respondent by reference to her policy. There is no evidence that this was before the judge, and Mr. Turner did not contend that it was, and he represented the Appellant in the First-tier Tribunal. The judge cannot be criticised for failing to take into account a policy which was not before him.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and I do not set aside the decision.

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed Date 11 November 2015

Deputy Upper Tribunal Judge Chamberlain