Delays In Receiving Decisions From The Home Office Webinar

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Presenters

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(A1) Introduction

Recent media coverage on delays in decision making by the Home Office in both asylum and immigration matters and the hearing of appeals speaks for itself:

- “Number of asylum seekers waiting more than six months for decision rises more than 70% in a year.”
- “Warning of huge backlog of immigration cases in UK”
- “Free Movement: Immigration appeal waiting times rise 13%, now take a year on average.”

(A2) Backlog in Decision Making

The backlog of unresolved immigration and asylum cases before the Home Office is notoriously large; for example, in late 2013 the Commons' Home Affairs Select Committee estimated that it had reached 500,000.

(A3) Complaints to Ombudsman

Poor handling of immigration-related complaints is a key reason why the Parliamentary and Health Service Ombudsman upholds almost **seven in ten complaints** about the Home Office, according to a **report** published on 10th November 2015.

(A4) Delays in Hearing Appeals

Once a decision is made, if refused, means further delays. Since the Immigration Act 2014 was passed, less than half as many people have a right to challenge Home Office decisions on appeal.

Despite this near 60% reduction in the number of appeals being heard, the average appeal is now taking almost 12 months to be resolved, up 13% on the same period last year.

(B) Features Common to Both Asylum & Immigration Cases

(B1) <u>When Delay Cannot be Used - Delay per se</u>

A delay in a decision, without more, is unlikely to form the basis for a successful challenge.

- **MB (Huang – proportionality – Bulletins) Croatia [2005] UKIAT 00092:** *"28….Delay by itself would be not so much rarely determinative as rarely ever significant."*
- In **Alihajdaraj v SSHD** [2004] EWCA Civ 1084: there was no case in which delay of itself had been determinative of any proportionality issue.
- **EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41 (25 June 2008):** ***"13….*** *As Mr Sales QC for the respondent pointed out, there is* ***no specified period within which, or at which, an immigration decision must be made;***
- The argument for the appellant on the **<u>Shala</u>** point was that he would have been granted asylum if his claim had been dealt with in a reasonable time; the Court of Appeal rejected that submission.

(B2) <u>Caveat</u>

- **FH & Ors, R (on the application of) v Secretary of State for the Home Department [2007] EWHC 1571 (Admin):**

"29……<u>…</u> steps should be taken to try to ensure that so far as possible claimants do not suffer because of that delay. They should be informed when receipt of an application is acknowledged, as it must be, that there will likely to be a wait which could be for x months (or years)…

Measures should be taken to minimise any prejudice to applicants occasioned by the delay. Thus those who were being given support should continue to receive it, those who were able to work should continue to be permitted to do so and there should be favourable consideration of desires to travel outside the United Kingdom for short periods.

(cont.)

"30. It follows from this judgment that claims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable. It is only if the delay is so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of the policy or if the claimant is suffering some particular detriment which the Home Office has failed to alleviate that a claim might be entertained by the court."

- **Anufrijeva [2004] QB 1124:**

"46. …. the approach of both the Strasbourg court and the commission has been not to find an infringement of article 8 ***unless substantial prejudice has been caused to the applicant.***"

(B3) <u>How long is too long (or long enough)</u>?

- In practical terms, the question will be is the delay unreasonable? It all depends on the facts:

  - **MM (Art 8- Shala - Delay) Serbia and Montenegro [2004] UKIAT 00016:**

"23. ….for delay to become unreasonable it would normally have to be quite excessive… we do not think it helpful to quantify periods of time as excessive or not excessive; ….. we do not think that periods of delay even several years could be considered excessive, ***unless accompanied by other special circumstances which disclose particular prejudice to a claimant…..."***

- A couple of examples:
  - **EB (Kosovo):** *"[1]…. It is not suggested that* ***four and a half years*** *is a reasonable time for the respondent and his officials to take to resolve an application for asylum."*

  - **JEUNESSE v. THE NETHERLANDS - 12738/10 - Grand Chamber Judgment [2014] ECHR 1036 (03 October 2014):**

"116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for ***more than sixteen years*** *and that she has no criminal record….."*

(B4) <u>Ask for an Explanation</u>

- Beyond 6 months you would be within your rights to contact the Home Office seeking an explanation, a progress report and a time frame.

- However the SSHD can dilute a future argument: **R (on the application of Frank Uchenna Obienna) v SSHD [2008] EWHC 1476 (Admin):**

"25. Applying this approach it is clear that ***the letter did not make a representation that the Home Office would deal with the application within a finite period, such as to constitute conspicuous unfairness and an abuse of power if it did not.*** *The use of the word* ***'aim'*** *(in the context of 3 weeks) and* ***'normally'*** *(in the context of 13 weeks at the most)* ***is the language of expectation and not of representation****."*

(B5) <u>No Explanation</u>

- **R (on the application of Frank Uchenna Obienna) v SSHD:**

  "19.The steps taken to deal with the applications since May 2005 have been described by Mr Romano in terms which could have been very much fuller." "35. … ***The failure by Government to acknowledge letters which ask relevant questions about matters of importance to the writer is a serious failure in public administration."***

(B6) <u>Unsatisfactory Explanation</u>

- **<u>EB (Kosovo)</u>:** *"27. … the balance in the Appellant's favour is significantly strengthened by the fact that the explanation for the delay is so unsatisfactory…."*

(C) Challenging Delay

(C1) <u>Abuse of Power</u>

- The ***<u>starting point</u>*** for a challenge against a decision on delay would typically be brought under the overriding principles of "Abuse of Power" and can be formulated in one of two ways:

  (i) Legitimate expectation - what was said.

  (ii) Conspicuous Unfairness - what was done or not done.

(C2) <u>Practical Application</u>

- **R (on the application of Frank Uchenna Obienna) v SSHD:** *"25. ….. the letter did not make a representation that* ***the Home Office would deal with the application within a finite period, such as to constitute conspicuous unfairness and an abuse of power if it did not.*** *The use of the word 'aim' (in the context of 3 weeks) and 'normally' (in the context of 13 weeks at the most) is the language of expectation and not of representation. When read in its proper context, there is nothing in the letter which would render it 'conspicuously unfair' to the Claimant if the claim were dealt with in (say) 14 weeks or any other longer finite period."*

(D) Preparing a Challenge

(D1) Pre-Action

- Early stages (above) will be crucial, set out the delay in a detailed chronology, clear representations articulating the **impact** of the delay.

(D2) Specific Circumstances

- Be creative! The more you can factor the better.
  - **Akaeke v SSHD [2005] EWCA Civ 947, [2005] INLR 575:** *"23. If there are factors which, in the special circumstances of a particular case, reduce the significance of public policy considerations underlying immigration control in general, there is nothing in Huang, or in Article 8 itself, which requires them to be excluded."*

(D3) Significance of the Delay – Question of Degree & Context

- The weight given to the delay is a matter for the Tribunal:

  - **MM (Art 8- Shala - Delay) Serbia and Montenegro [2004] UKIAT 00016:** *"22. ….. Strictly speaking, it is not a factor to be weighed in favour of the individual whose Art 8 rights are asserted;* ***it is rather a factor varying the weight to be placed on the interests of the state in the maintenance of effective immigration control****: see Beqiri [2002] UKIAT 00725.*
  - **Akaeke:** *"[25] Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal,"* per Carnwath LJ
  - **Alihajdaraj v SSHD [2004] EWCA Civ 1084**: Applying Huang, it is necessary to look to any **consequences** which any delay might have had.

(E) Asylum

The Legal Framework – Immigration Rules

(E1) Processing of Asylum Claim

- *"333A. The Secretary of State **shall ensure** that a decision is taken by him on each **application for asylum as soon as possible**, without prejudice to an adequate and complete examination.*

  *Where a decision on an application for asylum **cannot be taken within six months** of the date it was recorded, the Secretary of State **shall** either:*

  a. inform the applicant of the delay; or

  b. if the applicant has made a specific request for it, provide information on the time frame within which the decision on his application is to be expected. The provision of such information shall not oblige the Secretary of State to take a decision within the stipulated time frame."

The Legal Framework – Immigration Rules (cont.)

(E2) EU Directive

- **The Asylum Procedures Directive (DIRECTIVE 2013/32/EU) states at Article 31(6):**

*"Member States shall ensure that, where a decision cannot be taken **within six months**, the applicant concerned shall:*

(a) be informed of the delay; and

(b) receive, upon his or her request, information on the reasons for the delay and the time-frame within which the decision on his or her application is to be expected."

(E3) <u>Case Law - General Principle</u>

Typically, this will arise in the kind of case where the existence of ***"special circumstances which disclose particular prejudice to a claimant"***: for example:

- being **<u>denied the lawful entitlement</u>** to international protection, because of an unreasonable delay in making a decision in an asylum claim;
- denied the benefit of a policy favourable to the client at a given time because of an unreasonable delay;
- a delay in obtaining status papers after a grant or successful appeal.

(F) Immigration

What bearing does delay by the Home Office have on a non-national's rights under article 8?

(F1) <u>Case Law - General Principle - Article 8 Assessment</u>

- In **EB (Kosovo)** the House of Lords recognised that delay in the SSHD's decision making process may have an impact in three ways**:**
  - **First,** during the period of delay the person concerned may put down deeper roots **[§14]**
  - **Secondly,** a relationship entered into when the person has no leave may be precarious/tentative when started but as time passes with no action being taken an expectation may have grown that no action will be taken **[§15]**
  - **Thirdly,** it may reduce the weight that can be accorded to firm and fair immigration control **[§16]**

(G) Practical Application

(G1) <u>Maintenance of Effective Immigration Control</u>

- **Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 11:**

*"52. 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."*

(G2) Precariousness

- **Agyarko:***"53…. One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate."*

- **EB (Kosovo):**

"14….. the applicant may ***during the period of any delay develop closer personal and social ties and establish deeper roots in the community…. The longer the period of the delay, the likelier this is to be true****… [and] the applicant's claim under article 8 will necessarily be strengthened.* ***It is unnecessary to elaborate this point since the respondent accepts it.***

(G3) <u>Jeunesse - "Tolerated Presence"</u>

- **JEUNESSE:** *"116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities."*

(H) Practical Examples

(H1) <u>Delay + Identifiable Disadvantage</u>

- If you can point to the loss of an advantage due to the delay that will strengthen your argument considerably.
- **MB (Huang – proportionality – Bulletins) Croatia [2005] UKIAT 00092:** *"28 ….. Delay in decision-making may cause an individual to lose specific advantages or opportunities which timeous decision-making would have conferred; <u>Shala</u> is an example ….."*
- **EB (Kosovo):**
- **Jawad v Secretary of State for the Home Department [2010] EWHC 1800 (Admin) (16 July 2010):**
- **<u>Mthokozisi v SSHD</u> [2004] EWHC 2964 (Admin):**

- **Shala v SSHD** [2003] EWCA Civ 233: The decision to remove Mr Shala constituted a disproportionate and unjustified interference with his right to respect for his family life under Article 8(2) of ECHR because:

  (i) The Appellant was an ethnic Albanian from Kosovo who arrived in the United Kingdom in June 1997. It was the Secretary of State's policy up until mid 1999 to grant refugee status, or at the least exceptional leave to remain to ethnic Albanians from Kosovo.

  (ii) He was not interviewed until July 2001. By then he had been cohabiting since December 1998 with the woman he subsequently married in October 2001. She had two sons for whom he had become a father figure. **He had plainly established a family life in the United Kingdom**.

(H2) Delay + Identifiable Advantage

- **MB (Huang – proportionality – Bulletins) Croatia [2005] UKIAT 00092:** *"28 ….. The effect of delay may also be to create circumstances eg marriage or parenthood, which strengthen an individual's claim to a family life or to a private life through work, friendships, community ties, the need for medical treatment and a host of other considerations."*

- A further point of potential importance when addressing the question of the weight to be attached to the issue of the maintenance of effective immigration control is the principle in **Chikwamba v Secretary of State for the Home Department [2008] UKHL 40**.

(J) Children

(J1) "<u>Qualifying Child"</u>

- An important sub category is the "qualifying child".

(J2) <u>Section 117D – "Qualifying Child"</u>

- The definition of "qualifying child" is found in section 117D(1):

  "qualifying child" means a person who is under the age of 18 and who-

  (a) is a British citizen, or

  (b) has lived in the United Kingdom for a continuous period of seven years or more:

(J3) <u>Exceptions to certain eligibility requirements for LTR as Partner or Parent</u>

- "EX.1. This paragraph applies if

  (a)

  (i) the applicant has a genuine and subsisting parental relationship with a child who-

  (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

  (bb) is in the UK;

  (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and

  (ii) taking into account their best interests as a primary consideration, it would **not be reasonable to expect the child to leave the UK;"**

(J4) <u>Immigration Rules</u>

- Immigration Rules sets out requirements which, if satisfied, may lead to the applicant (child) being granted leave to remain. The relevant provision is as follows:

"276ADE(1)(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK;

(J5) "<u>Genuine and Subsisting Parental Relationship with a Qualifying Child</u>"

- Section 117B(6) of the NIA Act 2002, applies where "a court or tribunal" is required to determine whether a decision made under the Immigration Acts breaches Art 8 of the ECHR (see s.117A(1)):

"s117B(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where —

the person has a genuine and subsisting parental relationship with a qualifying child, and

it would not be reasonable to expect the child to leave the United Kingdom."

Case Law

(J6) Genuine and Subsisting Parental Relationship

- **R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship") IJR [2016] UKUT 31 (IAC):**

  "1. It is not necessary for an individual to have "parental responsibility" in law for there to exist a parental relationship.

  2. Whether ***a person who is not a biological parent is in a "parental relationship" with a*** *[qualifying child]…..* ***depends on the individual circumstances and whether the role that individual plays establishes he or she has "stepped into the shoes" of a parent.***

- **MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705 (07 July 2016):**

"17. Subsection (6) falls into a different category again. ***It does not simply identify factors which bear upon the public interest question. It resolves that question in the context of article 8 applications which satisfy the conditions in paragraphs (a) and (b). It does so by stipulating that once those conditions are satisfied, the public interest will not require the applicant's removal****.*

19. In my judgment, therefore, the only questions which courts and tribunals need to ask when applying section 117B(6) are the following:

(1) Is the applicant liable to deportation? If so, section 117B is inapplicable and instead the relevant code will usually be found in section 117C.

(2) Does the applicant have a genuine and subsisting parental relationship with the child?

(3) Is the child a qualifying child as defined in section 117D?

(4) Is it unreasonable to expect the child to leave the United Kingdom?

20. If the answer to the first question is no, and to the other three questions is yes, the conclusion must be that article 8 is infringed.

(K) Summary of Principles

a) Delay in dealing with an application may strengthening the ability to demonstrate family or private [*EB (Kosovo)* at §14] or reduce the weight to be given to the enforcement of immigration control [*Agyarko* at §52]. It is a question of fact.

b) Immigration policy will usually suffice without more to meet the requirements of article 8(2) [*Razgar* at §19]. Cases where the demands of immigration policy are not conclusive will be exceptional [*Razgar* at §20], *Huang* at §20, *MA (Pakistan) & Ors* at §19].

c) There is a distinction between persons who have some potential right under immigration policy to be in this country (for instance, under marriage policy, as in *Shala* and *Akaeke,* or *MA (Pakistan) & Ors*); and persons who have no such right.

d) In the former case, where it is sought to apply burdensome procedural rules to the consideration of the applicant's case, it may be inequitable in extreme cases [*Chikwamba* at §44], or of the system having broken down [*Akaeke*], to enforce those procedural rules [*Shala*; *Akaeke*].

e) Considerable administrative delay in the determination of an application, if proven to have brought about significant consequences beyond the mere passage of time, are factors that a decision-maker must consider under article 8(2) [*Strbac* at §25].

f) A delay that has caused an applicant to have no potential rights under immigration law to miss the benefit of a hypothetical hearing of an asylum claim that would have resulted in his obtaining ELR, will not in itself affect the determination of a subsequent article 8 claim [*Strbac*, at §32].

g) Reliance upon the breakdown of immigration control or the failure to apply the system properly are likely only to be relevant if that system in question is being sought to be enforced against the applicant [*Akaeke*].

h) Decisions on proportionality made by tribunals should not, in the absence of material errors of principle, be interfered with by an appellate court [*Akaeke*].

(L) Final Observations

(L1) Human Rights Appeals

- The vast majority of what has been said above, applies in equal measure to arguments that would be placed before the FTT on a human rights appeal. See **Huang v Secretary of State for the Home Department [2007] UKHL 11** for this proposition**.**

- **Agyarko:**

"56. …. ***Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination.*** *…."*

(L2) <u>Some Possible Counter Arguments</u>

- The SSHD cannot displace her duty to determine claims with sufficient expedition:

  - By reference to staffing or financial constraints: ***R v Secretary of State for Social Services, Ex p Child Poverty Action Group*** **[1990] 2 QB 540, 554C—555D,** or
  - By blaming insufficient resources: **FH v SSHD [2007] EWHC 1571 (Admin)** at [§11].
  - **R (on the application of Frank Uchenna Obienna) v SSHD [2008] EWHC 1476 (Admin):**

  "23…. it is not for the Court to condemn a period as unreasonable ***if it is the product of a policy which is rational."***

(M) Conclusion

(M1) *<u>Context is everything</u>*

Remembering that you are essentially arguing that the decision is disproportionate; we end where we started:

> *"28….. of course all will turn on the facts of the individual case".*

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