

Immigration Team Legal Bulletin

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Article 8

The House of Lords have recently provided definitive guidance in respect of Article 8, the right to respect for family life, and the following issues:

- **Beoku-Betts** – the SSHD and AIT should take into account the impact on those who share family life with the appellant;
- **Chikwamba** – the fact that the appellant could return to her home country to make an application for entry clearance should not defeat an Article 8 claim to remain in the UK;
- **EB (Kosovo)** – delay by the SSHD in considering an appellant's case will, *inter alia*, reduce the weight to be attached to the requirements of firm and fair immigration control when assessing proportionality.

Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39 (25 June 2008) [judgment](#)

In this case the issue facing their Lordships was summarised by Lord Brown as follows; [5]:

“In determining...[whether removal of] the appellant would interfere disproportionately with his article 8 right to respect for his family life, should the immigration appellate authorities take account of the impact of his proposed removal upon all those sharing family life with him or only its impact upon him personally...?”

The House unanimously agreed that the appellate authorities should take account of the impact on the family unit as a whole, such that each affected family member was to be regarded as a ‘victim’ for the purposes of the appeal. In so doing, the House of Lords overruled the ‘narrow’ approach adopted by the IAT and Court of Appeal below. As Baroness Hale observed; [4]:

“To insist that an appeal to the Asylum and Immigration Tribunal consider only the effect upon other family members as it affects the appellant...is not only artificial and impracticable. It also risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed.”

In this case the appellant's family in the UK consisted of his mother, who relied upon the Appellant for emotional support, two sisters and a

range of cousins and uncles; [9 & 12]. The adjudicator expressed himself satisfied that; [12]

“the appellant's family is close-knit and interacts on a very regular basis...the appellant has a strong relationship with his sisters” and “currently resides with his mother and younger sister...travelling home most weekends during university term time.” As for the suggestion that the “appellant's mother relied upon him for emotional support”, this he found “entirely natural in the circumstances of the family's departure from Sierra Leone and the death of [her husband] in 1998”.

Comment

It is noteworthy that the Court of Appeal had recently propounded a similar principle in **AB (Jamaica) v Secretary of State for the Home Department [2007] EWCA Civ 1302 [20]**, where it was stated that the (British citizen) husband of an overstayer was *in substance* “a party to the proceedings...From Strasbourg's point of view, his Convention rights were as fully engaged as hers.” The judgment from the House of Lords in **Beoku-Betts** makes it clear that the AIT must have regard to the right to respect for family life of an appellant's family members; failure to do so would amount to an error of law.

It must be borne in mind that the AIT will require more than a bare assertion from the Appellant that his family members will suffer a breach of their Article 8 rights if he is to be removed. At the very least, statements will be required from affected family members, if not their attendance at the full hearing; see [42]. The statement should set out in detail the family life that exists between the appellant and the family member and the impact that removal will have on that family life.

Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 [judgment](#)

The issue facing the House of Lords was whether or not an appeal based on an appellant's assertion that refusal of leave to remain would amount to a disproportionate interference with her family life should be dismissed on the basis that it would be ‘proportionate and more appropriate’ for the appellant to leave the UK and apply for entry clearance from abroad. The House of Lords rejected the suggested ‘need’ for the appellant to do so:

“It is, or ought to be, accepted that the appellant's husband cannot be expected to return to Zimbabwe, that the appellant cannot be expected to leave her child behind if she is returned to Zimbabwe and that if the appellant were to be returned to Zimbabwe she

would have every prospect of succeeding in an application made there for permission to re-enter and remain in this country with her husband. So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that government policy requires that she return and make her application from Zimbabwe. This is elevating policy to dogma. Kafka would have enjoyed it. I would allow this appeal."

Baroness Hale noted the judgment in **Beoku-Betts** and stated that the proposed temporary separation would be disproportionate with regards to the appellant's young daughter (and possibly the husband); [8]:

"Even if it would not be disproportionate to expect a husband to endure a few months' separation from his wife, it must be disproportionate to expect a four year old girl, who was born and has lived all her life here, either to be separated from her mother for some months or to travel with her mother to endure the "harsh and unpalatable" conditions in Zimbabwe simply in order to enforce the entry clearance procedures."

As for future cases, the following was noted by Lord Brown; [44]:

"Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad. Besides the considerations already mentioned, it should be borne in mind that the 1999 Act introduced one-stop appeals"

Comment

The Secretary of State's API on Article 8 (under the heading Consideration of Article 8 Family Life Claim) will need to be re-written as a result of this excellent judgment. No longer will the SSHD or AIT be able to assert that the appellant should not be allowed to jump the 'entry clearance queue', except in fairly rare circumstances; see also [42]. In cases where appellants have fallen foul of such a rule, practitioners should consider carefully whether an out of time application for reconsideration should be submitted.

EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41 judgment

Lord Bingham stated that delay may be relevant to Article 8 in the following way; [16]:

"...in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes...To the extent that this is shown to be so, it may have a bearing on the

proportionality of removal, or of requiring an applicant to apply from out of country"

Significantly, Lord Bingham also suggested that delay will ameliorate the fact that an appellant and his partner entered into a relationship when the appellant or both individuals were aware of the appellant's precarious immigration position; [15]:

"A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so."

In this case there had been a delay of over four and a half years. Lord Hope held that with regards to Article 8; [27].

"...the balance in the appellant's favour is significantly strengthened by the fact that the explanation for the delay is so unsatisfactory."

Comment

This case has put an end to the effect of **HB (Ethiopia) & Ors v Secretary of State for the Home Department [2006] EWCA Civ 1713**, in which delay had been described by the Court of Appeal as a mere relevant factor under Article 8(2), which would only influence the outcome of the decision if delay had had 'very substantial effects'. This is no longer required.

Conclusion

- (1) These cases each return appellants to the position that we were arguing for pre-HRA incorporation and thereafter. They significantly prove our instincts on Article 8 correct. Some IJs may find it difficult to properly apply these principles properly given the cynicism that spread during and remains since the 'exceptionality' era. Practitioners should have a detailed knowledge of these cases and be prepared to argue the facts in light of these principles.
- (2) In addition inevitably reconsideration grounds should be easy to spot in determinations recently promulgated.
- (3) Practitioners should revisit old files and consider whether the rights of other family members, the need for prior entry clearance and delay (significantly) featured in a case founded on an appellant's right to family life. If so, fresh human rights claims should be considered and if appropriate submitted forthwith.

Melanie Plimmer and Vijay Jagadesham
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