Neutral Citation No: [2024] NIKB 72 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **COL12589** *ICOS No:* **22/095867** *Delivered:* **13/09/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY JR247
TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

_____

Mr Hugh Southey KC with Mr Robert McTernaghan (instructed by Phoenix Law Solicitors) for the Applicant
Ms Neasa Murnaghan KC with Ms Marie-Claire McDermott (instructed by the Crown Solicitor's Office) for the Respondent

_____

COLTON J

Introduction

[1] The applicant was born in Lagos, Nigeria on 20 February 1975. She fled Nigeria to avoid female genital mutilation.

[2] In November 2019 she entered the United Kingdom via Manchester to London where she became a victim of sexual exploitation/forced sex work.

[3] On 27 February 2020 she escaped the house in which she was held and travelled to Belfast. She claimed asylum in this jurisdiction on 5 March 2020. Ultimately, she was granted refugee status on 20 January 2023.

[4] The applicant had issued judicial review proceedings on 4 November 2022 challenging the respondent's failure at that time to have made a decision regarding her asylum claim.

[5] Leave was granted by the court on 7 November 2022. The applicant was granted anonymity in these proceedings on the grounds that she was a victim of

modern slavery for the specific purposes of sexual exploitation when she made her asylum claim.

[6] After the decision was made to grant the application on 20 January 2023 the respondent argued that the application for judicial review was now academic and should be dismissed.

[7] The applicant maintained that she was entitled to seek a declaration and damages on the ground that the historic delay violated her rights under Article 8 of the European Convention on Human Rights ("ECHR") as enacted in the Human Rights Act 1998.

[8] As of January 2023 the court had dealt with multiple judicial review applications arising from delays in determining asylum claims. Generally speaking it was the court's practice to grant leave after which a final decision was usually made prior to a full hearing. This resulted in claims being withdrawn.

[9] However, in light of an increasing number of applications and the applicant's insistence on seeking a declaration and damages the court felt it was appropriate to grant leave, notwithstanding that a decision had been made. As there had been no judicial consideration of the issues raised in this application in this jurisdiction the court felt it appropriate to deal with the matter given the number of similar cases which were arising.

Factual background

[10] From the applicant's perspective the important dates are as follows:

5 March 2020	The applicant claims asylum.
29 July 2020	The applicant submits her preliminary information questionnaire (PIQ).
8 October 2020	The respondent sends a letter that states that it had not been possible to determine the claim within 6 months and states there would be further contact within 6 months.
29 October 2020	The applicant has her substantive asylum interview. At that time it was agreed that the case would be referred to the National Referral Mechanism ("NRM") for a determination of whether she was a victim of modern slavery.
13 October 2021	A conclusive grounds decision was made that the applicant was a victim of sexual exploitation/forced sex work.

9 June 2022 The applicant's solicitor writes to the respondent asking for an asylum decision.

6 September 2022 The applicant's solicitor writes to the respondent asking for an asylum decision. At this point concerns were raised about the impact on the mental health of the applicant arising from delay.

5 October 2022 The applicant's solicitor writes to the respondent asking for an asylum decision. The applicant's solicitor sends a letter in accordance with the pre-action protocol (PAP).

11 October 2022 The respondent sends a PAP reply.

4 November 2022 Judicial review proceedings issued.

20 January 2023 Applicant granted refugee status.

27 January 2023 Leave granted to apply for judicial review.

[11] The respondent has filed an affidavit from a Mr Elliott, Senior Case Worker, employed by the respondent which sets out the full history of the application from the respondent's perspective as follows:

Date	**Event**
20/02/1975	Applicant born in Lagos, Nigeria
02/07/2002	Visa application for Family Visit made – Visa Application Form (VAF): 335021. Withdrawn same day
03/07/2002	Visa application for Visit visa made – VAF: 335249. Refused on 13/08/2002
30/05/2019	Visa application for Family Visit made – VAF: 1461453. Granted on 21/06/2019. Expiry date 21/12/2019.
25/07/2019	Flew from Nigeria to UK using visa.
October 2019	Returned to Nigeria.
15/11/2019	Flew from Nigeria to Manchester via Doha, arriving the following day. Travels from Manchester to London by train, is met by a woman she was introduced to through the church in Nigeria, and falls into exploitation by this woman.
27/02/2020	Escapes the house she was held in, is assisted by strangers to Belfast.
March 2020	Beginning of restricted working conditions during the first lockdown.
03/03/2020	Contacted Asylum Intake Unit to make appointment to claim asylum.
05/03/2020	Asylum claim raised. Ownership with SSC Belfast.

	Screening interview completed. All paperwork provided, including Preliminary Information Questionnaire (PIQ) forms. Application Registration Card requested. Reporting conditions set for 3-monthly appointments. Screening indicates National Referral Mechanism (NRM) referral made prior to claim.
10/03/2020	Ownership with Asylum Routing Team Croydon, then Glasgow & Belfast Asylum Intake Team. The Applicant applies for Section 95 support, denied due to funds and property in Nigeria.
11/03/2020	Safeguarding referral sent for pain in leg and back, walking with a limp.
18/03/2020	Access to support granted as the applicant explains no access to Nigerian bank or property in order to sell it.
20/03/2020	Representative added – Phoenix Law Representatives request a 4 week extension for PIQ. Extension granted, blank form provided.
30/03/2020	Applicant moves into asylum support accommodation.
06/05/2020	6 week extension for PIQ agreed, until 17/06/2020.
24/06/2020	Email sent to Phoenix law to chase PIQ return.
26/06/2020	Applicant's representative Phoenix Law requests further extension as cannot see clients. Extension agreed until 29/07/2020.
09/07/2020	Pre-interview triage by Belfast Asylum Team. Rated as Amber as PIQ outstanding.
13/08/2020	Email sent to rep to chase PIQ, requesting return date of 28/08/2020.
23/09/2020	Email from rep stating applicant has not received ARC card. Reply sent with instructions for reporting lost ARC card.
24/09/2020	PIQ, statement and photos uploaded to Home Office storage platform – notes indicate had been received 27/07/2020 but not actioned.
28/09/2020	Email from rep requesting substantive interview date and stating if no response within 7 days then will raise pre-action protocol.
08/10/2020	Asylum delay letter issued to Phoenix Law/applicant's rep.
09/10/2020	Replacement ARC request through correct channel, new card issued.
21/10/2020	Notification sent for substantive interview booked for 29/10/2020 at 9.00am.
29/10/2020	Substantive interview complete. Paper copy of transcript provided to rep. Medical consent form saved to file. The Applicant submitted news articles, added to file. Safeguarding referral sent, medical consent form attached. Post-interview triage sheet sent to team leader, request sent

	to workflow for interview audio to be sent to legal rep. NRM referral discussed and consented to at interview, referral made.
30/10/2020	NRM line opened on SSHD's system.
04/11/2020	NRM Positive Reasonable Grounds decision made.
05/11/2020	Reps requesting interview audio.
11/11/2020	Reps email to state The Applicant has not received ARC card. Reply sent with instruction for reporting lost ARC card.
27/11/2020	Email sent to reps with interview audio attached.
30/11/2020	Replacement ARC requested through correct channel – previous delivery report notes delivery was unsuccessful, address is confirmed as correct, new card issued.
01/12/2020	Case is assigned to Decision Maker at Glasgow Asylum Team.
03/12/2020	Case returned to Performance team, NRM's Conclusive Grounds (CG) decision is outstanding and therefore a barrier to Asylum decision.
01/07/2021	Reps email to state the applicant has still not received ARC. Reply sent to explain first was undelivered due to property being high-risk as an HMO, second request for ARC was not reported as failed, requested reps to again submit through proper channels and address will be changed to reps address for this delivery.
08/07/2021	ARC request received, issued to rep's address.
22/07/2021	Reporting event conducted. Claimant accompanied by support worker from women's aid
02/08/2021	Ownership changes to Asylum National Workflow, National Case Progression Team, due to current triage status (pending NRM CG).
02/09/2021	National Case Progression Team - Barrier Review completed. Email sent to NRM for update. Next review scheduled for 26/11/2021.
18/09/2021	Belfast Case Progression review – NRM outstanding.
13/10/2021	Reported lost ARC received through proper channels, replacement requested. NRM Conclusive Grounds (CG) decision made.
21/10/2021	NRM CG decision letter uploaded to Home Office Storage Platform.
15/12/2021	Mitigating Circumstances interview complete at Reporting Event – minor information collected: medical, address, changes to family in UK.
08/01/2022	Appointment with NRM Hub.
09/03/2022	Mitigating Circumstances interview complete at Reporting Event.
08/06/2022	Mitigating Circumstances interview complete at Reporting

	Event.
10/06/2022	Email from reps requesting timeline for decision and advising they will take legal action if no response within 7 days. Response sent.
09/09/2022	Email from reps requesting decision 'this month' as delay unreasonable and impacting The Applicant's mental health.
11/10/2022	PAP response sent by email from Lit Ops, advising that timescales cannot be provided at present.
07/11/2022	JR petition received.
14/11/2022	Asylum Mersey respond to Lit Ops advising, barring complexities, decision target date is 14/02/2023.
22/11/2022	Mersey Barrier Review complete. Change of circumstances form requested.
03/12/2022	Rep's email with completed change of circumstances form. Mersey order file for scanning.
08/12/2022	File received into Mersey, placed in hold for scanning.
08/01/2023	Mersey complete Triage. Case progressed to Decision Ready, assessed as Green.
15/01/2023	Mersey PAP/JR team email the decision-making unit stating target date is less than a month away so can case be allocated to a decision maker or reallocated to another decision-making unit to meet the target.
16/01/2023	Ownership with Newcastle Asylum Team, allocated to DM. Biometric Enrolment letter sent to the applicant.
17/01/2023	Lit Ops contact Newcastle. Original date proposed was 14/02 but was amended to 14/01. Newcastle took on case expecting deadline of 14/02 but agreed to prioritise case.
20/01/2023	Ownership DM changes, still with Newcastle. Asylum granted by Newcastle Asylum Team, expiring 19/01/2028. Email sent to Newcastle Admin team requesting paperwork issued same day due to JR deadline.
24/01/2023	Biometric Residence Permit requested to Phoenix Law address.

[12] Against this background the applicant's case is that the respondent has a legal duty to avoid delay in making asylum decisions and that such delay has resulted in a breach of her article 8 rights. The legal issues will be discussed further below.

[13] Turning to the facts of this case, the applicant says there has been an initial unexplained delay between 27 July 2020 and 24 September 2020, that is the date between which the PIQ was lodged and actually uploaded to the Home Office's storage platform.

[14] The applicant then complains about the delay between 29 October 2020, when the substantive interview took place and 21 October 2021 when the NRM decision was made. The applicant says that the respondent was wrong to delay assessing the

substantive claim pending the NRM decision and that it should have adopted a parallel process in respect of the applications. She also says that the NRM decision in itself was delayed excessively. Finally, the applicant complains of the delay between 21 October 2021 and the final decision of 20 January 2023.

[15] It is the applicant's case that properly analysed no substantive steps were taken to assess the claim after 29 October 2020 until 21 October 2021. Thereafter, apart from a "mitigating circumstances interview" which was completed on 15 December 2021 there is a further culpable delay until the final decision was made in January 2023. The respondent argues that it is plain from the history set out in Mr Elliott's affidavit that this was an active and live claim. At all times the Home Office maintained contact with the applicant's solicitor and ensured that the applicant received the benefits to which she was entitled pending a final decision. She says it was entirely reasonable to await the decision from the NRM before finally deciding the claim. After receipt of the NRM decision there were three separate "mitigating circumstances" interviews, on 15 December 2021, 9 March 2022 and 8 June 2022, all of which were relevant to making the complex decision in this case.

[16] That said, it is clear that there were periods during which no apparent progress was made in this claim. The applicant accepts that there was an initial delay between 5 March 2020 and the lodging of the PIQ on 22 July 2020, which was due to difficulties encountered by the applicant's solicitors arising from the Covid-19 pandemic. This was entirely reasonable and has been explained by Ms Marmion (the applicant's solicitor) in her affidavit. That said, the court recognises that the restrictions imposed under the Covid-19 restrictions also had an impact on the respondent and her abilities to make a decision.

[17] The court asks the question "What were the reasons for any delays?"

[18] In this regard, Mr Elliott avers that:

> "5. The court will no doubt be aware of the backdrop of pressure on the SSHD in terms of the significant increase in asylum claims as well as victims of modern slavery in the last 10 years. By way of example the National Referral Mechanism publishes its statistics on a quarterly basis and updates its annual figures at Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, Quarter 4 2022 – October to December - GOV.UK (www.gov.uk). As is evident from the statistic such applications reports have steadily increased since 2004. The most recent update for Quarter 4 2022 October to December noted:

Key results

there were 4,418 potential victims of modern slavery referred to the Home Office in quarter 4 2022, representing a 4% decrease compared to the preceding quarter (4,581) and a 33% increase from quarter 4 2021 (3,331)

the number of referrals received this quarter is the second-highest since the NRM began in 2009

around three-quarters of referrals (78%; 3,453) were sent to the Single Competent Authority (SCA) for consideration and the rest (22%; 965) were sent to the Immigration Enforcement Competent Authority (IECA)

Albanian nationals were the most commonly referred nationality, followed by UK nationals which recorded their highest quarterly number since the NRM began

4,548 reasonable grounds and 2,103 conclusive grounds decisions were issued this quarter; of these, 85% of reasonable grounds and 84% of conclusive grounds decisions were positive

the Home Office received 1,307 reports of adult potential victims via the DtN process, the highest quarterly number since the DtN began."

[19] Whilst the court has received the full chronology in relation to this case, it would have been helpful to obtain more detailed figures and explanations from the respondent as to the difficulties encountered in respect of delays in determining asylum claims. At one stage it was suggested in the correspondence that this was due to putting in place mechanisms to deal with the new system to be implemented as a result of the Nationality and Borders Act 2022 which came into force on 22 June 2022, the effect of which was to create different statuses of asylum seekers. However, this has not featured in the respondent's affidavit evidence or in the submissions made by Ms Murnaghan in seeking to justify any delays.

[20] Ms Marmion has provided the court with some useful information in relation to delays in decision making in asylum seeking decisions. She refers to a paper published by the Migration Observatory at Oxford University published on 5 April 2023 dealing with the UK's asylum backlog. This paper demonstrated that there has been a significant increase in the backlog of asylum claims. It is stated in the paper that:

> "A decline in the number of decisions made on asylum claims has been an important driver of backlog growth."

[21] This paper provides a valuable insight into the backlog of asylum claims. The points include:

- On 31 December 2022, there were around 132,000 asylum applications awaiting an initial decision in the UK comprising around 161,000 people.
- At the end of 2021, the UK had the second largest asylum backlog in Europe after Germany.
- Asylum applications increased in 2021/2022, which added to an existing backlog.
- A decline in the number of decisions made on asylum claims has been an important driver of backlog.
- The time it takes for an asylum application to receive an initial Home Office decision has increased substantially in recent years.
- The decline in casework or decision-making has no definitive explanation, but plausible reasons include administrative issues and policy changes.

[22] The paper includes the following commentary:

> "The increase in asylum applications in recent years thus explains only part of the backlog. Another part of the explanation is that fewer decisions have been made by asylum caseworkers despite a growing number of staff. For example, if the Home Office had maintained the same number of decisions it was making in 2016 (around 31,000 per year) in the six years ending September 2022, the backlog would be almost 37,000 lower by 30 September 2022 – or 32% smaller. If, over the same period it had increased decision-making capacity to 40,000 decisions per year (which is roughly the number of applications received in 2015) the backlog would be about 82,000 lower and stand at 35,400 rather than 117,400 – a 70% decrease.
>
> If caseworkers take longer to make decisions that does not necessarily mean that they are performing less well. Decisions that are made more quickly could be less accurate. As explained in the next section a variety of reasons explains lower decision-making.

> Even without longstanding problems processing sufficient numbers of applications, there would always have been a spike in the backlog in the year ending September 2022 due to the above average increase in asylum applications that year. However, roughly half (48%) of the backlog built up before July 2021, during a period when asylum applications were not unusually high by recent UK standards."

[23] The report notes that a 2021 inspection of the UK's asylum casework by the independent Chief Inspector of Borders and Immigration highlighted a number of issues in the UK asylum processing. These included inadequate training for decision-makers, the reliance on excel spreadsheets, low morale and relatively high staff turnover.

[24] Reference was also made to Covid-19 where the paper commented:

> "While decisions in decision-making preceded the pandemic, the Immigration Inspector also found in his report on asylum casework that Covid-19 caused an additional decline in caseworker productivity in 2020, resulting from fewer face to face interviews with asylum applicants in 2020, fewer initial decisions were made (14,304) than in any calendar year since 1991.
>
> A low average number of decisions per caseworker continued in 2021 and 2022. It is not clear to what extent this continued, low rate of decisions is a hangover from Covid and its associated policies."

[25] The paper also referred to the new rules on admissibility introduced in January 2021 aimed to remove asylum seekers from the UK where the Home Office believes they could and should have applied for asylum in another country and also the suspension of the detained fast tracked process.

Delay/the legal framework

[26] The applicant submits firstly that the delay in determining her asylum claim was a violation of Regulation 333A of the Immigration Rules and/or Home Office policy and secondly that the delay violated her rights under Article 8 of the ECHR protected by the Human Rights Act 1998.

[27] The Immigration Rules governing asylum applications are made pursuant to section 1(4) of the Immigration Act 1971. Rule 333A of the Immigration Rules ("Rule 333A"), states that:

> "The Secretary of State shall ensure that a decision is taken 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 has not been taken within:
>
> (a) six months of the date it was recorded; or
>
> (b) without any revised timeframe notified to an applicant during or after the initial six-month period in accordance with this paragraph, and
>
> (c) where the applicant has made a specific written request for an update,
>
> the Secretary of State shall inform the applicant of the delay and provide information on the timeframe within which the decision on their application is to be expected. The provision of such information shall not oblige the Secretary of State to take a decision within the expected timeframe."

[28] Rule 333A gave effect to Council Directive 2005/85/EC ("the Procedures Directive") on minimum standards on procedures in Member States for granting and withdrawing refugee status.

[29] Article 23 is entitled "Examination procedures" and provides:

> "1. Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.
>
> 2. Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.
>
> 3. Member States shall ensure that, where a decision cannot be taken within six months, the applicant concerned shall either:
>
> (a) be informed of the delay; or
>
> (b) receive, upon his/her request, information on the time-frame within which the decision on his/her

> application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time-frame.
>
> 4. Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II, including where the application is likely to be well-founded or where the applicant has special needs."

[30] Rule 333A is reflected in the respondent's own service standard obligations for adults which provides in relation to asylum applications that after the screening exercise "you will usually get a decision on your application within six months."

[31] In similar vein, the government's information booklet for asylum applications provides at section 4:

> "We will aim to make a decision on your claim within six months, but this is not always possible and there may sometimes be delays. We will, however, seek to prioritise claims based on individual circumstances."

[32] Plainly, Rule 333A does not impose specific time limits within which the respondent must reach a decision on an asylum case. The respondent's policy clearly permits a flexible approach permitting it to carry out "an adequate and complete examination" of each asylum claim.

[33] In his submissions the focus of Mr Southey's arguments was on an alleged breach of the applicant's rights under article 8 ECHR which entitled her to an award of damages.

Does the applicant's claim come within the ambit/scope of Article 8?

[34] In answering this question the court reminds itself of the "*Ullah*" principle, reaffirmed by the Supreme Court in *Regina (AB) v Secretary of State for Justice* [2022] AC 487. There, the court was dealing with an alleged breach of Article 3 of the ECHR in the context of a young offender being placed in "single unlock" within the prison. Lord Reed, delivering the judgment of the court said:

> "56. An important additional rationale, which follows from the objective of the Human Rights Act as explained in *Ullah* and *Denbigh High School*, was identified by Lord Brown of Eaton-under-Heywood in *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2008] AC 153, para 106. Referring to

Lord Bingham's statement that domestic courts should keep pace with the Strasbourg jurisprudence, 'no more, but certainly no less', he commented:

> 'I would respectfully suggest that last sentence could as well have ended: 'no less, but certainly no more.' There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual *can* have the decision corrected in Strasbourg.'"

57. As Lord Brown explained, the intended aim of the Human Rights Act - to enable the rights and remedies available in Strasbourg also to be asserted and enforced by domestic courts - is particularly at risk of being undermined if domestic courts take the protection of Convention rights further than they can be fully confident that the European court would go. If domestic courts take a conservative approach, it is always open to the person concerned to make an application to the European court. If it is persuaded to modify its existing approach, then the individual will obtain a remedy, and the domestic courts are likely to follow the new approach when the issue next comes before them. But if domestic courts go further than they can be fully confident that the European court would go, and the European court would not in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic courts will remain uncorrected.

58. The approach to this issue laid down in *Ullah*, *Denbigh High School* and *Al-Skeini* has been repeatedly endorsed at the highest level. For example, in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] AC 1312, Baroness Hale of Richmond stated at para 53:

> 'The Human Rights Act 1998 gives effect to the Convention rights in our domestic law. To that

> extent they are domestic rights for which domestic remedies are prescribed: In *Re McKerr* [2004] 1 WLR 807. But the rights are those defined in the Convention, the correct interpretation of which lies ultimately with Strasbourg: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20. Our task is to keep pace with the Strasbourg jurisprudence as it develops over time, no more and no less.'"

[35] Bearing this in mind, I turn to the authorities relied upon by the parties in this application.

[36] Although Mr Southey sought to extract general principles from cases concerning delay in the context of breaches of article 5, I do not consider that they assist the court in deciding this application. In *Noorkoiv v Secretary of State for the Home Department* [2002] 1 WLR 3284 the Court of Appeal was dealing with delays in decisions of the Parole Board which had the effect of extending the applicant's period of detention.

[37] The Court of Appeal held that it was the obligation of the State to organise its legal system to enable it to comply with Convention requirements.

[38] The court "… drew a distinction between general faults in or under funding of the system which provide no defence even in relation to article 6(1), and 'the practical realities of litigious life in a reasonably well organised legal system.'"

[39] The court rejected the respondent's argument that it could rely on a lack of resources to excuse delays which would otherwise be in breach of Article 5(4) of the Convention.

[40] In *James v United Kingdom* [2013] 56 EHRR 12, the ECtHR was critical of the failure to anticipate the demands arising from fresh legislation when finding that a lack of resources violated article 5(4).

[41] In the court's view there is a fundamental difference between the obligations imposed on the State under article 5 in respect of delays affecting a person's liberty and delays allegedly affecting a citizen's article 8 rights. I do not consider that an analogy between a period of delay in deciding an asylum application and the manner in which authorities approach cases relating to detention and the obligations under article 5 an apt one.

[42] Turning then to the jurisprudence on article 8 as per *Pretty v United Kingdom* [2002] 35 EHRR 1 at [61] article 8 is "a broad term not susceptible to exhaustive definition."

Article 8 legal framework

[43] The question of whether a person's right to respect for their private life, guaranteed by Article 8(1) ECHR has been, or may be, infringed is intrinsically fact and context sensitive.

[44] In *Said v Secretary of State for the Home Department* [2023] NICA 49, the Court of Appeal considered Article 8 ECHR in the context of an applicant who had lodged further submissions under the Immigration Rules, having had his asylum claim refused. His complaint related to the loss of his Application Registration Card ("ARC") which is a document certifying his status as an asylum applicant or testifying that he is allowed to remain in the United Kingdom while an asylum application is pending.

[45] The court was critical of the evidence adduced by the applicant to establish an alleged infringement of his Article 8 rights.

[46] On the issue of the ambit of Article 8 the court observed as follows:

> "[52] We remind ourselves of the decision of the House of Lords in *R (Countryside Alliance) v HM Attorney General and Another* [2007] UKHL 52 and Lord Bingham's concise exposition of the private life element of Article 8(1) at para [10]:
>
> > '… the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose.'
>
> The House decided unanimously that the activity of fox hunting did not fall within the scope of this Convention right *inter alia* because of its public character and the lack of analogy with any of the categories summarised in para [53] *infra.* We refer also to the analysis of Lord Hope at para [54] and that of Lord Rodger of Earlsferry at paras [90]-[109].
>
> Baroness Hale, for her part, evaluated article 8 at para [116] thus:
>
> > 'Article 8, it seems to me, reflects two separate but related fundamental values. One is the

> inviolability of the home and personal communications from official snooping, entry and interference without a very good reason. It protects a private space, whether in a building, or through the post, the telephone lines, the airwaves or the ether, within which people can both be themselves and communicate privately with one another. The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people. This is fundamentally what families are for and why democracies value family life so highly. Families are subversive. They nurture individuality and difference. One of the first things a totalitarian regime tries to do is to distance the young from the individuality of their own families and indoctrinate them in the dominant view. Article 8 protects the private space, both physical and psychological, within which individuals can develop and relate to others around them. But that falls some way short of protecting everything they might want to do even in that private space; and it certainly does not protect things that they can only do by leaving it and engaging in a very public gathering and activity.'

[53] A detailed essay on article 8 jurisprudence is unnecessary. It suffices to say that the supermarket incident of which the appellant complains and its asserted impact on him are remote from the themes and concepts which have habitually featured in the article 8 jurisprudence: the person's inner circle; one's inner sanctum; how to live one's personal life; establishing and developing relationships with others; freedom from unjustified State intrusion; unjustified prohibitions on working; protection of the physical and moral integrity of the person; one's personal sexuality; personal identity; and social life. This is not designed to be an exhaustive list. Furthermore, this court is mindful of the elasticity in the concept of respect for one's private life and the potential for expansion of established categories. None of this points in the direction of any conclusion other than that article 8 ECHR is inapplicable."

[47] In *Regina (MK) (Iran) v Secretary of State for the Home Department* [2010] 1 WLR 2059, the Court of Appeal considered a delay in the determination of an asylum claim.

[48] In that case the claimant entered the United Kingdom from Iran via Greece, in September 2004 and claimed asylum. Since the Greek authorities accepted that under Council Regulation (EC) No:343/2003 they were responsible for determining the claim, the Secretary of State directed the claimant's removal to Greece. The claimant was subsequently assessed to be a minor and, in April 2005, the Secretary of State accepted that since the claimant was an unaccompanied child, he had responsibility under the Regulation for determining the claim. Nothing of substance was done by the Home Office in 2005 to progress the claim, during which time the claimant was detained for two months under the Mental Health Act 1983. In January 2006, the claimant's solicitors wrote to the Secretary of State alleging that the delay in processing the claim was exacerbating the claimant's mental health problems. In October 2007, the claim still not having been determined, the claimant sought judicial review of the Secretary of State's refusal or failure to determine his claim within a reasonable period.

[49] The claimant argued that he had a right to a hearing within a reasonable time and that his claim amounted to a "civil right" which he was entitled to have determined within a reasonable time, pursuant to article 6 of the Convention.

[50] The claimant failed. Although the claim was not based on an alleged infringement of article 8 it might be thought that the applicant *MK* had suffered more than the applicant in this case. The approach of the court as explained by Carnwath LJ is instructive:

> "**Illegality**
>
> 34. It was not in dispute that, at least under domestic law, the Secretary of State was under a public law duty to decide the asylum application within a reasonable time. Both parties, as I understood them, accepted what I said in *Home Secretary v S* [2007] EWCA Civ 546 para 51:
>
> > 'The Act does not lay down specific time-limits for the handling of asylum applications. Delay may work in different ways for different groups: advantageous for some, disadvantageous for others. No doubt it is implicit in the statute that applications should be dealt with within 'a reasonable time.' That says little in itself. It is a flexible concept, allowing scope for variation depending not

> only on the volume of applications and available resources to deal with them, but also on differences in the circumstances and needs of different groups of asylum seekers. But (as was recognised by the White Paper) in resolving such competing demands fairness and consistency are also vital considerations.'"

[51] The question of delay in the context of immigration decisions had been referred to in some of our domestic decisions although none are directly on point.

[52] A case frequently relied upon by the respondents in rebutting allegations of delay is the decision of Mr Justice Collins in the case of *FH and others, R (On the application of) v Secretary of State for the Home Department* [2007] EWHC 1571. That case concerned 10 applications which were heard together. The applicants were persons who had their initial claims refused and who had brought fresh claims based upon further evidence which were said to justify a fresh consideration.

[53] The delays ranged from two to three years. No decisions had been made on the fresh claims. Two of the cases were regarded as exceptional and did not require adjudication from the court. The outstanding claims were dismissed.

[54] In his judgment, Mr Justice Collins accepted that there was an obligation on the Secretary of State to determine applications within "a reasonable time." He referred to the judgment of Carnwath LJ quoted above.

[55] He set out his approach at para [11] as follows:

> "11. As was emphasised by Lord Bingham, the question was whether delay produced a breach of Article 6(1). Here the question is whether the delay was unlawful. It can only be regarded as unlawful if it fails the *Wednesbury* test and is shown to result from actions or inactions which can be regarded as irrational. Accordingly, I do not think that the approach should be different from that indicated as appropriate in considering an alleged breach of the reasonable time requirement in Article 6(1). What may be regarded as undesirable or a failure to reach the best standards is not unlawful. Resources can be taken into account in considering whether a decision has been made within a reasonable time, but (assuming the threshold has been crossed) the defendant must produce some material to show that the manner in which he has decided to deal with the relevant claims and the resources put into the exercise are reasonable. That does not mean that the

> court should determine for itself whether a different and perhaps better approach might have existed. That is not the court's function. But the court can and must consider whether what has produced the delay has resulted from a rational system. If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available. But in deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those resources should be applied to fund the various matters for which he is responsible."

[56] In his conclusion, he held at para [30]:

> "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."

[57] As Mr Southey points out, this case was determined on the basis of Wednesbury irrationality although Collins J indicated that this approach would not be different from that when considering alleged breach of the reasonable time required in article 6(1) of the Convention.

[58] In *EB (Kosovo) v Secretary of State for the Home Department* [2009] 1 AC 1159, the House of Lords considered the case of an applicant who entered the United Kingdom in September 1999 aged 13. He claimed asylum four days later. Following delay on the part of the Home Department, which the Secretary of State accepted had not been reasonable, the applicant's claim was refused in April 2004, and a letter was sent to him informing him of the Secretary of State's intention to remove him. Had his application been decided before his 18th birthday on 10 December 2003, when he had ceased to be an unaccompanied minor, he would probably have been granted exceptional leave to remain. He lived with his uncle, and his girlfriend had moved in with them. He and she had expressed an intention to remain together and marry. He resisted removal in reliance on his right under article 8 of the Convention.

[59] The claimant was successful. In dealing with the question of delay, Lord Bingham dealt with the matter as follows:

"**Delay**

13. In *Strbac v Secretary of State for the Home Department* [2005] EWCA Civ 848, [2005] Imm AR 504, para 25, counsel for the applicant was understood to contend, in effect, that if the decision on an application for leave to enter or remain was made after the expiry of an unreasonable period of time, and if the application would probably have met with success, or a greater chance of success, if it had been decided within a reasonable time, and if the applicant had in the meantime established a family life in this country, he should be treated when the decision is ultimately made as if the decision had been made at that earlier time. For reasons given by Laws LJ, the Court of Appeal rejected this submission, for which it held *Shala v Secretary of State for the Home Department* [2003] EWCA Civ 233**,** [2003] INLR 349 to be no authority. While I consider that *Shala* was correctly decided on its facts, I am satisfied that the Court of Appeal was right to reject this submission. 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 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. Mr Drabble QC, for the appellant, did not make this submission, and he was right not to do so.

14. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant

> enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. …
>
> 16. Delay may be relevant, thirdly, 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. …"

[60] The court determined that the Tribunal which had originally refused the applicant's claim had not adequately addressed the human problems raised by the applicant's appeals and the matter be remitted to the Tribunal for a fresh hearing at which, when considering the overall proportionality of ordering his removal, the relevance of the delay in the resolution of his claim and the manner of its handling should be considered. This case is authority for the proposition that delay in the immigration process might engage article 8. It can be seen from the facts of that case that the applicant was able to point to specific factors relating to his family and private life which had been affected by delay and which resulted in an order for his removal from the UK. Importantly had the application been determined earlier the application would probably have met with success.

[61] An important case is that of *BAC v Greece, App No: 11981-15*; [2018] 67 EHRR 27. There, the ECtHR was considering a claim based on a delay in an asylum decision.

[62] The facts were that the applicant was a Turkish national who fled to Greece in 2002. Upon arriving in Greece, he made a request for asylum, citing evidence that he had suffered torture in Turkey. Despite the Greek Advisory Board on Asylum issuing a favourable opinion in respect of the applicant's claim for asylum on 29 January 2003, and contrary to the established procedure according to which a decision ought to be made within 24 hours, the Minister for Public Order failed to make a decision on whether the applicant ought to be granted international protection. No such decision had been made by the time the applicant had communicated his complaint to the court, 12 years after the Advisory Board's favourable opinion, nor had a decision been taken when the court considered the matter.

[63] In the absence of any decision by the Minister between 2003 and 2015, the applicant was permitted to remain in Greece with "tolerated status" only.

[64] Importantly, the applicant established that he was unable to obtain gainful employment, but rather worked in construction without the requisite permit. He

indicated that he had wished to enrol in university but was unable to do so. He had also been unable to open a bank account or obtain a tax reference number, which were pre-conditions for engaging in gainful employment. Nor had he even been able to secure a driving licence. As regards his private life, his cohabitation with his wife had not become legally or materially possible until 2008 on the basis that she had obtained a short-term work permit in Greece, rather than in accordance with the legal provision on family reunion.

[65] In this regard, the court held that it was clear that in this situation the uncertainty experienced by the applicant as regards his status far surpassed that of an applicant awaiting the completion, within a reasonable time, of his or her asylum procedure. (My underlining).

[66] In its judgment the court said as follows:

> "36. The court emphasises that it has affirmed on many occasions that under Article 8 of the Convention the positive obligation of the State inherent in an effective respect for private life may involve the adoption of an effective and accessible procedure designed to secure respect for private life, and in particular the introduction of a statutory framework setting up an enforceable judicial mechanism to protect individuals' rights and, if necessary, of appropriate specific measures. Even though the boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition, the applicable principles are nonetheless similar. (My underlining)
>
> 37. Those positive obligations also include the competent authorities' duty to examine the person's asylum request promptly, in order to ensure that his or her situation of insecurity and uncertainty is as short-lived as possible.
>
> 38. The court first of all draws a distinction between the present case and that of *ME v Sweden*, in which the applicant complained, inter alia, about the anxiety, uncertainty and tension caused by the authorities' initial decision to return him to Libya. The court struck the case out of the list (Article 37(1)(b) of the Convention) because the authorities had in the meantime issued him with a permanent residence permit."

[67] At this stage I interject that *ME* assists the respondent in this case because it indicates that the European Courts will not entertain a claim based on delay if a

positive decision has, in fact, been made after the initiation of proceedings. *ME* concerned a challenge to a decision to remove the applicant who was relying on a breach of his article 3 ECHR rights.

[68] There, the court determined that:

> "32. The court observes at the outset that, according to its established case-law in cases concerning the expulsion of an applicant from a respondent state, once the applicant no longer risks being expelled from that state, it considers the case to have been resolved and strikes it out of its list of cases whether or not the applicant agrees."

At para [36] the court said:

> "36. Contrary to what the applicant suggests, in examining this question the court does not need to inquire retrospectively into whether a real risk engaging the State's responsibility under article 3 of the Convention existed when the Swedish immigration authorities refused his asylum request or when the Chamber adopted its judgment. These are historical facts but they do not shed light on the applicant's current situation, in which the impugned risk has been removed, this latter circumstance is decisive for the court's finding that the matter has been resolved …"

[69] Ms Murnaghan points out that if the court took such a view in the context of an article 3 case, then it is difficult to see how it could come to a different conclusion in the context of an article 8 case such as this when a positive decision has been made in favour of the applicant.

[70] In any event, returning to *BAC* the court continued at para [39]:

> "39. Secondly, the court notes that the applicant's situation is also different from one where the authorities refused to grant a residence permit to applicants who were illegally settled in the host country and were hoping to confront those authorities with family life as a fait accompli (see the case-law cited in the *Jeunesse v the Netherlands* judgment). In the present case, the issue at stake is the failure of the Minister for Public Order, for twelve years, to decide on the applicant's request for asylum, even though the Advisory Board on Asylum had issued a favourable opinion and the Greek judicial authorities, including the Court of Cassation, had rejected

> a request for extradition from the Turkish authorities. It is clear that in this situation the uncertainty experienced by the applicant as regards his status far surpassed that of an applicant awaiting the completion, within a reasonable time, of his or her asylum procedure.
>
> 40. In the instance case, the court considers that the alleged violation of Article 8 of the Convention also originated, not in any removal or expulsion order, but in the situation of insecurity and uncertainty experienced by the applicant over a long period, that is to say from 21 March 2002 – when he lodged his appeal against the decision to reject his asylum application – to the date of delivery of the present judgment."

[71] The court then went on to look at the actual prejudice and difficulties encountered by the applicant arising from the delay. The court went on to conclude:

> "45. The court finds unjustified the failure of the Minister for Public Order to decide on the applicant's asylum request, for which no reasons had been given and which had continued for more than twelve years (and is still ongoing), even though the domestic authorities had come down in favour of granting the applicant asylum and had rejected the request for extradition submitted by the Turkish authorities.
>
> 46. Accordingly, the court holds that in the circumstances of the present case the competent authorities failed in their positive obligation under Article 8 of the Convention to establish an effective and accessible procedure to protect the right to private life by means of appropriate regulations to guarantee that the applicant's asylum request is examined within a reasonable time in order to ensure that his situation of insecurity is as short-lived as possible (see also paragraph 37 above). There has therefore been a violation of Article 8."

[72] The question of the obligation under article 8 in the immigration context was considered by the Court of Appeal in *R(FWF) v The Secretary of State for the Home Department* [2021] 1 WLR 3781.

[73] In that case, the court was considering asylum claims in the context of "take charge requests" pursuant to Article 21 of Parliament and Council Regulation (EU) No: 604/2013 – Dublin III Regulations. There, the court considered the potential

positive and negative obligations arising from article 8. Laing LJ in delivering the judgment of the court said:

> "144. The distinction between positive and negative obligation cases may be difficult to apply to borderline cases, as the Supreme Court has recognised in many recent decisions, and as the Strasbourg Court acknowledged in *Osman v Denmark* 61 EHRR 10. But wherever the line may be drawn, the facts of this case are clearly some distance from it. Absent Dublin III, it could not be argued that by failing to admit Rs to the United Kingdom, the Secretary of State was interfering with their article 8 rights, as they had no right to be in the United Kingdom, and the Secretary of State was not responsible for the fact that they were in France and their brother was in the United Kingdom, or for the fact that their brother, with whom they had never lived, appears to be the only surviving and identifiable member of their family. I consider that this is a case in which, if article 8 applied, it could only impose a positive obligation on the Secretary of State, that the 'in accordance with the law' criterion would not apply to the discharge of that positive obligation, and that there is no Strasbourg case which begins to suggest that family reunion preceded by the delay which occurred in this case, could be a breach of any positive obligation. I accept the Secretary of State's submission that whether or not the Secretary of State complied with any positive obligation depends on the overall outcome. If article 8 imposed any positive obligation on the Secretary of State in this case, he complied with it.
>
> ***If Rs can rely on article 8 in the context of Dublin III, did the delay in this case interfere with Rs' article 8 rights?***
>
> 145. I will assume that my answer to the previous question is wrong, that the Rs can rely on article 8 in this context, and that the question is whether the delay in this case was an interference with the Rs' article 8 rights. This question was considered by UTJ Blum in *KF (Application No: JR/16421/2019)* (Unreported) 8 October 2019. The facts were similar to the facts in this case, except that in *KF*, the delay in effecting the transfer breached the long-stop time limit in Dublin III. When the TCR was made in this case, the Rs had never lived with NF. He left Afghanistan

> before they were born. Their contact with him, before they came to France, was very limited. There was some delay before they were transferred from France to the United Kingdom, but it did not exceed the Dublin III long-stop limit. They are now in the United Kingdom and living with NF. For reasons which are similar to those given by UTJ Blum in *KF*, I do not consider that the delay in this case did interfere with the Rs' article 8 rights. I consider that this conclusion is the only decision on this issue which a reasonable judge could reach."

[74] Ms Murnaghan placed particular emphasis on the decision in *Anufrijeva v Southwark LBC* [2004] QB 1124.

[75] In that case the claimants were seeking damages from their local council for breach of their right under article 8 on the ground that the respondent council had failed to discharge its duty to provide them with accommodation that met the special needs of one member of the family.

[76] The second claimant, an asylum seeker from Libya, arrived in the United Kingdom in February 2000 and was granted asylum in May 2001. He sought damages from the respondent under section 8 of the 1998 Human Rights Act on the ground that maladministration in the handling of his asylum application had caused delay and that he had received inadequate financial support during much of that period. He had been caused psychiatric injury by the stress of his experience which he alleged had infringed his right to private life under article 8.

[77] A third claimant, an asylum seeker from Angola, arrived in the United Kingdom in 1996. In January 2001 he was granted asylum and he applied for permission for his family to join him but his family was not given permission to enter the United Kingdom until November 2001. He claimed damages contending that much of the delay was attributable to maladministration which had infringed his rights under article 8.

[78] The claimants were unsuccessful before the Court of Appeal.

[79] In the court's judgment, Lord Woolf CJ asked the question "In what circumstances does maladministration constitute a breach of article 8?

[80] On this issue the court said:

> "44. We consider this question in relation to the particular type of maladministration that has taken place in each of the three appeals before us the failure, in breach of duty, to provide the claimant with some benefit or advantage to which the claimant was entitled under

public law. Such failure may have come to an end before the trial. If not, it is likely to be brought to an end as a consequence of a finding of breach of duty made at the trial, so that what is likely to be in issue is the consequences of delay.

45. In so far as Article 8 imposes positive obligations, these are not absolute. Before inaction can amount to a lack of respect for private and family life, there must be some ground for criticising the failure to act. There must be an element of culpability. At the very least there must be knowledge that the claimant's private and family life were at risk - see the approach of the ECtHR to the positive obligation in relation to Article 2 in *Osman v United Kingdom* (1998) 29 EHRR 245 and the discussion of Silber J in *N* [2003] EWHC 207 (Admin) at paragraphs 126] to [148]. Where the domestic law of a State imposes positive obligations in relation to the provision of welfare support, breach of those positive obligations of domestic law may suffice to provide the element of culpability necessary to establish a breach of Article 8, provided that the impact on private or family life is sufficiently serious and was foreseeable.

46. Where the complaint is that there has been culpable delay in the administrative processes necessary to determine and to give effect to an Article 8 right, 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. In cases involving custody of children, procedural delay has been held to amount to a breach of Article 8 because of the prejudice such delay can have on the ultimate decision - thus in *H v United Kingdom* (1987) 10 EHRR 95 the court held at p122, para [89], Article 8 infringed by delay in the conduct of access and adoption proceedings because the proceedings 'lay within an area in which procedural delay may lead to a de facto determination of the matter in issue', which was precisely what had occurred.

…

47. We consider that there is sound sense in this approach at Strasbourg, particularly in cases where what is in issue is the grant of some form of welfare support.

> The Strasbourg Court has rightly emphasised the need to have regard to resources when considering the obligations imposed on a State by Article 8. The demands on resources would be significantly increased if States were to be faced with claims for breaches of Article 8 simply on the ground of administrative delays. Maladministration of the type that we are considering will only infringe Article 8 where the consequence is serious."

[81] On the question of whether damages should be awarded in established breaches of article 8, the court went on to say:

> "75. We have indicated that a finding of a breach of a positive obligation under Article 8 to provide support will be rare and will be likely to occur only where this impacts severely on family life. Where such a breach does occur, it is unlikely that there will be any ready comparator to assist in the assessment of damages. There are good reasons why, where the breach arises from maladministration, in those cases where an award of damages is appropriate, the scale of such damages should be modest. The cost of supporting those in need falls on society as a whole. Resources are limited and payments of substantial damages will deplete the resources available for other needs of the public including primary care. If the impression is created that asylum seekers whether genuine or not are profiting from their status, this could bring the Human Rights Act into disrepute.
>
> 76. Similar considerations apply to delay in processing asylum claims or the procedure for admitting the relatives of refugees. Those admitted are likely, at least initially, to require support. In view of the numbers involved, some delay in the processing of asylum claims is inevitable and, at times, in the interest of the asylum seekers themselves, the process is understandably lengthy. The factors that weigh against recognising administrative delay as engaging Article 8 militate equally in favour of either no award or modest awards where Article 8 is engaged."

[82] The court was clearly laying down a marker on potential claims based on breaches of article 8 rights in the context of delays in processing asylum claims. Thus, at para [80] the court said:

> "80. The reality is that a claim for damages under the HRA in respect of maladministration, whether brought as a free-standing claim or ancillary to a claim for other substantive relief, if pursued in court by adversarial proceedings, is likely to cost substantially more to try than the amount of any damages that are likely to be awarded. Furthermore, as we have made plain, there will often be no certainty that an entitlement to damages will be established at all."

[83] The court went on to suggest as follows in relation to proceedings which includes a claim for damages for maladministration under the HRA:

> "(i) The courts should look critically at any attempt to recover damages under the HRA for maladministration by any procedure other than judicial review in the Administrative Court.
>
> (ii) A claim for damages alone cannot be brought by judicial review (CPR or 54. 3(2)) but in this case the proceedings should still be brought in the Administrative Court by an ordinary claim.
>
> (iii) Before giving permission to apply for judicial review, the Administrative Court judge should require the claimant to explain why it would not be more appropriate to use any available internal complaint procedure or proceed by making a claim to the Parliamentary Commissioner for Administration or Local Government Ombudsman at least in the first instance. …
>
> (iv) If there is a legitimate claim for other relief, permission should if appropriate be limited to that relief and consideration given to deferring permission for the damages claim, adjourning or staying that claim until use has been made of ADR, whether by a reference to a mediator or an ombudsman or otherwise, or remitting that claim to a district judge or master if it cannot be dismissed summarily on grounds that in any event an award of damages is not required to achieve just satisfaction.
>
> (v) It is hoped that with the assistance of this judgment, in future claims that have to be determined by the courts can be determined by the appropriate level of judge in a summary manner by the judge reading the

> relevant evidence. The citing of more than three authorities should be justified and the hearing should be limited to half a day except in exceptional circumstances.
>
> (vi) There are no doubt other ways in which the proportionate resolution of this type of claim for damages can be achieved. We encourage their use and do not intend to be prescriptive. What we want to avoid is any repetition of what has happened in the court below in relation to each of these appeals and before us, when we have been deluged with extensive written and oral arguments and citation from numerous lever arch files crammed to overflowing with authorities. The exercise that has taken place may be justifiable on one occasion but it will be difficult to justify again."

Conclusion

[84] From a review of the authorities, I conclude as per *EB* and *BAC* that delay in determining an asylum claim may result in a breach of an asylum seeker's article 8 rights. The obligation on the State is to provide a statutory framework under which asylum claims are assessed and which provide an enforceable judicial mechanism to protect any individual rights under that system. Such obligations include a duty to examine claims in a reasonable time.

[85] What amounts to a reasonable time is fact specific. It is not for the courts to be prescriptive in terms of any time limits in this context. There is no specified period within which, or at which, an immigration decision must be made.

[86] What is important is that the system provides consistent and fair outcomes.

[87] Turning to the facts of this case, the applicant focuses on the insecurity inherent in her situation and, in particular, the interference with her right to establish and develop relationships with other human beings and the outside world. In truth, this is a general assertion, which could be made in respect of any asylum seeker awaiting a decision. The applicant points to no relevant or significant relationships, unlike *BAC*, or the applicant in *EB*. The only specific issue she raises is that of her mental health.

[88] True it is that mental stability has been held to fall within the scope of article 8. In *Bensaid v United Kingdom* [2001] 33 EHRR 10, the applicant was an Algerian national who was a schizophrenic suffering from a psychotic illness. He arrived in the UK as a visitor in 1989 and married a UK citizen in 1993. Since 1994 and 1995 he has been receiving treatment for his medical condition. On the basis that the marriage had been one of convenience, however, the Home Secretary decided to remove him. Relying on articles 3 and 8 of the Convention the applicant claimed

that his proposed expulsion to Algeria placed him at risk of inhuman and degrading treatment and would violate his right to respect for his private life. The court in its assessment acknowledged at para [47] that:

> "Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life."

[89] However, on the facts of that case it held that the implementation of the decision to remove the applicant did not violate article 8 of the Convention.

[90] Turning to the facts of this case on the issue of mental health I note that the first time the issue of the applicant's mental health was raised on her behalf was in a letter of 8 September 2022. All that was said at that time was "this delay is unreasonable and impacting her mental health."

[91] In her initial screening interview, the applicant was asked about whether she had any medical conditions. She referred to the fact that she had been bitten by a dog and which had caused a significant injury to her leg. In relation to potential mental health issues, she stated:

> "I don't sleep very well. I will be awake all through the night. I might have depression. I don't know. I'm always worried."

[92] True it is that after the substantive interview on 20 October 2020, a note made by the interviewer said that the applicant was "displaying signs of trauma, no professional assessment made, I would point out there are symptoms there, she did answer she has no mental health issues, but I would imagine there is potential PTSD, those displays of trauma were apparent throughout the interview, due to her getting extremely upset and also talking about flashbacks."

[93] In relation to any other evidence before the court on this issue, the applicant simply avers that:

> "28. Since 13 October 2021, there has been a heightened urgency of my asylum claim and this delay has a great effect on my own mental health and well-being.
>
> 29. The delay has only exacerbated these problems.

30. I highlighted these problems to the proposed respondent in my SAI (see Q12-Q14).

31. I have discussed these problems with my GP, and I feel my life is currently in a state of limbo. I have been prescribed sleeping tablets from my GP which is under review."

[94] Having considered this evidence, it is difficult to see that the applicant has established a sufficient evidential basis for saying that there has been infringement with her article 8 rights.

[95] The respondent recognised her potential vulnerability and mental health issues and immediately referred her to the NRM procedure. Whilst she has been awaiting a decision, she has been provided with accommodation and an ARC card. The respondent has been in regular contact with her solicitor who has been assiduous in looking after the applicant's needs. There is no suggestion that she has been denied any access to health services, indeed, the opposite appears to be the case. The sort of substantial prejudice envisaged in *Anufrijeva* is plainly absent.

[96] The circumstances of this case are markedly different from the situation in *BAC*. There the uncertainty experienced by the applicant "far surpassed that of an applicant" awaiting the completion within a reasonable time of his or her asylum procedure. In *BAC,* despite a positive indication, the applicant was still awaiting a decision more than 12 years after his claim. During that time, he pointed to very specific prejudice he suffered as a result of the restrictions on his status. Importantly, at the time of the court's decision he was still awaiting a decision.

[97] In this case, notwithstanding any delay, the applicant has received a positive outcome. This alone weighs strongly against any finding of a breach of article 8.

[98] It may well be that the decision in this case should have been taken earlier. Plainly the evidence establishes that there is a significant backlog in the determination of asylum applications. This appears to be attributable to a number of factors including the volume of applications and available resources to deal with them. The applicant has been a victim of that backlog. The court has received an account of how her claim was dealt with from which it is clear that there were delays in deciding her application. Quicker, more effective decisions would be desirable. Quicker decision-making would undoubtedly improve the overall situation regarding claims for asylum. It is not, however, for this court to set out timescales or direct that additional resources be provided to ensure quicker decisions. The State has provided a statutory framework under which asylum claims are assessed and which provide an enforceable judicial mechanism to protect any individual rights under that system. That system produces fair and consistent outcomes which are subject to consideration and review by Tribunals and ultimately the High Court.

[99] In conclusion, I am not satisfied that the applicant has established a breach of her article 8 rights arising from any delay in determining her asylum application. The application for judicial review is therefore dismissed.

Guidance

[100] In terms of overall guidance in relation to claims alleging a breach of article 8 rights in the context of delays in making decisions in asylum claims, it seems to the court that the following principles should be applied:

(i) In certain circumstances delays in making decisions may give rise to a breach of an asylum seeker's article 8 rights.

(ii) The court cannot be prescriptive about what constitutes an unlawful period of delay.

(iii) An important factor will be whether an actual decision has been made. If a decision has been made, then it would only be in exceptional circumstances that a breach of article 8 will be established. If a decision is pending then the court will have to make an individual assessment of the period of delay, the reasons for any delay and whether a decision is imminent. Any delay must be so excessive as to be regarded as manifestly unreasonable. In a case such as *BAC* it was easy for the court to determine that the relevant delay was inexcusable.

(iv) In order to establish a breach of article 8 in any case, the applicant will need to point to specific evidence-based factors which demonstrate an interference with article 8 rights, above and beyond what one would expect of any person awaiting such an important decision. Any impact on private or family life must be serious. This could include factors pointing to serious deprivation such as homelessness, lack of medical attention required in respect of significant health issues, impact on the welfare of children and significant interference with family or personal relationships.