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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM
THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
(JUDICIAL REVIEW)

Between:

JR247

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Hugh Southey KC and Robert McTernaghan (instructed by Phoenix Law Solicitors) for the Appellant
Neasa Murnaghan KC and Marie-Clare McDermott (instructed by the Crown Solicitor's Office) or the Respondent

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Before: McCloskey LJ, Horner LJ and McAlinden J

McCLOSKEY LJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal against the judgment and associated order of Colton J dismissing the application for judicial review of JR247 (the "appellant") against the Secretary of State for the Home Department ("SSHD"): see [2024] NIKB 72. The target of the appellant's challenge was, per the Order 53 pleading, "…the proposed respondent's omission to make a decision on her immigration status within a reasonable time period." During the case management phase this court raised with the parties the question of whether this appeal is academic in accordance with the "Salem" principle. Written and oral submissions on this issue, supplementing and complimenting the parties' submissions on the substantive issues, were marshalled accordingly.

Relevant Chronology

[2] During the period preceding the initiation of these proceedings the (agreed) material dates and events were the following:

5 March 2020	Appellant claimed asylum.
27 July 2020	Appellant submits preliminary information questionnaire. [**p**272-320]
25 September 2020	Appellant's solicitor writes to the respondent asking for an asylum decision. [**p**389]
8 October 2020	Respondent sends a letter that states that it had not been possible to determine the claim within 6 months and states that there would be further contact within 6 months. [**p**321-324]
29 October 2020	Appellant's substantive asylum interview. [**p**334-378] Agreed that the case would be referred to the NRM for a determination of whether the appellant was a victim of modern slavery.
13 October 2021	Conclusive grounds decision that the appellant is a victim of sexual exploitations/forced sex work. [**p**379-380]
15th October 2021	Mitigating Circumstances interview completed. The mitigating circumstances interview resulted in minor information collected: medical, address, changes to family in UK.
09th March 2022	Further Mitigating Circumstances interview completed.
9 June 2022	Appellant's solicitor writes to the respondent asking for an asylum decision. [**p**390]
28 June 2022	Section 12 of the Nationality and Borders Act 2022 enters into force. [**p**440-447]
6 September 2022	Appellant solicitor writes to the respondent asking for an asylum decision. Concerns raised about impact on mental health of delay. [**p**391]
9 September 2022	Appellant solicitor writes to the respondent asking for an asylum decision. Concerns raised about impact on mental health of delay. [**p**392]

9 September 2022	Respondent sends an email apologising for the delay in processing her asylum claim. [**p**394]
5 October 2022	Appellant solicitor writes to the respondent asking for an asylum decision. [**p**394] appellant's solicitor sends a letter in accordance with the PAP. [**p**397-402]
11 October 2022	Respondent sends a PAP reply. [**p**403-404]

[3] On 4 November 2022 these proceedings were initiated. On 7 November 2022 Colton J, with commendable expedition, and acting ex parte, granted leave to apply for judicial review. Next, there materialised an event of unmistakable importance. SSHD acceded to the appellant's application for asylum and, on 24 January 2023, her biometric residence permit was issued. During the preceding intervening period the Crown Solicitor's Office, on behalf of SSHD, had proactively informed the appellant's solicitors of the imminence of the final decision. This signalled the beginning of the debate on whether the proceedings should continue. The judge directed the parties to provide written submissions on this issue. These were provided and, having considered them, the judge determined that the case should proceed. This culminated in a substantive hearing, the delivery of judgement and the appellant's Notice of Appeal.

[4] This court, in its case management of this appeal, raised with the parties both the "Salem" principle (*R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450) and other issues. One of these was the absence of any amended version of the Order 53 Statement in a context where the target of the appellant's challenge, rehearsed in para [1] above, had been extinguished by the supervening event noted. In this way the court established that there had been no amendment of the pleading. Furthermore, the appellant did not seek to make an amendment at this stage.

[5] Summarising, the underlying story spanned the period March 2020 to October 2022, the new and final chapter of the story unfolded between November 2022 and January 2023, the first instance proceedings occupied the period November 2022 to September 2024 and the appeal before this court is now of almost one years vintage.

Decision at first instance

[6] At first instance, the appellant's case was grounded exclusively under section 6 of the Human Rights Act 1998 ("*HRA 1998*"), the sole Convention right invoked being Article 8 ECHR. In a clear and comprehensive judgement, Colton J explored the guidance to be found in a series of decisions of the House of Lords, the English Court of Appeal and the ECtHR: *EB (Kosovo) v Secretary of State for the Home Department* [2009]

1 AC 1159; *R (MK Iran) v Secretary of State for the Home Department* [2010] 1 WLR 2059; *Anufrijeva v Southwark LBC* [2004] QB 1124; *BAC v Greece* [2018] 67 EHRR 27; *ME v Sweden* (Application no. 71398/12); *Bensaid v United Kingdom* [2001] 33 EHRR 10 and, most recently, *R (FWF) v Secretary of State for the Home Department* [2021] 1 WLR 3781.

[7] Colton J considered that, having regard to *EB* and *BAC:*

> "…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 provides an enforceable judicial mechanism to protect any individual rights under that system. Such obligations include a duty to examine claims in a reasonable time."

Adding at para [85]:

> "What mounts 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…
>
> What is important is that the system provides consistent and fair outcomes."

The key conclusion of the judge follows at para [94], in the wake of his review of the material features of the evidence:

> "Having considered this evidence, it is difficult to see that the applicant has established a sufficient evidential basis for saying that there has been an infringement with her Article 8 rights."

[8] In making this conclusion, the judge highlighted two factual considerations in particular. First (our summary), the flimsy nature of any evidence having an adverse impact on the appellant's mental health due to the delay of SSHD in making a final determination. Second, the positive steps taken on behalf of SSHD following receipt of the appellant's litigation affidavit containing some rather threadbare averments bearing on this issue. The next ensuing passage in the judgment, containing the observation that the facts of the appellant's case "…are markedly different from the decision in ***BAC***", draws attention to the unavoidably fact sensitive nature of claims of the present kind.

[9] Addressing squarely the fact that finality had been achieved in the appellant's case, Colton J continued at para [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."

The final ingredients in the judge's reasoning are contained in para [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. "

[10] Colton J could properly have paused at that point. However, he continued, completing his judgment in the following terms, at para [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."

The appeal

[11] The decision of Colton J is challenged on the following five grounds:

(a) Applying the test in *BAC v Greece*, app 11981/15 Colton J was required to consider whether the appellant's asylum claim was determined promptly, in order to ensure that her situation of insecurity and uncertainty was as short-lived as possible. That was not the test applied by Colton J. He, instead, focused on unreasonableness and/or manifest unreasonableness.

(b) Because article 8 of the European Convention on Human Rights ('article 8') was in issue, Colton J should have concluded that the delay was not in accordance with the law as there was a failure to apply domestic standards (*Vavřička v Czech Republic* app 47621/13 at [266]).

(c) Colton J erred by concluding that there was a need for further evidence of the impact of the delay on the appellant [94]. Case law such as *BAC* demonstrates that delay alone can violate article 8.

(d) Colton J erred when he directed himself that the fact that the appellant has received a positive outcome 'weighs strongly against any finding of a breach of article 8' [97]. That was not a relevant factor.

(e) Colton J erred by concluding that there had not been a violation of article 8 despite apparently accepting that the asylum decision in this case 'should have been taken earlier' [98].

[12] In the event of the appeal proceeding substantively and the appellant succeeding, what remedies are pursued? The answer is provided unambiguously in the written submissions of counsel:

> "A finding of a breach of Article 8 should be recorded and damages should be awarded."

An award of damages is one of the remedies pursued in the Order 53 Statement. However, this passage makes no mention of the other remedies claimed namely an order of mandamus, an order of *certiorari* and a declaratory order in four alternative guises.

The 'Salem' issue

[13] The appellant's response to the court's invitation for further submissions on the application of the "Salem" principle has the following four elements: there is no respondent's notice challenging the discrete decision of Colton J to proceed to a substantive hearing following the grant of leave to apply for judicial review; this decision involved no *DB* error; success for the appellant would entail vindication consisting of a finding of a violation of his rights under Article 8 ECHR and redress; and, fourthly, there is the factor of other cases "*… that await the outcome of this appeal*", recognised in *Salem* as an important consideration.

[14] Addressing each of these contentions in turn:

(i) The provisions of Order 59 of the Rules of the Court of Judicature ("RCJ") do not require a respondent's notice as a prerequisite to the Court of Appeal proactively raising the "Salem" principle (as has occurred in this instance and occurred in the Salem case itself). Equally fundamentally, rule 6 of Order 59 RCJ provides:

> "6.-(1) A respondent who, having been served with a notice of appeal, desires-
>
> (a) to contend on the appeal that the decision of the court below should be varied, either in any event or in the event of the appeal being allowed in whole or in part, or
>
> (b) to contend that the decision of the court below should be affirmed on grounds other than those relied upon by that court, or

(c) to contend by way of cross-appeal that the decision of the court below was wrong in whole or in part,

must give notice to that effect, specifying the grounds of his contention and, in a case to which paragraph (a) or (c) relates, the precise form of the order which he proposes to ask the Court to make."

None of the three situations postulated arises in the present case and no argument to the contrary were developed. For these reasons this contention is devoid of merit.

(ii) The suggested absence of any *DB* error in the discrete decision of the trial judge to allow the case to proceed at first instance is intertwined with the fourth of the appellant's contentions and will be addressed in the next succeeding paragraph.

(iii) The consideration that the appellant, if successful substantively before this court, would secure the vindication of a finding of infringement of her Article 8 rights is a factor to be weighed in the balance in this court's determination of the application of the *Salem* principle and we do so.

[15] Turning to the fourth contention, the suggestion that other cases are affected by the decision of Colton J and, therefore, would be affected by this court's determination of this appeal substantively occupies some prominence in the appellant's arguments. It is purely factual in nature and, thus, is properly characterised as an assertion. Colton J was specifically motivated by this consideration: see para [9] of his judgment.

[16] The question of whether there are "other cases", in the sense explained above, raises two issues. The first is the purely factual one of whether such cases exist. Both parties have had more than ample opportunity to put flesh to the bare bones of the appellant's assertion. The result is that there is before this court no evidence of, or agreement about, any such cases. This has unfolded in a context where the factor of "*other cases*" is one of undeniable importance, having regard to Lord Slynn's formulation of the "Salem" principle. If there were evidence, or agreement, to this effect, the second question which this court would have to address is whether there is any substance to the contention that such cases will be affected by the judgment of Colton J. This question does not arise.

[17] It follows that the fourth of the appellant's four contentions, noted above, is devoid of substance. As regards the second of the appellant's contentions, it matters not that the effect of this is that an error of the on the part of the judge, requiring consideration of the *DB* principles, may have occurred. It is unnecessary for this court to embark upon determining this question. What matters is that this consideration has, in the assessment of this court, been exposed as one of no substance. Furthermore,

we can identify no disharmony with the *DB* principles in any event and none was developed in argument before us.

[18] The next consideration to which we turn is that of fact sensitivity. The proposition that every case in which it is contended that delay by SSHD in immigration/asylum decision making has breached Article 8 ECHR is unavoidably fact sensitive is, in our view, incontestable. The appellant's submissions do not engage at all with this factor of fact sensitivity. Summarising, the appellant's "Salem" arguments are uniformly lacking in merit.

The Substantive Appeal

[19] It is of no little importance that the judge's conclusions at paras [87]–[99] are prefaced by his specific acknowledgement that having regard to the decisions in *EB* and *BAC* "…delay in determining an asylum claim may result in a breach of an asylum seeker's Article 8 rights." There can be no suggestion that this is other than an impeccable self-direction and there is no contrary argument before this court.

[20] Next, there is the self-direction of Colton J that delay in this context requires examination of whether the relevant authority's determination, or failure to make a determination, has unfolded following the elapse of "a reasonable time." This is linked to the judge's further self-direction, also unassailable, that "…what amounts to a reasonable time is fact specific": para [85]. We address this *infra,* in para [25] ff.

[21] We now turn to the opening sentence of para [98] of the judgment of Colton J:

> "It may well be that the decision in this case should have been taken earlier."

The appellant's argument, noted in para [11] (e) above, is that the judge "**apparently** accepted that the positive determination of the appellant's asylum application should have occurred sooner." [emphasis added] This court has reflected on the terms of this submission. The language of "apparently accepting" is not the language of a submission that a finding in the terms suggested was actually made by the judge. Indeed neither the verb "to find" nor any of its derivatives features anywhere in the written or oral submissions on behalf of the appellant. The intrinsic vagueness of the terminology employed exposes its incurable frailty.

[22] While the foregoing analysis by itself disposes of this ground of appeal, it is further confounded for two reasons. First, the language employed by the judge is manifestly not that of a concluded finding or evaluative assessment. Second, this single sentence cannot be isolated from all that precedes and follows it, in a lengthy paragraph which includes the judge's rehearsing of SSHD's explanations of the timescale of the decision making in the appellant's case. Notably, the judge did not criticise, much less reject, these explanations. This engages the *DB* principles (*DB v Chief Constable of PSNI* [2017] UKSC 7). The remaining considerations to which the

judge next drew attention all militated against the finding of an Article 8 ECHR violation in the appellant's case. The fifth ground of appeal (*supra*, para [11]) collapses accordingly.

[23] Next, we consider that the enquiry which the judge conducted relating to the impact on the appellant's health of the decision making timescale and the assessment which he made of the supporting evidence were unimpeachable. These were incontestably material facts and factors. The third ground of appeal has no merit in consequence. In passing, contrary to the appellant's specific submission, the judge did not conclude that there was a need for further evidence on this issue. Rather, the judge concluded that the evidential foundation was insufficient: see para [94]: there is a subtle difference.

[24] Then there is a challenge to the judge's freestanding conclusion, at para [97], that the positive outcome of her immigration status application "… weighs strongly against any finding of a breach of Article 8." Once again, this conclusion belongs to the fact sensitive compartment of the judgment under appeal. Properly analysed, the judge was applying the approach of the ECtHR in *BAC*, which was that at the time when the judgment of that court was delivered, the insecurity and uncertainty experienced by the claimant continued. In a sentence, that is not this case. The materiality of the judge's identification of the fact of a final decision is beyond plausible dispute. The weight to be attributed to this material factor was a fact sensitive matter lying within the province of reasonable evaluative assessment by the judge and challengeable only on *Edwards v Bairstow* or *DB* grounds. This court can identify no error in this respect. The fourth ground of appeal fails in consequence.

The factor of reasonableness

[25] We turn to consider the first ground of appeal (para [11] supra), which occupied centre stage in the appellant's arguments. This ground raises the materiality of the reasonableness of the decision making agency's conduct. The contours of the debate before this court on this issue may be summarised thus. We have in para [10] above reproduced para [100] of the judgment of Colton J. This court elicited from Mr Southey KC, on behalf of the appellant, that there is no challenge to the correctness of the first two of the judges' propositions. The bulk of counsel's oral submissions was directed to the third proposition.

[26] Counsel's sheet anchor was paras [37] and [46] of *BAC v Greece* [2018] 67 EHRR 27. There the applicant, a Turkish national, complained that his right to respect for private life protected by Article 8(1) ECHR had been infringed in circumstances where he had been living in Greece for a period of 12 years without final determination of his asylum application. His application succeeded. In its judgment the ECtHR, first, drew attention to the positive obligation which may sometimes arise under Article 8. The most important passages are in paras [37] and [46]:

> "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 (see M.S.S. v. Belgium and Greece [GC] (no. 30696/09, § 262, 21 January 2011).
>
> 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."
> [our emphasis]

It is appropriate to note two features of the parenthetic clause in *BAC* para [37], above. First, the passage noted in *MSS* does not prescribe any test; Second, *MSS* is a predominantly Art 3 ECHR case, in which Art 8 is not considered. This clause is, therefore, very much an aside.

[27] The central question probed by this court at the hearing was the following: in deciding whether the timescale for determining (or failing to determine) a person's asylum application gives rise to a breach to either the family life or the private life limb (or both) of Article 8 ECHR, is the court to take into account the reasonableness of the relevant State agency's conduct during the period under scrutiny? The answer urged on behalf of the appellant was "No." Ultimately, properly exposed, Mr Southey's submission in substance was that this is an irrelevant factor. The court is unable to accept this submission, for the following reasons.

[28] In our view, it cannot be correct that in a case where, in the kind of context exemplified by this appeal, the court considers that the conduct of the relevant State agency has been reasonable throughout the relevant period, this is to be disregarded in assessing whether there has been a breach of Article 8 ECHR. Equally, it cannot be correct that in a case where the court considers that the conduct of the State agency has been unreasonable during some, much or all of the period in question this is also to be disregarded. This court is clearly of the view that the language of paras [37] and [46] of *BAC* – "as short-lived as possible" – and in particular the last two words point firmly to an enquiry into, inter alia, the reasonableness of the conduct of the State agency.

[29] In our judgement, as a matter of correct textual analysis, paras [37] and [46] of *BAC* do not prescribe the test of whether the period in question was "as short-lived as

possible." Rather, as para [46] makes clear, the test is whether the asylum application has been examined within a reasonable time. In both paras [37] and [46], the clauses beginning with the words "in order to ensure" are clearly directed to the outcome to be achieved by the discharge of the obligation in play, namely, to determine the asylum request within a reasonable time. The terminology of "as short-lived as possible" is a formulation of result, the aim to be accomplished, to be contrasted with the formulation of the duty designed to achieve such result. Contrary to Mr Southey's submission, this linguistic formulation does not prescribe a legal test.

[30] We consider that the substantive Article 8 right in play namely, in the language of para [46], the asylum applicant's right to have their application "…examined within a reasonable time…" obviously gives rise to consideration of the reasonableness of the State's conduct. We would add that para [46], and not para [37], is the operative part of the Court's judgment (the *dispositif*). It expresses the court's conclusion on the Article 8 complaint and, in doing so, the parenthetic nature of the reference to para [37] is to be noted.

[31] In passing, in the analogous case of the reasonable time guarantee enshrined in Article 6(1) ECHR the court will consider the adequacy of the respondent State's explanation of the period in question: see *Eskelinen v Finland* [2007] 45 ECHR 43, paras 67–71. Judicial evaluation of the adequacy of any explanation or justification proffered will in our judgement inevitably involve an assessment of the reasonableness of the conduct of the relevant State agency. This must be correct also in cases where the question of whether the relevant State agency took adequate measures arises: see for example *Abdoell v Netherlands* [1992] 20 EHRR 585, para 24. Counsel's submissions were fixated with para [37] of *BAC* and did not engage with para [46].

[32] It follows from all of the foregoing that we reject the appellant's attack on para [100] (iii) of the judgment of Colton J. We would, however, add the following modest adjustment. The judge suggested that the delay under scrutiny must be so excessive as to be considered "manifestly unreasonable." Based on our assessment of the relevant jurisprudence, and subject to fuller argument in a suitable future case, we consider the correct standard to be "unreasonable", rather than "manifestly unreasonable." We would add that the exercise of considering para [100] (iii) in tandem with [100](iv) indicates that the judge evidently had in mind that in cases having the factor of delay alone a breach of Article 8 is likely to require that the delay be manifestly unreasonable, to be contrasted with cases where there has been delay in conjunction with the kind of factors instanced in [100] (iv). This exegesis discloses no error of principle.

[33] It was further submitted on behalf of the appellant that para [100] (iv) of the judgment of Colton J is irreconcilable with the following passage in the judgment of Lord Bingham in *EB (Kosovo) v Secretary of State for the Home Department* [2009] 1 AC 1159. There the House of Lords considered the issue of delay in the determination of an asylum application. While the argument for this court drew attention to para [15] only, it is necessary to consider paras [14] and [15] together:

> "**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 Secretary of State 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. Thus, in *R (Ajoh) v Secretary of State for the Home Department* [2007] Imm AR 817, para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status." This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time when he or she entered into a family relationship": see *Boultif v Switzerland* 33 EHRR 1179, para 48; *Mokrani v France* 40 EHRR 123, para 30. 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. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal."

[34] As the court pointed out during the hearing, under United Kingdom law and international law, an asylum applicant is <u>not</u> in the "very precarious situation" of being "liable to be removed at any time." Rather, as the law stands at present, such a person has the security of residence in the United Kingdom until determination of

their asylum application. This obligation of every receiving state lies at the very core of the Refugee Convention . When this was put to Mr Southey he did not contest it. More fundamental, perhaps, is the correct analysis of para [15] of Lord Bingham's judgment. Considered as a whole, its overall thrust is to the effect that an immigrant's Article 8 case may, depending upon its particular facts, become progressively stronger with the passage of time pending the determination of the application in question, whether this be for asylum, some other form of protection or a status such as settlement or temporary or permanent leave to remain in the United Kingdom.

[35] Giving effect to the preceding analysis, we are unable to identify any incompatibility with *EB (Kosovo)* paras [14]–[15] in para [100](iv) of the judgment of Colton J. We would add the following. The judge, in substance, clearly had in mind the reality that in every case in which an immigrant applies to the relevant State agency for a status in the United Kingdom the decision will not be made immediately. Thus there will be some delay in every case. There will always be a lapse of time between application and final determination.

[36] Colton J, correctly, draws attention to the consideration that the elapse of time *per se* is unlikely to support a finding of a breach of Article 8. This court agrees and, moreover, this was not contested before us. It is appropriate to add that this unlikelihood does not exclude the possibility of a case in which a court determines that the elapse of time on its own, without supporting elements, breaches a person's rights under Article 8: see the stark facts of, and decision in, *BAC.* Furthermore, the judge correctly stated that factors other than the elapse of time have the potential to ("could") fortify an Article 8 complaint in cases of the present kind. The judge instanced, inexhaustively, the factors of homelessness, lack of medical attention, impact on the welfare of children and significant interference with family or personal relationships. In the opinion of this court there can be no criticism of the judge's formulation.

[37] Finally, in this context, para 333A of the Immigration Rules provides:

> "333A. 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.
>
> 2. Where a decision on an application for asylum has not been taken within:
>
> (a) six months of the date it was recorded; or
>
> (b) within 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,

3. 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."

[38] We draw attention to this provision of the Rules for the purpose of making clear that while it featured fleetingly in the appellant's submissions, it was not contended – correctly – that a demonstrated breach of this provision would underpin a breach of Article 8(1) ECHR in a given case. Two observations are appropriate. First, this court has explained above the correct approach to the "as soon as possible" statement in BAC. Second, in argument counsel was driven to acknowledge the significant impediment posed by the words " without prejudice to an adequate and complete examination." This doubtless explains why the second ground of appeal – para [11] above – was not developed in argument before this court.

Practice: Authorities

[39] The long established Northern Ireland Court of Appeal practice (dating from PD1/2020, Appendix 3 [6]) permits the citation of a maximum number of 12 authorities, to include both statutory provisions and cases. It matters not whether this is spelled out explicitly in a case management order. This limitation may be exceeded upon request, with the permission of the court. In the present case, this limit was exceeded, without any form of communication with the court. This misdemeanour was compounded by the unheralded provision of a second bundle of authorities. Finally, at the hearing, there emerged the phenomenon of a still further, third, bundle of a "subsidiary" or "secondary" character. Counsel for the appellant sought to quote from this bundle. No member of the judicial panel was in possession of same. To summarise, there were flagrant breaches of practice in this case which will not be tolerated in any future case. The possible costs implications of this will be addressed when the final order of this court is determined.

Conclusion

[40] But for paras [25]–[35] above, this case would have been a paradigm contender for summary dismissal by the application of the *Salem* principle. The sole ground upon which this court declines to adopt this course is the propriety of taking the opportunity to review the correctness of para [100] of the judgement of Colton J, as indicated in para [32] above.

[41] For the reasons given the appeal is dismissed.