

# The relevance of 'delay' in deportation proceedings

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*WEBINAR – 1 APRIL 2021*



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# What is a 'delay'?

Generally:

1. Delay in making a decision to deport after conviction.
2. Delay in deporting after an unsuccessful deportation appeal.

What is the relevance of these delays in the proportionality assessment?

# Delay in removal cases

- ▶ We are familiar with relevance of delays in decision making to an Article 8 proportionality assessment in removal cases
  - ▶ **EB (Kosovo) v SSHD** [2008] UKHL 41
    - ▶ §14 – 16
      - ▶ 1. Developing closer personal and social ties and establish deeper roots in the community.
      - ▶ 2. A sense of impermanence fading as “months pass without a decision to remove being made, and months become years, and year succeeds year ... 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.”
      - ▶ 3. 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.

## *SSHD v MN-T (Colombia)* [2016] EWCA Civ 893

- ▶ The Appellant had been convicted of supplying a kilogramme of cocaine.
- ▶ Sentenced to 8 years imprisonment.
- ▶ There was a five-year delay between the Appellant's release from prison (2003) and the SSHD taking a deportation decision (2008).
- ▶ The Appellant lost the deportation appeal (2009) but no further action was taken by the SSHD to deport the Appellant.
- ▶ She then applied for leave (2012) which was refused. The appeal was allowed by the FTT and the UT upheld that decision. Appeal to CoA by the SSHD.
  
- ▶ The FTT held that the delay, the Appellant's low risk of reoffending and rehabilitation, demonstrated by the length of time she had not reoffended, together with satisfying Exception 1 of s.117C constituted very compelling circumstances under s.117C(6) of the 2002 Act.

## *SSHD v MN-T (Colombia)* [2016] EWCA Civ 893

- ▶ At §35 Jackson LJ held:
  - ▶ “I agree that rehabilitation alone would not suffice to justify the Upper Tribunal's decision in this case. If it had not been for the long delay by the Secretary of State in taking action to deport, in my view there would be no question of saying that “very compelling circumstances over and above those described in Exceptions 1 and 2” outweighed the high public interest in deportation. **But that lengthy delay makes a critical difference. That lengthy delay is an exceptional circumstance.** It has led to the claimant substantially strengthening her family and private life here. Also, it has led to her rehabilitation and to her demonstrating the fact of her rehabilitation by her industrious life over the last 13 years.”

## *SSHD v MN-T (Colombia)* [2016] EWCA Civ 893

- ▶ At §41 Jackson LJ identified three reasons for the public interest in the deportation of foreign criminals:
  - ▶ (1) once deported the criminal will cease offending in the UK;
  - ▶ (2) deterrence of others; and
  - ▶ (3) the expression of public concern at the crime.
- ▶ At §42
  - ▶ *“If the Secretary of State delays deportation for many years, that lessens the weight of these considerations. As to (1), if during a lengthy period the criminal becomes rehabilitated and shows himself to have become a law-abiding citizen, he poses **less of a risk** or threat to the public. As to (2), the **deterrent effect** of the policy is **weakened** if the Secretary of State does not act promptly. Indeed lengthy delays, as here, may, in conjunction with other factors, prevent deportation at all. As to (3), it **hardly expresses society's revulsion** at the criminality of the offender's conduct if the Secretary of State delays for many years before proceeding to deport.”*

## SSHHD v SU [2017] EWCA Civ 1069

- ▶ Appears to approve Jackson LJ's decision at §41-42
- ▶ At §61:
  - ▶ *"The passage on which Mr Yeo relied was at [41]-[42] in which Jackson LJ added comments, not forming part of the reasoning in his judgment, that where the Secretary of State delays deportation for many years, it lessens the weight of some reasons for the high public interest in the deportation of foreign criminals. The risk of re-offending had been much reduced during the delay. The deterrent effect on offending was weakened if prompt action to deport is not taken. The expression of society's revulsion at the offender's criminal conduct is blunted. These observations are of course well made, but they were not made in the context of a person who had unlawfully re-entered the country in breach of a deportation order and they clearly do not obviate the need for the decision-making tribunal to apply the relevant provisions and legal principles."*

# *RLP (BAH – revisited – expeditious justice)*

## *Jamaica* [2017] UKUT 00330

- ▶ Jamaican national aged 50.
- ▶ His initial presence in the UK, from April 1997 to December 1999 was lawful, pursuant to visitors and student visas. The Appellant's presence in the UK was unlawful since 01 January 2000.
- ▶ He was the father of a British child aged 15.
- ▶ Appellant was convicted of wounding with intent to do grievous bodily harm in 2001. He was sentenced to 4 years imprisonment.
- ▶ The SSHD took a 'removal' decision on 13 June 2003. A's appeal against this decision was dismissed on 11 September 2003. No action was taken by the SSHD
- ▶ In September 2012, in response to the Appellant's further submissions of November 2010, the SSHD took a deportation decision on account of the Appellant's conviction in 2001.
- ▶ FTI dismissed appeal in 2013 but due to various delays by HMCTS comes to the UT in 2017.



# *RLP (BAH – revisited – expeditious justice)* *Jamaica* [2017] UKUT 00330

## Headnote

*(ii) In cases where the public interest favouring deportation of an immigrant is potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in the underlying decision making process is unlikely to tip the balance in the immigrant's favour in the proportionality exercise under Article 8(2) ECHR.*

# RLP (BAH – revisited – expeditious justice) Jamaica [2017] UKUT 00330

## ▶ At §23

- ▶ “We reject this argument. On the one hand, the delay on the part of the Secretary of State can only be characterised egregious, is exacerbated by the absence of any explanation and is presumptively the product of serious incompetence and maladministration. However, on the other hand, the case against the Appellant is a formidable one: the public interest favours his deportation; the potency of this public interest has been emphasised in a series of Court of Appeal decisions; the Appellant’s case does not fall within any of the statutory or Rules exceptions; the greater part of his life was spent in his country of origin; there is no indication of a dearth of ties or connections with his country of origin; he is culturally and socially integrated there; his family life in the United Kingdom is at best flimsy; and most of his sojourn in the United Kingdom has been unlawful and precarious. We take into account all of these facts and factors in determining whether very compelling circumstances have been demonstrated. This is a self-evidently elevated threshold which, by its nature, will be overcome only by a powerful case. **In our judgement the maladministration and delay of which the Secretary of State is undoubtedly guilty fall measurably short of the mark in displacing the aforementioned potent public interest in the Article 8(2) proportionality balancing exercise.** We conclude that the Appellant’s case fails to surpass the threshold by some distance.”

# Tension?

- ▶ Arguably some tension between **MN-T (Colombia)** and **RLP** as to the relevance of delay in decision making in deportation appeals and how that affects the proportionality assessment.
- ▶ **MN-T (Colombia)** appears to be authority for the proposition that undue delay can reduce the public interest in deportation
- ▶ Permission granted by the CoA to explore tension between the two cases
  - ▶ Was to be heard on 24 and 25 March 2021
  - ▶ Now settled and remitted to the UT

# How else can delay be relevant?

## ▶ Rehabilitation

- ▶ Delay can affect the quality and success of rehabilitation.
- ▶ Cases which held rehabilitation was unlikely to yield significant weight like **Binbuga**, **Olarewaju**, and **Danso**, had no element of delay. Decision to deport was taken in under a year.
- ▶ **HA (Iraq) v SSHD** [2020] EWCA Civ 1176
  - ▶ §141: “Where a tribunal is able to make an assessment that the foreign criminal is unlikely to re-offend, that is a factor which **can carry some weight** in the balance when considering very compelling circumstances. The weight which it will bear will vary from case to case, but it will rarely be of great weight bearing the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminal in question but also on wider policy considerations of deterrence and public concern. I would add that tribunals will properly be cautious about their ability to make findings on the risk of re-offending, and will usually be unable to do so with any confidence based on no more than the undertaking of prison courses or mere assertions of reform by the offender or **the absence of subsequent offending for what will typically be a relatively short period.**”
- ▶ But remember rehabilitation only goes to one of the three public interests in deporting a foreign national offender so it is highly unlikely to be determinative of itself.

# How else can delay be relevant?

## Rehabilitation

- ▶ **HA (Iraq)** reviewed a number of authorities on rehabilitation and distanced itself from **Binbuga**.
  - ▶ “142. That summary may come to much the same thing in practice as the UT's proposition that "no material weight ... ordinarily falls to be given to rehabilitation in the proportionality balance"; but I think, with respect, that it is more accurately expressed, and **I cannot in any event adopt its reasoning that "rehabilitation will ... normally do no more than show that the individual has returned to the place where society expects him ... to be", notwithstanding its endorsement (not, I think, as a matter of ratio) in Binbuga.** I do not think that it properly reflects the reason why rehabilitation is in principle relevant in this context, which is **that it goes to reduce (one element in) the weight of the public interest in deportation which forms one side of the proportionality balance.** It is not generally to do with being given credit for being a law-abiding citizen: as the UT says, that is expected of everybody, but the fact that that is so is not a good reason for denying to an appellant such weight as his rehabilitation would otherwise carry.”

# How else can delay be relevant?

## Rehabilitation

- ▶ Issue on rehabilitation not necessarily over.
- ▶ SSHD argues that ***Binbuga*** was binding on ***HA (Iraq)*** on the question of rehabilitation having no or only limited weight.
- ▶ Potential argument that there is no reason why rehabilitation could not be given great weight
  - ▶ There are three aspects of the public interest in deportation, i.e. (i) prevention of re-offending, (ii) deterrence, and (iii) expression of public concern for the crime.
  - ▶ But these three are not necessarily equally weighted.
  - ▶ Provided that the fact-finding Tribunal gives adequate weight to the remaining two aspects of the public interest in deportation, rehabilitation could carry significant weight.

# How else can delay be relevant?

- ▶ Strengthening of family life

- ▶ Due to an inordinate delay, and perhaps unusual to most deportation cases, it may be that a child was born after the individual was released from prison.
- ▶ This can impact the harshness of the individual's deportation on the child under the Exceptions or under s.117C(6) of the 2002 Act because the child would have never experienced the shock of having the parent suddenly and abruptly leave the household.

# Final Thoughts

- ▶ There is no set length as to what constitutes an inordinate or egregious delay. All depends on the facts.
- ▶ Delay in taking a decision to deport and delay in deporting an individual after an unsuccessful appeal is unlikely to be treated differently. MN-T had both types of delays and no distinction was made.
- ▶ Delay should be used in conjunction with other factors (such as rehabilitation and strengthening of family/private life).
- ▶ Delay should not be the Applicant/Appellant's fault – should be the SSHD's fault.



# Contact Details

Any Questions?

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