

CASE COMMENTARY

**UNHAPPY FAMILIES AND USE OF ARTICLE 8 FOR  
FAILED ASYLUM SEEKERS**

**Chikwamba v Secretary of State for the Home Department [2008]  
UKHL 40**

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**INTRODUCTION**

Immigration minister Phil Woolas has attacked lawyers and charities that work on behalf of asylum seekers for undermining the law and “playing the system” by exploiting the appeals system.<sup>1</sup> However, the case of *Chikwamba v Secretary of State for the Home Department*,<sup>2</sup> handed down by the House of Lords on June 25<sup>th</sup> 2008, confirms the need for an effective appeals process, without which there would be no safety net for thousands of asylum seekers. The case concerns the application of article 8 of the European Convention of Human Rights (ECHR)<sup>3</sup> and the government’s policy regarding failed asylum seekers.

Until recently, anyone who had remained in the UK unlawfully and had during their time in the UK formed a relationship and perhaps a family had no legal basis upon which to regularise their status in the UK. Immigration law and rules required that they return to their country of origin and apply for entry clearance to return to the United Kingdom under the appropriate Immigration rules. The result of this was to separate families for lengthy periods, whilst the returnee was subjected to lengthy waits and had to satisfy strict immigration rules before applications were processed by British

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<sup>1</sup> Guardian interview November 18<sup>th</sup> 2008.

<sup>2</sup> *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40. two other important immigration appeals cases were handed down on the same day: *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, and *KB(Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41.

<sup>3</sup> Alias the Convention for the Protection of Human Rights and Fundamental Freedoms.

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missions abroad. In addition, they were likely to incur enormous personal financial costs in terms of airfares, accommodation and application fees. This was the case even where article 8 of the ECHR had been invoked, unless the circumstances were “exceptional”. The Secretary of State for the Home Department (SSHD) successfully arguing that it was generally proportionate and fair to expect such people to follow this procedure lest they gain an unfair advantage in “queue jumping” those who had adhered to the law.

Previously, the courts have accepted this approach, finding that government policy does not make it disproportionate to have a person leave the UK to apply for proper entry clearance on article 8 grounds from abroad, as it is necessary in the legitimate interests of maintaining and enforcing immigration control. Most notably in *R (Mahmood) v Secretary of State for the Home Department* where Laws LJ observed: “It is simply unfair that he [or she] should not have to wait in the queue like everyone else.”<sup>4</sup> Or in *R v Ekinci v Secretary of State for the Home Department* where as Simon Brown LJ put it: “...it is entirely understandable that the Secretary of State should require the appellant to return to Germany so as to discourage others from circumventing the entry clearance system...”<sup>5</sup>

However, the recent enlightened decision of the House of Lords in *Chikwamba (FC) v Secretary of State for the Home Department*<sup>6</sup> seems to break this pattern. In this case a unanimous House of Lords effectively overruled the previous controlling Court of Appeal decision in *Mahmood* and, in a landmark and corrective decision, decided that an appeal against a refusal of asylum and leave to enter that is based on the right to family life protected by article 8 should not be dismissed routinely because government policy required the appellant to leave the country to apply for entry clearance from abroad.

### THE FACTS

Sylvia Chikwamba, a Zimbabwean national, arrived in the UK seeking asylum on 22 April 2002. She brought with her a younger brother and a younger sister for whom she was responsible. Circumstances meant that she had had to leave behind two children by a man from whom she was estranged, and they had been taken into the care of relatives prior to her fleeing Zimbabwe; and yet she was still not yet 20 years old when she sought asylum

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<sup>4</sup> *R (Mahmood) v Secretary of State for the Home Department* [2001] WLR 840 at para 26.

<sup>5</sup> *R v Ekinci v Secretary of State for the Home Department* [2003] EWCA Civ 765 at para 17.

<sup>6</sup> Above n 2.

in the UK as a port applicant. The dire situation in Zimbabwe was well known but her claim for asylum was refused by the SSHD less than two months after her arrival, and leave to enter was thus formally refused a few days later on June 8<sup>th</sup> 2002. The bitter pill was temporarily sugared, however, because at the same time the Secretary of State announced that he had decided to suspend removal of failed asylum-seekers to Zimbabwe until further notice, due to the well-publicised and deteriorating situation in that country. Paragraph 14 of his letter stated:

“It is accepted that conditions in Zimbabwe have deteriorated in recent months and there were reports in December 2001 that some failed asylum seekers have faced difficulties on their return to Zimbabwe. While there is no evidence that returnees were being systematically detained for questioning or subjected to ill treatment, the Secretary of State was not satisfied, on the information then available, that unsuccessful asylum seekers could safely return to Zimbabwe. On 15<sup>th</sup> January 2002 the Secretary of State therefore decided to suspend removals of failed asylum seekers [and pending] the outcome of any appeal to the independent appellate authorities, be removed to Zimbabwe as soon as the Secretary of State is satisfied that it is safe to do so.”<sup>7</sup>

Chikwamba was thus saved from removal for the moment though without legally enforceable status in the UK. And the question remained: why had her request for asylum been refused in the first place given the fact that political situation in Zimbabwe was well known at the time? It would appear that it was principally an issue of credibility. Chikwamba asserted that she had sought refuge in UK because she and her mother were members of the opposition MDC<sup>8</sup> party and had been actively involved in opposing the Mugabe Zanu-PF<sup>9</sup> regime through involvement with that party. It is apparent that the Secretary of State simply did not believe her claimed membership of the MDC or her grounds for concern about the treatment she would receive in Zimbabwe if she returned as a failed asylum seeker, and therefore refused her application; the Asylum and Immigration Appeal Tribunal who dismissed her appeal against the SSHD’s decision taking the same view.

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<sup>7</sup> In the event, this general suspension was not lifted until 16<sup>th</sup> November 2004, some 2½ years after Chikwamba was initially refused leave to enter. The suspension has since been restored and currently remains in force.

<sup>8</sup> Movement for Democratic Change (MDC) headed by Morgan Tsangirai.

<sup>9</sup> Zimbabwe African National Union–Patriotic Front, formed in 1987 from the union of the Zimbabwe African National Union (ZANU) and the Zimbabwe African People’s Union (ZAPU).

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Having been refused leave to enter and under (albeit delayed) threat of removal, Chikwamba remained in the UK unlawfully as a failed asylum seeker who had exhausted her statutory appeal rights and, but for the SSHD's policy, would have been removed to Zimbabwe. She remained in this limbo as of June 2002, subject to the threat of removal as soon as the Secretary of State changed his policy.<sup>10</sup> Once the ban on deportation of failed asylum seekers to Zimbabwe was lifted she could be removed to Zimbabwe, with at that stage no prospect of return.

Around this time, Chikwamba met an old school friend, Mr Magaya, who was also a refugee from Zimbabwe but who had been granted asylum and indefinite leave to remain in the UK in June 2002. Their friendship blossomed and they were married in September 2002. It has never been suggested throughout the proceedings that this was anything other than a genuine love match. In effect, Chikwamba established a family life in the UK and the fact and duration of the suspension on removals to Zimbabwe may have given her some reassurance that she could stay. On April 14<sup>th</sup> 2004 a daughter, Bianca, was born. Bianca's status as a British Citizen by virtue of her father's indefinite leave to remain, coupled with her father's refugee status, was to play a crucial role in the proceedings that followed that date.

Previous to her marriage to Magaya, but during their relationship, and, presumably mindful that the Secretary of State's suspension may be coming to an end, Chikwamba had submitted a further application for asylum and requested to remain on humanitarian grounds, asserting that her removal to Zimbabwe would breach her article 8 ECHR right to respect for family life. By a decision letter of February 4<sup>th</sup> 2003, the Secretary of State again refused to accept her application and added that he was not prepared to grant her exceptional leave to remain outside the Immigration Rules.

She then appealed to an immigration adjudicator under s 65 of the 1999 Act (since repealed and replaced by ss 82 and 84 of the 2002 Act). The adjudicator dismissed her appeal against both applications in May 2003 on the somewhat dubious grounds<sup>11</sup> that because the situation in Zimbabwe (although "harsh and unpalatable") was not sufficient to trigger a claim under article 3, it followed, the adjudicator stated, that she could not establish a claim under article 8. The IAT then refused her leave to appeal against that decision.

Fortunately for Chikwamba, she had tenacious lawyers and charities working on her behalf (so derided by Immigration minister Phil Woolas).<sup>12</sup> Three months prior to the birth of her daughter she was eventually granted

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<sup>10</sup> Above n 7.

<sup>11</sup> The Court of Appeal later described it as "a plain error of law" [2005] EWCA Civ 1779, at para 12.

<sup>12</sup> See above n 1.

permission to apply for Judicial Review of the IAT's refusal to grant her leave to appeal, and a consent order was made on the substantive judicial review hearing in June 2004. Eventually, two and a half years after her initial asylum claim and seven months after the birth of her daughter she was finally granted leave to appeal to the IAT in November 2004 - just after the Secretary of State had lifted the suspension and reinstated forced returns to Zimbabwe.

### IMMIGRATION APPEAL TRIBUNAL (IAT)<sup>13</sup>

The IAT heard the appeal on January 4<sup>th</sup> 2005. Although it was conceded that the adjudicator had erred in his approach to Article 8, the only question for the IAT was that identified in article 8(2) itself: whether the proposed interference with her established private and family life in the UK was proportionate to the legitimate aim of immigration control. It had been established in *R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368* that decisions taken pursuant to immigration control would be proportionate in all save a small minority of "exceptional cases", identifiable only on a case by case basis. The test was to be taken from the IAT's decision in *M(Croatia) [2004] IAR 211*, to the effect that it could only allow an appeal under article 8 where the disproportion constituted by removal from the country between private rights and public interests was so great that no reasonable Secretary of State could reasonably reach a contrary view. Since then the Court of Appeal in *Huang v SSHD*<sup>14</sup> has superseded *M(Croatia)*, holding that it is the adjudicator or appellate authority's decision, not that of the Secretary of State that counts, and the test is whether the case was "truly exceptional on its facts". The IAT concluded that to require Chikwamba to return to her country of origin would be a proportionate interference with her, her husband's and their baby daughter's right to respect for family and private life guaranteed under article 8 of the ECHR and so dismissed her appeal.

Although this was, strictly speaking, adhering to government policy of the time, the decision was later heavily criticised by the House of Lords as having erred on an interpretation of article 8 *at this early stage*.<sup>15</sup> At the time the IAT took the view that Chikwamba's separation from her husband would only be for a "relatively short period" and therefore would not cause any hardship to either party. It is submitted that, in effect, Chikwamba lost her appeal because of the dogged application of government policy that a failed asylum seeker

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<sup>13</sup> Now confusingly renamed the AIT from April 2005.

<sup>14</sup> [2005] 3 WLR 4891. The House of Lords later allowed Mrs Huang's appeal and held there was no additional requirement of exceptionality in article 8 cases [2007] UKHL 31.

<sup>15</sup> See below n 33.

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such as Chikwamba should return to Zimbabwe to apply for entry clearance (under the Immigration Rules) to return to the UK.

### THE COURT OF APPEAL

In the Court of Appeal Chikwamba argued first, that family life with her husband and daughter could not be constituted outside the UK in Zimbabwe. Secondly, that as the SSHD refused to give her any assurance that her circumstances would comply with the specific and substantive requirements of the Immigration Rules so that she would be allowed to return,<sup>16</sup> there was a real chance that her removal might cause the break up of her marriage and cause Bianca to be separated from at least one of her parents. She might find herself permanently in Zimbabwe with or without her daughter but certainly without her husband, whom even the IAT accepted faced an insurmountable obstacle to his own return to Zimbabwe.<sup>17</sup> Hence her claim that refusal to allow her to make the application for leave to remain from within the UK would interfere disproportionately with her article 8(2) rights to family life.

The Court of Appeal<sup>18</sup> agreed with the IAT and dismissed her appeal in November 2005. They felt bound by the previous decision in *Mahmood*<sup>19</sup> and the Court of Appeal in *Huang* (the Court of Appeal heard the case before Huang's appeal was allowed by the House of Lords). To allow a presumption in favour of family unity "cuts across the clear rule of *Mahmood* and *Huang*, that it is only in exceptional cases that an adjudicator or the IAT can allow article 8 considerations to prevail over the public interest in maintaining efficient and orderly immigration control".<sup>20</sup> Chikwamba would have to return to Zimbabwe and seek entry clearance from the Entry Clearance Officer (ECO) at the British Embassy in Harare just like everyone else.

This is the nub of the issue. As a failed asylum seeker remaining unlawfully in the UK, Chikwamba was unable to satisfy immigration procedures for entry clearance. Unfortunately, the Court of Appeal, following *Mahmood*, seems to have assumed that these procedures in themselves struck the desired degree of proportionality. In effect they regarded article 8 as supplementary to consideration of the Immigration Rules, whereas in reality article 8 is engaged as soon as family life is disrupted quite irrespective of the merits or otherwise of the Immigration Rules.

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<sup>16</sup> See below n 22 and 23.

<sup>17</sup> He had been granted asylum and indefinite leave to remain in the UK in 2002 on this basis.

<sup>18</sup> Auld LJ, Jonathan Parker and Lloyd LJ; Auld LJ giving the single agreed judgment.

<sup>19</sup> Above n 8.

<sup>20</sup> Auld LJ at para 47.

## LEGISLATIVE BACKGROUND

Sylvia Chikwamba based her appeal around the protection given to her family life by article 8 of the ECHR, which states:

**“Article 8 – Right to respect for private and family life:**

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

However, as has already been said, she was also subject to immigration procedures which were potentially seeking her removal. Procedure for entry clearance and appeals are set out in the 1971 Immigration Act (the 1971 Act) as amended by various subsequent Acts and decisions, and now contained in the Nationality, Immigration & Asylum Act 2002 (the 2002 Act). In addition, Immigration Rules are made under section 3(2) of the 1971 Act. The Immigration Rules constitute a statement of the rules laid down by the Secretary of State for the Home Department as to the practice to be followed in the administration of the Immigration Act 1971; that is, for regulating the entry into, and the stay in, the UK of persons required by the Act to have leave to enter. Section 3(2) of the 1971 Act imposes on the Secretary of State a duty “from time to time (and as soon as may be) to lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of the Act...” In turn the Immigration Rules are interpreted in detail by the Immigration Directive Instructions issued by the Immigration Policy Unit. These are government guidelines as to how to interpret and apply the Immigration Rules; these are occasionally amended so as to reflect the Courts final interpretations of rules and policies.

The parallel system for asylum appeals is to be found in the Immigration and Asylum Act 1999 as amended by the 2002 Act. In addition, Asylum Policy Notices issued by the Asylum Policy Unit ultimately become the basis of Asylum Policy Instructions (APIs) issued by the Secretary of State. These are statements of policy as to how to interpret and apply the legislation. APIs

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(analogous to IDIs) cover the way in which applications are processed.<sup>21</sup> APIs attract more litigation and thus attempt to reflect the ever changing case law on this area.

Paragraph 28 of the Immigration Rules states that an applicant for entry clearance must be outside the UK at the time of the application. Even though Paragraph 2 states that Entry Clearance Officers (ECOs) must comply with the Human Rights Act 1998, the problem for Chikwamba was that, having been refused asylum and leave to enter the UK, she could obtain no assurance that she would satisfy some of the specific requirements for entry clearance in the Immigration Rule, forcing her to rely on article 8 instead.

The relevant rules for entry as a spouse are contained in Paragraph 281 and Paragraph 352A of the Immigration Rules. Paragraph 281(iv) provides general leave to enter as a spouse. It requires the applicant to show that she would be accommodated and maintained without recourse to public funds - a requirement that Chikwamba might not be able to meet.<sup>22</sup>

On the other hand, Paragraph 352A makes specific provision for leave to enter as the spouse of a refugee and so there is no analogous requirement to Paragraph 281(iv), thus implicitly recognising the financial difficulties facing refugees.<sup>23</sup> However, it does require that the marriage had taken place *before* the refugee fled the home country and was therefore also of no assistance to Chikwamba.

On her return to Zimbabwe therefore, she would not have been able to satisfy the requirements of the Immigration Rules. She was thus outside the Rules and would have no hope of return to the UK unless she could successfully appeal under section 65 of the Immigration and Asylum Act 1999.<sup>24</sup> The issue for the House of Lords was therefore comparatively straightforward:

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<sup>21</sup> The relevant API in the instant case is Article 8 of the ECHR, S 6: Consideration of Article 8 Family Life Claims.

<sup>22</sup> "Paragraph 281(iv) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively." (Consolidated Immigration Rules).

<sup>23</sup> "Paragraph 352A(ii) the marriage or civil partnership did not take place after the person granted asylum left the country of his former habitual residence in order to seek asylum." (Statement of Changes HC 395).

<sup>24</sup> S 65 of the 1999 Act (since superseded by ss 82 and 84 of the 2002 Act) states: "(1) A person who alleges that an authority has, in taking any decision under the Immigration Act relating to that person's entitlement to enter or remain in the United Kingdom, acted in breach of his human rights may appeal to an adjudicator against that decision... (2) For the purposes of this Part, an authority acts in breach of a person's human rights if he acts, or fails to act, in relation to that other person in a way which is made unlawful by s 6(1) of the Human Rights Act 1998."



“In determining an appeal under section 65 of the Immigration and Asylum Act 1999 (the 1999 Act) (now sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 (2002 Act)) against the Secretary of State’s refusal of leave to remain on the ground that to remove the appellant would interfere disproportionately with his article 8 right to respect for his family life, when, if ever, is it appropriate to dismiss the appeal on the basis that the appellant should be required to leave the country and seek leave to enter from an entry clearance officer abroad?”

## THE HOUSE OF LORDS

Having exhausted all other legal remedies, Chikwamba eventually won her appeal in the House of Lords. In a unanimous decision, the House of Lords<sup>25</sup> allowed her appeal on the basis that her removal to Zimbabwe would be in breach of the UK’s duties towards her under Article 8 ECHR: she could make her application from within the UK without having to return to Zimbabwe.<sup>26</sup>

Lord Brown rejected Chikwamba’s “wider argument” that it would *never* be appropriate to dismiss a section 65 appeal brought on article 8 grounds on the basis that the appellant should leave the country and apply for entry clearance from abroad. It had been argued by Chikwamba that the combined effect of section 65 of the 1999 Act (being the general right of appeal on human rights grounds) and section 72(2) of the 1999 Act, effectively did deny her this right to appeal.<sup>27</sup> Section 72(2)(a) states that an in-country appeal can only be denied when the Secretary of State certifies that the claim is “manifestly unfounded”, and, she argued, such a certificate can only be given when long-term removal is permissible. His Lordship held that this did not mean that the appellant was denied a right to an in-country appeal; rather it was to dispose of the appeal in a legitimate manner intended to promote immigration control.<sup>28</sup>

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<sup>25</sup> Lords Bingham of Cornhill, Hope of Craighead, Scott of Foscote, Baroness Hale and Lord Brown of Eaton-under-Heywood.

<sup>26</sup> The practical effect of which meant that she would be granted leave to remain in the UK on the basis of her family connections.

<sup>27</sup> See above n 24 for s 65. S 72(2) of the 1999 Act provides: “A person who has been, or is to be, sent to a member State or to a country designated under s 12(1)(b) is not, while he is in the United Kingdom, entitled to appeal—(a) under s 65 if the Secretary of State certifies that his allegation that a person acted in breach of his human rights is manifestly unfounded”.

<sup>28</sup> Above n 2, at para 34.

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Nevertheless, in regard to the “narrower argument”, only comparatively rarely (especially in family cases involving children) should an article 8 appeal be dismissed on the basis that it would be “proportionate and more appropriate” for the appellant to apply for leave to remain from abroad.<sup>29</sup> In Chikwamba’s case it was clear that the needs for effective immigration control did not require her to travel to Zimbabwe to make her application. In coming to this conclusion, Lord Brown took into account the “harsh and unpalatable” conditions in Zimbabwe; the fact that enforced returns of failed asylum-seekers had remained suspended for more than two years after her marriage; and the expense (both for the tax-payer and for herself) in travelling to and from Zimbabwe.<sup>30</sup>

By implication Mr Magaya’s refugee status and Bianca’s right to family life must also be taken into account; Baroness Hale reminding the House that in *Beoku-Betts v SSHD*,<sup>31</sup> the House had already decided that the effect on other family members with a right to respect for family life with the appellant must also be taken into account when considering an appeal under article 8.<sup>32</sup> This conclusion was “obvious” to Lord Scott who added his “astonishment” that the case should have had to come this far.<sup>33</sup>

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Although Lord Brown disposed of the “wider argument” with comparative ease, he found the “narrower argument” as to *when* it would be appropriate and proportionate to dismiss such an appeal altogether more difficult. This was particularly so because he was anxious to avoid successive appeals under section 65. His Lordship felt that the Court of Appeal had misjudged this point because they had assumed that any application would be dealt with by the ECO solely in accordance with the Immigration Rules, but Lord Brown pointed out that this was an erroneous assumption. Even if she could not bring her case strictly within the Immigration Rules, the ECO would be bound to decide her Article 8 claim in its own right because Rule 2 of the Immigration Rules requires ECOs (amongst others) to comply with the provisions of the Human Rights Act 1998. Thus, if the claim were rejected, she would have a further section 65 right of appeal, albeit this time from abroad, and with the possibility of successive appeals in the future.<sup>34</sup>

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<sup>29</sup> Ibid, at para 44.

<sup>30</sup> Ibid, at para 46.

<sup>31</sup> Above n 1.

<sup>32</sup> Ibid, at para 8.

<sup>33</sup> Ibid, at para 3.

<sup>34</sup> Ibid, at para 25 and para 26.

In helping them reach their decision the House of Lords reviewed the following: *Mahmood v SSHD*,<sup>35</sup> *Ekinici v SSHD*,<sup>36</sup> *Mukarkar v Secretary of State for the Home Department*,<sup>37</sup> *SB(Bangladesh) v Secretary of State for the Home Department*.<sup>38</sup>

The leading case of *Mahmood* concerned a Pakistani citizen who entered the UK illegally and claimed asylum. A week before his claim was refused and he was served with removal directions, he married a British citizen with whom he subsequently had two children. The Court of Appeal concluded that only in “wholly exceptional cases” should an applicant for leave to remain be able to escape the requirement under the rules for entry clearance to be obtained abroad by having his substantive application to remain determined in the UK. To decide otherwise, it was argued, would mean that someone outside the rules would be in a better position than someone within them and would effectively jump the queue. In addition, there would be no breach of article 8 if there were “no insurmountable obstacles” to the family living together abroad.

Although the HRA was not yet in force, Lord Phillips MR (as he then was) had approached the issue as if it was and concluded on the approach to article 8:

“...(2) Article 8 does not impose on a state any general obligation to respect the choice of residence of a married couple. (3) Removal or exclusion of one member from a state where other members of the family are lawfully resident will not necessarily infringe article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family. (4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.”<sup>39</sup>

Thus, in relation to the facts of *Mahmood*, although accepting that it would be harsh if an applicant was denied access to his children for some time, he nevertheless did not consider that “the Secretary of State’s insistence

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<sup>35</sup> Above n 4. A case by which the Court of Appeal in the instant case had felt bound, and a case, their Lordships pointed out, that was heard before the enactment of the HRA 1998.

<sup>36</sup> Above n 5

<sup>37</sup> [2006] EWCA Civ 1045.

<sup>38</sup> [2007] EWC Civ 28.

<sup>39</sup> Above n 4, at para 55.

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that the applicant should comply with the same formal requirements as all other applicants seeking an entry visa to join spouses in this country is in conflict with article 8.”

Laws LJ’s sums up the view of the Court in regard to queue jumping:

“Firm immigration control requires consistency of treatment between one aspiring immigrant and another. If the established rule is to the effect—as it is—that a person seeking rights of residence here on grounds of marriage ... must obtain an entry clearance in his country of origin, then a *waiver* of that requirement in the case of someone who has found his way here without an entry clearance and then seeks to remain on marriage grounds, having no other legitimate claim to enter, would in the absence of exceptional circumstances to justify the waiver, disrupt and undermine firm immigration control because it would be manifestly unfair to other would-be entrants who are content to take their place in the entry clearance queue in their country of origin.”<sup>40</sup>

In *Ekinici*, the appellant was a Turkish citizen with ‘an appalling immigration record’. He had entered the UK illegally and claimed asylum in the UK, untruthfully claiming that he had not previously sought asylum status elsewhere. In fact, he had previously lived in Germany for some eight years, unsuccessfully claiming asylum there on two occasions. Simon Brown LJ (as he then was) concluded that there was:

“...nothing even arguably disproportionate in requiring this appellant to return to Germany for the relatively short space of time that will elapse before he is then able to have his entry clearance application properly determined, if necessary outside the strict rules. That the Secretary of State is not contemplating or intending any longer-term, let alone permanent, separation of the appellant from his family seems to me abundantly plain . . .”<sup>41</sup>

By contrast, in *Mukarkar*, the appellant was a Yemeni citizen who obtained entry clearance as a visitor by deception and then unsuccessfully sought leave to remain as a dependent relative of his many children settled here. The Court of Appeal distinguished *Ekinici* on its facts and allowed his appeal to remain due to his need for “permanent and constant home help” and the unreasonableness that would be entailed in requiring his children to give up their jobs and return to the Yemeni to look after him.

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<sup>40</sup> Ibid, at para 23.

<sup>41</sup> Above n 5, at para 19.

Lastly, in *SB(Bangladesh)*, the appellant was a Bangladeshi woman who entered into an arranged polygamous marriage in Bangladesh and many years later dishonestly obtained entry clearance as a visitor to the UK before then unsuccessfully seeking leave to remain as being financially dependent on a daughter settled here. The IAT took the view that there was no reason why a properly structured application should be refused by an ECO in Bangladesh and refused her appeal. The Court of Appeal, however, indicated that the IAT was not entitled to make its own assessment of her prospects of coming back to the UK and allowed her appeal. After all, it would seem paradoxical if the stronger an appellant's perceived case for entry clearance under the immigration rules the more likely he or she is to be removed from the country in order to make it.

Lord Brown also gave consideration to the then current *Asylum Policy Instruction on Article 8: Consideration of Article 8 Family Life Claims*, which included, inter alia:

“Is the interference proportionate to the permissible aim? ...In many cases, refusal or removal does not mean that the family is to be split up indefinitely. The . . . policy is that if there is a procedural requirement (under the immigration rules, extra-statutory policies or concessions) requiring a person to leave the UK and make an application for entry clearance from outside the UK, such a person should return home to make an entry clearance application from there. In such a case, any interference would only be considered temporary (and therefore more likely to be proportionate). A person who claims that he will not qualify for entry clearance under the rules is not in any better position than a person who does qualify under the rules—he is still expected to apply for entry clearance in the usual way, as the ECO will consider article 8 claims in addition to applications under the rules. See *Ekinici*...

In addition, it may be possible for the family to accompany the claimant home while he makes his entry clearance application, in which case there will be no interference at all.

For example, where a claimant is seeking to remain here on the basis of his marriage to a person settled in the UK, the policy is that they should return home to seek entry clearance to come here as a spouse under the relevant immigration rule. *Where the spouse can accompany the claimant home while he makes his application, there will be no interference. Where this is not possible, the separation will only be temporary. The fact that the interference is only for a limited period of*

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*time is a factor that is likely to weigh heavily in the assessment of proportionality.*”(author’s emphasis)

This was the policy that was applied to Chikwamba, and Lord Brown remained unconvinced that the policy as a whole was indeed legitimate and proportionate. Implicit in his judgment is that he finds the policy fundamentally objectionable because it deliberately causes potentially destructive inconvenience to people’s lives under the pretence of being even handed.

While recognising that there may be some occasions where the necessity of maintaining and enforcing immigration control could be a legitimate aim, he doubted that this was indeed the real benefit conferred by such a policy:

“Is not the real rationale for such a policy perhaps the rather different one of deterring people from coming to this country in the first place without having obtained entry clearance and to do so by subjecting those who do come to the very substantial disruption of their lives involved in returning them abroad?”<sup>42</sup>

It is important to note, however, that Lord Brown does not think such an objective is always unreasonable. Sometimes it will be necessary to enforce such a policy.<sup>43</sup> Factors which may militate in favour of endorsing the policy strictly and requiring the appellant to return home to obtain entry clearance include the following:

- (1) Whether the appellant’s immigration record is ‘appalling’, such as in *Ekinici* where “few claimants come to court with a track record of such prolonged evasion and mendacity...” (Sedley LJ).
- (2) Whether the applicant has arrived in the UK illegally (for example, in the back of a lorry). If they have done so for a ‘bad reason’ for which entry clearance could readily have been sought (such as enrolling as a student) then requiring them to return home to seek entry clearance would be more legitimate than if they had entered illegally for a ‘good reason’, such as in order to advance a genuine asylum claim in good faith.
- (3) Whether the ECO abroad is better placed than the immigration authorities in the UK to investigate the claim, “perhaps as to the

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<sup>42</sup> Above n 2, at para 41.

<sup>43</sup> *Ibid*, at para 42.

genuineness of a marriage or a relationship claimed between family members”.<sup>44</sup>

(4) Whether the Secretary of State has delayed in processing the application, in which case this would go in the applicant’s favour.<sup>45</sup>

(5) The prospective length and degree of the disruption to the established family life. This would be a key issue in article 8 claims. If the disruption is minimal then it is more likely to be legitimate to apply the policy than if it is lengthy. Thus, it was legitimate and proportionate to remove Mr Ekinici (inter alia) because he was being required to travel no further than Germany and to wait no longer than a month for a decision on his case.<sup>46</sup> Even so the case had been regarded as an “exceptional” one that turned on its facts.<sup>47</sup> Cases involving children will be looked on more favourably.<sup>48</sup>

His Lordship was also unimpressed by the queue jumping argument which had been used by the SSHD (supported by previous jurisprudence) as an excuse in favour of strict endorsement of the policy:

“As we have seen, there is reference in some of the cases to jumping the queue, not having “to wait in the entry clearance queue like everyone else.” It is not suggested, of course, that others are thereby put back in the queue and thus delayed in obtaining entry clearance. On the contrary, the very fact that those within the policy do *not* apply for entry clearance shortens rather than lengthens that queue. What is suggested, however, is that it is unfair to steal a march on those in the entry clearance queue by gaining entry to the UK by other means and then taking the opportunity to marry someone settled here and remain on that basis.”<sup>49</sup>

However, Lord Brown does not agree that others *would* feel a sense of unfairness unless those like Chikwamba were required to make their claims to

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<sup>44</sup> Provided that it did not lead to successive and unnecessary appeals with the appellant abroad and unable to give evidence in person.

<sup>45</sup> Later confirmed in *EB (Kosovo)* [2008] UKHL 41, decided on the same day as *Chikwamba*.

<sup>46</sup> Lord Brown does not elaborate on why geographical distance from the UK might be of relevance. Presumably because it is likely to involve the applicant in less expense and that they are more likely and it would be easier for his family based in the UK to visit him there?

<sup>47</sup> Above n 2, at para 29.

<sup>48</sup> *Ibid*, at para 44.

<sup>49</sup> *Ibid*, at para 40.

## CASE COMMENTARY

remain from abroad. Only in those rare circumstances outlined above should the queue jumping principle be used to defeat a claim based on article 8, so “... only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad.”<sup>50</sup>

Primarily this is because the likely disruption to family life, including any difficulties the appellant or other family members might have in returning to their country of origin, should be considered in all cases and not confined to exceptional cases as had been emphasised in *Mahmood* (and had already been criticised by the House of Lords in *Huang*). This is particularly so in cases involving children and will also be relevant in considering the conditions of the country of origin. In Chikwamba’s case it was accepted that the conditions in Zimbabwe were “harsh and unpalatable” and Mrs Chikwamba might face the prospect of remaining there in such conditions for some months before obtaining entry clearance to enable her to resume her family life.

There are other additional reasons why Lord Brown believed the application of the policy is unfair. The API policy statement, together with the decisions in *Mahmood* and *Ekinici*, asserts that a weak case under the Immigration Rules (being more likely to result in permanent removal) should not be used to strengthen an article 8 claim. To allow so, it claims, would undermine the interests of immigration control. But Lord Brown is puzzled by the inconsistencies in the Secretary of State’s justification and application of the published policy, since the policy appears to apply routinely to all article 8 cases irrespective of whether the Immigration Rules apply or not.<sup>51</sup> So, although his Lordship agreed that it was entirely understandable that a person whose circumstances fell outside the Rules should not be better off than one within them, the inconsistency of application of the policy could lead to a situation where it would be “bizarre if the weaker the appellant’s case under the Rules the readier should the Secretary of State and the appellate authorities be to excuse him the requirement to apply for entry clearance abroad.”<sup>52</sup>

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<sup>50</sup> *Ibid*, at para 44.

<sup>51</sup> “A person who claims that he will not qualify for entry clearance under the rules is not in any better position than a person who does qualify under the rules—he is still expected to apply for entry clearance in the usual way, as the ECO will consider article 8 claims in addition to applications under the rules.” (Secretary of State’s Asylum Policy Instruction on Article 8).

<sup>52</sup> Above n 2, at para 36. And see, for example, that the policy did not seem to have been prayed in aid by the SSHD in *Beoku-Betts* who was not required to return home to obtain entry clearance despite the fact his case was outside the rules. Neither did the Secretary of State ever submit any explanation for why the policy was not applied



A further consideration is that the existing policy does not fit in with the desirability of the single, one stop in-country appeal that was anticipated by the 1999 Act.<sup>53</sup> There is a strong possibility that the policy will result in a second section 65 appeal if the ECO in the home country, considering a person's application following their return from the UK, should reject the Article 8 claim for what would be a second time. In such a case the appellant would be abroad and so unable to give evidence in person, quite apart from it potentially leading to successive expensive and unnecessary appeals. It is better that the article 8 claim, together with any asylum and other human rights claims, be decided once and for all together at the initial stage. If it is well founded, leave should be granted. If not, it should be refused. Thus, in most cases the UK court, and not the ECO, should decide whether the applicant's rights protected under article 8 was breached and if so whether the breach was proportionate to the demands of immigration control.

This is an important aspect of the decision and what makes it so far reaching in that even where the claim for entry clearance is likely to fail under the Immigration Rules, it would be less appropriate to remove since this would mean lengthy appeal proceedings that in turn would mean lengthy separation of the family concerned. It follows that if the applicant cannot apply under the Immigration Rules at all, where family life has been established, then removal would almost certainly be disproportionate as it would result in permanent breach of family life and the consequent breach of article 8.

Lastly, Lord Brown was concerned with recent changes to the Immigration Rules introducing the prospect of substantial mandatory periods of exclusion following refusal of entry clearance or leave to enter, since they were bound to have a impact on future application of policy in article 8 claims although not, of course, affecting the instant case.<sup>54</sup> His Lordship is referring to the changes brought about by Statement of Changes in February 2008. Following intense lobbying, however, the SSHD agreed to amend these Immigration Rules and laid Changes before Parliament in June 2008 so that the mandatory bars to re-entry would not apply to applications to join family members in the UK.<sup>55</sup>

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to the appellant Mr Kashmiri (the second appellant in *Huang*) who did not qualify under a rule requiring entry clearance but who was asserting a family claim to remain here under article 8.

<sup>53</sup> See shoulder note to s 77 of the 1999 Act.

<sup>54</sup> Above n 2, at para 45.

<sup>55</sup> See Immigration Rules HC 321 and 607 and now Paragraph 320(7)(c) of the Immigration Rules.

## CONCLUSION

The decision in *Chikwamba* is a major endorsement of the right to respect for family life, overruling *Mahmood* both on the exceptionality test and the no insurmountable obstacles test. It thus departs from a long established principle of policy that required people who were in the UK unlawfully to return abroad and join the queue for entry clearance before rejoining their families. It has already been applied in the lower appellate authorities<sup>56</sup> and has had a major impact on the way in which the UK Border Agency must now consider human rights claims under article 8.<sup>57</sup>

The decision has also had an impact on consideration of article 8 cases in Immigration law as a whole, due to its shift in the burden of proof. Almost exclusively in immigration and asylum law, the burden establishing proportionality in in-country applications based on article 8 alone, now shifts to the Home Office rather than the appellant. Following *Chikwamba*, it is now the Secretary of State who must show that in an article 8 case, especially those involving children, it is reasonable to require an applicant to go abroad and apply for entry clearance.

In response, the Secretary of State's API on article 8 has had to be revised and their instructions to caseworkers rewritten to take account of the judgment in *Chikwamba*.<sup>58</sup> It will no longer be possible for stringent existing policies to be applied indiscriminately and hopefully the UK Border Agency will be forced to adopt a more humanitarian and less bureaucratic approach to those who seek to remain in the UK on the basis of maintaining their family life. Having stated their previous position, the new *Instructions* continue:

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<sup>56</sup> See, for example, *Forrester (R on the application of) v Secretary of State for the Home Department* [2008] EWHC 2307 (Admin) where Sullivan J applied *Chikwamba*, concluding that it is one thing to say that one should have a fair and firm immigration policy, it is quite another to say that one should have an immigration policy which is utterly inflexible and rigid and pays not the slightest regard to the particular circumstances of the individual case.

<sup>57</sup> Two other House of Lords decisions, handed down on the same day as *Chikwamba*, have also contributed to a change in policy. In *Beoku-Betts v SSHD*, the House extended consideration of family life to other family members remaining in the UK, with the result that the SSHD and AIT should now take into account the impact of removal not only on the appellant, but also on those who share his/her family life, bringing the approach of the courts in the UK in to line with approach taken in Strasbourg; see *Uner v Netherlands (GC)* 18 Oct 2006, *Maslow v Austria (GC)* 23 June 2008. In *KB(Kosovo) v SSHD* the House decided that delay by the SSHD in considering the appellants case may also be relevant in article 8 cases.

<sup>58</sup> Asylum Policy Instruction *Article 8, S 6: Consideration of Article 8 Family Life Claims* (re-branded December 2008). *Casework Instruction Article 8* (UK Border Agency, 7<sup>th</sup> August 2008).

“... the policy position has changed in light of the judgment in the case of *Chikwamba v The Secretary of State for the Home Department* (2008). The House of Lords held that although the policy had a legitimate objective, the way in which it had been applied (i.e. in a fairly universal manner) was essentially wrong and that it is only comparatively rarely that it will be lawful to require someone with family here to return home and apply for entry clearance, particularly where children are involved.

The House of Lords emphasised that cases should, where possible, be considered fully at the earliest stage, i.e. in-country... The UK Border Agency, if minded to reject the claim, then has to show that the interference is proportionate, having regard to all the facts of the case.”<sup>59</sup>

Nevertheless, the government is committed to limiting the numbers of asylum seekers and migrants to the UK and, on past record, they have not been deterred from exploiting decisions that are fact dependent in a way that was not intended in order to achieve this end. In this way they ensure, with apologies to Tolstoy, that each unhappy family remains unhappy in its own way.<sup>60</sup> All the same, the intention of the House of Lords in *Chikwamba* is clear. In considering claims based on article 8, particularly where there are children, all the circumstances of the appellant and his/her family must be taken into account. Once disruption to family life is established due to removal, then article 8 is engaged so that the merits or otherwise of the case under the Immigration Rules becomes irrelevant.

This simple truth was what led Lord Scott to express his “astonishment that the case should have come this far”. It was “obvious” to him that Sylvia Chikwamba and her family should be permitted to remain in this country. He likened the present system to one of Kafka’s invention in its treatment of those who seek asylum: “...policies that involve people cannot be, and should not be allowed to become rigid inflexible rules. The bureaucracy of which Kafka wrote cannot be allowed to take root in this country and the courts must see to it that it does not.”<sup>61</sup> Hopefully, the decision of the House of Lords in *Chikwamba* will help ensure that it does not.

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<sup>59</sup> Ibid, p 2 post.

<sup>60</sup> “All happy families resemble one another, each unhappy family is unhappy in its own way” Tolstoy *Anna Karenina* (Penguin Classics, 1999) p 1.

<sup>61</sup> Above n 2, para 4.