Neutral Citation Number: [2008] EWCA Civ 855

Case No: C5/2007/1553

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
IA/00138/2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2008

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE WILSON
and
LORD JUSTICE STANLEY BURNTON

- -

Between :

BL (SERBIA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Declan O'Callaghan and Mr Daniel Coleman (instructed by **Ikie LLP**) for the **Appellant**
Ms Lisa Giovannetti (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date : 1 July 2008

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Approved Judgment

Lord Justice Stanley Burnton :

Introduction

1. This is an appeal by BL against the decision of the Asylum and Immigration Tribunal (Immigration Judge Holmes) of 14 February 2007 that the earlier decision of Immigration Judge Kulatilake was legally flawed and ordering reconsideration of her appeal by a different Immigration Judge, and the resulting decision of Immigration Judge Trethowan promulgated on 23 April 2007 dismissing her appeal against the Secretary of State's refusal of her application for leave to remain in the UK on Human Rights grounds.

History

2. BL is an ethnic Albanian from Kosovo, born on 5 May 1973. She fled Kosovo in May 1999, together with her sister-in-law, with whom she had lived in Kosovo, and her niece, who had been born the previous November. They arrived in this country on 22 June 1999 and claimed asylum. BL's asylum claim was refused in February 2000, and she was served with notice of removal. She appealed against the Secretary of State's decision, and her appeal was dismissed in June 2001.

3. BL made a Human Rights application to the Secretary of State on 8 August 2001. It was refused on 18 September 2001. She appealed. The adjudicator rejected her appeal in May 2002. She was granted permission to appeal in relation to her claim under Article 8, and her appeal to the Immigration Appeal Tribunal succeeded.

4. The basis of her claim was that she was a single vulnerable woman, then aged 29, whose parents and one of whose brothers had been killed in Kosovo and their house burnt down. She was living with her brother's widow and her niece. Her only living relatives, namely her sister-in-law, niece and her two surviving brothers, were in this country. She had a depressive illness and was suffering from mild to moderate PTSD. She had completed a course in English and computer studies, and was taking another course. By the date of the appeal, BL's sister had been granted exceptional leave to remain on the basis that her rights under Article 3 of the European Convention on Human Rights would be infringed if she were returned to Kosovo.

5. The IAT, giving reasons that today would be regarded as brief and perhaps inadequate, concluded, in its determination dated 26 November 2002:

> We are of opinion that, in the special circumstances of the instant appeal where, not alone (sic) was there a family life between the Appellant and her sister-in-law, while they were living in Kosovo, and as the family life continued in the United Kingdom, and as the status of the Appellant's sister-in-law had been settled only three days after the decision in the case of the Appellant, we find that, interpreting Article 8 in its broadest sense, as suggested by Mr Justice Collins in *Arman Ali* [2000] INLR 89, the return of the Appellant to Kosovo would be a disproportionate interference with her family life in the United Kingdom.

6. As a result of that decision, BL was granted leave to remain in the UK until 10 January 2004.

7. At some time in 2004 BL's sister-in-law and niece were granted indefinite leave to remain, and in December 2006 they both became British citizens.

8. Meanwhile, in December 2003 BL had also applied for indefinite leave to remain. She was not interviewed until 1 April 2005. The Secretary of State rejected her application on 4 April 2005. She appealed. Her appeal was heard by Immigration Judge Kulatilake, who allowed her appeal. In his determination dated 2 July 2005, he accepted that she had family life in this country, and said:

> 12. The specific facts of the appellant's sister-in-law's case are not before me. On the available evidence, I find that there are no insurmountable obstacles to the family returning together to Kosovo today, a country not unfamiliar to all parties.
>
> 14. Despite the commendable efforts of UNMIK, Kosovo remain to date unsettled. The US State Department Report for 2004 reports violence against women remained a serious and persistent problem (CIPU April 2005/K.6.112). Taking into account, the appellant has no immediate family or property to return to I find her vulnerability as a single woman is a truly exceptional feature, considering the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, I find the decision to refuse the appellant a variation of her leave to be disproportionate. Huang [2005] EWCA Civ 105.
>
> 15. Though the letter for the solicitors (Annex A16) appears to raise issues to engage Article 3 to quote "…if she is now returned to Kosovo, our client will be made to endure inhuman and degrading treatment…" no specific submissions were made by Mr Ikie. Moreover after enquiry by me, Mr Ikie confirmed the only issue for my determination is that of the engagement of Article 8. In the circumstances I have not addressed issues properly considered in the refusal letter under the 1951 Convention, which I adopt.

There was no paragraph 13.

9. The Secretary of State sought and obtained an order for the reconsideration of Immigration Judge Kulatilake's determination, on the ground that paragraphs 12 and 14 were inconsistent, and the finding in paragraph 14 was insufficient to make BL's case "truly exceptional" so as to satisfy the test that had then been laid down by the Court of Appeal's decision in *Huang* [2005] EWCA Civ 105. Reconsideration was ordered by Senior Immigration Judge Chalkley in a decision re-promulgated (as a result of an administrative error) on 6 March 2006.

The decisions under appeal

10. On 14 February 2007, Immigration Judge Holmes heard the application for reconsideration. He held that Immigration Judge Kulatilake's determination was fatally flawed, and ordered a fresh hearing on all issues. This was in part so that BL could call further evidence as to a change in her circumstances: one brother was in Greece and two were waiting for decisions on their asylum applications. (On this basis, BL has three, rather than two, surviving brothers, but nothing turns on the discrepancy.) Immigration Judge Holmes gave five reasons for his conclusion, essentially that Immigration Judge Kulatilake had not adequately addressed the facts and therefore the issues falling to be considered in an Article 8 claim.

11. The rehearing took place before Immigration Judge Trethowan on 17 April 2007, and his decision promulgated on 23 April 2007. He dismissed BL's appeal. In his determination, he set out the history of her application and summarised her claims as follows:

> 14. The appellant makes the following claims:
>
> (a) She had a continuing fear of returning to Kosovo. Her parents were dead and their home destroyed.
>
> (b) Her family life with her sister in law and niece was continuing.
>
> (c) She had also established a private life in the United Kingdom. She had part time employment and had been studying.
>
> (d) She was now pregnant and her baby was due at the end of June 2007. The father of her child had broken off their relationship when she informed him she was pregnant. She could not return to Kosovo and live alone as a single parent as she would be ostracised.
>
> (e) As well as her sister in law and her niece, two of her brothers were also in the United Kingdom. They had arrived in 2000 and claimed asylum. They were still awaiting their asylum interviews.
>
> (f) She was receiving treatment from the Chinese Medical Centre for the "post war traumatic experience, memory loss, sleeplessness, nightmares and serious depression".

12. At the date of the hearing, BL's younger brother in the UK was living with her and her sister-in-law and niece, who was now 8 years old. The older brother refused to have anything to do with her because of her pregnancy. She accepted that she would not be at risk in Kosovo, but feared returning there because as a single mother she would be ostracised. The third brother was said by BL to be in Northern Cyprus; her sister-in-law thought he was in Turkey.

13. During the hearing the Home Office presenting officer conceded that it would not be reasonable to expect BL's sister-in-law to return to Kosovo.

14. Immigration Judge Trethowan set out the issues to be considered on an Article 8 claim once an appellant has established a protected right to private or family life, as follows:

> (a) Will the proposed removal be an interference with that right?
>
> (b) If so, will such interference have consequences of such gravity as potentially to engage Article 8?
>
> (c) If so, is it in accordance with the law?
>
> (d) If so, is it necessary "in a democratic society in the interests of national security, public safety or the economic wellbeing 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 freedom of others"?
>
> (e) If so, is such interference proportionate to the legitimate public end sought to be achieved?

15. He continued:

> 43. It is not disputed that the appellant, her sister in law and her niece lived together in the same household for a brief period before they left Kosovo in 1999 and that they have lived together continuously in this country since their arrival in 2000. Further, the contribution made by the appellant to the care of her niece had not been challenged. It is also accepted that there is no blood relationship between the appellant and her sister in law. In November 2002 there was a finding by the Immigration Appeal Tribunal that there was family life between the appellant and he sister in law, and that removal would amount to a disproportionate interference with that family life. The respondent did not appeal that decision, and I cannot go behind it. I have to look at the situation as it is at the time of the hearing and assess the nature of the relationship between the appellant on the one hand and her sister in law and niece on the other in deciding whether or not there is a family life between them. On the basis of the evidence before me it is clear that not only has there been no change in the nature of their family life since the decision of the Tribunal in 2002, but it is probable that the relationship has strengthened in the period of over four years since that decision. Further, the level of private life the appellant has in this country has also increased as a result of the time that has elapsed. She has been able to continue her education and obtain employment. I therefore find that the appellant has a protected right to a private and family life. I further find that the proposed removal would be an interference with that right and that such interference would have

> consequences of such gravity as potentially to engage Article 8. It has not been argued that it is not in accordance with the law or necessary. The issue therefore is whether or not it is proportionate.

16. Immigration Judge Trethowan then summarised the effect of the decision of the Tribunal in November 2002:

> 44. In assessing the issue of proportionality I have born in mind the findings of the Tribunal in the appellant's previous appeal in the issue of proportionality. I am not bound by them as the decision was based on the situation of the appellant at the time of the Tribunal's decision. I have to consider the situation of the appellant as at the date of the hearing before me as disclosed by the evidence.

17. He referred to the guidance given by the Court of Appeal in *Mahmood* and by the House of Lords in *Huang* and continued:

> Mr Bassi has conceded that it would be unreasonable to expect the appellant's sister in law and niece to go live in Kosovo. From the evidence I have heard as to the financial circumstances of the appellant's sister in law it would appear that there would be financial constraints upon her ability to meet the expense of travelling to Kosovo so that she and her daughter could visit the appellant in that country and this is a factor I take into account. I also take into account that if the appellant had to return to Kosovo, she would have to endure an element of hardship, and possibly discrimination as a result of her pregnancy or situation as a single mother. However I have also considered the objective material that has been drawn to my attention, and in particular that relating to women in Kosovo as would be available for her. More importantly perhaps is the fact that the appellant has two brothers in this country with currently no legal status to be here. I have heard that there are outstanding asylum applications still to be considered by the respondent, but I have been present with no documentary evidence to confirm this. It is not for the respondent to present such evidence. I have also heard no evidence form the appellant's brothers and no reason has been given for the absence of such evidence, save for the claim that the appellant and her elder brother are estranged. Even if they have outstanding claims based upon the circumstances that existed in Kosovo at the time they fled in 2000, that in itself is not evidence that they cannot return to Kosovo now. Both the appellant and her sister in law accept that they know of no reason why the appellant's brothers should not be able to return to Kosovo. There is no evidence before me indicating that they are not in a position so to do. Further, I had no evidence to support the claim by the appellant that she and her elder brother are estranged as a result of her pregnancy. On the basis of the

> evidence before me I am unable to find as probably that the appellant's two brothers could not return to Kosovo with her, or would not be in a position to give her support and protection on their return.
>
> 46. I have no doubt that the appellant's sister-in-law and her niece would be distressed at the return of the appellant to Kosovo, and would miss her support. However, it is the rights of the appellant that are an issue. The affects upon the appellant of such distress would not be sufficient to result in a breach of her Article 8 rights.

18. He concluded:

> 48. In the light of all the evidence before me and the findings that I have made, I am unable to find as probably, having taken full account of all considerations weighing both in favour of and against the refusal, that the decision of the respondent prejudices the family life of the appellant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. The respondent's decision therefore is unlawful.

Accordingly, he dismissed BL's appeal.

The contentions of the parties before us

19. For BL, Mr O'Callaghan submitted:

(i) Immigration Judge Holmes had erred in law in finding that Immigration Judge Kulatilake had made an error of law.

(ii) Immigration Judge Trethowan had erred in his second stage reconsideration, in that he had failed to follow the decision of the Tribunal in November 2002.

20. For the Secretary of State, Miss Giovannetti submitted that Immigration Judge Kulatilake's determination could not be supported, by reason of the inconsistency between paragraphs 12 and 14 of his decision and the defects identified by Immigration Judge Holmes. She accepted that BL has a family life in this country, and that it will be interfered with if she is returned to Kosovo; but that Immigration Judge Trethowan was entitled to find that such interference was justified under Article 8.2 and his determination discloses no legal error.

Discussion

21. There was in the event a high degree of agreement as to the principles to be applied on this appeal. First, family life is not limited to the relationship between members of a nuclear family. Family life, the subject of qualified protection under Article 8, may exist as between relations who are more distant, and to persons related by marriage as well as by consanguinity (or adoption). Thus it was common ground that the relationships between BL and her sister-in-law and between her and her niece engage Article 8. A finding that it is not reasonable for a member of an appellant's family to

leave this country and to go to live with an appellant on his or her removal is a finding that the proposed removal potentially infringes Article 8. The decision maker must then decide whether the proposed removal of the appellant is justified under Article 8.2: in practical terms, is it a proportionate response to the need for immigration control?

22. Article 8 similarly protects the private life of an appellant. Private life and family life are inter-related, and many if not most cases in which Article 8 falls to be considered both private and family life will have to be addressed.

23. It is at the stage when the question of the justification for the interference with the Article 8 right falls to be considered that the nature of the relationship with which the proposed removal will interfere falls to be considered. Put briefly, the closer the relationship, the more difficult will it be for the State to establish that the proposed removal is proportionate. Thus, it is obvious that removal that will divide mother and young child is unlikely to be proportionate; removal that will divide an adult and, say, a cousin will normally be easier to justify. It is not simply the degree of the relationship that falls to be considered, but also the closeness and other aspects of the relationship. There may be sisters-in-law living together for whom separation will not be significant; for others, who have forged a close relationship involving mutual dependence, the threatened break must be given real weight. There will be cases where the relationship between a woman and a young niece is no or little different from that between a mother and her child, as where the child is an orphan who is living with and dependent upon her aunt. Again, the degree of interference will be relevant. For example, to what extent will the relatives be able to keep in touch? Will they be able to visit each other?

24. There was also an absence of controversy as to the effect of the decision of the IAT of 26 November 2002. The principles were stated by the IAT in *Devaseelan* [2002] UKIAT 00702:

> **Our guidelines on procedure in second appeals**
>
> 37. … The first Adjudicator's determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the Appellant was then making, at the time of that determination. It is not binding on the second Adjudicator; but, on the other hand, the second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second Adjudicator may be quite different from what might have been expected from a reading of the first determination only. But it is not the second Adjudicator's role to consider arguments intended to undermine the first Adjudicator's determination.
>
> 38. The second Adjudicator must, however be careful to recognise that the issue before him is not the issue that was before the first Adjudicator. In particular, time has passed; and the situation at the time of the second Adjudicator's

> determination may be shown to be different from that which obtained previously. Appellants may want to ask the second Adjudicator to consider arguments on issues that were not – or could not be – raised before the first Adjudicator; or evidence that was not – or could not have been – presented to the first Adjudicator.
>
> 39. In our view the second Adjudicator should treat matters in the following way.
>
> (1) **The first Adjudicator's determination should always be the starting-point**. It is the authoritative assessment of the appellant's status at the time was made. In principle issues such as whether the appellant was properly represented or whether he gave evidence, are irrelevant to this.
>
> (2) **Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator.** If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.
>
> (3) **Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator**. The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them.

The emphases are in the original.

25. Other passages from the determination of the IAT in *Devaseelan* were cited by the Court of Appeal in *Djebbar* [2004] EWCA Civ 804, in which an unsuccessful attack was mounted on the guidelines:

> 29. In our judgment, the IAT, specialising in this field, was entitled to provide guidance to the entire body of specialist adjudicators about how they should deal with the fact of an earlier unsuccessful application when deciding the later one. Such guidance was essential to ensure consistency of approach among special adjudicators. The guidelines remedied an immediate and pressing difficulty, with direct application to, but not exclusively concerned with, the many cases in which, after unsuccessfully exhausting all the possible legal channels, asylum seekers remained in the United Kingdom, and put forward a case on human rights grounds after October 2000.
>
> 30. Perhaps the most important feature of the guidance is that the fundamental obligation of every special adjudicator

independently to decide each new application on its own individual merits was preserved. The guidance was expressly subject to this overriding principle.

> "The first adjudicator's determination … is not binding on the second adjudicator; but, on the other hand, the second adjudicator is not hearing an appeal against it … the outcome of the hearing before the second adjudicator may be quite different from what might have been expected from a reading of the first determination only. … The second adjudicator must, however, be careful to recognise that the issue before him is not the issue before the first adjudicator. In particular, time has passed; and the situation at the time of the second adjudicator's determination may be shown to be different from that which was obtained previously. Appellants may want to ask the second adjudicator to consider arguments on issues that were – or could not be – raised before the first adjudicator; or evidence that was not – or could not have been – presented to the first adjudicator."

The guidance concluded with similarly unequivocal language. Guideline 8 says in terms:

> "We do not suggest that, in the foregoing, we have covered every possibility. By covering the major categories into which second appeals fall, we intend to indicate the *principles* for dealing with such appeals. It will be for the second Adjudicator to decide which of them is or are appropriate in any given case."

This is not the language of *res judicata* nor estoppel. And it is not open to be construed as such. In view of the argument, we must emphasise that in *Devaseelan* the IAT purported to do no more than provide guidance, and in our judgment, properly exercising its responsibilities, that indeed is what it did.

…

40. … Having analysed the guidelines as a whole, in the light of the specific criticisms, it seems to us that it would be positively disadvantageous for this Court now to attempt to rewrite any part of the guidance by expressing the same ideas in different language. We have no reason to believe that adjudicators approach this guidance as if they were construing statute or regulation, or apply it as if it were, without regard to the true merit (or otherwise) of the fresh application. The great value of the guidance is that it invests the decision making process in each individual fresh application with the necessary degree of sensible flexibility and desirable consistency of approach, without imposing any unacceptable restrictions on the second adjudicator's ability to make the findings which he

> conscientiously believes to be right. It therefore admirably fulfils its intended purpose.

26. While emphasising the findings of the IAT in the determination dated 26 November 2002 as the starting point for BL's subsequent appeals, Mr O'Callaghan accepted that their assessment of proportionality may be affected by subsequent changes in the understanding and application of the requirement of proportionality involved in Article 8.2. Article 8 has been in practice the most uncertain of the Convention Articles relevant to asylum and immigration claims in its application. The opinion of Lord Bingham in *Razgar* [2004] UKHL 27, [2004] 3 WLR 58, gave helpful clarification, and led to a reduction in the prospects of successful reliance on Article 8.1 as against Article 8.2. He said:

> 17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:
>
> (1) will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference 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?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?
>
> 18 If the reviewing court is satisfied in any case, on consideration of all the materials which are before it and would be before an adjudicator, that the answer to question (1) clearly would or should be negative, there can be no ground at all for challenging the certificate of the Secretary of State. Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112. If the reviewing court is satisfied that the answer to this

> question clearly would or should be negative, there can again be no ground for challenging the certificate. If question (3) is reached, it is likely to permit of an affirmative answer only.
>
> 19 Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognized in the Strasbourg jurisprudence (see *Ullah* [2004] 3 WLR 23, 29, para 6) and implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively.
>
> 20 The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. In *Secretary of State for the Home Department v Kacaj* [2002] Imm AR 213, 228, para 25, the Immigration Appeal Tribunal (Collins J, Mr C M G Ockelton and Mr J Freeman) observed that: "although the [Convention] rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate." In the present case, the Court of Appeal had no doubt [2003] Imm AR 529, 539, para 26, that this overstated the position. I respectfully consider the element of overstatement to be small. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis.

27. Until the decision of the House of Lords in *Huang* [2007] UKHL 1, [2007] 2 AC 167, the last sentence of paragraph 20 of Lord Bingham's opinion was widely seen as stating a test for the application of the requirement of proportionality involved in Article 8.2, rather than an expectation of the likely result of the application of that requirement. In *Huang* in the Court of Appeal [2005] EWCA Civ 105 Laws LJ said, at paragraph 56:

> In our judgment (the adjudicator's) duty, when faced with an Article 8 case where the would-be immigrant has no claim under the (Immigration) Rules, is and is only to see whether an

> exceptional case has been made out such that the requirement of proportionality requires a departure from the relevant Rule in the particular circumstances.

28. That Lord Bingham had expressed an expectation and had not stated a rule of law was clarified in *Huang*, which also settled the question whether the Immigration Judge's jurisdiction in relation to the assessment of proportionality was to review the decision of the Secretary of State or one in which the Judge makes his own original decision. *Huang* did not, however, affect the expectation of Lord Bingham in Razgar: see the penultimate sentence of paragraph 20 of the opinion of the Appellate Committee:

> 20. In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* above, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test.

29. Thus, in *KR (Iraq)* [2007] EWCA Civ 514 Sedley LJ said:

> 6. …. I agree nevertheless with Auld LJ that the essential change in our approach following Huang will be that, rather than take the threshold of entry into art. 8(1) to be some exceptionally grave interference with private or family life, tribunals and courts will take the language of the article at face value and, wherever an interference of the kind the article envisages is established, consider whether it is justified under art. 8(2). In the great majority of cases it will be, because immigration controls are established by law and their operation ordinarily meets the criteria of proportionality which, in the Strasbourg jurisprudence, measure what is necessary in a democratic society for such prescribed purposes as the economic wellbeing of the country. While therefore there is no need to apply a formal test of exceptionality, it will be only rarely in practice that an otherwise lawful removal which disrupts family or private life cannot be shown to be compliant with art. 8.

30. In jurisprudential theory, there has been no change in the law relating to Article 8 between 2002 and today. But there have been changes in its application, to which the above cited decisions have contributed. In a real sense, the law has moved against BL and her Article 8 claim, as the last sentence of the citation from the judgment of Sedley LJ demonstrates.

31. It is also common ground that it was for the Immigration Judge to take into account factual developments since 2002, both in relation to the circumstances of BL and her relationships with her relatives in this country and in relation to changes in conditions in Kosovo.

32. With these principles in mind, I turn to consider the first principal contention of Mr O'Callaghan, namely that Immigration Judge Holmes was wrong to hold that Immigration Judge Kulatilake had made a material error of law in his determination of BL's appeal. Mr O'Callaghan pointed out that the Secretary of State had not challenged the original finding that BL had a family life in the UK, with her sister-in-law and niece; there had been no cross-examination of BL or her sister-in-law, and all that was said on behalf of the Secretary of State was that his representative relied on the decision letter, which had disputed the claim that BL had a family life in this country. That contention was inconsistent with the finding of the IAT in November 2002; it was inconsistent with the *Devaseelan* guidelines, and it would not have been open to Immigration Judge Kulatilake to have accepted it. It followed, Mr O'Callaghan submitted, that his finding in paragraph 12 of his determination was immaterial.

33. In my judgment, Immigration Judge Kulatilake's determination was fatally flawed. Paragraphs 12 and 14 are inconsistent. In paragraph 12 he found that the family could return together to Kosovo, but in paragraph 14 he assumed that BL would return alone. If, as found in paragraph 12, the family could return together, her return alone would be due to the decision of her sister-in-law and niece to remain here rather than the decision of the Secretary of State to return BL to Kosovo. I therefore accept Miss Giovanetti's submission that in paragraph 12 Immigration Judge Kulatilake rejected the claim of interference with family life, and decided in paragraph 14 that there would be an unlawful interference with her personal life. Where the alleged interference with family life is that enforced removal of one member of the family would divide the family, the first question to be considered is whether the family as a whole can reasonably be expected to accompany the person removed back to his or her country of origin. If they can reasonably be expected to return together, there is no interference with family life, which can be continued in the country of origin. Immigration Judge Kulatilake found, in effect, that BL's return would not interfere with her family life, since it could be carried on in Kosovo.

34. The inconsistency between paragraphs 12 and 14 means that neither can stand. It follows that reconsideration was inevitable.

35. I also agree that Immigration Judge Kulatilake's determination contains an insufficient consideration of the issues of proportionality, but in view of the fundamental flaw in that determination to which I have referred it is unnecessary to enlarge on this.

36. Turning to Immigration Judge Trethowan's determination, he was required to accept as a starting point that in 2002 BL had a family life in this country and that her removal to Kosovo would have been a disproportionate and unlawful interference with that family life. He did so. It was accepted that it would not be reasonable to expect her sister-in-law and her niece to return to Kosovo, and it followed that there would be an interference with BL's family life were she to be returned. Thus the issue for the Immigration Judge was whether at the date of his decision, the interference with the family and private life of BL was justified under Article 8.2. The Immigration Judge correctly identified this as the issue for decision in paragraph 44 of his determination.

37. For this purpose, the Immigration Judge had to assess BL's family and personal life and the consequences of her removal to Kosovo as at the date of his decision and to apply the law as at that date. He took into account that her family life with her sister-in-law and her niece and her younger brother, who was living with them, would have strengthened since 2002. In relation to BL's personal life, her fear was that as a single mother, as it was assumed she would be, she feared she would be ostracised on her return.

38. Against those considerations, the Immigration Judge took into account the improvement in conditions generally in Kosovo. As to her situation as a single mother, he considered the objective material, and in particular that relating to women in Kosovo as disclosed in the Kosovo country report, which showed that some assistance would be available to her. He also had no evidence that her two brothers in this country, who had no legal status to be here, could not return with her and give her support and protection. Given the change in conditions in Kosovo since 1999, it was understandable, and I think right, that he should consider that they could return unless there was some particular reason why they could not. Neither BL nor her sister-in-law knew of no reason why they could not return.

39. It is not suggested that Immigration Judge Trethowan did not consider and take into account relevant matters, other than the decision of the Tribunal in November 2002. It is clear that he correctly applied the law as laid down by the House of Lords in *Huang*, to which he referred. There is no allegation of perversity in his conclusion. No reliance was placed on the second sentence of paragraph 46 of his decision.

40. Given the changes in circumstances since 2002, in Kosovo and in the application of Article 8.2, his decision was unobjectionable notwithstanding that he reached a different conclusion from that reached by the Tribunal in November 2002, and notwithstanding the changes in BL's personal and family circumstances. As the Court of Appeal made clear in *Djebbar*, it was for Immigration Judge Trethowan to make the decision he conscientiously believed to be right, and this is what he did.

41. For these reasons, I would dismiss this appeal.

Lord Justice Wilson:

42. I agree.

Lord Justice Mummery:

43. I also agree.