Asylum and Immigration Tribunal

VW and MO (Article 8-insurmountable obstacles) Uganda [2008] UKAIT 00021

THE IMMIGRATION ACTS

Heard at Field House
On 15 January 2008

Before

MR JUSTICE HODGE OBE, PRESIDENT
SENIOR IMMIGRATION JUDGE STOREY

Between

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellants: Mr R Khubber of Counsel instructed by Islington Law Centre
For the respondent: Mr J Wright, Home Office Presenting Officer

(i) *The case of Huang (HL) has not affected the need for a structured approach to Article 8. Subject to the need to avoid applying too high a threshold to the issue of interference, and not applying a legal test of "truly exceptional", the five-stage approach set out in Razgar (HL) remains correct.*

(ii) *The test or criterion of "insurmountable obstacles" remains part of UK and Strasbourg jurisprudence on Article 8. The fact that both UK and Strasbourg decisions sometimes formulate this test in terms of "reasonableness" or "seriousness" shows that it is not a test subject to strict definition. Whichever of these formulations is used, however, an applicant must show more than a degree of hardship.*

(iii) *If there are no insurmountable obstacles or serious difficulties in the way of family members accompanying an applicant abroad, special reasons need to be shown for why an adverse decision is not to be considered proportionate.*

DETERMINATION AND REASONS

1. The first appellant is a national of Uganda. On 13 February 2002 her asylum claim was refused but she was granted Exceptional Leave to Remain (ELR) until 24 December 2002 to coincide with her 18th birthday. The second appellant is her daughter who was born in the United Kingdom on 11 November 2004 (her father is a British citizen). On 11 May 2007 the respondent decided to refuse to grant the first appellant further leave and to refuse to vary leave to remain in the United Kingdom. The second appellant was refused on the same basis. In a determination notified on 18 September 2007 Immigration Judge Bryant found that the first appellant had not given a credible account of her past experiences in Uganda and dismissed both their appeals on asylum, humanitarian protection and Article 3 grounds. He also rejected their Article 8 grounds of appeal.

2. The grounds for review were limited to challenging the immigration judge's decisions in relation to Article 8 ECHR. The immigration judge had accepted that the appellants had a private and family life in the United Kingdom but did not consider that their proposed removal (which would arise in consequence of the immigration decisions made against them) would amount either to interference or to a disproportionate interference with the right to respect for that family life.

3. The grounds submitted that the immigration judge erred in several respects: (1) in finding that there was no interference; (2) by relying unduly in assessing the issue of proportionality on an "obsolete" test of "insurmountable obstacles"; (3) by failing to give proper weight to the degree of disruption the appellants' removal would cause both to them and to the second appellant's father; (4) by failing to consider and appreciate the relevance of the Home Office delay in making a decision; and (5) in overemphasising the relevance of the first appellant's precarious immigration status when embarking on a relationship with her British citizen partner.

4. In his skeleton argument Mr Khubber contended, inter alia, that the appellants' submissions on Article 8(2) had been strengthened by the recent decision of the Court of Appeal in AB (Jamaica) EWCA Civ 1302, which concerned the threatened removal of a person who had a settled British citizen husband. In oral submissions Mr Khubber contended that the effect of recent United Kingdom and Strasbourg case law on Article 8 was to require far greater weight to be placed on the notion of striking a fair balance and on the degree of disruption that a removal decision caused to a person's right to respect for family life.

5. Contrastingly, Mr Wright asked us to find that the immigration judge had properly applied the approach set out by the House of Lords in Razgar [2004] UKHL 27 and Huang [2007] UKHL 11. He had taken into account all relevant family details, including the social worker report. The position of the appellant's partner in AB (Jamaica) was significantly different from that of the appellant's partner in the instant case.

Our Decision

6. We find that the immigration judge erred in law but that his error was not material.

7. We turn to the first ground of review, which was that the immigration judge erred in finding that the proposed removal of the two appellants would not amount to an interference. Mr Khubber submitted that the immigration judge's approach to this issue ran contrary to the approach set out by Lord Bingham in Huang, since elaborated in AG (Eritrea) [2007] EWCA Civ 801. In one respect this submission cannot be right. Confining ourselves purely to the immigration judge's *wording* of the test relating to interference, error is hard to find, since it was the same as that adopted by Lord Bingham in Razgar: at paragraph 90 (reiterating paragraph 88) the immigration judge specifically reminded himself that the second question which he had to ask was that posed by Lord Bingham, namely whether "the proposed interference by the respondent would not have consequences of such gravity as potentially to engage the operation of Article 8". However, so far as concerns the immigration judge's *application* of this test, we accept that he fell into precisely the type of error highlighted in AG (Eritrea), KR (Iraq) [2007] EWCA Civ, and KD (Sri Lanka) [2007] EWCA Civ 1384, in that he effectively applied a test of "exceptionally grave interference" and so wrongly treated the threshold for the engagement of Article 8(1) as being especially high. In AG (Eritrea) the Court of Appeal stated at para 28 that:

> "It follows, in our judgement, that while an interference with private or family life must be real if it is to engage art 8(1), the threshold of engagement (the "minimum level") is not a specifically high one."

8. In KR Sedley LJ stated:

> "…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 Article 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 Article 8(2)."

9. We deduce that the immigration judge applied just such a test from his evident unwillingness, when considering the issue of interference to treat as of any significance the fact that the first appellant had been in the United Kingdom since December 2001, had been granted (albeit only until her 18th birthday) ELR,

had commenced family life with a partner who was a British citizen and had had a child with him. The immigration judge had regard to these factors when considering proportionality but only obliquely referred to them when considering interference and its gravity: indeed, at paragraph 89 he appeared to regard the above factors as relevant (along with Home Office delay) only to whether they "might increase [her] ability to demonstrate family or private life bringing her within Article 8(1)."

10. However, as Mr Khubber conceded, this error could not in itself be material, since the immigration judge went on to make alternative findings regarding proportionality and so assumed that Article 8(2) was engaged. Nonetheless, argued Mr Khubber, that did not rescue matters, since the immigration judge's error of law in relation to the issue of interference "contaminated" his findings under Article 8(2) dealing with proportionality. He confirmed that no challenge was made to the immigration judge's assessment that the proposal to remove was "in accordance with the law" and pursued a legitimate aim within the meaning of Article 8(2).

11. So we must turn to examine the immigration judge's treatment of the issue of proportionality. One thing which will already be clear from our earlier references to post-Huang cases is that there is no question of Huang meaning that decision-makers are no longer to apply the same structured approach to Article 8 as before. Subject to the clarification that (i) to establish interference the threshold is not an especially high one and (ii) that in assessing proportionality there is no legal test of "truly exceptional circumstances", Lord Bingham's five-stage set of questions as set out in Razgar remain the correct framework for making structured decisions. That is made abundantly clear in AG(Eritrea). In that schema the issue of proportionality under Article 8(2) arises under Lord Bingham's fifth question.

12. In general terms we consider that the immigration judge's approach to the balancing exercise under Article 8(2) was exemplary. Having identified the relevant guidance of the higher courts in Huang and in AG (Eritrea), he set out the factors, counting for and against the appellants which had particular relevance in this case. At para 84 he did not find it proved "that there are indeed insurmountable obstacles to the family, being the appellant, her daughter and her partner, living together in Uganda, even though this would indeed involve a degree of hardship for some or all members of the family" and at para 92 he stated:

> "The fifth and final question is whether the proposed interference by the respondent is proportionate to the legitimate aims of the respondent. I take into account my findings under the Refugee Convention and Articles 2 and 3 of the Human Rights Convention; the length of time the appellant has been in this country and the length of her partnership with Mr A; the age of the second appellant, M; the medical history of the appellant and her miscarriage; the reports prepared by Dr Warren and Ms Finlayson; the delay there has been in the respondent reaching his decision on the appellant's application; my finding that I do not find it proved that there are insurmountable obstacles to the whole

> family living together in Uganda; my finding that it would be open to the appellant to make an application for entry clearance to enter the United Kingdom from Uganda; my finding that the appellant's partner was aware of her uncertain immigration status during the relationship; and the submissions made to me. I note the House of Lords judgement in Huang [2007] UKHL 11 and that where the issue of proportionality is reached, the ultimate question is whether the refusal of leave of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, prejudices the family life of the appellant in a manner sufficiently serious to amount to a breach of the fundamental rights protected by Article 8. I find that any removal of the appellants to Uganda would be proportionate and would be lawful. I find that there are no substantial grounds for believing that these appellants' rights and those of the appellant's partner, under Article 8 of the Human Rights Convention would be violated on any removal of the appellants to Uganda."

13. Notably Mr Khubber was not able to point to any significant factor which this assessment overlooked. Furthermore, much of Mr Khubber's argument amounted to no more than a disagreement with the immigration judge's assessment of the relative weight to be given to different factors. Contrary to what he sought to assert during oral submissions, we do not consider that mere disagreement as to the weight to be given to relevant factors can, without more, disclose errors of law: Braintree District Council v Alasdair Stuart Thompson [2005] EWCA Civ 178, para 19; Mukarkar [2006] EWCA Civ 1045 paras 33,40. But it remains for us to consider Mr Khubber's specific points of challenge (points (2)-(4)).

The "insurmountable obstacles" issue

14. And so we move to the second ground of review. Here the crux of Mr Khubber's submissions was that by applying to the appellants a test or criterion of "insurmountable obstacles", the immigration judge had misconstrued both United Kingdom case law and Strasbourg jurisprudence. Whilst we think that Mr Khubber put his arguments well, we find for a number of reasons that there is no merit in them.

15. We should note at the outset that there are two contextual difficulties with Mr Khubber's submissions on "insurmountable obstacles". First of all, it is clear that the immigration judge's essential finding was that the appellants' removal would cause them no more than "a degree of hardship" see para 84. So even if Mr Khubber is right in arguing that the "test" of insurmountable obstacles which this immigration judge applied is too high or has effectively been lowered by recent case law, he did not suggest – and it cannot seriously be suggested – that the proper "test" is to be treated as satisfied by the existence of no more than a degree of hardship for those involved.

16. Secondly, whatever the rights and wrongs of the immigration judge placing reliance on the concept of insurmountable obstacles, the conclusions he reached in relation to Lord Bingham's fifth question (in Razgar) concerning proportionality were specifically reached by reference to the formulation given in Huang. To repeat the relevant part of para 92, he wrote:

> "I note the House of Lords judgment in Huang and that where the issue of proportionality is reached, the ultimate question 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, 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. In this present case, I have found it not to be proved that the life of the family could not reasonably be expected to be enjoyed in Uganda. Even so, I do not find it proved that the respondent's decisions do prejudice the family life of the appellants in a manner sufficiently serious to amount to a breach of the fundamental rights protected by Article 8. I find that any removal of the appellants to Uganda would be proportionate and would be lawful."

17. But the Huang formulation makes no reference to "insurmountable obstacles".

UK case law on the "insurmountable obstacles" test

18. Our third reason for rejecting Mr Khubber's submissions brings us even more squarely to consider the position under UK case law. Insofar as the immigration judge did rely on the concept of "insurmountable obstacles" when assessing the question of proportionality, we see no error on his part, since that "test" has been and remains an established part of United Kingdom case law. It was relied upon by the Court of Appeal in Mahmood [2001] 1 WLR 861 following a careful examination by the Master of the Rolls of Strasbourg jurisprudence on Article 8(2) in the context of expulsion cases. Mahmood has not been reversed or overturned; indeed it has been one of the cases on Article 8 most frequently cited by the Court of Appeal and the Tribunal. It is binding on us.

19. Mr Khubber submitted that in Huang the House of Lords effectively reversed or overturned or modified Mahmood. The effect of the opinion in Huang was, he said, to replace the "test" of insurmountable obstacles with a less stringent "reasonableness" test. That submission has three difficulties. One is that their lordships said nothing about overturning or modifying Mahmood. Bearing in mind that they reversed the Court of Appeal in Huang (in respect of its treatment of "exceptional circumstances" as a legal test), it would seem odd, if their lordships thought there was a further errant Court of Appeal dictum on the same set of issues, that they should not at least comment upon it. Another difficulty is that the analysis in Huang nowhere identified the test of "insurmountable obstacles" as flawed. The third difficulty will be made clearer in a moment.

20. As for Mr Khubber's further submission that even if Huang itself did not (or did not on its own) displace Mahmood, subsequent (post-Huang) Court of Appeal authority has, we will leave that too to be addressed below.

Strasbourg jurisprudence

21. Mr Khubber's parallel submission was that since by s.2 of the Human Rights Act 1998 the Tribunal and courts have a duty to take into account Strasbourg case law, we should take cognisance of the fact that the Strasbourg Court no longer approved of the "test" of insurmountable obstacles and in the Grand Chamber case of Uner v Netherlands App.no.46410/99, 18 October 2006 [2007] Imm AR 303, [2007] INLR 273 had replaced it with a less stringent test. In Uner the test was not "insurmountable obstacles" but rather:

> " the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled" (para 57)

22. Of course, Mr Khubber's argument here, if correct, causes difficulties for his own earlier submission that the proper test to be applied is that of "reasonableness" as set out in Huang (HL). Uner does not refer as such to the test as a "reasonableness" test. That difficulty is not to be underestimated because of the very point Mr Khubber relied on elsewhere, namely that the Tribunal's primary duty is to apply the law relating to Article 8 as established by the higher courts in the UK under the Human Rights Act.

23. But leaving that difficulty to one side, however, Mr Khubber's submission that the concept of "insurmountable obstacles" suffered demise in the 2006 case of Uner, flies in the face of what we know of Strasbourg case law post-Uner. That the "test" is alive and well is most obvious from one of the cases he himself cited: that of Konstatinov v Netherlands 16351/03, 26 April 2007, [2006] ECHR 336. The latter states at para 48:

> "…Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, *whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them* and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would be precarious from the outset. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see Rodrigues da Silva and Hoogkamer v. the Netherlands, no. 50435/99, § 39, ECHR 2006 ..., with further references)." (emphasis added)

24. Mr Khubber's response to this difficulty when it was put to him was to say that the Chamber in Konstatinov was not a Grand Chamber and that, in the event of conflict, UK courts and tribunals should accord precedence to Grand Chamber judgements. Whilst he did not help us with any authority for that view we are aware that such exists. In Al-Skeini and others [2007] UKHL 26 Lord Roger of

Earlsferry, having noted that not all the judgments and decisions of the European Court speak with one voice, stated at para 68:

> "Faced with these conflicting elements in the case law, national courts are justified in giving pre-eminence to the decision of the Grand Chamber in Bankovic v Belgium (2001) 11 BHRC 435…"

25. But Mr Khubber's submission here begs the question of whether there is in fact conflict; to answer that we must look further.

26. That leads us to pose two closely related questions which lie at the heart of this litigation. What sort of test is the test of "insurmountable obstacles" and what is its meaning? (For the moment it is convenient to refer to it as a "test" but that too is something needing further examination.)

Meaning

27. Mr Khubber's submission included the point that the test of "insurmountable obstacles" (even if it remains a UK and Strasbourg test) is not to be understood as a necessary condition or prerequisite for being able to show disproportionality. We agree with him on that.

28. That it was not understood as a necessary condition by Lord Phillips of Worth Matravers MR in Mahmood is clear from his well-known summary at para 55 of that judgment:

> "55. From these decisions I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration controls:
>
> (1) A State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
>
> (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 family 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.
>
> (5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.
>
> (6) Whether interference with family rights is justified in the interests of controlling immigration will depend on

(i) the facts of the particular case and

(ii) the circumstances prevailing in the State whose action is impugned."

29. The language here is clearly not intended to impose strict preconditions At subparagraph (3) removal is said to "*not necessarily* infringe Article 8…provided that…"; at subparagraph (4) Article 8 is said to be "*likely to be* violated…if ..." (emphasis added). Subparagraph (6) reinforces this by emphasising that the balancing exercise is very fact-specific. Further, if one looks back to the Strasbourg cases from which Lord Phillips extracts the "insurmountable obstacles" criterion which forms part of subparagraph 55(3), the case discussed at greatest length is that of Poku v United Kingdom (1996) 22 EHRR CD 94 in which the Commission prefaces its reference to the "insurmountable obstacles criterion" with the cachet: "[w]hether removal or exclusion of a family member from a Contracting State is incompatible with the requirements of Article 8 will depend on a number of factors…". None of the subsequent Court of Appeal cases applying Mahmood have deviated from this approach: see e.g. Ekinci [2003] EWCA Civ 765. UK decisions post-Huang case law have also continued to emphasise the need for specificity on the part of the fact-finding tribunal: see e.g. AB (Jamaica), para 18.

30. Turning to Strasbourg cases, the approach taken by the Commission in Poku continues to be reflected in the Court's later jurisprudence. Thus in Uner such factors are variously described by the Grand Chamber as "relevant criteria", (also the "Boultif criteria") "relevant considerations", "elements to be taken into account" or considerations the Court "will have regard to" (paras 66, 57, 58).

31. The consistency with which the Court describes the "insurmountable obstacles" test as a relevant criterion is enough to establish that it is a factor (Poku, Uner) or criterion (Uner) or "guiding principle" (Boultif v Switzerland, no.54273/00 para 46 ECHR 2001-IX) which the decision-maker must or "should" take into account: see Uner, para 60. To that extent (but to that extent only) it can be said to be a necessary requirement. But it is never said that failure to satisfy this /factor/criterion/principle necessarily means that the adverse decision must be proportionate. Indeed to elevate it into a necessary condition in that sense would undermine the Court's essential principle concerning the need to strike a fair balance between the applicant's rights and interests and the interests of the state or wider community. For then it could become a factor dispositive of an application irrespective of weighing other relevant considerations in the balance. Likewise the Tribunal (see, for example, Cafer Bakir [2002] UKIAT 01176) and the Court have emphasised the need for fact-specific application of such criteria in just as strong terms as used by the Master of the Rolls in para 55(6) of Mahmood.

32. Having said that, consideration of whether there exist insurmountable obstacles or serious difficulties is clearly a guiding principle or criterion (or, for convenience, "test") of major importance to the proper conduct of the balancing

exercise. That is because it reflects (and is a direct corollary of) one of the first principles upon which all Strasbourg jurisprudence on Article 8 in expulsion cases is based, namely that it is the right of states to control exit and entry of foreign nationals and no-one has a right to choose in which country they reside or in which they conduct their private and family life. Thus at para 54 in Uner the Court states:

> "The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, p. 34, § 67, Boujlifa v. France, judgment of 21 October 1997, Reports of Judgments and Decisions 1997 VI, p. 2264, § 42). The Convention does not guarantee the right of an alien to enter or to reside in a particular country. "

33. Similar formulations abound: to take two recent examples, see e.g. Da Silva and Hoogkamer [2006] 1 FCR 229 ("… Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory."(para 39); Konstatinov ("Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory" (para 38)).

34. Again and again the Court has emphasised that an applicant cannot normally succeed if all he can show is that he or she would *prefer* to conduct his family life in the host Member State. More must be shown than that relocation abroad would cause difficulty or hardship. Thus in Abdulaziz,Cabales and Balkandali v UK (1985) 7 EHRR 471 the Court concluded that the applicants had not shown "special reasons" why they could not be expected to establish family life in their own or their husbands' home countries: see para 68. To similar effect, in Headley v UK App.no. 39642/03 at Section C(2)(b) the Court stated:

> "Not least, the Court will also consider the seriousness of the difficulties which the other family members would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his family member cannot in itself preclude expulsion (Boultif, § 50)."

35. If mere hardship or difficulty sufficed, then the interference would not be capable of causing disproportionality since it would not threaten the essence or substance of the right protected.

Wording

36. Analysing the issue by reference to basic Strasbourg principles also helps resolve the next main issue concerning the correct wording of the test. For it shows that in both UK and European Court decisions there is no adherence to a strict formula or technical wording.

37. The clearest evidence of this lies in the fact that even on a superficial survey one can find key cases which use different formulations within the same judgment. In Mahmood, although subparagraph 55(3) refers to "insurmountable obstacles":

> "(3) …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."

the next paragraph (still dealing with the same issue but in the context of long-established family members) uses the terminology of "reasonableness":

> "(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. "

38. Earlier in the same judgment Laws LJ had seemingly treated the test as one of reasonableness: he stated at para 33 that the respondent "…was entitled to conclude that it would be reasonable for her, and the children, to accompany [the appellant] to Pakistan". The Master of the Rolls' earlier summary of cases at para 54 had stated the test as applied by the Court in Beljoudi as one about whether there existed "real practical or even legal obstacles in the way of [this man's] wife accompanying [him] to Algeria".

39. As already touched on, the House of Lords in Huang (para 20) formulates the test in terms of reasonableness:

> " 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." (emphasis added)

40. In post-Huang Court of Appeal cases, the reasonableness formulation has been repeated frequently, but in AB (Jamaica) Sedley LJ deploys a slightly different variant. At paras 18-19 he seeks to draw on the criteria adopted by the House of Lords at para 20 in Januzi [2006] UKHL 5 in relation to the different question of whether an asylum-seeker can be expected to relocate in his or her country of origin (criteria cast in terms of reasonableness and undue hardship). In a more recent case, AB (Democratic Republic of Congo) [2007] EWCA Civ 1422, the Court treated the relevant criterion as that of "insurmountable obstacles": see paras 20-21.

41. Turning to Strasbourg jurisprudence one can see that the European Court too utilises more than one formulation, sometimes even within the same judgment. Thus in Keles v Germany App no. 32231/02 27 Oct 2005 at para 57 the Court, having referred to Boultif v Switzerland (2001) 33 EHRR 50, no.54273/00 para 46

ECHR 2001-IX, stated that where an exclusion order is imposed on second generation immigrants who have started a family of their own in a Contracting State "the Court applies the following guiding principles in its examination of the question of whether that order was necessary in a democratic society". One of the principles given in the list that follows is "the seriousness of the difficulties which the spouse is likely to encounter in the applicant's country of origin". But when it turns to this principle or factor at para 63, it states:

> "With regard to the question of whether the applicant's family could reasonably be expected to follow the applicant to Turkey…"

42. Ranging more widely, it can be seen that the Court over a long period has employed principally three formulations:

> -an "insurmountable obstacles" wording: "…whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them" (see e.g. Da Silva and Hoogkamer, para 39; Headley v UK App no. 39642/03 1 March 2005; Konstatinov, paras 48,52);
>
> -a "reasonableness" wording: "…the question of whether the applicant's family could reasonably be expected to follow the applicant to …"(see e.g. Keles, para 63; Uner, para 64); and
>
> - a "seriousness" wording: " the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled." (see e.g. Boultif, para 48 ,Uner, para 57, Keles, para 57).

43. What the above analysis shows is that the "insurmountable obstacles" test is not subject to strict definition but is used interchangeably with two other formulations.

44. What conclusions are to be drawn? We think there are principally two. Firstly, the range of expressions used shows that it is wrong to treat the use of one formulation rather than another (out of the three) as proof that the judicial decision-maker is adopting less - or more - stringent criteria. The wording of each articulates the same basic principle. Second, in both UK and Strasbourg case law one can see that although the wording can vary, there is always the same essential underpinning (or basic principle) that what must be shown is more than a mere hardship or mere difficulty or mere obstacle. There is a seriousness test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience.

45. The answer to Mr Khubber's second ground is therefore that neither UK nor Strasbourg case law is to be read as having rejected the "insurmountable obstacles" test or adopted less stringent criteria. By the same token, the fact that both UK and Strasbourg decisions adopt a criterion of reasonableness or seriousness (or undue hardship) shows that it would be wrong to define the test

as one that requires in all cases difficulties that cannot of necessity be overcome or surmounted.

46. It is appropriate that we comment further on the introduction by Sedley LJ in AB (Jamaica) of a further variant based on criteria relating to "undue hardship"/"reasonableness" applied by the House of Lords in Januzi when giving guidance on the proper approach to cases of asylum seekers involving the issue of internal relocation. As a reminder of the need for decision-makers (when considering, inter alia, the issue of the seriousness of the difficulties in the way of family member who are established in a Contracting State accompanying an applicant abroad) to conduct a wide-ranging examination, it is indeed instructive. However, beyond that, we see a real danger of decision-makers muddling two distinct sets of legal principles: refugee and asylum-related Article 3 principles and principles governing Article 8 expulsion case law. Any detailed recourse to the former is not easily reconcilable with the need for decision-makers to heed and apply the basic principles of UK and Strasbourg jurisprudence on Article 8. (We will have cause to address the case of AB (Jamaica) again below in relation to two other matters.)

47. We turn to Mr Khubber's third ground of review which contends that the immigration judge failed to give proper weight to the adverse impact on the first appellant's partner (and father of her child) of having to leave the United Kingdom in circumstances where he had established ties to this country and hardly any practical or cultural links with Uganda. Mr Khubber considered that a similar failure was found fatal by Sedley LJ in AB (Jamaica). This failure went hand-in-hand, he said, with a failure to accord due weight to the evidence from a social worker that removal of the second appellant, a minor child, would not be in her best interests.

48. Dealing with the latter point first, it is clear that the immigration judge took the social worker report by Ms Finlayson into account: see para 92 of the determination (already cited). And we see no error in the immigration judge deciding at para 92 , having considered her report (as well as that prepared by Dr Warren) in the context of the evidence considered as a whole, that it did not suffice to persuade him that the proposed removal of the appellants to Uganda was disproportionate. We particularly bear in mind that the second appellant was of a tender, adaptable age, which is a consideration which both UK and Strasbourg decisions have frequently seen as weakening a claim that the best interests of the child necessitated non-removal of a parent or parents.

49. Turning back to Mr Khubber's principal argument, we would reiterate the point made earlier that it does not seem to us that mere disagreement with the weight attached by an immigration judge to such a factor can give rise (without more) to an error of law. Additionally, we would note that (in assessing the degree of disruption removal would cause this family) the immigration judge properly saw it as necessary to consider the evidence before him objectively. In this

regard whilst noting at para 84 what was felt subjectively by the first appellant's partner (among others) about the prospect of having to relocate abroad, the immigration judge concluded that:

> "……I find the obstacles put forward by the appellant's partner to be largely unresearched. He says he fears there the health, culture, health and safety, the disease, and the people the appellant mixed with there. Some of his knowledge of East Africa is simply based upon what he has heard in a pub in Edmonton. He is unemployed and there is no medical evidence before me as to why he could not live and be employed in Uganda. I have not found it proved that it would be unsafe for the appellant in Uganda. I do not find it proved that there are indeed insurmountable obstacles to the family, being the appellant, her daughter and her partner, living together in Uganda, even though this would indeed involve a degree of hardship for some or all members of the family".

50. Earlier he had recorded this man's evidence that: he was born on 21 August 1962 and when aged 3 had lived in the USA before going to live in Nigeria between 1966 and February 1992, when his family came back to the UK; that he does not speak the language in Uganda; and that he and his wife have many friends in the UK and have established their lives here together and would like to see their daughter grow up as a British child (paras 41-46, 54-64). Hence only around 15 of his 45 years had been spent in the UK and he had lived over 25 years in another African country (Nigeria). As we have already noted, the immigration judge had also taken into account, inter alia, the fact that the first appellant had been in the United Kingdom since December 2001, had been granted (albeit only until her 18th birthday) ELR, had commenced family life with her British citizen partner and had had a child with him. In our judgement it was entirely open to the immigration judge, on these facts, and having made a detailed assessment, to view the degree of disruption as not being at more than the level of hardship or difficulty.

51. We come next to Mr Khubber's fourth ground of review which alleged a failure by the immigration judge to consider and appreciate the relevance of the delay in the Home Office making a decision in this case: some five years (the period between submission by the first appellant of an application for further leave to remain in December 2002 and the eventual decision on 11 May 2007). Here we can be no less brief. The immigration judge plainly did consider the relevance of delay and it is clear from para 89 that he did so in accordance with Court of Appeal guidance as set out in HB (Ethiopia) [2006] EWCA Civ 1913. His finding was that "I do not find it proved that any delay there has been has prejudiced the appellant so as to have a substantial effect upon her claim." That was clearly a finding which was consistent with case law (see also KD (Sri Lanka) [2007] EWCA Civ 1384) and open to him on the evidence.

52. Mr Khubber's final ground of review was that the immigration judge had erred by overemphasising the relevance of the first appellant's precarious immigration status when embarking on a relationship with her British citizen partner. He relied in particular on the decision of the Strasbourg Court in Da Silva and Hoogkamer [2006] 1 FCR 229 which was said to state that there should

not be an overemphasis on the immigration status of the applicant (in that case the mother of a young child who had been unlawfully present throughout her stay).

53. There is no challenge to the immigration judge's finding at para 92 that the couple commenced their relationship (in June 2003) in the knowledge that the first appellant's immigration status was uncertain. With that in mind, we are bound to say that Mr Khubber's reliance on Da Silva and Hoogkamer is puzzling in two respects: one is that this judgement makes use of the very "insurmountable obstacles" criterion which he had earlier asked us to treat as no longer correct; the other is that in it the Court went out of its way at para 39 to describe this criterion as an " important consideration":

> "[a]nother important consideration" when deciding to what extent removal will disrupt family life is "…whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of the family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (Mitchell v the United Kingdom (dec.) no, 40447/98, 24 Nov 1998 and Ajayi and Others v The United Kingdom (dec.) no. 27663/95, 22 June 1999).

54. Further (and simply highlighting how fact-specific consideration has to be) the Court only decided (see para 43) that this factor was not weighty in this case because the Dutch Government had itself indicated that :

> "…lawful residence in the Netherlands would have been possible on the basis of the fact that the first applicant and Mr Hoogkamer had a lasting relationship between June 1994 and January 1997 (see paragraph 34). Although there is no doubt that a serious reproach may be made of the first applicant's cavalier attitude to Dutch immigration rules, this case falls to be distinguished from others in which the Court considered that the persons concerned could not at any time reasonably expect to be able to continue family life in the host country (see, for example, Solomon v. the Netherlands, cited above)."

55. Mr Khubber submitted that the factor of foreknowledge of uncertain immigration status had been found by AB (Jamaica) not to matter when the family member established in the UK is a British citizen. We agree with Mr Wright that the facts of this case are clearly distinguishable from those in AB (Jamaica). AB concerned a (British citizen) husband, not a (British citizen) boyfriend. AB concerned a husband (aged 44) who had not only been born in the UK but had lived here all his life (para 10); it did not concern someone who had lived for around 25 years in another (African) country, as compared to 15 years in the UK. Additionally, one factor seen to flaw the decisions of the Tribunal and the immigration judge in AB was their "dismissive" treatment of the burden which removal of this man's wife and children would place on him (paras 20-22); whereas in this case the immigration judge considered that issue in detail. AB is also distinguishable on another ground. It primarily concerned whether the immigration judge and Tribunal had properly considered the application of DP3/96. Under that policy enforcement action is not as a general

rule normally to be initiated against a person who has otherwise no right to remain under the Immigration Rules if he or she is married to a person settled in the UK and that marriage took place at lest two years before enforcement action was taken. One of the flaws identified by Sedley LJ at para 29 was expressly that of the immigration judge's:

> "failure to bring into the assessment of the proportionality of removing the appellant the fact that the executive as a matter of policy does not regard an overstayer who is now in a qualifying marriage as ordinarily liable to removal if the settled spouse cannot reasonably be expected to go to…"

56. AB (Jamaica), that is to say, was a case founded in part upon what was contained in the respondent's policy, rather than a simple application of the principles guiding the assessment of a claim under Article 8 itself. In this case there is no question of any application of DP3/93: the first appellant is not an overstayer and the matter of enforcement action has yet to arise.

57. We conclude that Mr Khubber's fifth ground for review falls away.

58. Even had we been prepared to accept that there were serious difficulties or insurmountable obstacles in the way of the first appellants' husband accompanying her and the second appellant to resume their family life in Uganda, we would still not have considered that the immigration judge materially erred in law. His decision included a finding that "it would be open to the appellant to make an application for entry clearance to enter the United Kingdom from Uganda": see para 92. The grounds of review raised no particular challenge to this finding and did not submit that there would be serious difficulties preventing the two appellants applying for entry clearance from Uganda in order to join her partner as family members of an unmarried partner; and, to the extent that reasons can be implied for challenging it, they are the same as those we have rejected earlier.

Insurmountable obstacles in the context of a step-by-step approach to Article 8

59. Given the recent reminder by Sedley LJ in AB (Jamaica) of the importance of decision-makers making "a structured decision" when applying Article 8, it is important that we clarify one further issue that arose from Mr Khubber's submissions at the hearing. He argued that the immigration judge had wrongly made use of an "insurmountable obstacles" criterion both at Lord Bingham's question 2 (interference stage) and question 5 (proportionality stage). Of course, we have earlier found that the immigration judge erred in law in his approach to the interference question because he imposed too high a threshold. But it is right that we emphasise that we did not consider that his error here arose from the mere taking into account of considerations relating to whether or not there were insurmountable obstacles to the family resuming their family life in Uganda.

60. We accept that from our earlier analysis the test of insurmountable obstacles is principally – and is properly seen as - one which is applied in the context of assessing proportionality under Article 8(2).

61. We stress that because we have seen a number of immigration judge decisions in which it is treated as primarily (sometimes exclusively) a test relating to the question regarding whether there is *interference* (or whether the interference has grave consequences). We are also aware that one leading textbook, Macdonalds Law and Practice appears to espouse just such a position. In its 5th edition, it is stated at para 8.58 (p.293) that:

> "In reading the case law here, it is, in our view, important to recognise that the discussion of where the 'family' can reasonably be expected to reside is conducted in relation to whether or not there has been an interference with Article 8(1) rights. It is only if such interference is established that the Court or Tribunal needs to move on to the question of justification under Article 8(2)."

62. We respectfully disagree. As we have seen, for the European Court this question is and has always been a "guiding principle" of considerable importance in addressing the Article 8(2) question of whether the interference is necessary in a democratic society and so proportionate.

63. But that is not to say this principle or factor is not also relevant when examining the question of interference. As the Tribunal noted in MM (Article 8 – family life – dependency) Zambia [2007] UKAIT 00040:

> "11. However, it does not follow that the assessment of family life which has to be made is one which freezes the situation in the present, without regard to the past and probable future. The preliminary question of whether or not there is a family or private life (or both) is plainly a different question from those raised in Lord Bingham's five questions: one obvious difference is that its analysis does not involve any balancing exercise. However, at all stages of the Article 8 assessment – when deciding whether there is an existing private or family life, when deciding whether any existing private or family life is the subject of an interference having grave consequences (Lord Bingham's question 2) and when deciding whether any such interference is proportionate to the legitimate public end sought to be achieved (Lord Bingham's question 5) – the approach followed by the Strasbourg Court is to take account of a wide range of circumstances, including the applicant's previous personal and family circumstances and the likely developments they will undergo in the future: Marckx v Belgium, Berrehab v Netherlands (1988) 11 EHRR 322, Keegan v Ireland (1994) 18 EHRR 342. That too must be our approach"

64. Once it has been established that there exists a private and/or family life, the nature of the inquiry is always holistic. To suggest that the "insurmountable obstacles" test or criterion is artificially split off, so as to arise only when considering interference or only when considering disproportionality, would be to ignore the Court's flexible and commonsense approach.

65. Equally, however, it is relatively unusual for the Court to find in cases in which there is an established private and family life of any strength that an expulsion

measure would not constitute interference. Thus in Sezen v Netherlands App.No. 50252/99, judgement of 31 January 2006, the Court noted:

> "The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see *Mehemi v. France (no. 2)*, no. 53470/99, § 45, ECHR 2003-IV)."

66. Bringing to bear this approach of the Court to the interference issue makes readily understandable also why the post-Huang UK case law has emphasised that at Lord Bingham's question 2 stage, the threshold is not to be understood as an especially high one.

67. Whilst, therefore, when considering the issue of whether there is interference, it is relevant to consider, among other factors, the issue of obstacles or difficulties in the way of family members accompanying the applicant abroad, it will often be relatively easy to show a (sufficiently grave) interference, at least where the applicant has effective family ties in the UK which will be significantly disrupted by the proposed removal.

68. We add one final comment on the observation made by Sedley LJ in AB (Jamaica) at para 31 that "…the obligation under art.8(2) rested on the Home Secretary to show that it was proportionate to expect him to emigrate to Jamaica if he wanted to preserve his marriage…". As presently advised, we are not persuaded that this paragraph furnishes authority for the proposition that the burden of proving that it would not be reasonable to expect a family member established in the UK to accompany an expellee abroad rests with the respondent. That matter was not argued in AB (Jamaica); rather the respondent simply accepted that this was so in that case. Further, it is not clear that attaching burdens in this way is consistent with the approach of the Strasbourg Court. Indeed, to the extent that one can discern a placing of burdens in relation to this issue, it would seem that the Court either places it on the appellant (see e.g. Abdulaziz, para 68) or sees it as a shared burden depending on the nature of the evidence that is relevant. In Konstatinov one of the arguments raised by the applicant was that her partner was stateless and might be denied admission to her country of origin. In rejecting this argument the Court described that claim as "no more than conjecture" (para 52).

69. We note further that in the case of AB (Democratic Republic of Congo) [2007] EWCA Civ 1422, which was decided after AB (Jamaica), Toulson LJ at para 21 was not prepared to treat the legal burden as being on the respondent even in a case concerning a spouse who had established refugee status in the UK.

70. For completeness we must record that Mr Khubber's further written submissions made reference (in case we found a material error of law) to the second appellant having been granted British citizenship in November 2007 and the first appellant now expecting her second child due to be born in May 2008. Her partner was also said to have obtained employment that started in January

2008 and the couple to be about to make an application for a certificate of approval for marriage. However, these submissions referred to evidence and materials that were not before the immigration judge and, as Mr Khubber conceded, such matters are not relevant to our decision as to whether the immigration judge materially erred in law. Whether, given we have found no material error of law, such matters will lead the Secretary of State to review the appellants' immigration position, is not a matter for us.

71. For the above reasons we conclude that the immigration judge did not materially err in law. His decision to dismiss the appellants' appeals must stand.

Signed

(Dr H H Storey)

Date: