C5/2005/0885

Neutral Citation Number: [2005] EWCA Civ 1779
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
MMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London, WC2

Wednesday, 16 November 2005

B E F O R E:

LORD JUSTICE AULD

LORD JUSTICE JONATHAN PARKER

LORD JUSTICE LLOYD

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SYLVIA CHIKWAMBA

Claimant/Appellant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant/Respondent

- - - - - - -

(Computer-Aided Transcript of the Stenograph Notes of
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MR RAZA HUSAIN (instructed by TRP of Birmingham) appeared on behalf of the Appellant

MR STEVEN KOVATS (instructed by Treasury Solicitor) appeared on behalf of the Respondent

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J U D G M E N T

LORD JUSTICE AULD:

Introduction

1. This is an appeal by Sylvia Chikwamba against the determination of the Immigration Appeal Tribunal ("IAT") dismissing her human rights challenge brought on Article 8 grounds. The IAT concluded that, to require her to return to her country of origin, Zimbabwe, would be a proportionate interference with her, her husband's and their baby daughter's right to respect for family and private life guaranteed under Article 8 ECHR. Ms Chikwamba's husband is a recognised refugee and, like her, a Zimbabwean national. The couple married in the UK while she was awaiting the hearing of her appeal to an adjudicator from a refusal of asylum and permission to remain on humanitarian grounds. She has an extended family in Zimbabwe, including two children there by another man from whom she is estranged.

2. The first issue on the appeal is whether the IAT misdirected itself by following the guidance given in the case of M (Croatia) [2004] IAR 211, to the effect that it could only allow an appeal brought on Article 8 grounds where the disproportion constituted by removal from the country between private right and public interest was so great that no reasonable Secretary of State could reasonably reach the contrary view. That guidance was overruled by this Court in Huang v SSHD [2005] 3 WLR 4891, in which it held that the question of proportionality was for the appellate authority, the adjudicator and/or the IAT, as the case may be, and that the test was whether the case was "truly exceptional on its facts".

3. That issue gives rise to a more focused question, namely whether the facts, including - in the event of failure on some or all of Ms Chikwamba's other arguments - the hazards of her involuntary or voluntary return to Zimbabwe to claim entry clearance to the UK, are such that the IAT, properly directing themselves, could possibly have found them truly exceptional so as to hold that her Article 8 rights prevailed.

4. The basic legislative framework is to be found, first, in Article 8 ECHR, which provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, for 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 freedom of others."

It is trite law that rights under the ECHR are to be secured in a manner that is practical and effective, rather than theoretical or illusory.

5. The other part of the legislative - or near legislative - framework to which I should refer is Rule 352A of the Immigration Rules, HC 395, which provides as follows:

> "The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse of a refugee are that:
>
> (i) the applicant is married to a person granted asylum in the United Kingdom; and
>
> (ii) the marriage did not take place after the person granted asylum left the country of his former habitual residence in order to seek asylum; and
>
> (iii) the applicant would not be excluded from protection by virtue of article 1F of the United Nations Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and
>
> (iv) each of the parties intends to live permanently with the other as his or her spouse and the marriage is subsisting; and
>
> (v) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity."

There is thus (owing to para 352A(ii)) no provision in the Immigration Rules for the admission of the spouse of a refugee where the marriage takes place after the refugee's flight from his or her home country.

The Facts

6. Mrs Chikwamba is, as I have said, a national of Zimbabwe. She arrived in the country in April 2002 at the age of 20, and sought asylum on the basis of her and her mother's involvement in the opposition Movement for Democratic Change ("the MDC") in Zimbabwe.

7. By a decision letter of 5th June 2002, the Secretary of State refused her claim for asylum, principally for want of her credibility, in particular as to her claimed membership of the MDC. He also rejected her claim to remain on humanitarian grounds based on her concern about the treatment she would receive in Zimbabwe if returned there as a failed asylum seeker. At para 14 of the letter, the Secretary of State stated:

> "14. It is accepted that conditions in Zimbabwe have deteriorated in recent months and there were reports in December 2001 that some failed asylum seekers have faced difficulties on their return to Zimbabwe. While there was no evidence that returnees were being systematically detained for questioning or subjected to ill treatment, the Secretary of State was not satisfied, on the information then available, that unsuccessful asylum seekers could safely be returned to Zimbabwe. On 15th January 2002 the Secretary of State therefore decided to suspend removals of failed asylum seekers to the outcome of any appeal to the independent appellate authorities, be removed to Zimbabwe as soon as the Secretary of State is satisfied that it is safe to do so."

8. I should break into the narrative here to mention that the Secretary of State appears wrongly to have suggested in that passage that his decision to suspend enforced returns to Zimbabwe had been made because he considered it would not be safe to return them. Baroness Scotland of Ashtal explained in a parliamentary answer in the House of Lords on 4th November 2003:

> "The suspension of removals of failed asylum seekers to Zimbabwe announced in January 2002 was in response to concerns about the serious deterioration in the situation in Zimbabwe in the build-up to the presidential election held in March that year. We did not, at that time, regard it as unsafe to return failed asylum seekers to Zimbabwe, but in view of the rapidly changing conditions we considered that it would be appropriate not to enforce returns.
>
> The Government's position is, as it has been since January 2002, that each asylum (and human [rights] claim made by a Zimbabwean national will be considered on its individual merits in accordance with our ..... [convention obligations]. Each application is considered against the background of the latest available country information including that obtained from and through the Foreign and Commonwealth Office ..... "

9. It was some three months after the Secretary of State's refusal of asylum and relief on humanitarian grounds, and while the suspension on returns to Zimbabwe was still in force, that, on 26th September 2002, Ms Chikwamba married her present husband, a Zimbabwean national as I have said. She had known him since she was a child, and had formed a relationship with him after her arrival in the UK. On 13th June 2002 he had been granted asylum.

10. Following a further application for asylum or permission to remain on humanitarian grounds, the Secretary of State by a decision letter of 4th February 2003 again refused Ms Chikwamba's applications and added that he was not prepared to grant her exceptional leave to remain outside the Immigration Rules.

11. An adjudicator, on 14th May 2003, dismissed her appeal against both her applications. Whilst expressing the view in paragraph 11 of his determination that conditions in Zimbabwe were "harsh and unpalatable", he too found that her claim to asylum lacked credibility and he found that she was at no risk to breach of her rights under Article 3 if she were to be returned. With regard to her Article 8 claim, based on her marriage in this country, the adjudicator noted that her husband was aware of her status as an asylum seeker at the time of the marriage. In rejecting her claim under this head and in holding that return to Zimbabwe would be "wholly proportionate" to her claim for respect for her family life, he purportedly took as his guide the well known synthesis of Lord Philips MR (as he then was) in R (Mahmood) v Secretary of State [2001] 1 WLR 840, at para 55, of the approach of the Commission and the European Court of Human Rights which, for convenience because it will be referred again in this judgment, I set out:

> "(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 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."

12. However, the adjudicator, having cited that passage from Lord Phillips' judgment, went on in paragraph 24 of his determination, to make a plain error of law in holding that, for want of establishing facts sufficient to engage Article 3, Ms Chikwamba could not make out a case under Article 8.

13. On Ms Chikwamba's appeal to the IAT, she argued, in relation to her Article 8 claim, that it was disproportionate to expect her to return to Zimbabwe because (1) she could not go there given the suspension of removals to Zimbabwe; (2) her husband could not go there because he had been given asylum in the UK; and (3) the birth of her daughter on 14 May 2004.

14. Pending the hearing of that appeal, the Secretary of State, in November 2004, lifted the suspension he had imposed in January 2002 on returns of failed asylum seekers to Zimbabwe, in response to strong indications that it had been exploited.

15. However, I should again interrupt the narrative to mention a recent authority drawn to the Court's attention, the decision of the Asylum and Immigration Tribunal ("AIT"), in AA (Involuntary returns to Zimbabwe) Zimbabwe [2005] UKAIT 00144 CG. In that case the AIT appear to have concluded that involuntary returns to Zimbabwe could not be effected compatibly with Article 3 ECHR or article 1A(2) of the Refugee Convention. The AIT appears, however, to have concluded that voluntary returns would not necessarily breach the Convention. I shall return later in this judgment to its reasons for that distinction, so far as necessary. We understand that, pending the

outcome of an application by the Secretary of State for permission to appeal that determination to the Court of Appeal, he has announced that he will not compulsorily return unsuccessful asylum seekers to Zimbabwe.

16. Returning to the narrative, on 25th January 2005, the IAT dismissed Ms Chikwamba's appeal. In doing so, its main reasons were that: (1) she had established a private and family life in the UK; (2) the only question, therefore, was that identified in Article 8(2) itself, whether the proposed interference with that established private and family life was proportionate to the legitimate aim of immigration control; (3) R (Razgar) v SSHD [2004] 2 AC 368 had established that decisions taken pursuant to immigration control would be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis; and (4) the test was to be taken from the IAT's decision in M (Croatia) [2004] IAR 211, namely whether the disproportion was so great that no reasonable Secretary of State could remove it in the circumstances. The IAT's reference to M (Croatia) was in paragraph 14 of its determination (that is to say, this tribunal's determination in this case):

> "Mr Wong [counsel for Ms Chikwamba then] ..... acknowledged the proper weight to be given to the need to maintain immigration control as decided by the Immigration Appeal Tribunal in ..... Croatia ..... In that case the Tribunal decided that it should normally be held that a decision to remove is unlawful only when the disproportion is so great that no reasonable Secretary of State could remove in those circumstances, Elsewhere in ..... [Croatia] the Tribunal referred to the fact that the public interest in maintaining immigration control will usually be 'a very weighty consideration indeed'."

17. Since that determination of the IAT, its guidance in M (Croatia) has been superseded by the decision of this Court in Huang, holding that it is the adjudicator's decision, not that of the Secretary of State, as to proportionality that counts. An adjudicator now is required to allow an appeal if, but only if, he concludes that the case is truly exceptional on its facts. So it is no longer enough for an adjudicator or an Immigration Appeal Tribunal to uphold the Secretary of State's refusal of relief under Article 8 on the Wednesbury basis that it was not irrational. This is how Laws LJ, giving the judgement of the Court in Huang, put it, at paragraphs 59 and 60:

> "59 ..... The true position in our judgment is that the Human Rights Act 1998 and section 65 (1) require the adjudicator to allow an appeal against removal or deportation brought on article 8 grounds if, but only if, he concludes that the case is so exceptional on its particular facts that the imperative of proportionality demands an outcome in the appellant's favour notwithstanding that he cannot succeed under the Rules.
>
> 60 In such a case the adjudicator is not ignoring or overriding the Rules. On the contrary it is a signal feature of his task that he is bound to respect the balance between public interest and private right struck by the Rules with Parliament's approval. That is why he is only entitled on article 8 grounds to favour an appellant outside the Rules where the case is truly

> exceptional. This, not *Wednesbury* or any revision of *Wednesbury*, represents the real restriction which the law imposes on the scope of judgment allowed to the adjudicator. it is not a question of his deferring to the Secretary of State's judgment of proportionality in the individual case. The adjudicator's decision of the question whether the case is truly exceptional is entirely his own. He *does* defer to the Rules; for this approach recognises that the balance struck by the Rules will generally dispose of proportionality issues arising under article 8; but they are not exhaustive of all cases. There will be a residue of truly exceptional instances. In our respectful view such an approach is also reflected in Lord Bingham's words in R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368, para 320 ..... " .

That reasoning, as I have already indicated, applied also to the IAT, where, as here, its jurisdiction on appeal remained at large and was not confined to points of law only.

18. Returning to the IAT's reasoning in this case, on the main issues I have identified and others to which I shall come, it is plain that it took the Huang not the M (Croatia) approach to the various facts on which Ms Chikwamba relied in maintaining that this was a truly exceptional case. One by one, the IAT expressed its own view as to the lack of exceptionality, individually or collectively of those facts, concluding in paragraph 22 of its determination:

> "Our conclusion is that it would not be disproportionate to require the appellant in this case to return, possibly accompanied by her child ..... in order to apply for admission as a spouse under paragraph 281 of HC 395."

Submissions and Conclusions

19. I turn to the main first issue, who decides proportionality?

20. Mr Raza Husain, who appears for Ms Chikwamba, with a view to emphasising what he maintained was a strong case for exceptionality in cases like this, that is where the family relationship is one of spouses and/or between parent and young children, noted that none of the three cases considered by this Court in Huang, concerned such sensitive and close family relationships. In contrast, he said, Mahmood, which should be read with Huang, did. He submitted that it is plain from the IAT's reference in paragraph 14 of its determination to M (Croatia) that it followed the guidance in that case in considering proportionality, and erred in doing so.

21. Mr Steven Kovats, for the Secretary of State, submitted, as I have pointed out, that, although the determination of the IAT in this case pre-dated Huang, its detailed reasoning on all the issues before it, in substance, adopted the Huang approach. In the alternative, Mr Kovats submitted that, if the IAT directed itself by asking whether the Secretary of State's decision was one that a reasonable Secretary of State could have made, it is plain from the way in which it went on to express itself on the various issues before it, that it would have reached the same decision if it had directed itself in accordance with Huang.

22. In my view, there is no need for Mr Kovats to have had recourse to that alternative argument, for, as I have said, the IAT clearly decided for itself whether this was a case of true exceptionality, just as it decided for itself whether to accept or reject the other arguments, characterised by Mr Husain as errors of law or of mixed law and fact.

23. Turning to the other criticisms that Mr Husain made of the IAT's decision as errors of law or of mixed law and fact in the context of proportionality, as explained by Lord Bingham in A and Others v Secretary of State for the Home Department [2004] UKHL, [2005] 2 AC 68, paragraph 44, the IAT, in paragraph 15 of its determination, rejected the argument on behalf of Ms Chikwamba that the conditions in Zimbabwe are unsafe so as to constitute one of the factors in the case making it exceptional. This is how it dealt with the point:

> "15 ..... there is no reason to think her asylum claim having been rejected that the appellant will suffer any human rights abuses. The adjudicator dismissed her asylum and Article 3 claim because he found she had no well founded fear of persecution in Zimbabwe and there was no real reason to believe that she would encounter risk of torture or inhuman and degrading treatment. Moreover the appellant has other relatives in Harare including two children by a previous relationship now aged 7 and 3 who, according to the appellant's own answers in interview, reside in the same place. Whilst it may be true that human rights abuses occur in Zimbabwe, there is no particular reason to believe in this case that the appellant will suffer such abuse."

24. Mr Husain submitted, in support of the second ground of appeal, that the conditions in Zimbabwe were and are exceptional for this purpose and that the IAT erred in that passage in effectively excluding from its analysis the difficulties Ms Chikwamba would be likely to encounter in returning to Zimbabwe, especially with her infant child. The effect of the IAT's reasoning was, he said, to render those difficulties irrelevant to the proportionality analysis, because its conclusion did not cross the Rubicon of persecution or human rights abuses. While persecution or human rights abuses would have been dispositive of the issue, conditions that were "harsh and unpalatable", strong and, as he said, undisturbed epithets for the adjudicator to have used to describe country conditions in Zimbabwe, remained a relevant question. The error of law by the IAT, he submitted, was that it had closed its mind to unpleasant conditions or consequences short of human rights abuses when considering whether all the circumstances here flowing from a return to Zimbabwe would amount or contribute to exceptional circumstances within the Mahmood and Huang sense.

25. Whether or not circumstances or conditions below the Articles 3 or 8 thresholds may contribute to what, for want of a better term, I would call a basket of exceptional circumstances for the purpose of Mahmood and Huang, the possible circumstances in this case as demonstrated by the evidence before the adjudicator and put before the Secretary of State were Article 3 or 8 or nothing.

26. Mr Husain added that the adjudicator's views were also predictably accurate, being harsh and unpalatable, by reference to a recent "country guidance" case on Zimbabwe

given in May 2005, SM and Others [2005] UKIAT 00100, where the IAT concluded at paragraphs 41 and 42 that, although returned failed asylum seekers would not, without more, be at risk of persecution or human rights abuse, "those deported to Zimbabwe from the UK ..... [would] be subject to interrogation on return" and "returnees ..... [were] regarded with contempt and suspicion on return and ..... face[d] a very hostile atmosphere". That is the passage where it indicates its concern to comment on those who were deported or forced returnees to Zimbabwe.

27. Mr Kovats' short and correct answer to that submission, it seems to me, is that it does not amount to a complaint of an error of law. Nor, I would add, is there in this context a route to identifying such an error through the medium of Wednesbury irrationality, since that door has been closed as to exceptionality by Huang. As for Mr Husain's specific complaint that the IAT "had closed its mind to unpleasant conditions or consequences short of human rights abuses", there is simply no basis for such criticism in any of the critical conclusion paragraphs, in particular paragraph 20 to which I shall come.

28. Stripped of the case of AA, to which I have briefly referred, this is, as Mr Kovats submitted, simply an attempt to argue for a different finding on the facts.

29. I turn to the next criticism, the third ground of appeal, in essence, which concerns the Secretary of State's suspension on returns.

30. Mr Husain submitted that the IAT made a further error in paragraphs 16 to 17 of its determination when considering the relevance of the Secretary of State's 34-month long suspension of removals to Zimbabwe, concluding that the suspension was not "comparable with the grant of leave to remain". Paragraph 17 of the IAT's determination gives the context in which it expressed that view:

> "17 We do not attach very much weight to this point which we do not think is comparable to the position in a case such as Shala [Shala v SSHD [2003] EWCA Civ 233] where an appellant had a legitimate belief that he would benefit from a policy granting either temporary or permanent leave at the time he arrived in the United Kingdom to make his asylum claim thus justifying an 'in country' application."

31. In this particular case the appellant had been told in June 2002 that her claim for asylum was being refused and, given the content of her claim, the prospect of successfully establishing refugee status was highly optimistic. The policy of suspending enforced returns to Zimbabwe is not, in our view, comparable with the grant of leave to remain.

32. Mr Husain's criticism was that, while the grant of temporary admission following a suspension of removal is not technically equivalent to the grant of leave, the suspension here was relevant to the unreality of requiring Ms Chikwamba to have left the UK to apply for entry clearance before marrying her husband, especially where the Secretary of State himself cited, in the appellant's case itself and three months before her marriage, the lack of general safety as the reason for suspending returns there in June

2002. Mr Husain suggested that in the circumstances, the suspension was "comparable" to a grant of leave; a good reason had been identified for not requiring the appellant's return and permitting her to stay in the UK.

33. As I have indicated in paragraph 8 above, Mr Husain's characterisation there of the Secretary of State's reasoning in announcing the temporary suspension in January 2002 was not quite that.

34. Mr Husain added that the fact and duration of the suspension on removals to Zimbabwe gave, one way or another, some reassurance to Ms Chikwamba at the time of her marriage in September 2002. It was also relevant, he said, when considering the present proportionality of a requirement to return, following the re-activation of returns in November 2004.

35. Mr Kovats' response again was that this was not a point of law. He added that, in any event, the IAT correctly contrasted the temporary policy of suspending removals with the practice considered in Shala of granting refugee status to ethnic Albanians from Kosovo.

36. Mr Husain, on the next and fourth ground of appeal under the general heading of the "Impact of Refugee Status and Family Unity", submitted that the IAT erred in law (at paragraph 20 of its determination) in treating the status of a refugee in the UK as much the same as that of a British citizen or a person with indefinite leave to remain. This is how the Tribunal expressed its conclusion in that paragraph:

> "20 We readily accept that a refugee in the United Kingdom is entitled to respect for his own family life and equally a spouse of such a person is entitled to the same respect. We cannot see, however, that these rights differ in any material way from the respect due to a spouse of a British citizen or any other person resident in the United Kingdom with indefinite leave. The rights of all are now protected by Article 8 of the ECHR as enshrined in English law. In the case of a foreign national who marries a British citizen in the United Kingdom, in the absence of exceptional circumstances, that person will be required to return to their own country to apply for leave to enter as a spouse. We cannot see the case for distinguishing the spouse of a British citizen, and the appellant in this case, who has married a refugee with a right to remain in the United Kingdom."

37. Mr Husain countered that reasoning by arguing that those subject to immigration control are in some respects in a better position than British citizens, and that there is nothing in principle odd about that, for example, economically active EU nationals.

38. On the same subject - refugee status and family unity - the IAT, in paragraph 19 of its determination, considered a plea on Ms Chikwamba's behalf that it should have regard to the desirability of preserving family unity, and an application of that principle applied by the Tribunal in the unstarred IAT decision of Gamelshid (Appeal No 13261/1996). That case concerned the Somali Family Reunion Policy in force at the

time, which applied to pre-flight family relationships, but which the Tribunal held should also apply to those who married after arriving in this country. The response of the IAT in this case to that authority was that it did not consider it had much relevance to the facts of this case.

39. Mr Husain submitted that a refugee enjoys, as a matter of international law (where the principle of family unity is an important aspect of the Refugee Convention) and domestic law through policy and the immigration rules, a strong presumption, as he put it, in favour of family unity. He said that it was not Ms Chikwamba's fault that the relationship with her husband arose only while they were in the UK. And he submitted that the IAT should not have dismissed it as of little relevance, as it did in paragraph 19 of its determination, disregarding acceptance by the IAT of such an argument in Gamelshid. The IAT's approach betrayed, he said, a failure in this case to appreciate strong pointers of exceptionality contributed by the strong regard in international institutional law and jurisprudence for family unity, especially where one of its members is a recognised refugee.

40. Mr Husain stressed the importance of considering the rationale rather than simply the letter of polices in the Statement of Changes of Immigration Rules governing the obtaining of leave to enter the UK, such as para 352A, protective of family unity established before flight, as recognised by Schiemann LJ in Shala at paragraph 21. The rationale, he submitted, is to discourage opportunistic refugee marriages, and to encourage those who are left abroad after the refugee's flight, to obtain entry clearance. But given the accepted genuineness in this case of Ms Chikwamba's marriage in the UK to a refugee who shared her nationality, he maintained that it was wrong of the IAT to regard the application as a normal immigration application, and, inflexibly, to require her to return to Zimbabwe to obtain entry clearance.

41. In summary, on this and the other grounds of appeal, Mr Husain maintained that where, as here, by reason of Ms Chikwamba's husband's refugee status, it is common ground that family life cannot be constituted outside the UK in Zimbabwe, and there is doubt as to whether she could comply with the substantive requirements of the immigration rules, the act of removal may cause a state of affairs, for example, the break up of a marriage, the separation of a young child from her parents, with which the Strasbourg Court is, as Baroness Hale of Richmond put it in Razgar at para 50, "unsympathetic". The existence of "insurmountable obstacles to the family living together in the country of origin of the family member", as Lord Phillips MR put it in paragraph 55(3) in Mahmood, also points, he said, powerfully against the proportionality of return and to the exceptional nature of the present case.

42. Mr Kovats, in reply, submitted that the authorities show that this complaint is unfounded, based as it is for practical purposes on Ms Chikwamba's concern that if she were to return to Zimbabwe to apply for entry clearance, her application would be refused. Citing Mahmood (at paragraphs 26 and 65-66) and Ekinci v SSHD [2003] EWCA v 765 (paragraphs 16-19, 22 and 23), he submitted that it was not the function of the IAT in a case such as this to prejudge the outcome of any application for entry clearance that Ms Chikwamba might make.

43. He argued that Mr Husain, in making the submission he did under this heading, confused two separate things: first, the substantive matter of permanent unity or break up of a family and, secondly, the procedural means, such as entry clearance, for protecting the permanence of family unity. Procedural rules, the procedural aspect, is recognised in the immigration rules and instructions outside the immigration rules and in the United Nations Handbook on procedures and criteria for determining the status of refugees.

44. Mr Kovats submitted that what matters is the threat, if any, to the former of those two matters, to the permanent unity of the family, subject, as it is, to the provision of appropriate procedures for its protection, a matter for national resolution.

45. In my view, Mr Husain's complaint under this head is ill-founded in two respects. First, as the authorities to which Mr Kovats has referred indicate, the fact that someone who has arrived in this country without the required entry clearance may be able to show that he would have been entitled to one does not, in the absence of exceptional circumstances, allow him to remain here without it. As Laws LJ observed in Mahmood, at paragraph 26:

> "it is simply unfair that he [or she] should not have to wait in the queue like everyone else."

Or, as Simon Brown LJ in Ekinci, a case of a Turkish asylum seeker who had entered this country via Germany, put it at paragraph 17:

> "17 ..... It would be a bizarre and unsatisfactory result if, the less able the applicant is to satisfy the full requirements for entry clearance, the more readily he should be excused the need to apply ..... it is entirely understandable that the Secretary of State should require the appellant to return to Germany so as to discourage others from circumventing the entry clearance system ..... "

46. Mr Husain has suggested that the legal basis of this reasoning in Mahmood and Ekinci has been rendered uncertain by subsequent developments in the law recognising the particular vulnerability of failed asylum seekers seeking to rely on human rights claims, illustrated, he suggested, by the starred IAT decision in Moon [2005] UKIAT 00112. However, such an argument, it seems to me, if given wide effect, could drive a coach and horses through the effective and orderly contribution of the entry clearance system to immigration control.

47. The second reason why Mr Husain's submission under this head is ill-founded is that his assertion that there is a presumption in such cases in favour of family unity - cuts across the clear rule of Mahmood and Huang, that it is only in exceptional cases that an adjudicator or the IAT can allow Article 8 considerations to prevail over the public interest in maintaining efficient and orderly immigration control.

48. Indeed, Mr Husain's argument came very close to suggesting that the combination of a recognised refugee who wishes his family to join him is, in itself, an exceptional circumstance so as to require Article 8 interest to prevail.

49. In short, in my view the IAT correctly considered whether the case in any or all of these respects was so exceptional such that Ms Chikwamba should not be required to comply with the immigration rules and apply for entry clearance, and made no error of law in concluding that this was not such an exceptional case.

50. But for the reliance that Mr Husain placed on the recent AIT case of AA (to which I have briefly referred when summarising the facts), I would, for the reasons I have given, dismiss the appeal. What is the effect of that decision?

51. Mr Husain submitted that, even if Ms Chikwamba returned to Zimbabwe voluntarily with a view to seeking entry clearance so as to render it consistent with Article 3 ECHR and Article 1A(2) of the Refugee Convention, the conditions that she, and perhaps her infant child, would have to endure in Zimbabwe, as a failed asylum seeker advancing a claim for family reunion with a recognised Zimbabwean refugee, would render such a course of action disproportionate to her right to respect for her family life. It would, he said, be so disproportionate as to amount to exceptional circumstances requiring departure from the normal imperatives of immigration control.

52. The AA case was concerned with identifiable forced returns to Zimbabwe. The IAT considered a large body of evidence, and much of its determination is given over to rehearsing and making its findings of fact on that evidence. In paragraph 154, in concluding one section of its findings, it referred to the relevant authority in Zimbabwe in these terms:

> "The CIO are not primarily responsible for immigration services at Harare Airport, but they do however have a presence there. The evidence we have seen makes it clear that when planes from the United Kingdom arrive at Harare members of the CIO are present in great numbers. Although there was some suggestion in the evidence before us that the Zimbabwean authorities treated arrivals from other white Anglophile countries, the United States of America, Australia and New Zealand for example, with similar suspicion, it is in our view clear that the CIO take a particular interest in arrivals from the United Kingdom."

The paragraph goes on, and I emphasise the following sentence:

> "Nevertheless it appears to be the case that ordinary travel to and from the United Kingdom, including voluntary departures by those who had dealings with the immigration authorities of this country, are dealt with in the usual way by immigration officers, not the CIO at the airport in Harare."

That is the central finding of the IAT in that case, which I summarised earlier, to the effect that, while forced returns may subject those returned to a risk of Article 3 or

Article 8 human rights abuses, voluntary returns are not subject to the same risk.

53. Mr Husain drew our attention to paragraph 170 of the IAT's determination which, he suggested, introduced an element of ambiguity into that seemingly clear distinction. I do not read it as such. It reads:

> "First, in relation to the evidence we have heard, it is possible that we might have taken a different view"

that is to say, in relation to involuntary returns

> "if the government had made any arrangements to ensure so far as possible that those returned voluntarily and those returned involuntarily are not readily distinguishable on arrival. Part of the risk we have identified arise from the government's apparent disinterest in the precise way in which passengers' documents are dealt with by airline staff. It is also possible that we might have taken a different view if there had been evidence ..... that substantial numbers of failed asylum seekers returned involuntarily from the United Kingdom passed through Harare Airport without any problems. If the government is concerned to avoid risk to individuals in making policy decisions based on fact, it will no doubt carefully monitor returns to any country regarded as dangerous and will present resulting facts as evidence in asylum appeals."

The IAT in that paragraph, as throughout its determination of the appeal, was concerned with involuntary returns to Zimbabwe, not, as remains a possibility here, voluntary return.

54. In any event, Mr Husain's use of the AA case was not to establish any point of law, but to rely on its rehearsal of the evidence and findings of fact as "evidence" in this case - evidence that is not admissible, certainly not on a point of law to the Court of Appeal in a wholly different case.

55. The irony in Mr Husain's reliance on the AA case is that if Miss Chikwamba were to refuse to return to Zimbabwe voluntarily to make a claim for entry clearance, thus unnecessarily exposing herself to involuntary return and hence to possible ill treatment of the sort found in AA from Zimbabwean authorities, she would be able to pray-in-aid the consequence of her refusal as a contribution to exceptional circumstances in support of her Article 8 claim. That would be absurd.

56. For all those reasons, I am satisfied that the IAT in this case, whatever its reference to the guidance given in M (Croatia), in effect, applied what was to become the Huang rule, and decided for itself the issue of proportionality. In relation to the other grounds of appeal that Mr Husain has advanced, I can see no error of law on issues of proportionality, which are themselves matters of mixed law and fact, on which I would upset the IAT's determination. Accordingly I would dismiss the appeal.

57. LORD JUSTICE JONATHAN PARKER: I agree.

58. LORD JUSTICE LLOYD: I also agree.

Order: Appeal dismissed with the appellant's costs subject to detailed assessment. Permission to appeal was refused.