Neutral Citation Number: [2007] EWCA Civ 133

Case No: C5/2006/1582/AITRF

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE AYSLUM AND IMMIGRATION TRIBUNAL
HR002872004

Royal Courts of Justice
Strand, London, WC2A 2LL

22nd February 2007

Before:

LORD CHIEF JUSTICE OF ENGLAND & WALES
LORD JUSTICE SCOTT BAKER
and
LORD JUSTICE THOMAS

- -

Between:

MS (IVORY COAST)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Andrew Nicol Q.C and Elizabeth Dubicka (instructed by **Fisher Meredith**) for the **Appellant**
Charles Bourne (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 29 January 2007

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Judgment
As Approved by the Court

Lord Justice Scott Baker:

This is the judgment of the court.

1. MS, the appellant, appeals with the permission of Neuberger LJ against a decision of the Asylum and Immigration Tribunal ("AIT") on 9 May 2006. The AIT had allowed her appeal against the refusal of the respondent Secretary of State to accept that her removal from the United Kingdom would breach her Article 8 rights.

2. The appellant describes the question raised by this appeal as whether the AIT is obliged to determine a human rights appeal by reference to a hypothetical removal from the United Kingdom at the time of the hearing even though the Secretary of State has no immediate intention to remove the appellant; or whether the position should be considered as at the time when removal is likely to take place. More specifically, is an undertaking by the Secretary of State not to remove the appellant pending the outcome of contact proceedings (provided they are pursued expeditiously) an answer to her claim under Article 8 of the European Convention on Human Rights ("ECHR").

Background.

3. There is a good deal of background history in this case that is of no direct relevance to the present appeal. In particular the appellant has made a failed asylum claim. It is, however, necessary to describe something of the history. The appellant is 38. She was born in 1968 in the Ivory Coast. Her family was involved in the Ivoirean People's Front Party. Her father was arrested and imprisoned several times.

4. She was educated in Abidjan from the age of 7. She had a daughter by her first husband in 1987. The marriage did not last and she married again. Her second husband was SG.

5. On 3 March 1994 she arrived in the United Kingdom but was refused leave to enter. She sought asylum 5 days later on 8 March.

6. On 4 August 1994 her husband, Mr SG, arrived to join her. His application for asylum was refused on 16 June 1995. The marriage came to an end on 4 August 1995 and they subsequently divorced.

7. On 6 August 1995 she gave birth to twins, L and S. They are now 11½. She began to suffer mental health problems.

8. Her asylum application was refused on 30 October 1996. She appealed but the appeal was dismissed in her absence on 31 July 1998.

9. In the meantime, her children had been taken into care and she had been arrested and

charged with six offences of grievous bodily harm, one of actual bodily harm and one of cruelty towards them. Her husband had resumed contact with the twins and was granted a residence order in 1998. He and they were later granted residence permits on the basis of his subsequent marriage to a European Economic Area national.

10. On 4 January 1999 the appellant was convicted and sentenced to three years imprisonment for the offences to which we have referred. Whilst in prison she received some visits from the twins. Around this time she learned that her mother and elder daughter had been drowned off the African coast.

11. In February 2000 she made further representations for asylum to the Secretary of State. After her release from prison on 3 June 2000 she remained in immigration detention. She applied for exceptional leave to remain so as to pursue a contact order with her children. She continued to have some contact with them until August 2000.

12. On 20 June 2000 the respondent refused her application and set removal directions for 27 June. She sought judicial review of the proposed removal arguing there would be breaches of Articles 6 and 8 of the ECHR if she was removed prior to determination of her contact application. She was granted bail. Her contact application was dismissed on 18 October 2001 when she failed to appear, having previously failed to attend appointments with the consultant psychiatrist who was to report to the court.

13. On 23 January 2002 her renewed application for leave to apply for judicial review was finally rejected by the Court of Appeal.

14. In early 2003 she made further representations to the respondent based on Articles 3 and 8 of the ECHR. These representations were rejected by letter of 10 June 2003. This letter records: "the Secretary of State … is satisfied that your client's removal does not breach the European Convention of Human Rights." and a little later, "your application for leave to remain is therefore refused and is hereby recorded as being determined on 10 June 2003." However expressed in the letter, it is nevertheless common ground that the decision was a refusal of leave to enter the United Kingdom. This is the underlying decision to which the present appeal relates. The appellant appealed against the respondent's decision. The appeal came on for hearing before an adjudicator (Mr Dawson) on 13 July 2004. At about the same time the appellant's solicitors indicated that fresh contact proceedings were to be launched. The adjudicator allowed the appeal on Article 8 grounds. His decision was promulgated on 27 July 2004. He rejected her appeal on all the other grounds.

15. The adjudicator decided:

- The appellant had established a private life in the United Kingdom. This was inevitable having been here since 1994.

- She had not seen her children for four years and did not have family life with them.

- It was her ambition to renew contact. Removal would frustrate and interfere with attempts to renew family life. In practical terms she could not prosecute a claim from abroad from Abidjan. The respondent had misunderstood the application of paragraph 246 of the Immigration Rules (which relates to applying for entry clearance from abroad).

- The respondent had misapplied the proportionality test and he (the adjudicator) "did not think it would be proportionate for her to be removed at this stage."

16. The adjudicator said that removal would take away the last chance the appellant had of resolving much of what had been troubling her. Removal would result in a serious decline in her mental health. He considered that her endeavours to establish contact with her children were a legitimate expression of her right to private life coupled with access to continued psychiatric help. He said that having allowed the appeal it would be for the Home Office to decide how to give effect to his decision. But at the very least he considered there should be a reprieve from removal to give the appellant an opportunity to prosecute an application for a contact order within a reasonable period of time.

17. The respondent appealed to the AIT and the appellant put in a respondent's notice. On 19 April 2005 the AIT concluded that the adjudicator had made a material error of law as follows:

> (a) He ought to have given some consideration to the history of the appellant's claim (pursued or not) for contact with her children since her release from immigration detention in November 2000.
>
> (b) On how far the appellant would be able to pursue such an application from overseas he:
>
> 1. applied the wrong standard of proof;
>
> 2. failed to cite any evidence to support his decision.

18. Under the transitional provisions in Schedule 2 Part 2 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 the appeal proceeded as if it were a reconsideration following review by the AIT. On 26 August 2005 it resolved various issues that are irrelevant to the present appeal and adjourned full reconsideration of the appellant's Article 8 case on her wish for contact with her children in this country. Its original intention had been to conclude the matter at the hearing on 26 August 2005. However, the appellant's contact proceedings had not progressed because the father's

whereabouts were unknown. An address for service was eventually obtained and a directions hearing in the contact proceedings fixed for September 2005, at which it was anticipated the father's attitude to contact would be known and a CAFCASS report would, if necessary, be ordered.

19. In the meantime, contact proceedings having been issued, on 15 July 2005 District Judge Redgrave had refused to give a certificate under paragraph 246 of the Immigration Rules. (This is a certificate that the person concerned intends to pursue an application for contact; either such a certificate or a contact order is a necessary prerequisite for entry clearance to come to this country for the purposes of contact).

20. At the hearing before District Judge Cushing on 15 September 2005 it was agreed that a CAFCASS report was not needed because an expert's report was to be obtained from Dr Judith Freedman of the Portman Clinic. This, however, would take some time to prepare. The father's position at this stage was that he would not oppose contact.

21. The contact proceedings came before Coleridge J on 6 February 2006. The father was no longer publicly funded and it had not been possible to agree a joint letter of instruction for Dr Freedman. Dr Freedman said she would be unlikely to report before the end of June. It was unclear how many meetings she would need. The parties were given until the end of February to agree a joint letter of instruction. All this caused delay in the hearing before the AIT which did not take place until 24 April 2006. Even then it was still unclear whether Dr Freedman had been instructed.

22. A hearing of the contact proceedings was, at some point, fixed to take place as soon as possible after 14 July 2006. The father's position hardened. He might be prepared to agree *indirect* contact, but only if Dr Freedman was in favour of it.

23. Unsurprisingly the AIT felt it could wait no longer for the family court to resolve contact. It therefore proceeded to hear the respondent's appeal on 24 April 2006, promulgating its decision on 9 May 2006. It is from that decision that the present appeal arises.

24. The AIT was referred to *Ciliz v The Netherlands* [2000] 2 ELR 469 where the European Court of Human Rights (ECt.HR) made clear that Article 8 was likely to be engaged in circumstances such as those in the present case. The AIT was therefore not surprised to hear that the Home Office policy was not normally to remove those involved in continuing family proceedings about children.

25. The AIT thought the adjudicator was correct in his conclusion that for practical purposes the appellant would be unable to pursue an application for contact from abroad – even if he had not applied the correct standard of proof.

26. Thus at the date of the hearing before the AIT the appellant had an outstanding application for a contact order with her children. It was her claim that for her to be removed before those proceedings were concluded would violate her right to family life

under Article 8. Both the adjudicator and the AIT agreed that she would be unable in practical terms to pursue a claim for contact from the Ivory Coast. Preventing her from taking part in the contact proceedings, so she submits, would frustrate her efforts to re-establish contact with her children and this would constitute a disproportionate interference with her right to family life.

27. The position of the Home Office was that no removal directions had been given and they were not going to give any so long as the contact proceedings were prosecuted with due diligence.

28. As the AIT put it at paragraph 26 the real issue was whether:

> (a) the appellant's Article 8 rights were adequately protected by the undertaking conceded by the Home Office in which case the refusal of leave to remain should be upheld and the appeal from the respondent dismissed, or
>
> (b) she should be given open ended leave to remain and her appeal allowed.

By the expression "open ended leave to remain" we think the tribunal was referring to discretionary leave to remain, to which we shall return in a moment.

29. The AIT observed that, depending on how Dr Freedman's report turned out, the appellant might end up with contact or with no contact. No contact would remove the Article 8 justification for staying here because of the children but might lead to a breakdown in her mental health. On the other hand, if she were awarded contact it would give her a firm basis for applying for a visa under paragraph 246 of the Immigration Rules to return from time to time to exercise contact. Visa services, while not available from Abidjan, were available from Accra with a wait of just 11 days. This would be a right much easier for the appellant to exercise than trying from the Ivory Coast to establish an order for contact in this country. However, the possibility of getting contact at the end of the day was not enough to justify open ended leave now.

30. The tribunal said that, whilst the appellant had a recurrent depressive disorder, the evidence was that it did not make her return to the Ivory Coast "permanently out of the question". If the family court ruled against contact and she suffered an adverse reaction that would have to be assessed at the time. If she were to be given regular contact then, subject to being able to afford the fare (which could not, in the AIT's view, amount to truly exceptional circumstances) she could apply for a visa and come back from time to time to exercise it.

31. The tribunal concluded:

> "It follows that we see no such "truly exceptional" circumstances

in the appellant's private or family life as would make her eventual removal disproportionate to the legitimate purpose of immigration control in terms of *Huang* [2005] EWCA Civ 105."

Accordingly, the appeal from the Secretary of State's decision was dismissed.

32. Cases like the present obviously present a problem for the Secretary of State. The decision of the ECHR in *Ciliz* indicates that it may, depending on the circumstances, be disproportionate to remove a parent from the United Kingdom while contact proceedings remain unresolved. Rather than conduct a detailed examination of the facts of each case we were told the Secretary of State gives assurances such as he gave in the present case. We can see the attraction of doing so. But, submits Mr Andrew Nicol QC for the appellant, the effect of doing so is to deprive the appellant, if the respondent would indeed be in breach of s 6 of the Human Rights Act 1998 in removing her, of the benefits of discretionary leave to remain. The other side of the coin is that if the respondent would not be in breach then the appellant has the advantage of remaining here when, absent the undertaking, she would not be entitled to. It is further said that in giving such assurances or undertakings the Secretary of State is not following any published policy and that he is required to exercise the statutory jurisdiction given to him by Parliament. We turn to consider the various statutory powers.

Leave to enter/remain.

33. A grant of leave to enter or to remain allows a person to be lawfully present in the United Kingdom. It may be granted for an indefinite or limited period, (s 3(1)(b) Immigration Act 1971 ("the 1971 Act")). Such leave may be varied or extended by a further grant for either a limited or an unlimited period, (s 3(1)(b) and (3)). Limited leave may be subject to conditions; indefinite leave may not.

34. S 3C of the 1971 Act requires the Secretary of State to lay down statements of the rules (or changes in them) made by him in respect of entry into and stay in the United Kingdom of persons required by the Act to have leave to enter, '*including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances'*. The present statement of the rules is to be found in HC 395. The Secretary of State however retains discretion to grant leave to enter or remain outside the requirements of the Immigration Rules.

35. During a period of limited leave, the person may apply for variation (or removal) of the duration of, or the conditions attached to, their leave. If such an application is refused with the result that the person has no leave to enter or remain in the United Kingdom, the refusal is an 'immigration decision' giving rise to an in-country right of appeal (see ss 82(2)(d) and 91(1) and (2) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act")).

36. S 3C of the 1971 Act provides that an application to vary limited leave, if made before the leave expires, has the effect of extending the leave during any period in which (a)

the application is neither decided nor withdrawn, (b) an appeal could be brought in time in the United Kingdom under s 82 or (c) such an appeal is pending.

Temporary admission.

37. The adjudicator refers to the appellant having been given temporary admission by the Home Office beginning when she first entered the United Kingdom in 1994 following refusal of leave to enter and extending (whether or not continuously we do not know) until 3 June 2004. We are told, and it is agreed by both sides, that the appellant remains in the United Kingdom by virtue of continued temporary admission.

38. Temporary admission is a status given to those who are liable to be detained pending removal. Those temporarily admitted are deemed not to have entered the United Kingdom (see s 11 of the 1971 Act).

39. Paragraph 8 of Schedule 2 to the 1971 Act provides for removal directions to be served on a person who is refused leave to enter. Under paragraph 21(1) of Schedule 1, "a person liable to detention or detained…..may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or released from detention; but this shall not prejudice a later power to detain him." By paragraph 16(2) of Schedule 2 a person may be detained pending a decision whether or not to give removal directions or pending his removal in pursuance of such directions. 'Pending' means 'until', so that the person remains liable to detention "so long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this": *R (Khadir) v Secretary of State for the Home Department* [2006] 1AC 207, 219D.

40. Paragraph 21 of Schedule 1 also gives immigration officers power to impose restrictions on a person granted temporary admission as to residence, employment, occupation and reporting.

41. Although by s 11 a person temporarily admitted is deemed not to have entered the United Kingdom, he is 'lawfully present' in the United Kingdom for social security purposes, see *Szoma v Secretary of State for the Home Department* [2006] 1AC 564.

42. It is implicit in the Secretary of State's undertaking not to remove the appellant while her contact application is proceeding that her temporary admission will continue.

Discretionary leave to remain.

43. Humanitarian protection and discretionary leave to remain were introduced on 1 April 2003 to replace exceptional leave to remain. It is relevant to this case that a human rights claim may result in discretionary leave if the qualifying criteria are met. The Asylum Policy Instruction ("API") on Discretionary Leave dated 12 January 2006 which was in force at the date of the hearing before the AIT provides, *inter alia* as

follows:

"2. **Criteria for granting discretionary leave**

2 Cases where removal would breach Article 8 of the ECHR

Where the removal of an individual would involve a breach of Article 8 of the ECHR (right to respect for private and family life) on the basis of family life established in the UK, they should be granted Discretionary Leave. Leave should not be granted on this basis without a full consideration of the Article 8 issues. …

This category applies to both asylum and non-asylum cases. In non-asylum cases it is most likely to arise in the context of a marriage or civil partnership application where, although the requirements of the Rules are not met (e.g. because the correct entry clearance is not held), there are genuine Article 8 reasons which would make removal inappropriate. …

…….

5. Duration of grants of discretionary leave

6. Standard period for different categories of discretionary leave

Subject to sections 5.2 and 5.3 it will normally be appropriate to grant the following periods of Discretionary Leave to those qualifying under the categories set out in section 2. …

- Article 8 cases (section 2.1) – 3 years …

……

7. Non-standard grant periods

There may be some cases – for example, some of those qualifying under section 2.1 (Article 8) … where it is clear from the individual circumstances of the case that the factors leading to Discretionary Leave being granted are going to be short lived. For example:

- an Article 8 case where a person is permitted to stay because of the presence of a family member in the United Kingdom and where it is known that the family member will be able to leave the United Kingdom within,

say, 12 months;

- or a case where a person is permitted/required to stay here to participate in a court case.

In these cases it will be appropriate to grant shorter periods of leave.

…..

8. Curtailing discretionary leave.

A grant of Discretionary Leave will not normally be actively reviewed during its currency."

The API of January 2006 has been replaced by one of October 2006. There are, however, no changes that are relevant to the present case.

Leave to remain outside the immigration rules.

44. In situations falling outside the API there is a possibility of leave outside the Immigration Rules (LOTR). LOTR's legal basis arises from s 3A of the 1971 Act and the Immigration (Leave to Enter) Order 2001 (SI 2590/2001). Broadly, this is a residuary power to deal with special or unusual situations that would not otherwise be covered.

45. LOTR is the subject of Chapter 1 Section 14 of the Immigration Directorates' Instructions ("IDI") dated April 2006. Paragraph 1 provides:

> "where a person does not qualify for leave under the Rules or the Humanitarian Protection or Discretionary Leave policies, any other leave to enter or remain must only be granted under a further category of 'Leave Outside the Rules (LOTR)' – such instances are likely to be rare."

And paragraph 1.2:

> "The only two circumstances where it will be necessary to consider granting LOTR will be in mainly non-asylum and non-protection cases:
>
> - Where someone qualifies under one of the immigration policy concessions; or

- For reasons that are particularly compelling in circumstance."

Where particularly compelling circumstances are alleged (see paragraph 2.2):

> "Any such case should be considered on its individual merits and in line with any relevant policy at the time. Case workers/immigration officers should always first give full consideration to whether someone first qualifies under the provisions of the Immigration Rules, or the Humanitarian Protection and Discretionary leave criteria or any relevant policy instruction.
>
> It is not possible to give instances or examples….However, grants of such LOTR should be rare, and only for genuinely compassionate and circumstantial reasons, or where it is deemed absolutely necessary to allow someone to enter/remain in the UK, when there is no other available option."

Paragraph 3 provides that LOTR should not be granted because removal does not seem a viable option or where it conflicts with any relevant policy.

46. LOTR would not have been appropriate in the present case. The appellant did not qualify under any of the immigration policy concessions listed; nor were there reasons that were particularly compelling in circumstance. More particularly, this was, if anything, a discretionary leave to remain case.

47. Against that background we turn to the position of the AIT. S 86 of the 2002 Act provides:

> "….
>
> (3) The Tribunal must allow the appeal in so far as it thinks that -
>
> > (a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or
> >
> > (b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.
> >
> > ….
>
> (6) Refusal to depart from or to authorise departure from immigration rules is not the exercise of a discretion for the purposes for subsection (3)(b)."

48. Had the AIT concluded that the respondent's decision was contrary to s 6 of the Human

Rights Act 1998 it should and would have allowed the appeal. Where an appeal succeeds on human rights grounds the Secretary of State must grant leave to enter or remain; he cannot simply allow the successful appellant temporary admission, see *S v Secretary of State for the Home Department* [2006] EWCA Civ 1157 where the Court of Appeal said:

> "46 Mr Singh pointed out that, where such applicants (asylum and human rights applicants) are refused leave to enter, they have a right of appeal. If their appeal succeeds, on asylum or human rights grounds, they are entitled to leave to enter and to remain here, in the latter case, until they can be safely (be) returned without violation of their ECHR rights. This status cannot be taken away from them by the Secretary of State conferring on them a new status which does not in this manifestation form any part of the statutory scheme. We accept Mr Singh's submissions."

49. An individual who has discretionary leave to remain has a number of advantages that someone who remains, as in the present case, simply on the basis of the Secretary of State's undertaking not to remove him does not have. These are:

1) entitlement to work;

2) entitlement to benefit; and

3) the opportunity to apply for the leave to be varied i.e. for practical purposes extended.

It may be that the temporary admission which we are told has been granted to the appellant in the present case to some extent assists her on (1) and (2) but that is a matter we do not intend to explore as, for reasons we shall explain, we do not think it was appropriate for her to have temporary admission.

50. Why, submits Mr Nicol, should someone who meets the criteria for discretionary leave to remain be deprived of its benefits? A person in the shoes of the appellant should either be given recognised status or no status at all. It seems to us that there is force in Mr Nicol's submissions. We do not have a ruling from the AIT on what its decision would have been absent the undertaking. The appellant has been left in no man's land.

51. Mr Bourne, for the respondent, argues that the policy is benevolent. He points to the practicalities of the Secretary of State's stance. Detailed investigation becomes unnecessary in what will often be a short term problem. Discretionary leave to remain carries with it the right to apply for an extension which, if refused, creates an immigration decision from which an in-country appeal lies. This is likely to lead to a multiplicity of applications and is hardly consistent with the "one-stop" philosophy of the legislation.

52. The Secretary of State's practice to grant assurances or undertakings not to remove in cases such as the present is not, as far as we are aware, based on any published statement of policy. It may well be that its effect is to disadvantage the few for the benefit of the many. This does not seem to us, however, to be a satisfactory justification. If the result of his practice is that some individuals who would, following a full investigation of their case, be entitled to discretionary leave to remain do not get it then it seems to us that the practice is unjust.

53. The AIT's jurisdiction was to determine whether the removal of the appellant in consequence of the refusal of leave to enter would be unlawful under s 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights. S 84(1)(g) of the 2002 Act provides:

> "An appeal under s 82(1) against an immigration decision must be brought on one or more of the following grounds-
>
> ……
>
> 4) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

54. By s 82(2)(a) "immigration decision" includes refusal of leave to enter the United Kingdom. In the present case it is common ground that the Secretary of State's decision of 10 June 2003 is in effect a refusal of leave to enter the United Kingdom.

55. It is also common ground that the AIT was required to consider the position as at the date of the hearing. This is clear from *Ravichandran* v *Secretary of State for the Home Department* [1996] Imm A.R. 97, 114 and *Saad & Ors* v *Secretary of State for the Home Department* [2002] INLR 34. In *Saad* Lord Philips of Worth Matravers MR, giving the judgment of the court, said that in *Ravichandran* both Simon Brown and Staughton LJJ had stressed that the express words of s 8(1) of the Asylum and Appeals Act 1993 look to the future. He said at para 52:

> "Thus the subsection provides that the appellant may appeal "on the ground that his removal in consequence of the refusal *would be* contrary to the United Kingdom's obligations under the Convention (our emphasis)".
>
> It was thus held that in *Ravichandran* (*Senathirajah*) v *Secretary of State for the Home Department* [1996] Imm AR 97 that it was the duty of the appellate authorities to consider the position as at the time of the hearing of the appeal."

He referred to the Secretary of State's "detailed statement of grounds" in support of the

application for judicial review in the *Afghan Highjacking* case [2002] INLR 116 where he made the following submission in respect of the wording of the 1999 Act which echoes that of s 8 of the 1993 Act:

> "All asylum appeals are hypothetical. They are all concerned with the removal that has not in fact taken place. This is recognised by the wording of s 69(1)(4) which in each case refer to a removal that the appellant claims "*would be"* contrary to the Convention. It is to be noted that the statute does not say "*will be*". Although that is not this case, "*would be"* includes the situation where no removal is in fact contemplated."

He continued later:

> "[56] What emerges from this analysis is that, where an appeal is brought under s 8(1), the IAT will necessarily have to determine the refugee status as at the date of the hearing of the appeal. It follows that such an appeal provides a satisfactory vehicle for mounting a challenge to the Secretary of State's rejection of an asylum claim.
>
> [57] The same is true of an appeal under s 8(3) and (4). In each case the decision facing IAT is the hypothetical one of whether removal would be contrary to the Convention at the time of the hearing – i.e. on the basis of the refugee status of the appellant at that time.
>
> [58]…..the Secretary of State was, in our judgment, right to submit that all asylum appeals under s 69 of the 1999 Act (and thus under s 8 of the 1993 Act) are hypothetical in the sense that they involve the consideration of a hypothesis or assumption, which is reflected in the wording of each of the subsections of s 8, namely that the applicant's removal or requirement to leave (as the case might be) '*would be* contrary to the United Kingdom's obligations under the Convention' (our emphasis)."

56. As Laws L.J pointed out in *JM v Secretary of State for the Home Department* [2006] EWCA Civ 1402, para 26, in a judgment with which the other members of the court agreed, s 8 was to all intents and purposes in identical terms to s 84(1)(g) of the 2002 Act.

57. Although *Ravichandran, Saad* and the *Afghan Highjacking* case (to which we shall refer in a moment) all involved the Refugee Convention, the same reasoning applies to the tribunal's jurisdiction under s 84(1)(g) of the 2002 Act in so far as it concerns a claim that removal would be in violation of one or more of the rights under the ECHR set out in Schedule 1 to the Human Rights Act 1998 and so be unlawful under s 6 of that Act. Accordingly, submits Mr Nicol, the task of the AIT is to consider whether a hypothetical removal at the date of the hearing would be contrary to the appellant's Convention rights. In *JM* the contention was that since no removal directions had been set the appellant was in no danger of imminent removal; the appeal was only against the

Secretary of State's refusal to vary the appellant's leave which did not of itself entail any removal.

58. Laws L.J focused on the words in s 84(1)(g) "removal of the appellant from the United Kingdom *in consequence* of the immigration decision." He said at para 16:

> "Evidently the court has to decide whether an "immigration decision" consisting in a refusal to vary leave, which is appealed pursuant to the section 82(2)(d) is an immigration decision "in consequence of which" the appellant's removal would be unlawful under the Human Rights Act section 6 as being incompatible with the appellant's Convention rights. The answer to the question must, I think, depend on the sense Parliament intended to give to the phrase "in consequence of." In a case where variation of leave has been refused, removal is not an immediate consequence. Removal directions must separately be given if the appellant is to be removed under the present statutory regime. Such directions cannot be given contemporaneously with the refusal to vary leave. But removal may at least be an indirect consequence of refusal to vary: without it, removal directions could not lawfully be given. Did Parliament, in enacting section 84(1)(g), intend this latter, wider sense of consequence or only the narrower sense so that it referred to an imminent removal?"

59. Laws L.J. opted for the wider construction and rejected the AIT's view that the human rights issue was not justiciable on a variation of leave appeal. He said at para 17:

> "On the AIT's view of the question, namely that the human rights issue is not justiciable on a variation of leave appeal, the unsuccessful appellant in such a case, if he has a potential article 8 claim which would so to speak come live on his removal, surely faces a very unsatisfactory choice. Either he leaves the United Kingdom, as the criminal law says he must, without his human rights claim being determined, or he remains until removal directions are given, anticipating that at that stage he will be able to ventilate his human rights claim before the AIT.
>
> 18 It seems to me to be to be wrong in principle that the price of getting before an independent tribunal, for a judicial decision on a human rights claim should be the commission of a criminal offence and other associated legal prohibitions. But that seems to me the effect of the AIT's conclusion."

Following conclusion of argument counsel have clarified that the present appellant's position is different in that by virtue of her continued temporary admission she commits no offence by remaining here.

60. Towards the end of his judgment at para 26 Laws L.J. said that the AIT had

distinguished *Saad* from the case with which the court was dealing on the ground that *Saad* was an asylum case and not an ECHR case; and a refugee, once recognised as such, enjoyed an objective international status which ought to be ascertained even where the appellant's removal to a place where he feared persecution was not imminent. He concluded:

> "27 In my judgment that does no more than point to the fact that the rights conferred by the ECHR and the Refugee Convention are, in various respects, not the same. The reasoning in *Saad*, however, seems to me with respect to point strongly towards the wider view of the term 'in consequence of' in section 84(1)(g) in contrast to the narrower approach, a contrast I have explained earlier.
>
> 28 The short, but important, position is that once a human rights point is properly before the AIT they are obliged to deal with it. That is consonant with the general jurisprudence relating to the obligations of public bodies under the Human Rights Act and seems to me to be the proper result of the construction of the relevant provisions."

61. Mr Nicol submits that it is immaterial that the respondent has no present intention to set removal directions in consequence of his decision to refuse leave to enter. He submits that the position is indistinguishable from that in the *Afghan Highjacking* case. In that case a number of Afghan asylum seekers, who had arrived in the United Kingdom on board a highjacked aeroplane, were refused asylum by the Secretary of State and refused leave to enter. The Secretary of State indicated that he had instructed immigration officers not to set removal directions until he had further considered wider issues and that he intended to remove when circumstances permitted. He did not grant exceptional leave to remain. The asylum seekers' appeals under s 8(1) of the Asylum and Immigration Appeals Act 1993 were dismissed. They then appealed to the Immigration Appeal Tribunal which adjourned the appeals indefinitely, notwithstanding that all parties wished to proceed, on the basis that it had no power to deal with the issue of refugee status if there was to be no removal and that, as the Secretary of State had indicated that he intended to remove the asylum seekers at some point, it would be unfair to dismiss the appeals immediately as the appellants would have no further right of appeal. The Secretary of State and one of the asylum seekers sought judicial review; the other asylum seekers appeared as interested parties. The Court of Appeal held that a person may appeal against a refusal of leave to enter on the ground that his removal in consequence of the refusal would be contrary to the United Kingdom's obligations under the Geneva Convention even if the Secretary of State has no current ability or intention to remove him.

62. The Court of Appeal accepted the submissions of Mr Howell Q.C. who appeared for the Secretary of State. Included in those submissions was the following:

- A person may appeal against a refusal of leave to enter on the ground that his removal in consequence of the refusal *would be* contrary to the United Kingdom's obligations under the Geneva Convention. If his removal would be contrary to those obligations, his appeal is entitled to succeed even if the Secretary of State has no

current ability or intention to remove him. By contrast, his removal would not be contrary to the Geneva Convention if he is not a refugee. Accordingly his appeal must be dismissed if he is not a refugee.

- The IAT's approach of adjourning the cases sine die benefits those claimants who are not refugees, whose appeals should be dismissed, and penalises any claimant who may be a refugee by postponing the determination of his appeal unnecessarily.

63. There is thus, it seems to us, a parallel to the benefit and detriment caused to those claimants whose human rights claims are not determined but instead have undertakings from the Secretary of State.

64. There may be very substantial difficulties in the way of the appellant resuming contact with her children. An important factor will be the wishes and feelings of the children themselves as they are now 11½. Further, it is not clear what the father's attitude is. Nor is the advice of the expert witness yet known.

65. Be that as it may Mr Nicol submits that, as is apparent from the authorities to which, we have referred, the legislation requires that court to hypothesise the removal and not to proceed on the basis that there is not going to be a removal. The position, he argues, is quite straightforward: notwithstanding the respondent's undertaking the hypothesis of a removal remains. The AIT should have allowed the appeal, just as in the *Afghan Highjacking* case the tribunal should have hypothesised a removal at the date of the hearing.

66. For the Secretary of State, Mr Bourne accepts that the mere fact that this is a human rights case does not distinguish it from the authorities to which we have referred. He submits that the remaining Article 8 issue (i.e. contact) is strictly temporary in contradistinction to *JM* and the refugee cases. He points out that the immigration decision made it lawful for the Secretary of State to set removal directions at any time. He submits that if the appellant's argument is correct it means that the AIT was obliged to decide the appeal on the basis that the appellant was going to be removed from the United Kingdom when the contact application was pending when in reality she was not going to be. Whilst s 84(1)(g), he accepts, does provide for the AIT to rule on a hypothetical removal, it should not be so construed as to require the court to rule on a removal which on the evidence will not take place. The subsection envisages a future contingency that might actually happen. He submits that although the *Afghan Highjacking* case illustrates that the AIT is required to decide in all cases whether removal would be unlawful, the court is not required to proceed on a false premise as to the circumstances in which the hypothetical removal could take place.

67. Mr Bourne, having emphasised that it is an established fact that the appellant will not be removed pending the determination of her contact application, relies on *GH v Secretary of State for the Home Department* [2005] EWCA Civ 1182 and *Gedow and Others v Secretary of State for the Home Department* [2006] EWCA Civ 1342. In *GH* the claimant was a Kurd from Iraq. He lived in Suleymaniya, a city in the Kurdish Autonomous area in North Iraq. His asylum and human rights claims failed. But the

Secretary of State was not making enforced returns to Iraq and could not say when they would start. No removal directions had been set and *GH's* appeal failed. The issue related to his eventual route of return and whether it would be safe. As no route had been set the claimant was in no position to establish either a well founded fear of persecution or a risk amounting to a breach of Article 2 or Article 3 of the ECHR.

68. In *Gedow* the court was concerned with Somalians and there was an issue about safety of arrival at an airport and of a journey into Mogadishu. But that was looking into the future. Again, no removal directions had been set. Hooper L.J said:

> "I have reached the conclusion that it is impossible for immigration judges in cases of this kind (involving the safety of arrival at an airport and of a journey into Mogadishu) to deal with all the eventualities at the time of the hearing. The judge may have to make it clear what has to be done by the respondent so that an enforced returnee to Somalia does not face a real risk of Article 3 ill-treatment at the point of his return. The judge is then entitled to assume, for the purposes of the hearing before him or her, that what is required will be done."

69. Both those cases are in our view distinguishable from the present case. There, there was no breach of rights, nor was it other than speculative whether there ever would be. That was dependent on the route and circumstances of return. *GH* and *Gedow* were both concerned with the mode of return. At the time the tribunal had to make its decision it was impossible to say what that would be. The present case is not concerned with the mode of return at all. It is concerned with an existing and known state of affairs namely that the appellant is in the process of trying to establish contact with her children. The question is whether, if she is removed now her Article 8 rights will be violated. That question is capable of being resolved now but the tribunal chose not to do so because, in its view, the Secretary of State's undertaking made it unnecessary to do so.

70. In our judgment the AIT did not decide the hypothetical question it was incumbent upon it to decide, namely whether the appellant's Article 8 rights would be violated by a removal when the case was before it i.e. when the contact application was outstanding. Time has moved on. It is now 9 months since the AIT's decision. The circumstances will be different. The AIT will need to know what has happened in the contact proceedings. One can envisage arguments both ways. Mr Bourne points out that the facts are some way removed from those in *Ciliz.* The appellant has served a lengthy prison sentence for physical abuse of her children and, as far as we are aware, has not seen them for some time. The present views of the children and their father are unknown. If the AIT had decided the question it should have decided and concluded that her Article 8 rights would be violated by her removal then the next question would have been the length of discretionary leave to remain and quite a short period might have been appropriate to cater for the outstanding contact proceedings; it could of course always be extended. The AIT had jurisdiction to decide this issue (see s 87 2002 Act).

71. Whilst it is correct, as the authorities show, that the decision maker is, to an extent, required to consider a hypothetical situation, it is neither required nor appropriate to

speculate about the future. Thus questions about what may happen, for example, to the appellant's mental health in circumstances as yet unknown were irrelevant to the AIT's consideration.

72. The appellant was entitled to have determined whether removal from the United Kingdom with an outstanding contact application would breach s 6 of the Human Rights Act 1998. That question was capable of resolution one way or the other. What was not appropriate was to leave her in this country in limbo with temporary admission and the promise not to remove her until her contact application has been concluded. Temporary admission is, as we have explained, a status given to someone liable to be detained pending removal. If the appellant had a valid human rights claim she is not liable to be detained pending removal. And if she has not, she ought to be removed. If she is entitled to discretionary leave to remain she ought to have it for the period the Secretary of State thinks appropriate, together with the advantages that it conveys; and if not she ought not to.

73. In the course of argument the point was made that circumstances could arise where a contact hearing was likely to be resolved in, for example, a matter of days. It would in those circumstances be impractical to expect a human rights decision without knowing the outcome of that application. In our judgment that is the kind of situation that can be dealt with by appropriate case management.

74. A question arose during the hearing of the appeal whether the appellant is eligible for legal aid in respect of her contact proceeding. It is agreed that a person is eligible for legal aid in respect of proceedings under the Children Act 1989 (subject to means and merits) irrespective of immigration status.

Conclusion.

75. On the point of principle the AIT should have decided whether the appellant's removal on the facts as they were when they heard the appeal, i.e. with her outstanding application for contact with her children, would have violated Article 8 of the ECHR and thus put the Secretary of State in breach of s 6 of the Human Rights Act 1998 if he removed her. It was not open to the AIT to rely on the Secretary of State's assurance or undertaking that the appellant would not be removed until her contact application had been resolved. Nor was it appropriate to speculate upon whether there might be a violation of Article 8 on different facts at some point in the future. Had the AIT decided the Article 8 point in the appellant's favour she should have been granted discretionary leave to remain as envisaged in the API of January 2006. This could have been for quite a short period, whatever was regarded as sufficient to cover the outstanding contact application. It would have been open to the appellant later to apply for the period to be extended should the circumstances so warrant. It was open to the AIT under s 87(1) of the 2002 Act, if it allowed the appeal, itself to fix the period of discretionary leave to remain. Alternatively it could have remitted that question to the Secretary of State.

76. Mr Nicol submits the Secretary of State had in effect accepted that that the appellant's removal would violate Article 8. We do not agree; it was unresolved because of the

undertaking not to remove until the question of contact was resolved. In our judgment the correct course is for this court to remit the case to the AIT for it to decide in the light of the evidence before it at the time (and matters will have moved on since the case was last before it) whether the appellant's removal will violate Article 8 and if so the appropriate period of discretionary leave to remain.

77. We therefore allow the appeal and remit the case accordingly. If the AIT decides that issue in the appellant's favour (and we express no view on the outcome) it can go on under s 87(1) of the 2002 Act to determine the appropriate period of discretionary leave to remain which could, depending on the circumstances, be quite short.

78. For these purposes the AIT must be given full information about the up to date position of any contact proceedings.