Neutral Citation Number: [2009] EWCA Civ 5

Case No: C5/2008/1098 & C5/2008/1441

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
AS/00321/2007 AND AS/00322/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2009

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE SEDLEY
and
LORD JUSTICE WILSON

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Between :

1. VW (UGANDA)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
	Appellant
2. AB (SOMALIA)	
- and –	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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- -

Mr R Drabble QC and Mr R Khubber (instructed by Islington Law Centre) for the **First Appellant**
Mr R Drabble QC and Miss A Smith (instructed by Messrs Clifford Johnston & Co) for the **Second Appellant**
Miss L Busch (instructed by Treasury Solicitors) for the **Respondent**

Hearing date: Friday 14 November 2008

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Judgment

Lord Justice Sedley :

1. We have heard these appeals together for two reasons. One is that the decision in *AB* was explicitly predicated on the decision in *VW*, so that it was thought that the two would stand or fall together. The other is that both sides have invited the court, in the light of recent jurisprudence, to set out the correct approach to ECHR art. 8 in the context of removals or refusals of entry clearance. In this we have had the advantage of informed and constructive submissions from Richard Drabble QC for the two appellants and Lisa Busch for the Home Secretary, as well as the full and scholarly decision of the AIT (Hodge P and SIJ Storey) in *VW*.

VW (Uganda)

Factual Background

2. VW is a national of Uganda. Now aged 23, she entered the UK illegally on 23 December 2001, two days short of her 17th birthday. Her case - omitting detail which might identify her - was that she had been forced to flee Uganda because, for political reasons, she and other family members were first placed under house arrest and then held prisoner by soldiers who occupied the house, repeatedly raped the Appellant, struck her in the face with a pistol and threw chemicals in her face. She applied for asylum in the UK on 27 December 2001. The application was refused by the Respondent on 13 February 2002 but the Appellant was granted exceptional leave to remain until 24 December 2002 when she would become 18. The Appellant submitted an application for further leave to remain on 20 December 2002 for herself and her daughter, M, who had been born in the UK in November 2002. This application was refused by the Respondent on 11 May 2007.

3. The appellant's partner, the father of her daughter, is of Nigerian ethnic origin but is a citizen of the United Kingdom, having been born here. At the age of 3 he went with his family to the United States and then to Nigeria, where he lived from 1966 to 1992, when the family moved back here. There was no suggestion that he had any familiarity with Uganda or with the languages spoken there.

4. Their daughter, born in November 2004, is accordingly a British citizen. Although it was not until after the first AIT decision that a certificate of citizenship was obtained for her, this has always been her legal status.

5. A measured report from a social worker, Ms Finlayson, said:

> "While neither parent felt comfortable choosing a fate for [the daughter], they both agreed that she would be safer to remain in England with her father. They believe the risks in her moving to Uganda would be too high. However, they both stressed their belief that separating [her] from her mother, who is a significant attachment figure to her, would destabilise her and could contribute to long-term issues for her in the future."

6. The immigration judge dismissed her appeal both on asylum and human rights grounds, concluding that although the Appellant and her daughter enjoy a family life with her partner, the child's father, who is a British citizen, and that although removal may involve a degree of hardship, there were no insurmountable obstacles to the family living together in Uganda, so that the proposed interference by the Respondent would not have consequences of such gravity as to potentially engage the operation of Article 8. Further and alternatively, if Article 8 was engaged, removal would not be disproportionate because there were no insurmountable obstacles to the whole family living together in Uganda.

7. The AIT ordered reconsideration in relation to Article 8. Before the hearing of the first stage of the reconsideration before the AIT, the Appellant's daughter obtained a certificate of British citizenship, to which she had been entitled from birth. Following a hearing on 15 January 2008 the AIT concluded that, although there had been an error of law, it was not material. They ordered the dismissal of the appeal to stand.

8. VW now appeals, by permission of Buxton LJ, on the following grounds:

   (a) That the AIT made a material error of law by using an 'insurmountable obstacles' test of proportionality. The correct test of proportionality requires a comprehensive evaluation of what can reasonably be expected of the appellant in the light of the values protected by art.8

   (b) That in weighing the factors relevant to proportionality the AIT failed to evaluate the impact of removal on the family life of VW's partner, a British citizen who had never been to Uganda, and on the child if – as the appellant indicated would happen – she was left here with her father.

   (c) That, contrary to the finding of the AIT, it was for the Home Secretary to establish the justification for removal.

AB (Somalia)

Factual Background

9. The Appellant and her six children, aged between 7 and 19, are Somali nationals from Mogadishu living without permission in Ethiopia. The sponsor is the Appellant's husband. They fled from their home country, Somalia, when civil war broke out in 1991, and settled in Nairobi, Kenya, where he and his wife made a living as tea merchants. Their children were all born during the ten years for which they lived there, but the family began to be harassed by the police as illegal immigrants.

10. In November 2000 the sponsor flew to the UK and claimed asylum. The application was refused and an appeal failed, but he was granted exceptional leave to remain in the UK until 19 January 2005. In February 2005 he was granted indefinite leave to remain because it was recognized that it was not right to expose anyone to the violence and lawlessness then prevailing in Somalia. Also in 2005, the appellant and her children, on the sponsor's instructions, crossed into Ethiopia, where they have since lived without permission and in straitened circumstances, though with sufficient

income to have at least some of the children privately educated. The sponsor in 2006 visited them there.

11. The Appellant applied for entry clearance to join her husband in December 2005. This was refused. In November 2006 the appeal against refusal was heard by Immigration Judge de Haney who dismissed the appeal on the ground that the family could not be adequately provided for without recourse to public funds. He made no assessment under Article 8 of the ECHR. An application for reconsideration on human rights grounds was refused by Senior Immigration Judge Spencer, but on renewal before the High Court, Dobbs J ordered reconsideration of the immigration judge's approach to Article 8.

12. On a first stage reconsideration the AIT found that IJ de Haney had materially erred in law by failing to make proper findings under Article 8 and adjourned the matter for a second stage reconsideration hearing on human rights grounds. The Respondent accepted that the Appellant and her six children had established an extant family life with the sponsor. But in a determination promulgated on 16 April 2008, Immigration Judge Mather, while accepting that art. 8(1) was engaged by the refusal to grant the family entry clearance, dismissed the appeal on the grounds that there were no 'insurmountable obstacles or serious difficulties' preventing the Appellant, the sponsor and their children from maintaining their family life in either Ethiopia or Somalia.

13. The Appellant sought permission to appeal to the Court of Appeal. This was refused by SIJ Perkins on the ground that 'The grounds complain with some justification that the Immigration Judge tried to apply the 'insurmountable obstacles' test but, as is explained in VW and MO (Article 8 – Insurmountable Obstacles Uganda [2008] UKAIT 00021, although the test can be formulated in many ways, each of the correct formulations is equally demanding. Nothing turns on this alleged error.'

14. Permission to appeal was, however granted by Scott Baker LJ, who considered that the AIT's determination and reasons did not fit easily with paragraph 12 of Lord Bingham's opinion in EB (Kosovo).

15. The first ground advanced by the Appellant in this case is that the AIT have improperly applied an *'insurmountable obstacles'* test in the assessment of the issue of proportionality.

16. The second ground is that the immigration judge did not give adequate reasons for his conclusion that the family would not face anything more than a degree of hardship in establishing family life in Somalia or Ethiopia. In reaching this conclusion, the Immigration Judge noted that the sponsor has indefinite leave to remain in the UK, is fit, well and capable of working, and the ages of the children. The Appellant argues that a proper consideration of proportionality under Article 8(2) requires a balancing of all relevant circumstances. These include the fact that Somalia has been accepted as being too dangerous to return the sponsor to, and that he and his family have no legal right to be in Ethiopia.

The law

17. Before turning to the detail of the respective determinations, it may be useful to set out what is now understood on all hands to be the relevant law.

18. In *EB (Kosovo)* [2008] UKHL 41, at §12, Lord Bingham, with the assent of the other members of the Appellate Committee, said:

> "Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse *and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal*, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

19. The words which I have italicized lay to rest an issue which has troubled decision-makers and advocates at least since the decision of this court in *R (Mahmood) v Home Secretary* [2001] 1 WLR 840, because of the use by Lord Phillips MR, in the course of giving the second judgment, of the phrase "insurmountable obstacles" in the context of art. 8. This court sought, in the later case of *LM (DRC) v Home Secretary* [2008] EWCA Civ 325 to explain the contextual significance of the phrase. Ms Busch adopts what I said in §11-14 of my judgment in that case. But for the present, at least, the last word on the subject has now been said in *EB (Kosovo).* While it is of course possible that the facts of any one case may disclose an insurmountable obstacle to removal, the inquiry into proportionality is not a search for such an obstacle and does not end with its elimination. It is a balanced judgment of what can reasonably be expected in the light of all the material facts.

20. What those facts are, however, can in art. 8 cases be a subject of real difficulty, because they may well include the intentions of individuals should the very event occur which they are trying to forestall. I will return to this problem when I come to the disposal of the present cases.

21. Art 8 cases, including those before the court, also encounter occasional difficulty in the application of Lord Bingham's tabulation in *Razgar*. In §17, it will be recalled, he set out the sequence of questions as follows:

> "(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?"
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

22. As this court made clear in *AG (Eritrea)* [2007] EWCA Civ 801, §26-28, the phrase "consequences of such gravity" in question (2) posits no specially high threshold for art. 8(1). It simply reflects the fact that more than a technical or inconsequential interference with one of the protected rights is needed if art. 8(1) is to be engaged.

23. There will also be unnecessary difficulty if the relationship of questions (4) and (5) is misunderstood. The emphasis in question (4) is not on simple necessity but on whether the need for the general restriction on the primary right lies within one of the specified purposes. If it does, then whether the particular restriction is necessary in a democratic society engages question (5). Clearly, if the restriction is plainly unnecessary, the art. 8 question will be answered in the appellant's favour; but that will be rare. In any other case, once a permitted purpose has been established in answer to question (4) (as in cases governed by the Immigration Rules it generally will be), the inquiry moves to question (5) which, by focusing on the proportionality of the measure in the individual case, gives effect to the jurisprudence of the Strasbourg court as to what is "necessary in a democratic society". There is no discrete or prior test of necessity.

24. *EB (Kosovo)* now confirms that the material question in gauging the proportionality of a removal or deportation which will or may break up a family unless the family itself decamps is not whether there is an insuperable obstacle to this happening but whether it is reasonable to expect the family to leave with the appellant. It is to be hoped that reliance on what was a misreading of *Mahmood*, as this court had already explained in *LM (DRC)* [2008] EWCA Civ 325 (and as Collins J had previously done in *Bakir* [2002] UKIAT 01176, § 9), will now cease.

The two cases in the AIT

VW (Uganda)

25. IJ Bryant dismissed the asylum claim, having made findings of inconsistency which led him to disbelieve even that the appellant was who she said she was. It is not now sought to disturb this conclusion, which left as the single issue the question of removal of the appellant to Uganda, to which she was prima facie liable under the Immigration Rules.

26. The immigration judge found, uncontentiously, that removal would interfere with respect for the private and family life of both the appellant and her daughter, which – provided that the interference would be substantial, as was plainly the case - was all that was needed to establish that art. 8 was engaged. More problematically for what followed, he made no similar finding in respect of her partner's family life, which was as much engaged as the appellant's (see *AB (Jamaica)* [2007] EWCA Civ. 1302 ; *Beoku-Betts* [2008] UKHL 39); and he overlooked the fact, to which the skeleton argument had drawn attention, that the child was a British citizen. One result of this was that he treated her, when he came to art. 8(2) as a future candidate for entry clearance like her mother.

27. The immigration judge then found

> "89. I have found it not to be proved that there are insurmountable obstacles to the whole family living together in Uganda and I have found it proved that the appellant's partner was aware of the appellant's uncertain immigration status during the course of their relationship. I have found that it would be open to the appellant to seek entry clearance from Uganda to enter the United Kingdom as a fiancée or unmarried partner of Mr Adeyemi Olusegun Oyenuga. I note the private life which had developed in this country in the years that the appellant has been here. I also note the delay in the respondent reaching his decision on the appellant's application for further leave to remain but I note from the judgment of the Court of appeal in HB (Ethiopia) [2006] EWCA Civ 1713, that delay in dealing with an application might increase an appellant's ability to demonstrate family or private life bringing her within Article 8(1) but, although it may be a relevant factor under Article 8(2), it would have to have very substantial effects if it was to influence the outcome. 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. As regards the second question posed by Lord Bingham in Razgar, I am only concerned with Article 8(1).
>
> 90. Even though the threshold of engagement of Article 8(1) is not a specially high one, I find, given my findings above on whether there are insurmountable obstacles to the family living together in Uganda and the ability to seek clearance from Uganda, that the proposed interference by the respondent would not have consequences of such gravity as potentially to engage the operation of Article 8.

> 91. If, however, Article 8 is engaged, I go on to consider the other steps set out by Lord Bingham. I would answer the third and fourth questions in the affirmative as it is settled that this country has the right under internal law to control the entry of non-nationals into its territory and the effective enforcement of immigration control is a legitimate aim under Article 8(2).
>
> 92. The fifth and final question is whether the proposed interference by the respondent is proportionate to the legitimate aims of the respondent. ”

28. It is extremely difficult, with all possible respect, to discern what the immigration judge considered that he was deciding. He appears to have thought that, even though removal was plainly going to interfere with family life, there was still a balancing exercise to be done before it could be decided that the interference would have consequences of sufficient gravity to engage art. 8. For reasons set out earlier in this judgment, this was quite mistaken.

29. Moreover, the contingent question under art. 8(2) was not, as the immigration judge took it to be, whether the proposed interference was proportionate to the legitimate aims of the respondent. That is a question which will always answer itself in the Home Secretary’s favour. It was whether the removal of the appellant, notwithstanding its effects on her and others, was proportionate to the legitimate aims of immigration control.

30. Having taken into account all his earlier findings, including the finding that there were “no insurmountable obstacles to the whole family living together in Uganda”, but having also noted that the House of Lords in *Huang* had spoken in terms of what could reasonably be expected, the immigration judge concluded:

> “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 [sic], 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.”

31. In a fully and carefully reasoned and determination, the AIT (Hodge P and SIJ Storey) concluded that, while the immigration judge had erred in finding that art 8 was not engaged, any such error was cured by his alternative finding that, assuming it to be engaged, removal would not be disproportionate. It is no longer necessary to follow their scholarly tracing of the concept of insurmountable obstacles in the Strasbourg jurisprudence or their endeavour to reconcile it with domestic case-law, because – as is common ground - the correct test is now to be found in *EB (Kosovo)*. But recognition should be given, as Richard Drabble QC for both appellants readily accepted, to the conclusion at which the AIT arrived (§44) that, if a removal is to be held disproportionate, “what must be shown is more than a mere hardship or a mere difficulty or mere obstacle. There is a seriousness test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience.” I would respectfully

endorse this. The question in any one case will be whether the hardship consequent on removal will go far enough beyond this baseline to make removal a disproportionate use of lawful immigration controls. This in turn will depend, among many other things, on the severity of the interference. If the appellant's partner, for example, was familiar with Uganda, the consequences of removal might be that much less severe; but the impact on the rights attending his citizenship of this country would still weigh heavily in the scales.

32. The AIT concluded (§50) that, given the biography of the appellant's partner, "it was entirely open to the immigration judge … to view the degree of disruption as not being at more than the level of hardship or difficulty". There are several problems with this conclusion. One is that, as this court pointed out in *AB (Jamaica)* [2007] EWCA Civ.1302 the impact of one partner's removal on his or her family life has to be looked at in the round. It is therefore only if it can properly be said that the appellant's partner either will go to Uganda with her or will be behaving unreasonably if he chooses not to that the tribunal can avoid judging the overall proportionality of an enforced family break-up. Another is that the way the AIT expresses it is significantly different from the way the immigration judge expresses it. The immigration judge's finding, cited in §29 above, follows a readoption of his finding that there are no insurmountable obstacles to re-establishing family life in Uganda and is followed by a finding that art. 8 is not engaged at all. It is based on no structured reasoning about the predictable or potential impact of removal on the three people directly affected.

33. The immigration judge's assessment was flawed both in the ways indicated above and in its omission of any proper consideration of the child's status and future. There is no direct reference to the plainly relevant passage of the social worker's report quoted above: I will return to its importance in the next part of this judgment. If by holding it to have been open to the immigration judge to find the prospective disruption proportionate the AIT meant that on the facts only such a conclusion was possible, I respectfully differ. If by it they meant that his finding on art. 8(2) was tenable, for the reasons given above, again I respectfully differ.

34. The AIT's reasons include this sentence:

> "Hence only around 15 of his 45 years had been spent in the UK and he has lived over 25 years in another African country (Nigeria)."

If this means no more than the appellant's partner, although a UK citizen, had not made the UK his home for much of his life, it is correct and unexceptionable; but it carries an unfortunate suggestion that one African country is very much like another, paying no regard to such things as language or culture.

35. In my judgment the immigration judge's determination was more profoundly flawed than the AIT was prepared to acknowledge. In particular it contained no adequate reasoning to support a finding that it was reasonable to expect the whole family to go with the appellant to Uganda. The AIT ought so to have held.

36. The issue in this case is less complex. On the second-stage re-determination IJ Mather wrote (§43):

> "I take into account that the Sponsor has been granted Indefinite Leave to Remain in the United Kingdom but I am not persuaded by the evidence given that there are insurmountable obstacles or serious difficulties to the Appellant, Sponsor and their family establishing a family life in either Ethiopia or Somalia. I do not accept that the Appellant has shown that there would be anything more than a degree of hardship in establishing family life in either country (VW and MO – Article 8 Insurmountable Obstacles) Uganda [2008] UKAIT 00021.)"

37. This can be described without offence as a mixed finding. It does not depend or turn on an insurmountable obstacle test. If there *had* been an insurmountable obstacle to the sponsor's rejoining the appellant and their children in Ethiopia the appeal under art 8 would presumably have been allowed. If there had been serious difficulties there would have been a difficult balance to be struck. But if, as the immigration judge affirmatively found, there would be no more than "a degree of hardship" in establishing family life in either Ethiopia or Somalia, this will necessarily have been a humanitarian claim which did not outweigh the requirements of lawful immigration control.

38. Reminding herself that the children's ages now ranged from 7 to 19 and that the sponsor is fit and able to work, the immigration judge concluded that the interference with the convention right constituted by the refusal of entry clearance to the wife and children was proportionate, in these circumstances, to the legitimate aim of immigration control.

39. It was suggested in argument for the appellants and accepted by counsel for the Home Secretary that these two appeals stood or fell together. This might have been so, but on examination it is in my judgment not so. In contrast to the decision in *VW (Uganda)* the determination in the present case seems to me to have settled upon the right question and, subject to the problem to which I now turn, to have given a perfectly tenable answer to it.

Back to the future

40. Removal and deportation cases in which the issue of proportionality has to be determined under art. 8(2) commonly raise but do not always address the question: on what factual basis is the proportionality of removal to be evaluated? The case of *VW* poses the issue clearly. If she is removed, she will have the choice of leaving her child here or taking her with her; and her partner will have the choice of remaining here or

seeking to join her in Uganda. Assuming that there is no insuperable obstacle to either of these courses (for example, a refusal of entry by the Ugandan authorities, a possibility unaddressed in the decision), the question still remains whether it will be taken.

41. There will be many cases where, whatever the appellant says, it can safely be predicted that the child will go too if she or he is removed. But VW's is not such a case: the child is a UK citizen and has a father who is now settled and has a right of abode here. Many mothers faced with such a dilemma (and the social worker's report convincingly suggests that VW is among these) would break the maternal bond in the child's interests and leave her with her father. AB, if unable to bring his family here, may elect to remain without them and so leave them fatherless in Ethiopia.

42. In many such cases, nevertheless, it is too much to ask of a decision-maker that he or she should form a confident or even a probabilistic view of what will follow a proposed removal or deportation in terms of family break-up or continuity. The evidence may simply not make it possible. Some appellants will command belief when they say what they will do, so that the decision-maker can proceed to assess the proportionality of removal or deportation on a reasonably firm footing. Others may try to practise a form of emotional blackmail on the decision-maker, so that the latter does not know what in truth will happen if removal or deportation goes ahead. In yet other cases it may be clear that what the appellant says is the reverse of what he or she would in the event do. Many others may truthfully say that they do not know what they will do; or the decision-maker may conclude, whatever they say, that this is the case. In such cases it would be risky and unfair to demand that a decision-maker should treat what is at best an educated guess as a future fact. Here, in my judgment, it is the hardship of the dilemma itself which has to be recognised and evaluated.

43. It has in the past been urged by the Home Office that there is relatively little hardship in breaking up a family by removal where the removed spouse can immediately apply for entry clearance in order to return. The decision of the House of Lords in *Chikwamba* [2008] UKHL 40, for reasons which it is not necessary to reproduce here, has called a halt to this false logic. The likelihood of return via entry clearance should not be ordinarily treated as a factor rendering removal proportionate; if anything, the reverse is the case.

Conclusions

AB (Somalia)

44. In my judgment the fact findings in this case were sustainable and were gauged by an apt standard. The immigration judge did not ask in terms whether it was reasonable to expect the sponsor to rejoin his family rather than bring them here to join him, but her sustainable finding that the former course would involve no more than a degree of hardship is indistinguishable from a finding that it was reasonable to expect it.

45. The main thing that has given me pause is that there is no evidence that the sponsor, any more than his family, has any entitlement to reside in Ethiopia. But this is not a

case of enforced break-up, for the parting occurred more or less voluntarily. It is a case of attempted family reunion in which, while an existing family life has been established, albeit at a distance, the moral pressures are different. It was in my judgment open to the immigration judge to infer that if the sponsor's family could reside in Ethiopia without entitlement or leave, he could do so too. In this respect, as in others, the case differs from *VW.*

VW (Uganda)

46. Although the immigration judge at one point spoke in terms of what it was reasonable to expect, he did not make it, directly or indirectly, his criterion of judgment. Moreover the facts make it extremely difficult, in my view, to arrive at such a conclusion. The disbelief of the appellant's asylum claim takes away any reliance on a well-founded fear of what will await her on her return, at least in terms of political persecution. But against this she has a partner whose home, as of right, is here, and her child, a British citizen, is the child of both of them. Leaving aside the unanswered question whether he would be permitted to do so, it seems to me incontestably unreasonable to expect the partner, who has no connection with Uganda whatever, to go and live there as the price of keeping this family intact. The predictable reality is that if the appellant goes, he will stay.

47. Then there is the child. For my part I see no reason, and none was advanced here or below, to reject what the social worker reported: that the child will be separated from her mother in her own interests, but with possibly damaging consequences for her development, and - one may add – grief for her mother. If this is speculation, however, what is certain is that the appellant will be faced, if she is to be removed, with a painful dilemma in relation to her child. Whichever resolution is arrived at, it will not be in the child's best interests. As Ms Finlayson wrote in the next paragraph of her report:

> "Whether she were to be separated from her mother or her father, the secure and comfortable lifestyle her parents have created for [the child] would be taken from her. The fate of her mother would be unknown and her father would be left to readjust to life as a single protective parent, whilst dealing with his own issues of loss and concern for his partner."

Even when this is discounted for the adverse asylum finding, it is a telling passage.

48. The closest the immigration judge comes to a finding on proportionality is in §84 where he says:

> "I also note from Mahmood that the removal of one family member from this country 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 when this involves a degree of

> hardship for some or all members of the family. In this particular case, I have found that the appellant would not be on risk on return to Uganda. I note what is said by Ms Finlayson in her report and that M has a need to remain in the close proximity of both parents to whom she is securely attached. I note the fears of both the appellant and her partner, as expressed to Ms Finlayson and at court, about the conditions in Uganda for M. I do note, however, that M is very young and the respondent is not seeking to separate the appellant from her and whilst I take full note of what is said by Ms Finlayson, I do not find it proved that M would suffer harm if she traveled to Uganda with her mother. There was evidence before me of what was said to amount to insurmountable obstacles to the family living together in Uganda, but 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 found it not 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 member of the family."

But, unlike the determination in AB's case, this passage leaves open and unexamined the critical area between the want of any insurmountable obstacle and a degree of hardship.

49. Ms Busch submits that, if a material error of law is established, the appeal should be sent back for redetermination. Mr Drabble submits that to remove this appellant would be so plainly a disproportionate interference with the right of all three individuals to respect for their family life that the appeal should be allowed outright. The decision in *Chikwamba* tips the scales in Mr Drabble's direction. Accepting for the present all that is said about the facts in §84 (see above), the likelihood that the appellant will eventually secure entry clearance in order to return (a possibility which the immigration judge in his next paragraph declined to evaluate), far from diminishing the claim to remain, is capable, in a case such as this, of strengthening it.

50. In my judgment, despite the elements which are capable of telling against the art. 8 claim, the enforced break-up of this family – the more so, not the less, if the break-up is to be only temporary – is not justified by the legitimate demands of immigration control. The appellant is a failed asylum-seeker but no more; her partner has no job at present, but he is her child's father and joint carer and this country is his home. Above all, consideration is owed to a child who is a British citizen and who, whatever was to follow from her mother's removal, would be the principal sufferer. In the end there is only one right answer.

Outcomes

51. I would dismiss AB's appeal and allow VW's.

Lord Justice Wilson:

52. I agree.

Lord Justice Mummery:

53. I also agree.