

Case No: C5/2008/0126

Neutral Citation Number: [2008] EWCA Civ 997
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No. AA/14610/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 15th July 2008

Before:

LORD JUSTICE BUXTON
and
LORD JUSTICE KEENE

Between:

TG (CENTRAL AFRICAN REPUBLIC)

Appellant

- and -

**THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondent

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr B Lams (instructed by Messrs Scudamores) appeared on behalf of the **Appellant**.

Mr A Payne (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

Judgment

(As Approved by the Court)

Crown Copyright©

Lord Justice Keene:

1. This is an appeal against a decision of the Asylum and Immigration Tribunal (AIT) dated 5 November 2007, by which that body dismissed an appeal by the appellant who is a national of the Central African Republic, who arrived in this country on 1 December 2002. The order for reconsideration which led to the AIT decision limited the issues to those arising under article 8 of the European Convention on Human Rights. There is no doubt that the immigration judge who made that decision on 5 November approached the topic of proportionality on a basis which, while perhaps understandable at the time, can now be seen to have been legally flawed in the light of the recent decision of the House of Lords in Chikwamba v SSHD [2008] UKHL 40; [2008] 1 WLR 1420. That is accepted by the Secretary of State and has been so accepted for some days now. The Secretary of State has therefore proposed that the matter be disposed of by consent with an order remitting the case to the AIT to re-determine. That, however, is not acceptable to the appellant and his advisers. They seek an order from this court that it would be disproportionate to remove the appellant rather than leaving that issue to the AIT.
2. Normally, since that requires a decision to be made on the facts and judgment to be exercised, one would expect that issue as to proportionality to be made by the fact-finding tribunal, especially when it is a specialist body like the AIT. But Mr Lams, on behalf of the appellant, contends that this court should make the decision since that was what happened in Chikwamba. He contends that the facts of this case are so stark that there is no reason why this court should not decide the proportionality issue. He stresses that there is a child in this family and that the appellant's partner is HIV positive and that it is accepted that she cannot be expected to move to the Central African Republic. So it is an entry clearance case and, it is said, one at least as strong, if not stronger, than Chikwamba, where the House of Lords itself determined that it would be disproportionate for Mrs Chikwamba to be returned to Zimbabwe. Reliance is placed on a passage from the judgment of Lord Brown of Eaton-under-Haywood at paragraph 44 in the Chikwamba case where his Lordship said:

“Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad.”
3. For my part, I do not accept the submission that the facts are so stark that this court unusually should make the decision. These are fact-sensitive issues and inevitably there are factual differences between this case and Chikwamba, not all to this appellant's advantage. For example, just to take two matters, Mrs Chikwamba had married at a time when removals to Zimbabwe were suspended. This appellant, during some of the time when he has been living with his partner in this country, seems to have disappeared from the official radar screen for a period of something around two years. Such matters as the

immigration history of an appellant are clearly relevant, as Lord Brown indicated himself at paragraph 42. Then Mrs Chikwamba, it was accepted, could not realistically leave her child behind in order to seek entry clearance from Zimbabwe, so in that case there would have been an impact on the child who had a right to remain in the United Kingdom. It has not been said that the appellant's son could not be left in this country with his mother during any such time. So there is a difference there. I must also say that we simply do not know whether there was any issue in Chikwamba about whether the House of Lords should decide that issue of proportionality or remit it. Nothing is revealed in the judgments and we do not have a note of the argument. Now I make it clear that I am not seeking to suggest that the decision on proportionality ultimately will go against the appellant. It may well be that he will win, but that is for the AIT, in my judgment, to decide. No fact-finding tribunal has yet applied its mind properly to this issue of proportionality with the correct legal principles in mind, and it ought to be allowed to do so.

4. I would end by expressing my own regret that the time of this court has had to be taken up in resolving this dispute about remedy. The consent order proposed by the Treasury Solicitor appears to me to have been a reasonable and realistic one which ought to have been accepted. So, as a matter of formality, I would allow this appeal and I would remit this case to the AIT to re-determine the issue of proportionality.

Lord Justice Buxton:

5. I agree. I would only add three short comments. The first is that, like my Lord, I by no means find it self-evident that the facts of this case are so clearly either similar to, or more favourable to the applicant than, those in Chikwamba so that we are obliged -- that is what the test must be -- to follow the course taken in Chikwamba itself of simply quashing the order for removal. Without going into unnecessary detail, and certainly without seeking in any way to bind or indeed influence the Asylum and Immigration Tribunal who will eventually decide this matter, it is quite clear that a very strong consideration in Chikwamba was the fact that it was the wife who was to be removed from the country, inevitably in the companionship of her four-year-old child. That is made absolutely plain as the determining factor in paragraph 8 of the speech of Baroness Hale of Richmond. That factor alone would, in my view, prevent this court from taking the course urged on it by Mr Lams. Secondly, however, there is a more fundamental matter of principle involved here, which is that it is not for the appellate court but for the expert tribunal on whom that role is conferred to decide questions of proportionality, and the appropriate course must be that the matter returns to the AIT, as my Lord has ordered.
6. Thirdly, it is possible that Mr Lams has been led into the submissions he made this morning by reason of the fact that in Chikwamba itself the House of Lords did not remit the matter, but effectively decided the proportionality case for itself. It is important to emphasise that it is far from clear, and is not clear from the report, whether that matter was in issue before the house. Understandably, the very important general question of the lawfulness of the Government's policy was in the forefront of attention in that case. And, the

House of Lords in any event considered the facts in that case to be extreme. I have already referred to Baroness Hale. That is made even clearer by Lord Brown in paragraph 46 of his speech. It is therefore important for the profession to realise that it will not be appropriate in future to rely upon the fact that in Chikwamba the matter was not remitted to argue that, equally in this court, a case should not be remitted.

7. This I think is the first case of this type to come before the court after the determination of the House of Lords in Chikwamba and parallel cases. It is very important for it to be fully understood that it is not the role of this court, and that that role cannot be deduced from Chikwamba, to determine issues of proportionality. In future we will not expect to see cases in which a decision by the Secretary of State to agree to a remission of cases of this sort is contested by the applicant.
8. For those reasons, in conjunction with those of my Lord, I would allow this appeal in full and remit the matter to the AIT.

Order: Appeal allowed