# IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 9th December 2003
Date Determination notified:
..12/02/2004.....

Before:

The Honourable Mr Justice Ouseley (President)
Mr P R Moulden
Mr P R Lane

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

For the Appellant: Mr P Nathan, instructed by Sutovic and Hartigan
For the Respondent: Mr G Phillips, Home Office Presenting Officer

## DETERMINATION AND REASONS

1. This is an appeal against the decision of an Adjudicator, Mr M E Taylor, who, by a determination promulgated on 28th March 2003, dismissed the Appellant's appeal on both asylum and human rights grounds from the decision of the Secretary of State refusing his claim and directing his removal to Croatia in a letter of 24th January 2002. The Appellant is a Croatian citizen, an ethnic Serb, from Eastern Slavonia, who was born on 6th March 1981 and applied for asylum on his arrival in the United Kingdom on 24th October 1999.

2. The Adjudicator heard evidence to the effect that the Appellant was harassed in Croatia, subjected to threats and frightened of carrying out military service because of his ethnicity and his moral principles about serving in the Croatian Army as a Serb. The Adjudicator did not accept the asylum claim. He took the view that, in reality, the evidence of the Appellant had been embellished and exaggerated in relation to his treatment and in part had been untruthful. He said that he did not think the Appellant was of any interest to the police, that he had never been interviewed by them, and that no interest had been shown when he

obtained a passport or when he left the country. The incidents to which he referred were of a relatively minor nature and there never had been a physical attack on the Appellant. The Adjudicator said that he was satisfied that the main reason the Appellant left Croatia was to avoid being drafted into the Army. The Adjudicator noted that his brother had served in the Army and a number of his Serb friends from the same village presently were serving.

3. The Adjudicator was satisfied that the Appellant would not suffer ill-treatment in breach of Article 3 or persecution if he were to be returned and undertook his military service. The Adjudicator considered the position in relation to those matters in the light of the Tribunal decision in SK [2002] UKIAT 05613.

4. Although a challenge was raised in the grounds of appeal against the Adjudicator's decision on asylum and Article 3 grounds, the Tribunal refused permission to appeal on those grounds. It granted permission on only one ground, which is the sole ground which is being pursued before it. This is related to Article 8 ECHR and to the effect of the decision of the Court of Appeal in Shala [2003] EWCA Civ 233 on what was said to have been the delay between the making of the asylum claim and the Secretary of State's decision on it. As we have said, the claim for asylum was made on 24th October 1999 but the refusal letter was not produced until 24th January 2002, something over two years later.

5. The Appellant's evidence, relevant to this ground, was summarised by the Adjudicator in paragraph 11:

> "The Appellant says that he has settled in the United Kingdom. The Appellant is now married, lives in rented accommodation and has been working for the last two and a half years. The Appellant states he met his wife at Christmas 2001, started a relationship in January 2002 and married her just after she attained 16, with the consent of her mother, on 24th August 2002. The Appellant says his wife could not leave the United Kingdom because her family is here and that she would not be able to go to Croatia as she cannot speak the language."

It was submitted to the Adjudicator, and accepted by him in the light of the decision in SK, that it was proper for the Adjudicator to take that marriage into account when considering whether return to Croatia would breach any Article 8 ECHR rights. When the Secretary of State rejected the Appellant's claim in January 2002, he had done so on the basis that the Appellant was not married, as was the case at that time. The Secretary of State simply said that he was not satisfied that the removal of the Appellant would be contrary to the United Kingdom's obligations under the ECHR. There was no explicit reference to proportionality, and no obvious reason why there should have been.

6. The Appellant said that the relationship had started before the Respondent's decision to refuse his application for asylum and submitted that there would be insurmountable obstacles in the way of his very young wife going to Croatia and therefore it would be disproportionate for him to be returned. She was young; she could not speak the language; the

economic situation was deplorable and it was said that she would be discriminated against because she was married to a Serb. The Appellant also said that as his passport had expired and for other reasons, there would be an inordinate delay in his obtaining entry clearance and in any event there was a risk that an application would fail as his wife would not be able to satisfy the maintenance test in the Immigration Rules.

7. The Adjudicator said, in paragraph 27:

> "I am satisfied that the Appellant married Roxanne White on 24th August 2002. I have heard evidence from Roxanne and have had sight of the original marriage certificate."

We read that paragraph as accepting that there was an actual marriage. The Adjudicator later expressed reservations, in the circumstances perfectly understandably, about whether the marriage was in fact a genuine marriage. He said, in paragraph 33:

> "Although I am satisfied the Appellant and his wife live together in rented accommodation, it has not been proved to the required standard that their relationship is that of a closely married couple. I noted that the Appellant, at the hearing, believed his wife was still attending a hairdressing college yet the Appellant's wife stated that she had left the hairdressing college in November 2002. I have also noted that the Appellant's wife was only 15 years old when they met and would have been quite impressionable and they appeared to have married in undue haste. I have, as previously indicated, not found the Appellant to be totally truthful and has exaggerated his claims and have no doubt that the speed in which he married was in order to remain in the United Kingdom."

8. The Adjudicator recognised that there would be an interference with Article 8 rights if the Appellant were returned to Croatia; he said that the wife had ruled out the first option of accompanying him for the reasons which we have already adverted to, but had said that she would support an application for entry clearance by the Appellant. The Adjudicator then considered whether the return of the Appellant to Croatia would be disproportionate in the light of the lawfulness and necessity for the proper control of immigration in a democratic society. He pointed out that the Appellant became aware of the refusal of asylum very shortly after the relationship had commenced and at a time when the wife-to-be was just over 15½. If her husband returned to Croatia, she would move in with her family nearby. In the light of all that, the Adjudicator concluded that it would not be disproportionate for the Appellant to return to Croatia and concluded that there were no insurmountable obstacles to prevent an application being made for entry as a spouse. He thought there would be no difficulty in obtaining a passport. He concluded by saying:

> "I believe if the Appellant seeks to apply for entry into the United Kingdom it will test his commitment to the marriage and indicate whether the marriage was for the purpose of settling in the United Kingdom."

9. Events had moved on by the time the appeal came before the Tribunal. There was a further statement from Roxanne Mikac, the wife, dated 24th October 2003. In it she said, as was obvious from her appearance in front

of us, that she was pregnant. She said in this statement, which without opposition from the Respondent we admitted, that on 1st June 2003, the very date upon which permission to appeal was granted, she learned that she had become pregnant. She said *"we did not plan to have a family so soon. We wanted to wait until Dragan's immigration case was resolved ... ."* Because of the pregnancy, they moved out of the accommodation they had been occupying and moved into her parents' home in August. She referred to the support that her parents had offered both of them. She emphasised that her husband worked full-time and supported her. She earned some money part-time herself. She thought that she would not be able to cope financially without him or in other ways and said that their lives would be severely disrupted.

10. Like the Adjudicator, we accept that the decision in SK obliges us to look at the application of Article 8 in the light of circumstances as they now are and that we are not confined to examining circumstances as they were at the time of the Secretary of State's decision.

11. Fundamental to the Appellant's case in relation to Article 8 before us was the contention that there had been a delay by the Secretary of State in his decision-making process, which delay was a significant factor in making the return of the Appellant to Croatia disproportionate. It was said that this delay had been unreasonable and had deprived the Appellant of the opportunity of having his asylum claim determined in line with a then favourable policy. Mr Nathan relied upon Bulletin 2/99 from the Home Office which set out advice to caseworkers in relation to Serb issues. That advice said:

> "There is no 'group policy' towards Serbian asylum seekers from Croatia and so each case is determined on its own merit.
>
> The general presumption is that Serbs (or those with a mixed Serbian background through parents or marriage) from the war-affected areas of Eastern Slavonia, Baranja & Sirmium; the Krajina and Western Slavonia, may be able to substantiate a claim to asylum on the grounds of their ethnicity."

Mr Nathan drew attention to the fact that another seemingly earlier version of the advice said that such Serbs *"will"* be able to substantiate a claim rather than *"may"* be able to substantiate a claim. He submitted that, in any event, the effect of the change was not significant, read properly.

11. Shortly after the Appellant's claim was made, Bulletin 4/99 was produced which, in slightly different language, said something fairly similar:

> "While not every case of an ethnic Serb will meet the Convention criteria, caseworkers should be aware that the likelihood is that many ethnic Serbs will be able to make a case for asylum under the Convention and each application should therefore be considered very carefully before reaching a decision."

12. Mr Nathan emphasised the legitimacy of the arrival of the Appellant in 1999 in the sense that he arrived with what was at the time a legitimate claim to asylum. Mr Nathan prayed in aid the decision of the Court of

Appeal in Shala v SSHD. He submitted that it was relevant to consider the effect of the time taken by the Secretary of State to reach his decision and the consequences which the delay had had on the prospects of the Appellant receiving the benefit of a policy or an expectation. The Court of Appeal concluded that delay by the Home Office in determining the application of Shala had deprived him of the advantage of making an application for variation in his leave from within the United Kingdom. This ought to have gone into the balance in considering proportionality, because it was unfair for the balancing exercise to be conducted "*without any weight being attached to the fact that the policy being put into one side of the scales would not have been applicable at all but for the delay on the part of the Home Office*", Keene LJ at paragraph 16. It was unfair that the Appellant in that case should suffer because of uncertainty arising not from his fault but from the Home Office's failings. The Home Office's concern was that allowing Shala to apply in-country would encourage others to exploit the established procedures, but the Court of Appeal concluded that it would be clearly disproportionate in the circumstances of that case to require that Appellant to leave the United Kingdom and apply from Kosovo.

13. Those factors in that case were seen as militating against the application of facets of the approach to this sort of problem set out in R v SSHD ex parte Mahmood [2000] EWCA Civ 315, [2001] 1WLR 840, in which, at paragraph 55(i)-(vi), a number of aspects were discussed including:

> "(ii) that Article 8 did not impose on a state any general obligation to respect the choice of residence of a married couple;
>
> (iii) that removal or exclusion of one family member from a state where other members of the family are lawfully resident would not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family;
>
> (iv) Article 8 is likely to be violated by the expulsion of a member of a family that has been long-established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled;
>
> (v) knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious, militates against the finding that an order excluding the latter spouse violates Article 8. Nonetheless whether interference with family rights was justified in the interests of controlling immigration depended on the facts of the particular cases and the circumstances prevailing in the state whose action is impugned."

14. Mr Nathan submitted that there were two aspects to the Appellant's rights under Article 8 ECHR which would be interfered with by his removal and in respect of which the circumstances showed that the interference would be disproportionate. He had a private life which comprised his job as a fork lift truck operator, but he also had a family life, based on the marriage which post-dated the Secretary of State's decision, which now included the pregnancy which post-dated the Adjudicator's decision. It was anticipated that the baby would be born on the 2nd February 2004.

15. He also submitted that relevant factors to go into the balance were that the Appellant's wife would not wish to go to Croatia for perfectly understandable reasons. It would be harsh in the extreme to expect her to go and that amounted to an insurmountable obstacle. There was, he said, no justification in inflicting misery to avoid the impression of someone jumping the queue. The Appellant would have to do military service which would be an additional misery factor leading to a disproportionate and lengthy separation.

The approach to determining proportionality

16. It was submitted by Mr Nathan and by Mr Phillips for the Secretary of State that where the Secretary of State has not considered the issue of proportionality in relation to Article 8, whether as here because he did not think it was engaged or because, as again is the position here, circumstances have changed before the Adjudicator or Tribunal, it was for the Adjudicator and for the Tribunal on appeal to decide for itself whether removal of the Appellant would be disproportionate. We had no power to remit the matter to the Secretary of State for him to reach any conclusion on it. Neither sought that the appeal should be dismissed in order that the matter be placed before the Secretary of State for his consideration of any issue of proportionality in the light of the particular facts as they now turned out.

17. Mr Nathan supported his approach by citing a passage from the judgment of Dyson LJ in R (Razgar) v SSHD [2003] EWCA Civ 840, [2003] INLR 543. At paragraph 41, Dyson LJ said:

> "Where the essential facts found by the adjudicator are so fundamentally different from those determined by the Secretary of State as substantially to undermine the factual basis of the balancing exercise performed by him, it may be impossible for the adjudicator to determine whether the decision is proportionate otherwise than by carrying out the balancing exercise himself. Even in such a case, when it comes to deciding how much weight to give to the policy of maintaining an effective immigration policy, the adjudicator should pay very considerable deference to the view of the Secretary of State as to the importance of maintaining such a policy. There is obviously a conceptual difference between (a) deciding whether the decision of the Secretary of State was within the range of reasonable responses; and (b) deciding whether the decision was proportionate (paying deference to the Secretary of State so far as is possible). In the light of Edore v Secretary of State for the Home Department [2003] EWCA Civ 716, INLR 361, we would hold that the correct approach is (a) in all cases except where this is impossible because of the factual basis of the decision of the Secretary of State has been substantially undermined by the findings of the adjudicator. Where (a) is impossible, then the correct approach is (b). But we doubt whether, in practice, the application of the two approaches will often lead to different outcomes."

18. Dyson LJ, in the passage to which we have referred, was probably not addressing the issue which arises here. He was addressing the not uncommon problem which arises where an Adjudicator finds facts relating to a proportionality issue which are different from those which were the basis for the Secretary of State's consideration and conclusion on the issue. Here, we are concerned with changes of circumstance after the Secretary of State's decision. But it was submitted that the logic of what Dyson LJ said

should apply equally to this situation. We are also bound by the starred determined in SK as to the admissibility of evidence about matters arising after the Secretary of State's decision when considering Article 8, notwithstanding what might be thought the implicit limitation in sections 77(3) and (4) of the 1999 Act. It is a common problem for the circumstances which engage Article 8 to evolve over the time after the Secretary of State interview and his later decision.

19. Edore v SSHD [2003] EWCA Civ 716, [2003] INLR 361, as does Razgar, holds, as a general proposition, that the question of whether a decision is proportionate is one where the Tribunal should ask itself whether the decision of the Secretary of State is outside the range of responses reasonably open to him; it should not reach decisions on proportionality itself. But Edore did not have to grapple with the problem of a change in the appraisal of facts as a result of the appeal to the Adjudicator, let alone the problem of a change in circumstances which could occur at any time.

20. In Djali v SSHD [2003] EWCA Civ 1371, 16th October 2003, the Court of Appeal again considered the position which arises where the Secretary of State has not taken a decision on the proportionality issue. It had not been raised before him; the question of Article 8 did not arise until the appeal was before the Adjudicator. For that reason the Court did not regard the approach to the Secretary of State's decision as falling within the Edore principle. Simon Brown LJ said, at paragraph 24:

> "Although no doubt the Secretary of State at some point in the course of the appeal proceedings must be taken to have decided the question of proportionality against the appellant, the appeal process itself is necessarily directed to his earlier decision."

He then said in paragraph 25:

> "I proceed, therefore, on the basis that the Adjudicator and the IAT were entitled to reach their own independent conclusions on the question of proportionality (assuming always that the Article 8(2) stage was reached). Could they, on this basis, reasonably conclude that the interests of immigration control did not require the appellant and family to be returned to Kosovo?"

The Court of Appeal reached the view that the only reasonable conclusion on proportionality which the Tribunal could reach was that removal was proportionate. So it did not feature in fact a decision in respect of which two reasonable but different decisions were possible. Nor did it suggest that the Court of Appeal, on appeal on a point of law, ask itself any question other than whether the decision appealed from was reasonable.

21. There are two possible approaches where there has been no decision on the new facts by the Secretary of State. One is to say that it is now for the judicial decision-maker to make the decision, giving appropriate weight to the public need identified in relation to immigration control. This would be consistent with the approach in Razgar in relation to cases where the basis of factual appraisal by the Adjudicator is different from the basis relied on by the Secretary of State. This of course may involve material which was

not before the Secretary of State but which related to something which had happened by the time he made his decision. It would be very sensible to have the same approach for both the circumstances. This is what Djali concludes.

22. We confess to some unease about the implications of this. It is plain that two reasonable views can be held in many situations about the way in which the competing interests should be weighed. Where the Tribunal considers that there are two reasonable views, it is difficult to see how one can be described as unlawful. Yet its jurisdiction to allow an appeal is founded on the power to hold a decision unlawful, as one which breaches human rights. Nor can it be said that the Secretary of State's decision is unlawful simply because the Secretary of State did not consider the question; the issue may not have been raised and the circumstances may later have changed.

23. An alternative but consistent approach is to say that the question which arises under section 65 is whether the decision of the Secretary of State is an act which breaches the Appellant's rights, using the language of section 65(5) and (3). This is taken by the Court of Appeal and SK to involve consideration of whether the decision under appeal, essentially that the Appellant can be removed, is unlawful if carried out in the present circumstances. The relevant decision is not as such a decision about proportionality. It is that removal would not breach his human rights. If it is said that there is no Secretary of State decision about proportionality, it is difficult to see where the jurisdiction to deal with it comes from, for the Tribunal can only deal with the decision appealed against, but must do so in the current circumstances as it finds them to be. The real question, regardless of whether the Secretary of State considered proportionality or whether the relevant facts have been appraised differently or have changed, is whether, at the date of hearing, the decision that the Appellant can be removed is lawful. That means asking whether or not the decision that the Appellant should be removed falls outside the range of reasonable responses as to whether removal would be proportionate to the interference with family life.

24. This reflects the emphasis on the limit of the powers of the Tribunal and Adjudicators which underlay the reasoning of Moses J in Ala which was approved by the Court of Appeal in Edore. The latter approach has the advantage of setting the powers of the Adjudicators and Tribunal firmly in the context of the statutory powers which govern it; it avoids such judicial bodies having to decide for themselves how much weight they consider that Government policy should have, at least in form, and it emphasises that it is not for such bodies to exercise what might appear to be an original jurisdiction in relation to decisions which have not been made.

25. We consider, however, that in the light of the authorities to which we have referred that where a decision on proportionality has not been taken by the Secretary of State as here, the Adjudicator is obliged to reach his own conclusion on whether removal would be disproportionate. The first approach has to be followed. The Tribunal, if dealing with an appeal on a point of law, is only entitled to interfere with that decision if it is unreasonable, or fails to follow the guidance of the Tribunal or higher

authority. The ability to reach an independent conclusion does not belong to each appellate body in turn.

26. But this does assume that the facts and evidence remain the same. Where the facts have evolved or have been found to be different from those which formed the basis for the Secretary of State or Adjudicator's decision, the logic of Djali and Razgar is that the Tribunal has to reach its own independent judgment on proportionality.

27. In each case, however, the appellate body has to have regard to the interests of immigration control, and it will usually be a very weighty consideration indeed. In view of the consistent recognition by the Court of Appeal in Edore, Razgar and Djali that the proportionality of removal is essentially a matter for the Secretary of State within the limits of individually defined reasonableness, the two approaches which we have discussed should not yield differing results, as Dyson LJ expected. It was a pragmatic aim of enabling the decision-making process to proceed which underlay those decisions and not a desire for the judiciary to determine how significant immigration control and its procedure was. The way in which that independent decision is reached must reflect the Secretary of State's primary role in the assessment of proportionality, the fact that it is pragmatism which puts the judiciary in the position of making the assessment in certain circumstances and the judicial expectation that the two sources of assessment would rarely lead to different answers. In our judgment, Adjudicators and the Tribunal should grapple with the issue of proportionality in the following way, so as to achieve a degree of consistency and to recognise the weight to be attached to immigration control and the system for its maintenance.

28. The starting point should be that if in the circumstances the removal could reasonably be regarded as proportionate, whether or not the Secretary of State has actually said so or applied his mind to the issue, it is lawful. The Tribunal and Adjudicators should regard Shala, Edore and Djali as providing clear exemplification of the limits of what is lawful and proportionate. They should normally hold that a decision to remove is unlawful only when the disproportion is so great that no reasonable Secretary of State could remove in those circumstances. However, where the Secretary of State, eg through a consistent decision-making pattern or through decisions in relation to members of the same family, has clearly shown where within the range of reasonable responses his own assessment would lie, it would be inappropriate to assess proportionality by reference to a wider range of possible responses than he in fact uses. It would otherwise have to be a truly exceptional case, identified and reasoned, which would justify the conclusion that the removal decision was unlawful by reference to an assessment that removal was within the range of reasonable assessments of proportionality. We cannot think of one at present; it is simply that we cannot rule it out. This decision is starred for what we say about proportionality.

Applying that approach

29. We deal first with the contentions in relation to Shala, recognising that the impact of delay on the consideration of proportionality is relevant to both private and family life, although the weight to be given to it is likely to be very much greater in the latter than in the former.

30. The Court of Appeal in Shala held that there were circumstances in which the delay on the part of the Secretary of State in dealing with the asylum claim was an exceptional feature which took the case outside the significant area of judgment which the courts would allow him in balancing the conflicting interests of the proper maintenance of immigration control and interference with Article 8 rights. The exceptional feature in that case was that the Appellant had a legitimate claim to enter because at that time he would have been the likely beneficiary of the Secretary of State's policy of granting asylum to ethnic Albanians from Kosovo but his claim had not been determined for some four years despite his chivvying the Secretary of State for an answer, which was an unreasonably long time. Had the decision been made within a reasonable time, he would have been likely to have been granted some form of leave to remain. This would have enabled him to make an in-country application for a variation in his leave to stay as a spouse and the Secretary of State's policy, of requiring those who had no leave, to apply for entry clearance out of country, would not have applied, and the interference with family life would not have occurred. The Appellant in that case had married someone who had no connection with Kosovo, who already had two children and who had already been granted refugee status in this country. The interference was expected to be temporary and was to be inflicted in order to maintain the integrity of the immigration control system, to encourage others to abide by it and to discourage its breach in circumstances where the asserted need to uphold the system in its vigour and harshness in that particular case, arose from the Secretary of State's failure to deal with matters in a reasonably prompt fashion.

31. There are a number of factors here which make this rather a different case from Shala. First, there was no equivalent policy in force, at the time of entry, as the Bulletins 2 and 4/99 make reasonably clear. There was, however, a good prospect that at the time of entry, if a decision had been made then, the Appellant would have been granted some form of leave to remain. We are prepared to assume that a Government committed to speedy decision-making could reasonably have made a decision within a year, by late 2000. However, we are not in a position to say whether the Appellant would have received a favourable decision then. The situation had changed in Croatia. It is not possible to say that throughout a reasonable decision-making period, the Appellant would have had good prospects of a favourable decision from the Secretary of State.

32. Second, the Appellant had only just commenced his relationship with his girlfriend, whose age would have put a legal bar on its completeness, when the refusal was issued. It is not entirely clear anyway what constituted the "relationship" in early January 2002. Although the relationship flowered into marriage shortly after the wife became 16, it was dependant on parental consent which might have been withheld. The consent was given and the marriage ceremony occurred, while the Appellant had an appeal

pending to the Adjudicator against that refusal and all parties knew that his situation was precarious. His wife became pregnant at a time when they did not know whether the Appellant would even be granted permission to appeal against the adverse Adjudicator's decision. The sole content of his private life as opposed to his family life upon which Mr Nathan relied was the fact of the Appellant's employment.

33. The position in which the Appellant finds himself is one of his own making; he was found to be someone who exaggerated and at one point lied to the Adjudicator. It would not be an illegitimate inference to say that he did what he did to assist an unlikely claim to stay, as the Adjudicator found. This is very different from what faced the Court in Shala.

34. We conclude that there would be an interference with family life of some significance. After all, the Appellant now is married and is shortly to be a father. The imminent arrival of the baby supports the view that the marriage is genuine, at least from the point of view of the mother-to-be, notwithstanding the wholly understandable doubts as to its durability expressed by the Adjudicator and which continue in our view. The interference with the private life of the Appellant in the way suggested by Mr Nathan is of no significance at all.

35. However, the relationship, whatever precisely may be encompassed by that expression in this case, began but three weeks before the Secretary of State's adverse decision and cannot have attained any real depth by that time. Even before that, the Appellant knew that his position was uncertain and precarious. After that date, he knew even more clearly how precarious it was. The relationship developed after that date, when both of them, and especially the Appellant, were fully aware of the position. They were married in circumstances of exceptional haste. The baby was conceived after the Adjudicator's decision was promulgated. It is quite clear that the first, and maybe both, of these acts were at least from the Appellant's point of view intended to assist his otherwise unmeritorious claim to stay – indeed to provide it with a foundation, as the Adjudicator concluded.

36. Even if that were too severe a judgment, it would be difficult to avoid the conclusion that a hasty marriage and fatherhood, at a time when the adverse immigration position was certain or obviously precarious, would generally enable people to jump the queue and to avoid the normal entry requirements. This would be to send a quite clear message as to how those controls could be evaded. It would be all the more troubling if marriage to and fatherhood through the young and impressionable were to become the route to the avoidance of the normal rules of immigration control.

37. This is also not a case where the Secretary of State's unreasonable delays have deprived the Appellant of the benefit of the application of a favourable policy. The family circumstances, as they developed against the actual chronology of decision-making, are wholly different from those in Shala.

38. We do not accept that their family life cannot be undertaken in Croatia, though the circumstances may be harsh and the Appellant may have to undertake military service before he can leave. We apply the Tribunal's

guidance in DK v SSHD [2003] UKIAT 00153K (Croatia). Mr Nathan referred to the more recent electoral success of the HDZ, the right wing party of the former President Tudjman. But the same material refers to the change in its nature to become a moderate conservation party, as had been already observed in the material in DK. Its success was seen as due to economic problems rather than resurgent nationalism. Its leaders were moderate. Some of its coalition parties were moderates. There was concern over the likely inclusion of a neo-fascist group, but one trying to distance itself from the Ustashe regime of the Second World War. This does not persuade us that there is a material change in circumstances.

33. The fact that his wife may not wish to go there for understandable reasons does not mean that she cannot. Still less does it mean that they can impose on the Respondent their choice of country of residence, in the light of Mahmood. After all, she too knew of his precarious position, of what he thought the conditions would be like in Croatia and that she did not speak the language, and has taken the risks with him. We are not in a position to say how long an application for entry clearance will take, nor how successful it is likely to be. He has some prospects of success in his application but his position under the Immigration Rules is not necessarily clear-cut because of the prospect of maintenance from public funds.

34. There has been a change in circumstances since the Adjudicator's decision and so we are not limited to deciding whether the Adjudicator's decision was reasonable, although it plainly was on the material before him. The decision to remove continues to involve no breach of the Appellant's human rights; it is a proportionate response to the interests of immigration control, falling within the range of reasonable conclusions available to the Secretary of State. If the decision on proportionality is one for us to make on a different basis, we regard the interference with family life in this case as proportionate paying proper regard to the interests of immigration control and the due operation of the system of control. We cannot say that a different conclusion, however, would be unreasonable. It follows that we consider that the Secretary of State's decision does not involve a breach of the Appellant's human rights. The appeal is dismissed.

MR JUSTICE OUSELEY
PRESIDENT