Neutral Citation Number: [2009] EWCA Civ 240

Case No: C5/2008/0004

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
HIS HONOR JUDGE GOLDFARB
AA/00227/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2009

Before :

LORD JUSTICE RIX
LORD JUSTICE TOULSON
and
LORD JUSTICE RIMER

- -

Between :

AF (JAMAICA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Miss S Naik (instructed by **Messrs Dexter Montague & Partners**) for the **Appellant**
Mr Robert Kellar (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date : Thursday 4th December 2008
Further submissions in writing : 5th, 9th, 15th, 16th and 17th December 2008

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Rix :

1. The appellant, AF, is a citizen of Jamaica, born on 29 November 1978, who arrived in the UK on 9 December 1998, when he was 20, with leave to enter as a visitor. He subsequently applied, in time, for an extension of leave to remain as a student, an application which was never dealt with. On 11 August 1999 he married S, a British citizen, and on 4 October 1999 applied instead to vary his application for leave to remain as a student to one for leave to remain as a spouse. That latter application was not dealt with until it was refused on 9 November 2005 in circumstances recited below. It is said, and it has not been seriously challenged by the respondent, that it follows that his immigration status was not in default while he was awaiting the answer to his application.[1]

2. In the meantime, on 12 September 2000, a son was born to the married couple. AF also had a daughter from a previous relationship, who was born in England on 10 February 2000 and has lived with her mother here.

3. On 12 November 2000 AF witnessed the killing of his cousin, JB, by a member of a Jamaican criminal gang, Michael Porter. He was abducted and threatened, and entered into a police witness protection programme. He gave evidence at Porter's trial. Another witness, Stephen Williamson, together with his son, were murdered in Jamaica. Porter was acquitted in 2001 of the murder of JB but found guilty of a separate serious offence and sentenced to 18 years in prison.

4. On 7 June 2001 AF was himself arrested on suspicion of supplying class A drugs and held on remand. On 26 November 2001 he was convicted of conspiracy to supply class A drugs (heroin and cocaine) and sentenced to a term of 7 years imprisonment. He was not recommended for deportation. However, on 30 September 2004 notice of intention to deport was served on him, in the light of his conviction, and on the same day he applied for asylum. He was released from prison on 11 October 2005.

5. On 9 November 2005 the Secretary of State for the Home Department who is respondent to this appeal (the "Secretary of State") refused AF's asylum application and also his long extant application for leave to remain as a spouse. His asylum application referred to a claim for humanitarian protection and articles 2 and 3 of the ECHR, on the basis that he would be in danger of mistreatment or

[1] See the Immigration (Variation of Leave) Order 1976 which extends the duration of the original leave until the end of the 28th day after the decision on the application and section 3 of the Immigration Act 1971 (as amended from 2 October 2000 by the Immigration and Asylum Act 1999) and section 3C of the Immigration Act 1971 (as inserted from 1 April 2003 by section 118 of the Nationality Immigration and Asylum Act).

death from criminal gangs in Jamaica. Consideration was also given to article 8 of the ECHR. It was considered that AF would not be at real risk of a breach of article 3 in Jamaica, in as much as he would be able to access sufficient protection or else relocate to a place of safety. The reasons for refusal letter stated inter alia that –

> "43. Consideration has also been given to whether your family life might be disrupted if you were removed from the UK, and to whether this would cause a breach of Article 8 of the ECHR. It is noted that you are married to a British citizen and that you have a five-year-old son together. You married this woman on 11 August 1999, two months after the expiry of your visitor's visa. All your representations have been carefully considered, but although your wife is a British citizen it is considered that the fact that shortly after your marriage you applied for an extension to stay in the UK as her spouse demonstrates that when you embarked on this relationship you both knew that you might be required to leave the United Kingdom. Both your son and wife may apply to settle with you in Jamaica or to accompany you to that country while you apply for entry clearance to re-enter the United Kingdom from Jamaica for settlement as a spouse…
>
> 46. Additionally, after taking into account your seven-year conviction for conspiracy to supply cocaine and Heroin any interference with your family life caused by your removal to Jamaica is in your case outweighed by the public interest and that your removal is both justified and proportionate in pursuit of these aims under Article 8(2). Therefore you do not qualify for Discretionary Leave."

6. On 8 December 2006 the Secretary of State issued her decision to make a deportation order in the case of AF. Her letter of the same date giving her Reasons for Deportation referred to her policy DP 3/96 relating to marriage applications, but wrongly stated that it did not apply because the marriage had not pre-dated the notice of intention to deport by the necessary two years (in fact the marriage had pre-dated that notice by a few days short of five years). As for article 8, the letter stated:

> "…your case has been considered in light of the findings of the Court of Appeal in the case of *Samaroo*…It is concluded that in light of your criminal offence your removal from the United Kingdom is necessary in a democratic society for the prevention of disorder and crime and for the protection of health and morals…Furthermore, no reason can be found why your wife and child would not be able to accompany you to Jamaica should they wish to do so. Your child is considered young enough to adapt to life abroad…"

7. On 3 January 2006 AF lodged his appeal against the Secretary of State's two decisions. On 14 March 2006 AF's appeal was heard and on 21 March 2006 the AIT determination rejecting that appeal was published. Grounds for reconsideration were lodged. On 5 March 2007 the AIT found an error of law and on 10 September 2007 the second stage reconsideration was heard by Immigration Judge Goldfarb. She promulgated her determination on 28 September 2007, dismissing AF's appeal, which had been argued under articles 2, 3 and 8 of the ECHR and under Rule 364 of the Immigration Rules. That is the determination under appeal here. Permission to appeal to this court was granted by Moses LJ upon renewal of AF's application.

8. The grounds of appeal complained of error in IJ Goldfarb's dealing with both article 3 and article 8: but in oral submissions Ms Sonali Naik on behalf of AF confined herself to article 8, with particular reference to the position of AF's wife and children and to the Secretary of State's policies DP 3/96 and DP 5/96 which relate to marriage and children with long residence respectively. In the meantime AF and his wife had had another child, a daughter, born on 10 October 2006.

The article 8 jurisprudence

9. It is well known that there have been two major decisions from the House of Lords in recent years concerning the application of article 8. In *Huang v. Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, it was held, first, that the article 8 decision was for the appellate immigration authority itself, investigating the facts on an up-to-date basis, and was not a mere review of the rationality and legality of the primary decision-maker; and secondly, that in assessing the proportionality of its decision for the purposes of article 8(2), the test was expressed as follows:

> "20. In an article 8 case where this question is reached, the ultimate question for the appellate authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of the considerations weighing in favour of refusal, prejudices the life of the family of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality."

10. In *Beoku-Betts v. Secretary of State for the Home Department* [2008] UKHL 39, [2008] 3 WLR 166, the House of Lords further held that for these purposes what had to be considered was the family life of the family unit as a whole, and not merely the impact that the decision would have on the appellant by himself or herself. Each member of the family unit was to be regarded as a victim. That decision settled an issue which had arisen in immigration and asylum jurisprudence in previous years and which prior to the decision in the House of Lords had been resolved on balance in the more restricted view of the question. At para 41, Lord Brown of Eaton-under-Heywood contemplated that it would no doubt be "only infrequently" that the issue would affect the outcome of an appeal, but "clearly on occasion it will".

11. *Huang* suggests that for these purposes one of the guiding principles is whether the family life "cannot reasonably be expected to be enjoyed elsewhere" (see *Huang* at para 20 cited above) and that appears to be confirmed by recent Strasbourg jurisprudence: see *Sezen v. The Netherlands* (2006) 43 EHRR 621 in a passage itself cited by Lord Brown in *Beoku-Betts* at para 38 ("Having regard to its finding…that the second applicant and the children cannot be expected to follow the first applicant to Turkey"). Similarly in *Boultif v. Switzerland* (2001) 33 EHRR 50 the ECtHR had referred ultimately to whether the wife there "cannot…be expected to follow her husband, the applicant, to Algeria" (at para 53). More recently, in *Uner v. The Netherlands* (2006) ECHR 873, the Grand Chamber revisited *Boultif's* "guiding principles" and referred at para 57 inter alia to –

> " - the nationalities of the various persons concerned;
> - the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
> - whether the spouse knew about the offence at the time when he or she entered into the family relationship;
> - whether there are children of the marriage, and if so, their age; and
> - the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled."

The Grand Chamber continued:

> "58. The Court would wish to make explicit two criteria which may already be explicit in those identified in the *Boultif* judgment:
> - the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
> - the solidity of social, cultural and family ties with the host country and with the country of destination."

12. IJ Goldfarb made her determination after the House of Lords' decision in *Huang* but before its decision in *Beoku-Betts*.

DP 3/96 and DP 5/96

13. Even before the Human Rights Act 1998, the principles of article 8 concerning family life were sought to be addressed in the policies published by the Home Office. Thus DP 3/96 is concerned with persons who do not qualify for leave to remain under the Immigration Rules and are to be considered for deportation but seek nevertheless to remain on the basis of marriage in the United Kingdom.

14. Relevant guidelines of DP 3/96 include the following:

> "5. As a *general rule*, deportation action under 3(5)(*a*) or (3)(5)(*b*) (in non-criminal cases) or illegal entry action should not normally be initiated in the following circumstances (but see notes below):
>
> (a) where the subject has a genuine and subsisting marriage with someone settled here and the couple have lived together in this country continuously since their marriage for at least 2 years before the commencement of enforcement action;
> *and*
> (b) it is unreasonable to expect the settled spouse to accompany his/her spouse on removal.
>
> *Notes*
> …
> (ii) In considering whether or not, under paragraph 5(b) above, it would be unreasonable for a settled spouse to accompany the subject of enforcement action on removal the onus rests with the settled spouse to make out a case with supporting evidence as to why it is unreasonable for him/her to live outside the United Kingdom. Factors which caseworkers should take into account, if they are made known to them, will include whether the United Kingdom settled spouse:
>
> *(a)* has very strong and close family ties in the United Kingdom such as older children from a previous relationship that form part of the family unit; or
> *(b)* has been settled and living in the United Kingdom for at least the preceding 10 years…
>
> *Criminal convictions*

> 6. In cases where someone liable to immigration control has family ties here which would normally benefit him/her under paragraph 4 above but has criminal convictions, the severity of the offence should be balanced against the strength of the family ties. Serious crimes which are punishable with imprisonment or a series of lesser crimes which show a propensity to reoffend, would normally outweigh the family ties. A very poor immigration history may also be taken into account. Caseworkers must use their judgment to decide what is reasonable in any individual case.
>
> *Children*
> 7. The presence of children with a right of abode in the UK (see note below) is a factor to be taken into account. In cases involving children who have the right of abode, the crucial question is whether it is reasonable for the child to accompany his/her parents abroad. Factors to be considered include:
>
> *(a)* the age of the child (in most cases a child of 10 or younger could reasonably be expected to adapt to life abroad);…"

15. DP 5/96 (headed "Deportation in cases where there are children with long residence") originally referred to such children as being aged 10 or over, but in February 1999 was reissued in identical terms to refer to children aged 7 or over. In that amended version, it reads as follows:

> "The purpose of this instruction is to define more clearly the criteria to be applied when considering whether enforcement action should proceed or be initiated against parents who have children who were either born here and are aged 7 or over or where, having come to the United Kingdom at an early age, they have accumulated 7 years or more continuance residence.
>
> *Policy*
> Whilst it important that each case must be considered on its merits, the following are factors which may be of particular relevance:
>
> (a) the length of the parents' residence without leave;
> (b) whether removal has been delayed through protracted (and often repetitive) representations or by the parents going to ground;
> (c) the age of the children;
> (d) whether the children were conceived at a time when either of the parents had leave to remain;
> (e) whether return to the parents' country of origin would cause extreme hardship for the children or put their health seriously at risk;
> (f) whether either of the parents has a history of criminal behaviour or deception…"

16. At the time of the 1999 amendment a "policy modification" was issued, a Parliamentary answer was given and a press release made concerning the policy, to the effect that in the case of a child of seven years or more it is only in exceptional cases that indefinite leave to remain will not be given, and that "the general presumption is that we would not normally proceed with enforcement action". The full details are contained in this court's judgment in *NF (Ghana) v. Secretary of State for the Home Department* [2008] EWCA Civ 906 (30 July 2008). As a result, this court stated at para 39 of its judgment in that case that:

> "39. For the future it seems to us inevitable that tribunals considering the impact of the Secretary of State's policy in relation to the passing of seven years residence on the part of a child of the family should:
>
> (1) start from the position (the presumption) that it is only in exceptional cases that indefinite leave to remain will not be given, but
> (2) go on to consider the extent to which any of or a balancing of all the factors mentioned in the 1999 policy modification statement makes the case an exceptional one."

17. *NF (Ghana)* was not a case where a criminal conviction of the parent subject to deportation was in issue; but there was a poor immigration record. NF's appeal was allowed primarily on the basis that insufficient focus had been given (in the light of a full understanding of DP 5/96 as amended in 1999) to the case of a child who had been five at the time of the Secretary of State's decision in that case but had turned seven by the time of the AIT determination there under appeal. The submission that the same outcome was inevitable was rejected.

18. In the present case, none of AF's children were 7 or older at the time of the Secretary of State's decisions in November 2005 and December 2006. Therefore, DP 5/96 in its amended form did not fall for consideration by the Secretary of State. I have referred in para 6 above to the single reference to "Your child is considered young enough to adapt to life abroad…".

19. DP 3/96 was revoked on 24 April 2008, in a written ministerial statement (*Hansard*, 24 April 2008, column 107WS). The statement included this passage:

> "The fact that an individual is married to or is the civil partner of a British citizen or someone settled in the UK will continue to be a relevant factor to be taken into account when considering removal. Each case will be considered on its individual merits in line with the Human Rights Act and the immigration rules."

20. Transitional arrangements were also published. In sum, DP 3/96 will continue to apply where consideration of it had already been initiated prior to 24 April 2008, as in this case.

21. Shortly after the conclusion of the hearing of this appeal, the Secretary of State also revoked DP 5/96. This was done on 9 December 2008. Transitional arrangements were again published. This led to a further flurry of written submissions from both parties. There is a dispute about whether the transitional arrangements apply to the present case. This of course is one where none of AF's children where over 7 at the time of the Secretary of State's decisions, so that we are not concerned with a misapplication by the Secretary of State of her own policy. However, at the time of the determination in relation to the reconsideration of AF's appeal before IJ Goldfarb two of AF's children, namely his daughter by his previous relationship and his son by his wife, born respectively in February and September 2000, had turned seven: and it is common ground that those were matters which, together with the Secretary of State's policy, were relevant considerations to be taken into account by the immigration judge. In my judgment, to that extent DP 5/96 remains relevant on this appeal, despite its revocation. Although the present type of case is not specifically mentioned in the transitional arrangements, understandably because we are not concerned at present with the Secretary of State's application of the policy, the transitional arrangements are not in any event intended to be a comprehensive statement of the continuing relevance of the policy in extant cases. This is demonstrated by the language of the transitional arrangements itself: "There are likely to be existing cases where DP 5/96 will continue to apply despite its withdrawal."

The AIT determination

22. There is no doubt that IJ Goldfarb's determination contained a lengthy, detailed and careful exposition of the facts and considerations which arose in this case. Nevertheless, when for the purposes of this appeal the focus has been turned on whether she adequately addressed the position of the family unit as a whole, and in particular that of AF's three children, it may be seen that the matter is not clear-cut. I have already observed that her determination preceded the House of Lords decision in *Beoku-Betts*. It was also before this court's decision in *NF (Ghana)*.

23. At para 23 IJ Goldfarb set out relevant parts of DP 3/96 and DP 5/96 but in the latter case without reference to the material subsequently discussed in *NF (Ghana)*. I refer to relevant parts of the evidence of AF and his wife which IJ Goldfarb recorded. Thus AF said that his wife had been very supportive of him

when in prison and regularly visited him and brought their son to see him. The son suffered from Attention Deficit Hyperactivity Disorder and his behaviour was particularly bad when AF was in prison: it had improved significantly since his return home. Deportation would have a profound effect on his relationship with his wife and son. He had nothing to offer them with regards to employment and accommodation in Jamaica. His wife would be separated from her own family in the UK, with whom she is very close. His son's relationships with his grandparents and other members of his extended family would result in breakdown. Reference to the further child born in October 2006 was also made. As for his eldest child, there was regular contact with her and he also spoke with her regularly on the phone.

24. AF's wife also gave evidence. Their relationship began a couple of months before they wed in August 1999. She knew that his status was as a student at college. She always assumed that AF might have to return to Jamaica as he was not British, but married him anyway. She would not have returned to Jamaica to live with him, and would not do so now. She had strong and close family ties in the United Kingdom, where she had lived all her life.

25. IJ Goldfarb's findings were as follows. She considered that AF was not in as much danger as the impression he had sought to give. There was no evidence that Porter had had Stephen Williamson and his son killed. Moreover, if Porter had wanted to have AF killed, he could have accomplished it. AF had not wanted to take up the police's offer to move home. The authorities in Jamaica would be able to give AF adequate protection by admitting him into their witness protection programme. Therefore AF's case under articles 2 and 3 was rejected.

26. IJ Goldfarb turned to consider article 8 at para 63 of her determination. She immediately concluded that AF had a family life in the UK with which his deportation would interfere in such a way as potentially to engage article 8. She concluded, however, that his removal was in accordance with law and necessary in a democratic society for the prevention of disorder or crime or for the protection of health or morals, and this despite the fact that she accepted that his risk of reoffending was low and that he had expressed remorse for his criminal activities. She said that "the interference if such it be is necessary" (at para 63).

27. It was at this point that she turned to consider the position of AF's family. I will set out the most material passages:

> "64. I also take into account in coming to this conclusion *Mahmood*, the principle I rely on is set out in paragraph 55 of that decision. Sub-paragraph 5

states that knowledge on the part [of] one person at the time of marriage that rights or residence of the other was precarious militates against the finding that an order excluding the latter spouse violates Article 8. Sub-paragraph 6 states that whether an interference with the family rights is justified in the interest of controlling immigration would depend on the facts of a particular case, the circumstances prevailing in the state whose action is impugned. Having regard to the facts of the particular case, the Appellant's wife is a British citizen, however there are no unsurmountable obstacles to her being able to accompany the Appellant to Jamaica. Her evidence is that she would not go with the Appellant to that country, but that is her personal choice, she has stated her reliance on family members around the area in which she lives and I note that she has also stated that she is starting studies in late 2007. However I do not consider that those reasons constitute insurmountable obstacles. I have also taken into account the fact of the Appellant's daughter born in February 2000 with whom the Appellant enjoys regular contact. That child has a mother with whom she lives. There is some consideration of the child going to live with the Appellant, this is possibly linked to any departure from the United Kingdom of that child's mother were she not to be given further leave to remain in this country. However, there is no evidence whatsoever before me concerning any proposed arrangements and in any event notwithstanding any close relationship that may have developed between the Appellant and the child and also between the child and the rest of the Appellant's family, I do not consider that the circumstances involving this child amounts to any reasons as to why any interference proposed by the removal of the Appellant should is not lawful *(sic)*.

65. In summary, with regard to the Appellant's claims that his rights under Articles 2 and 3 would be breached, I do not conclude that the appellant has demonstrated that there is a serious risk or a real risk that he would suffer a gross or flagrant breach of his rights under those Articles were he to be returned to Jamaica. With reference to article 8 I conclude that the interference is proportionate to the aims and objectives to be achieved in respect of immigration law.

66. I note the principle from *Huang* UKHL 11, paragraph 20 which considers the question as to whether it is unreasonable to expect the Appellant to be able to enjoy his private or family life if returned. I am invited, per paragraph 18 of *Huang* to take into account a number of factors personal to the Appellant. I have done so, with great care and come to my conclusion, below.

67. I am also invited to take into account DP 3/96, first of all it must be stated that in the reasons for deportation letter dated 8th December 2005, paragraphs 9 and 10 contradict themselves and paragraph 10 is in fact incorrect with reference to the marriage of the Appellant, on 11th August 1999 not pre-dating by two years of service of the letter of intention to deport. Nevertheless I accept the Respondent's representative's submissions that the Secretary of State has a duty to protect the wider interest. I also note the provision in paragraph 5(b) that it would be unreasonable to expect the settled spouse to accompany the spouse on removal. I take account of note (ii) which states that the onus rests on the settled spouse to make out a case and supporting

> evidence as to why it is unreasonable to live outside the United Kingdom. I have considered factors (a), (b) and (c) as set out above. I note that the Appellant's wife has stated that she has strong and close family ties in the United Kingdom. However not all children from a previous relationship are her own grown up family and I consider that those strong and close family ties can be maintained by visits as between the Appellant's wife and her family. His spouse has lived in the United Kingdom all her life and that is acknowledged; the spouse does not suffer from any ill-health from medical evidence which would show that her life would be significantly impaired if she were to accompany the appellant on removal. I also note paragraph 7 that the presence of children with right of abode is a fact to be taken into account, there is no evidence before me whatsoever to show why the Appellant's children could not adapt to life abroad. There is no issue of serious ill-health for which treatment is not available in the country to which the family is going."

28. IJ Goldfarb next turned to consider Rule 364, in the context of which she briefly mentioned "The Appellant and his wife have young children" (at para 69). She also also referred (at para 71(v)) to –

> "Domestic circumstances – these have been described above, there is nothing exceptional or compassionate in the Appellant's domestic circumstances. The Appellant has two young children, they will be able to travel to Jamaica with the Appellant were he to be deported. The third child Ashley, at present with [her] mother, whilst it has been submitted that the Appellant would be granted the equivalent of a "residence agreement" so that the child will live with the Appellant, there is no evidence before me to show that there has been either any discussion or agreement as to this proposed arrangement."

29. Submissions on this appeal have focused on the adequacy of IJ Goldfarb's consideration of the family life of AF's wife and children in paragraphs 64 and 67 of her determination.

Discussion and conclusion

30. Thus on behalf of AF, Ms Naik has submitted that these paragraphs are inadequate to do justice to the principles of article 8 as developed in *Beoku-Betts* and, by reference to DP 5/96, in *NF (Ghana)*. In this connection she observes that the immigration judge's test of "insurmountable obstacles" does not encompass *Huang's* and the Strasbourg jurisprudence's reliance on the more general test of

whether a family member can reasonably be expected to join the deportee. She also relies on the fact that not only AF's eldest daughter, but also his son by his wife, had turned seven by the time of the determination without adequate consideration being given to those facts and to the separate needs of those children.

31. On behalf of the Secretary of State, on the other hand, Mr Robert Kellar has submitted that the immigration judge took account of all that she was required to and that her overall balancing of the article 8 issue of proportionality cannot be faulted. Moreover, even if her analysis did lack something because she was deciding the appeal without the assistance of their Lordships' opinions in *Beoku-Betts*, nevertheless this was not one of those rare cases where that analysis would make any difference. In any event, any tribunal would be bound to consider that the justificatory interests bound up in AF's conviction for a serious drug crime outweighed other factors. As for DP 5/96, this was not of direct applicability because none of the children had been over 7 at the time of the Secretary of State's decisions.

32. In my judgment, the submissions of Ms Naik prevail when I consider the structure of IJ Goldfarb's determination, for all its obvious care and detail, it appears to me that the article 8 issue has been concluded on too narrow a basis to survive the later decisions in *Beoku-Betts* and *NF (Ghana)*. That of course is no fault of the immigration judge.

33. Thus although reference is made to AF's wife and children, the matter has been looked at through the eyes of AF alone, and not as though, as *Beoku-Betts* now teaches, his wife and children have to be considered as potential victims themselves. As for his wife, it is true that on the findings of the immigration judge there are no insurmountable obstacles to her being able to accompany AF to Jamaica, but that does not answer the question as to whether it is reasonable to expect her to do so. The "no insurmountable obstacles" test rather seeks to answer the separate question, raised for instance in *Boultif* (at para 48), as to the relevance of difficulties that she might encounter upon relocation in Jamaica. It does not conclude the subsequent (or higher category) question of whether it is reasonable to expect her to go to Jamaica, which must be an important consideration in the question of justification and the overall balance of proportionality.

34. The immigration judge stated at the beginning of paragraph 64 of her determination that she was relying on the principles set out in para 55 of the decision in this court in *R (Mahmood) v. Home Secretary* [2001] 1 WLR 840. That itself incorporates (inter alia) a reference to the "no insurmountable obstacles" test (at sub-para (3)). However, the immigration judge has used it as a more general

test than its expression in *Mahmood* justifies, as can be seen from the language in which it was there expressed, viz –

> "(3) Removal or exclusion of one family member from a state where other members of the family are lawfully resident will not necessarily infringe article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all the members of the family."

35. However, since *Mahmood* further decisions both in Strasbourg and in the House of Lords have instructed the court to ask itself whether it was reasonable to expect the wife and other members of the family to go with the deportee. It may be observed moreover that that expression is to be found in the language of DP 3/96 itself (at para 5(b) and again at para 7). The immigration judge did refer to this test (in the context of noting "the principle from *Huang*" at the beginning of her para 66), but she did so expressly in terms of the personal impact upon AF, not in terms of his family's rights. Thus she said:

> "I note the principle from *Huang* UKHL 11, paragraph 20 which considers the question whether it is unreasonable to expect the appellant to be able to enjoy his private or family life if returned."

36. Moreover, by this time she had already decided the article 8 issue of proportionality adversely to AF (at para 65).

37. In context, para 64 of the determination is not a focused consideration of the position of AF's family members, but rather a more general dealing with the check-list of matters set out in para 55 of *Mahmood*.

38. As it is, the only child mentioned in para 64 is AF's oldest child, his daughter, born in February 2000 to a mother with whom AF had had a relationship before marrying his wife. It is not clear why this is the only one of AF's three children there mentioned, but it is possibly because the two children of the marriage were simply considered as having no further role in the article 8 enquiry other than as accompanying their mother whether she chose to go to Jamaica or stay in the UK. However, especially given the fact that the elder of those two children had already turned 7 by the time of publication of the determination (although two days short of his seventh birthday on the day of the hearing), the immigration judge ought in my judgment to have taken account of the fact that he had grown up in this country where he was born and to have reached an age which DP 5/96 as amended

in 1999 indicated was a significant milestone for the purpose of article 8 considerations.

39. The immigration judge did not reach the significance of the Secretary of State's policies until her para 67, where she gave further consideration to the position of the wife for the purposes of DP 3/96. She noted the provision in paragraph 5(b) of that policy regarding the question whether it would be unreasonable to expect the settled spouse to accompany the deportee on removal, but merely commented that she had already considered that among other factors: which was not in fact the case. She went on to refer to para 7 of DP 3/96 regarding children with a right of abode as a "factor to be taken into account". It was only in this context that she expressly considered the two children of the marriage. She took account of the seven year old child (which in context may have been a reference to the daughter born in February 2000 and not to the son born in September 2000), referring to the amendment of 1999 inaccurately as DP 5/99, but merely commented that "there is no evidence before me whatsoever to show why the Appellant's children could not adapt to life abroad". However, on the evidence the children would remain in the United Kingdom with their mother(s). There is no real consideration of the interests of the children in losing their father (or alternatively being uprooted from the extended family and home in England to which at any rate the older child of the marriage had become accustomed). There was no consideration of the recognition given at the time of the 1999 amendment to DP 5/96 that once a child had reached seven it would need to be an exceptional case which would justify uprooting the child from its home.

40. In sum, what Sedley LJ had said in *AB (Jamaica) v. Secretary of State for the Home Department* [2008] HRLR 465 about a British husband whose Jamaican wife was to be returned to Jamaica as an overstayer, cited by Lord Brown in *Beoku-Betts* at para 35 ("It cannot be permissible to give less than detailed and anxious consideration to the situation of a British citizen who has lived here all his life before it is held reasonable and proportionate to expect him to emigrate to a foreign country in order to keep his marriage intact") would appear to apply in the present case to both wife and children.

41. Mr Kellar nevertheless submitted that in the light of AF's criminal conviction the immigration judge's determination, even if flawed, was inevitable, and would inevitably be repeated upon further reconsideration by the AIT. He referred to *Samaroo v. SSHD* [2001] EWCA Civ 1139, *N (Kenya) v. SSHD* [2004] EWCA Civ 1094 and *Baig v. SSHD* [2005] EWCA Civ 1246. In *Samaroo* and *N (Kenya)* the critical matter was the appellant's criminality (although there that was still more serious than it is here), and in *Baig* the deportee's immigration history was very poor. This court upheld the AIT's determinations in each of those cases that such considerations outweighed any interference with family life. I would accept that AF's criminality may well at the end of the day prove to be the decisive

factor. Nevertheless, I would not hold that the result is inevitable. AF's wife and children are not responsible for AF's criminal conduct, and they are entitled to have their own rights to family life properly considered and entered into the balance.

42. Since the hearing of this appeal and my writing this judgment in draft, the decision of this court in *VW (Uganda) v. Secretary of State for the Home Department; AB (Somalia) v. Secretary of State for the Home Department* [2009] EWCA Civ 5 (16 January 2009) has come to my attention. That in turn has led me to *EB (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41, [2008] 3 WLR 178 at para 12, and to *LM (DRC) v. Secretary of State for the Home Department* [2008] EWCA Civ 325 (17 March 2008) at paras 10/14, to which we might have been but were not referred. Albeit those cases all arose in the context of removals rather than deportations and did not raise the issue of proportionality against the background of the commission of a serious criminal offence, they each in their own way dethrone the significance of the test of "insurmountable obstacles" or emphasise the importance of the test of whether it is reasonable to expect a spouse or child to depart with the family member being removed. The ultimate test remains that of proportionality. Since those cases lend support to the reasoning and decision to which I had already come, I did not feel it necessary to draw them to counsel's attention for further submissions on their part.

43. I would therefore allow the appeal and remit the case to the AIT for reconsideration.

Lord Justice Toulson

44. I agree.

Lord Justice Rimer

45. I also agree.