ILPA SUBMISSION TO THE MINISTRY OF JUSTICE CONSULTATION ON LEGAL AID

ANNEXE TWO

COMPENDIUM OF HIGHER COURT ARTICLE 8 CASES BETWEEN JANUARY 2006 AND DECEMBER 2010

INTRODUCTION TO THE COMPENDIUM OF ARTICLE 8 CASES IN THE HIGHER COURTS BETWEEN 2006 AND 2010

for the ILPA Response to the Ministry of Justice Consultation on Legal Aid

Introduction

1. The aim of this compendium of the jurisprudence of the higher courts (Court of Appeal, House of Lords and Supreme Court) in relation to Article 8 of the ECHR is to highlight the real and inevitable difficulties that will face the tribunals, the Court of Appeal and Supreme Court as well as litigants in person, if the entire area of immigration law, including Article 8 cases, will in future be excluded from the scope of public funding. The compendium provides brief summaries all significant higher courts cases during a five-year period between January 2006 and December 2010.

2. In the light of the criteria set out in the Ministry of Justice Consultation Paper "Proposals for the Reform of Legal Aid in England and Wales" (CP12/10) at paragraph 4.12, cases involving Article 8 of the ECHR commonly entail a level of complexity and often vulnerability on the part of the applicant or others affected by the proceedings which ought to justify the continuation of legal aid for these cases. These proceedings involve questions about the most fundamental aspect of the applicant's private and family life, either at the point at the removal or deportation or the refusal of entry to the applicant to join one or more family members. The issues are of such importance that a privately paying client with sufficient means would pay for the proceedings.

Complexity of Article 8 law

3. It is self-evident from the volume of cases in the attached compendium (selecting only higher court cases), that Article 8 cases very often involve complex legal issues. As regards the substantive interpretation of Article 8, the jurisprudence since 2006 has seen several instances of

the senior judiciary disagreeing on the correct interpretation of the United Kingdom's international obligations under Article 8 of the ECHR.[1]

4. Of particular significance is the developing interpretation of Article 8 during 2007 and 2008 when the House of Lords was called upon repeatedly to clarify fundamental principles of Article 8. The case of **Huang v. Secretary of State for the Home Department**[2] (hereinafter 'SSHD') in which the House of Lords ended continuing controversy over the applicable approach under Article 8, represented a paradigm shift from what was an unduly restrictive interpretation of the standard of review under Article 8.[3] Despite authoritative guidance from the House of Lords in **Huang v SSHD** it required the Court of Appeal's refusal to accede to a request from the Secretary of State for settlement in **AG (Eritrea) v SSHD**[4] so that the Court could give guidance in no unclear terms to the tribunal, which then still commonly applied the wrong approach to Article 8.

5. The House of Lords decision in **Huang** precipitated a series of further fundamental developments in the interpretation of Article 8. While the Court of Appeal had already made it clear that the rights of the family members of an applicant had to be taken into account when assessing the proportionality of the deportation of the applicant[5] it nevertheless required litigation up to the House of Lords in the subsequent case of **Beoku-Betts v SSHD**[6] to lay this down authoritatively.

6. A further significant development was the House of Lords decision in the case of **Chikwamba v SSHD**[7] which decided that the SSHD's practice of requiring an unlawfully present spouse to return to the home country in order to apply for entry clearance constitutes in most instances at least where children are affected a breach of Article 8. Finally also in 2008 the House of Lords overruled previous Court of Appeal case law[8] on the effect of the then prevalent excessive delays on the part of the Home Office in processing applications. In the case of **EB (Kosovo) v SSHD**[9] the House of Lords laid down a three-fold test regarding the relevance of Home Office delay to Article 8.

7. The complex nature of Article 8 decision-making is not only illustrated by these fundamental decisions of the House of Lords, but also by the subsequent need for Court of Appeal jurisprudence clarifying the precise import of the House of Lords decisions for tribunal decision-making.[10] Significant developments have also taken place in relation to specific aspects of Article

[1] See eg **ZN (Afghanistan) (FC) and Others (Appellants) v. Entry Clearance Officer (Karachi) (Respondent) and one other action** [2010] UKSC 21, where the Court of Appeal had reached the opposite view of the Supreme Court regarding whether refugees lose their status as such upon becoming British citizen; see also **Ahmed Mahad (Ethiopia) and others v. Entry Clearance Officer** [2009] UKSC 16, where the Supreme Court overruled the longstanding practice of the courts to prohibit third party support in various immigration cases.

[2] **Huang and Kashmiri v SSHD** [2007] UKHL 11

[3] See eg. **Mukarkar v SSHD** [2006] EWCA Civ 1045; **B v SSHD**, [2006] EWCA Civ 954; **MA (Afghanistan) v SSHD** [2006] EWCA Civ 1440.

[4] **AG (Eritrea) v SSHD** [2007] EWCA Civ 801

[5] **AB (Jamaica) v SSHD** [2007] EWCA Civ 1302

[6] **Beoku-Betts v SSHD** [2008] UKHL 39

[7] **Chikwamba (FC) v SSHD** [2008] UKHL 40

[8] See eg. **OK (Afghanistan) v SSHD** [2006] EWCA Civ 1500

[9] **EB (Kosovo) (FC) v SSHD** [2008] UKHL 41

[10] See eg **VW (Uganda) and AB (Somalia) v SSHD** [2009] EWCA Civ 5, where the Court of Appeal spelt out the precise stages the tribunal would have to go through in deciding on proportionality in family life cases. See also **AG (Eritrea) v SSHD** [2007] EWCA Civ 801 as well as **HM (Iraq) v. SSHD** [2010] EWCA Civ 1322, where the Court of Appeal, once in the context of family life and then in the context of private life, stressed the need for structured decision-making on proportionality under Article 8.

8, such as the case law on health and the right to moral and physical integrity[11], on the scope of family life.[12]

Complexity – procedure

8. In the period between 2006 and 2010 the cases refer to three separate structures of the now Immigration and Asylum Chamber (from two-tier, to single-tier and back to two-tier structure). The change to a one-tier structure led to uncertainty over the scope of reconsideration hearings, and the proper procedure to be adopted upon reconsideration, and required guidance from the Court of Appeal.[13] A litigant-in-person would not be able to navigate the procedure correctly.

9. Sometimes complex procedural issues arise in relation to deciding whether the appeal route or the judicial review route is appropriate in a particular case.[14] Complexity also arises in relation to the scope of the tribunal's jurisdiction in Article 8 cases and the tribunal misinterpreted its own statutory powers before the House of Lords decision in **Huang v SSHD**.[15]

Complexity – Home Office policy

10. Article 8 cases often arise in the context of Home Office policy that is pertinent and potentially favourable to a particular applicant. The precise impact of a policy on a particular case is often complex, but the Court of Appeal has ruled that the existence of a policy under which an applicant would qualify will be an important consideration under Article 8.[16] Appeals often arise out of the failure by the SSHD to follow her own policy and it is not uncommon for the SSHD not to refer the first-tier tribunal to relevant policy and provide the tribunal with a copy of the policy.[17]

11. Litigants in person are in no position to have awareness of Home Office policies which are often not widely publicised[18] and difficult to locate, and it requires legal expertise to know of past policies which are usually no longer publicly available but may have historic significance in a case. Nor are litigants in person able to understand the precise legal significance of policy and complex questions arise, such as whether a policy exists independently of the Immigration Rules or not,[19] or identification of the policy's real rationale and thereafter ascertaining whether the rationale in itself is disproportionate and therefore unlawful.[20]

12. The Court of Appeal has also only recently ruled on the constitutional significance or status of policy (as being made under Immigration Rules which are not in themselves the subject of

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[11] See eg the earlier very restrictive decisions on HIV positive applicants in **Shereni v SSHD** [2006] EWCA Civ 198; **C v SSHD** [2006] EWCA Civ 151; **A v SSHD** [2006] EWCA Civ 482 – and the subsequent shift in cases such as **AE (Ivory Coast) v SSHD** [2008] EWCA Civ 1509; **JA (Ivory Coast) and ES (Tanzania) v SSHD** [2009] EWCA Civ 562; **DM (Zambia) v Secretary of State for the Home Department** [2009] EWCA Civ 474; **RS (Zimbabwe) v Secretary of State for the Home Department** [2008] EWCA Civ 839.

[12] See eg **HK (Turkey) v. SSHD** [2010] EWCA Civ 583 clarifying that family life of a minor who lives at home does not suddenly end with the minor's 18th birthday; **ZB (Pakistan) v Secretary of State for the Home Department** [2009] EWCA Civ 834 ruling that family life can exist between adult children and their elderly and frail parents who depend on the child's support and care.

[13] **DK (Serbia) v SSHD** [2006] EWCA Civ 1747.

[14] **Quila and others v SSHD** [2010] EWCA Civ 1482

[15] **Huang and Kashmiri v SSHD** [2007] UKHL 11

[16] **NF (Ghana) v SSHD** [2008] EWCA Civ 906

[17] **LL (China) v SSHD** [2009] EWCA Civ 155; **AB (Jamaica) v SSHD** [2007] EWCA Civ 1302; **AF (Jamaica) v SSHD** [2009] EWCA Civ 240; **R. (on the application of Tozlukaya) v SSHD** [2006] EWCA Civ 379; **AL (Serbia) v SSHD** [2006] EWCA Civ 1619.

[18] An unpublished policy was involved in **MS (Ivory Coast) v SSHD** [2007] EWCA Civ 133

[19] **MK (Somalia) v SSHD** [2008] EWCA Civ 1453

[20] **Chikwamba (FC) v SSHD** [2008] UKHL 40

Parliamentary approval).[21] The purpose of policy impacting on Article 8 rights has also been subject to intense examination. For example, policy introduced under Statute, such as the "Certificate of Approval for Marriage" scheme that limited the rights of those subject to immigration control to enter into a civil marriage (other than in the Church of England) was not rationally aimed at its purported intention of preventing sham marriages.[22]

Complexity – Overlap with international law and other domestic law

13. Cases concerning Article 8, by definition and its place in the European Convention on Human Rights, as given effect to under s.6 Human Rights Act 1998 involve the interface of domestic and international law, namely the European Convention on Human Rights. Strasbourg jurisprudence is directly taken into account in reaching conclusions on the proper approach and applicable tests in Article 8 cases.[23]

14. Complexity also arises where the interplay of one or more Convention rights in the same case are involved, or when other Convention rights have a bearing on the assessment of Article 8, or have a "combined effect" (e.g. right to marry Article 12 and right to family life Article 8[24] or freedom from discrimination Article 14 and right to family life Article 8[25]).

15. A further issue frequently arises in relation to the interface of EU free movement law and Article 8. EU law and ECHR law are increasingly overlapping given the shift within the EU towards a rights based (rather than historically economic) approach. This has generated a range of Directives (e.g. the Citizens Directive) and culminated in the EU Charter for Fundamental Rights which may now be litigated in domestic Courts. The EU is set to accede to the ECHR now that Protocol 14 to the ECHR has been adopted.

16. Issues arise for instance in the context of the Citizens Directive 2004/38/EC regarding the rights of third country national spouses of Union citizens exercising Treaty rights and whether there is a requirement of prior lawful residence[26], or in the context of proportionality, in particular whether rights or considerations under the Citizens Directive should be a relevant factor.[27] An unrepresented litigant will not be able to understand the interface of different areas of law, identify the relevant evidence required under the parallel EU regime, or comprehend and refer to relevant case law from the ECJ/CJEU that the tribunal may not be aware of.

17. Article 8 cases often involve complex analysis of other international instruments including the UNCRC or the Universal Declaration of Human Rights[28] or other areas of domestic law, including family law, criminal law or nationality law[29]. Without the representative's awareness of these areas the points would not have been identified and argued, with the likely consequence that the applicant would have lost his case and have been removed in fact in breach of Article 8.

Appeals by the SSHD

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[21] **SSHD v. Pankina** [2010] EWCA Civ 719

[22] **Baiai & Others v SSHD** [2008] UKHL 53, at [46].

[23] Section 2 of the Human Rights Act 1998; see eg. **JO (Uganda) JT (Ivory Coast) v SSHD** [2010] EWCA Civ 10; **KB (Trinidad and Tobago) v. SSHD** [2010] EWCA Civ 11.

[24] **Quila and others v. SSHD** [2010] EWCA Civ 1482

[25] **EM (Lebanon) v SSHD** [2008] UKHL 64; **AL (Serbia) v SSHD** [2006] EWCA Civ 1619

[26] **Metock v Ireland** European Court of Justice 25 July 2008 Case C 127/08

[27] **Valentin Batista v. SSHD** [2010] EWCA Civ 896

[28] **AR (Pakistan) v SSHD** [2010] EWCA Civ 816; **ZH (Tanzania) v SSHD** [2011] UKSC 4 is a prime example of the significance of international law for Article 8 and is referred to as such here, although it falls outside the temporal scope of this paper.

[29] **Patel, Modha & Odera v. ECO (Mumbai)** [2010] EWCA Civ 17; **MS (Ivory Coast) v SSHD** [2007] EWCA Civ 133

18. Appeals by the SSHD highlight the importance of the issue and cases of complexity. Procedural unfairness and inequality of arms are the inevitable results of the SSHD appealing against a lawful decision in favour of unrepresented litigants who are unable to effectively represent themselves. Appeals by the SSHD may themselves involve a complex procedural route to the Court of Appeal which litigants are forced to defend, in addition to the substantive grounds.[30]

19. The consequence of litigants being unable to defend appeals is plain. One consequence is their forced return, despite the fact a lawful decision in their favour was made.[31] The SSHD may be putting forward an incorrect proposition of law in favour of an appeal that a litigant in person may be unable to defend before the higher courts.[32] The UK's liability for a breach of Article 8 ECHR is a further consequence. Article 13 of the ECHR, the right to a practical and effective remedy, may also be brought into play in this context.

20. This is important given the original design of the HRA 1998, namely to "bring rights home" but the effect will be that litigants will be forced again to take the long road to Strasbourg – requiring use of time and resources of government agents in the Foreign & Commonwealth Office and leaving crucial decision-making to "foreign judges".

Vulnerability

21. Vulnerability is intrinsic in Article 8 cases given that it protects aspects of private sphere, including private and family life and the right to physical and moral integrity and the right to personal development._In this context vulnerability arises often by reason of age (children or the elderly or aging and unwell parents who require daily care and support from their adult children),[33] mental illness, disability, physical or mental or auditory impairments or cases concerning psychological or mental health conditions or trauma.[34]

22. Vulnerability is important when considering the impact of decision-making on the vulnerable, including minors,[35] and de facto adopted children considering the rights of the child where there is constructive removal or deportation[36] and the courts have welcomed separate representation of minors in cases involving the removal of one of the parents[37]. Vulnerability is a clear feature of cases involving "compassionate or compelling circumstances" under the Immigration Rules which inform an Article 8 assessment.[38]

Ability of the litigant to represent themselves effectively

23. The senior judiciary have repeatedly expressly identified that the issues in Article 8 cases are of real constitutional importance or real difficulty.[39] Complexity of law and procedure have resulted in disagreements between the senior judiciary on the interpretation of scope/proportionality under Article 8 and the applicable tests, matters of statutory interpretation, interpretation of the

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[30] **ZB (Pakistan) v Secretary of State for the Home Department** [2009] EWCA Civ 834 (30 July 2009) Rix, Wall and Aikens LJJ

[31] **MT (Zimbabwe) v Secretary of State for the Home Department** [2007] EWCA Civ 455

[32] See eg **Huang and Kashmiri v SSHD** [2007] UKHL 11, where it was the SSHD's appeal in Huang.

[33] **ZB (Pakistan) v SSHD** [2009] EWCA Civ 834

[34] **GN (Serbia) v SSHD** [2006] EWCA Civ 1886, 7

[35] **CL (Vietnam) v SSHD** [2008] EWCA Civ 1551; **BL (Serbia) v SSHD**, [2008] EWCA Civ 855; **QJ (Algeria) v. SSHD** [2010] EWCA Civ 1478

[36] **MK (Somalia) v SSHD** Court of Appeal Civil Division 19 December 2008 [2008] EWCA Civ 1453.

[37] **EM (Lebanon) v SSHD** [2008] UKHL 64

[38] **MK (Somalia) v SSHD** Court of Appeal Civil Division 19 December 2008 [2008] EWCA Civ 1453

[39] **The Secretary of State for the Home Department v. Pankina** [2010] EWCA Civ 719, Sedley LJ

immigration rules or policy.[40] Litigants in person would be completely unable to even raise such matters as grounds let alone provide argument on complex matters.

24. As such, litigants would be at a distinct disadvantage *vis-a-vis* their opponent represented by Treasury Counsel (question equality of arms). Litigants would be completely unable to pursue a practical and effective remedy (under Article 13 ECHR).

25. Litigants in person would be unable to effectively represent themselves by reason of case management, navigating (let alone understanding) the procedural rules (civil procedure and the Tribunal Rules of Procedure and related Practice Directions), complex procedural history,[41] discharge the burden of proof by placing sufficient and up to date evidence before the Tribunal;[42] or cases concerning the legal and practical effect of a decision by the SSHD shifting the litigant into other jurisdictions (e.g. the criminal or family courts).[43]

26. Identifying recourse to further redress,[44] or matters of misinterpretation by the Tribunal of the powers available (or not) to it when their case is being heard further demonstrate the inability of litigants to effectively represent themselves.[45]

27. The necessity of legal representation has been expressly recorded in the reported judgments of the higher Courts. For example, the Courts have also expressly invited Counsel's assistance on effective resolution and disposal of the case at hand.[46] As seen above, landmark decisions on Article 8 ECHR clearly require a comprehensive understanding of the procedural regime of statutory appeal rights as well as international law. The Courts have even referred in such cases to the *"enticing submissions"* and *"excellent submissions"* of Counsel and stressed that they only reached their conclusion on the basis of the assistance received from Counsel.[47] Counsel have also been invited, on both sides, to undertake further research into relevant Article 8 case law on the existence of family life between adult children and their elderly parents, and both Counsel did so.[48]

28. The tribunals will also be faced with real difficulties in properly deciding Article 8 cases where a litigant is unrepresented due to the lack of relevant evidence. Litigants in person are unaware of the evidential requirements of different types of Article 8 cases and specific types of evidence have often played a crucial if not decisive role in Article 8 cases. For instance social worker reports have assisted the tribunal in assessing the impact on the rights of family members,[49] and medical reports are crucial when assessing the impact of relocation to another country on applicants or their family members who suffer from medical issues.[50]

Conclusion

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[40] **Ahmed Mahad (previously referred to as AM) (Ethiopia) and others v. Entry Clearance Officer** [2009] UKSC 16
[41] **AP v. SSHD** [2010] UKSC 24
[42] **S v SSHD** [2006] EWCA Civ 695
[43] **JM v SSHD** [2006] EWCA Civ 1402
[44] **DK (Serbia) v SSHD** [2006] EWCA Civ 1747; **QJ (Algeria) v. SSHD** [2010] EWCA Civ 1478; **BA (Nigeria) and PE (Cameroon) v SSHD** [2009] UKSC 7; **AS (Somalia) v SSHD** [2009] UKHL 32
[45] **Huang and Kashmiri v SSHD** [2007] UKHL 11
[46] **Quila and others v. SSHD** [2010] EWCA Civ
[47] **BA (Nigeria) and PE (Cameroon) v SSHD** [2009] UKSC 7; see also **DS (Afghanistan) v SSHD** [2006] EWCA Civ 1767
[48] **ZB (Pakistan) v SSHD** [2009] EWCA Civ 834
[49] See eg. **VW (Uganda) and AB (Somalia) v SSHD** [2009] EWCA Civ 5 where the Court placed great reliance on the findings of the social worker.
[50] See eg. **AR (Pakistan) v. SSHD** [2010] EWCA Civ 816; **AJ (Liberia) v SSHD** [2006] EWCA Civ 1736; **AE (Ivory Coast) v SSHD** [2008] EWCA Civ 1509

29. The complexity and nature and types of these cases, frequently involving vulnerable individuals and applicants with real language barriers, demonstrate that excluding Article 8 from the scope of public funding will put considerable pressure on the tribunals. These will be faced with applicants who are unable to represent themselves effectively, impacting on the quality of judicial decision-making, and foreseeably giving rise to breaches of the United Kingdom's international legal obligations.

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COMPENDIUM OF HIGHER COURT ARTICLE 8 CASES

BETWEEN JANUARY 2006 AND DECEMBER 2010

Abbreviations:

ECHR: European Convention on Human Rights 1950

SSHD: Secretary of State for the Home Department

IAT: Immigration Appeals Tribunal

AIT: Asylum and Immigration Tribunal

ENGAGEMENT OF ARTICLE 8 (1)

Scope of Article 8 (1) (e.g. cases deciding what falls within physical and moral integrity; private life etc.)

1. **R v Secretary of State for the Home Department** Court of Appeal (Civil Division) 2 May 2006 [2006] EWCA Civ 719. Before: Lord Justice Rix and Lord Justice Richards.

   Facts: This was a permission application by a stateless Palestinian against a decision of the AIT. He had come to the UK in 2001 as an asylum seeker. He was refused asylum but no removal directions were made. The applicant appealed to an adjudicator who refused his appeal. He successfully appealed before the IAT which ordered a fresh hearing. This was caught by transitional arrangements following the new statutory scheme so fell to be heard as a reconsideration hearing by the AIT. He lost the fresh hearing and sought permission to appeal only on article 8 grounds. He had by this time met and married a British citizen who did not feel able to move with him to the Middle East.

   Issues: The AIT had refused the appeal on Article 8 (and Articles 2 and 3) on the grounds that the refusal to grant leave to enter, and the notice of an intention to remove the applicant, would not realistically result in the applicant being removed, because removals of Palestinians to the West Bank was not possible, following AB (Risk — Return — Israeli Checkpoints) Palestine CG [2005] UKIAT 00046. Therefore the decision would not lead to the feared disruption of family life and did not engage Article 8(1).

   Result: It was arguable that the decision did engage Article 8(1) and that it was disproportionate. The first, because the new one-stop appeals system envisaged all aspects of an immigration case being considered together at one hearing, rather than dealing with some aspects on the refusal of leave to enter and others on the consequent issuing of removal directions. The alternative in cases such as these where removal cannot be effected in the foreseeable future would otherwise be to leave the applicant in 'immigration limbo' with no access to employment and other civil rights but no ability to leave the country. The then recent decision of the European Court of Human Rights in *Affaire Aristimuno Mendizabal v. France* suggested that that itself could amount to a breach of Article 8.

Finally, the decision, while not setting removal directions, described itself as a decision to remove and the fact that removal is in fact impossible should not render that otherwise unlawful decision lawful. On proportionality, it was arguable that removal would be disproportionate because there would be no way of this applicant making an application from the West Bank to return to the UK under normal immigration channels as the spouse of a UK citizen.

2. **MS (Ivory Coast) v Secretary of State for the Home Department** [2007] EWCA Civ 133 (22 February 2007) Lord Chief Justice; Baker; Thomas LJJ.

   Facts: The Appellant was refused leave to remain. She appealed to an adjudicator, who allowed her appeal on Art.8 grounds on the grounds that the Appellant had been given an undertaking not to remove her until contact proceedings were settled. The SSHD appealed to the AIT, asserting that he had undertaken not to remove the Appellant pending the outcome of contact proceedings that she was pursuing. The AIT dismissed the appeal on the basis of the undertaking, holding that it could not see such "truly exceptional" circumstances in the Appellant's private or family life as would make her eventual removal disproportionate to the legitimate purpose of immigration control.

   Issues: The Appellant argued that the AIT has failed to consider her Article 8 rights as at the date of hearing and that an undertaking given by the SSHD did not replace Article 8 protection.

   Decision: The Court of Appeal held that the AIT should have decided whether the Appellant's removal on the facts as they were when it heard the appeal would have violated Art.8 and thus put the SSHD in breach of the HRA s.6 if he removed her applied. That question had been capable of resolution one way or the other. It had not been open to the AIT to rely on the SSHD's undertaking, which had the effect of leaving the Appellant in limbo and enjoying the status only of temporary admission. Nor was it appropriate for the AIT to speculate on whether there might be a violation of Art.8 at some point in the future. Had the AIT decided the Art.8 point in the Appellant's favour, she should have been granted discretionary leave to remain.

   Result: Appeal allowed

   Importance and Complexity: This case would have been exceptionally difficult for an unrepresented Appellant, not least as it involved an unpublished (and seemingly well guarded) policy of allowing persons involved in contact proceedings to remain in the UK until those proceedings are completed. From a legal point of view the arguments were complex, involving not only the applicability of policy to Article 8 claims but also the effect of allowing a person to remain in the United Kingdom but without proper leave (in limbo). Perhaps most importantly (and of the most complexity) was the Court's finding that the AIT erred in law by not making the Article 8 decision as at the date of the hearing. Before the Court of Appeal the SSHD vigorously argued the opposite of the Court's finding on this issue.

3. **MT (Zimbabwe) v Secretary of State for the Home Department** [2007] EWCA Civ 455 (25 April 2007) Waller; Buxton; Lloyd LJJ

   Facts: The appellant appealed against a decision of the Asylum and Immigration Tribunal overturning a determination of an adjudicator allowing her appeal under Article 8. The Appellant was a Zimbabwean national and had lived with her cousin and his family since the death of her mother. Her cousin was an activist against the ruling regime and fled to the United Kingdom where he obtained refugee status. The Appellant joined her cousin in the UK to claim asylum and indefinite

leave to remain as a dependent relative under Art.8 of the Convention. The adjudicator rejected her asylum claim but found that she fell within Art.8 on the grounds that she was more than normally emotionally dependent on her cousin and his family and that to return her to Zimbabwe would be a disproportionate interference in her family life. On the Secretary of State's appeal, the AIT held that the adjudicator had not given adequate reasons for holding that M's relationship with her cousin was sufficiently close to engage article 8(1) and that even if it had been engaged; any interference in the Appellant's family life was not disproportionate under article 8(2).

Issues and Findings: The Court of appeal held that the AIT had erred in overturning the adjudicator's decision. While another adjudicator might have taken a different view of the Appellant's circumstances, it was plain that the adjudicator's conclusion that Art.8 (1) was engaged was not unfounded and that she was entitled to make that finding. On the whole, the adjudicator gave adequate reasons for her conclusion, citing the Appellant's longstanding ties wither cousin and his family and the cultural norms of Zimbabwean society. On the issue of proportionality, it was clear that the adjudicator recognised that in normal circumstances, interference with family life would be justified by the requirements of immigration control. However she found that on balance, in the instant case, it was not justified. Her decision was arguably generous to the Appellant but the fact that she reached a conclusion that might seem unusually generous to another tribunal did not mean that she had made an error of law.

Result: Appeal allowed in the Appellant's favour.

Importance and complexity: This case involved a person who had been found by an adjudicator to have been entitled to remain in the United Kingdom with her family but that right had been overturned by the Tribunal on application from the SSHD. It was, and still is, par for the course that the SSHD will deny that article 8(1) is engaged where the family life is with a person other than spouse or under-age children / parents. The Court of Appeal found that the decision that the Appellant was entitled to remain in the United Kingdom was a legally sound one and it was the AIT on reconsideration that fell into error. If this Appellant had no access to public funds then it is likely she would have been required to leave the United Kingdom despite a lawful finding that that would be a disproportionate breach of her article 8 rights.

4. **Metock v Ireland** European Court of Justice 25 July 2008 Case C 127/08. Before: the Grand Chamber composed of composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts, Presidents of Chambers, A. Tizzano, U. Lõhmus, J.N. Cunha Rodrigues, M. Ilešic (Rapporteur), J. Malenovský, J. Klucka, C. Toader and J.-J. Kasel, Judges.

   Facts: This case joined the appeals of appellants in similar situations to Mr Metock. Mr Metock arrived from Cameroon in Ireland, where his application for asylum was refused. His wife is a UK national originally from Cameroon and exercising free movement rights in Ireland since 2006. They married in 2006 and have two children. Mr Metock's application for a residence card was refused on the ground he had not previously been lawfully resident.

   Issues: Whether Irish legislation imposing condition of prior lawful residence is compatible with Community law.

   Result: Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ("the Citizens Directive") precludes Member States from requiring that third country national spouses of Union citizens exercising Treaty rights to have previously been lawfully resident in another Member State before arriving in the host

Member State. Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.

5. **Baiai & Others v Secretary of State for the Home Department** House of Lords 29 July 2008 [2008] UKHL 53. Before: Lord Bingham, Lord Rodger, Baroness Hale, Lord Brown, Lord Neuberger.

   Facts: Appellants, Algerian national who entered UK illegally and his Polish girlfriend exercising free movement rights. Met in UK and wished to marry. Certificate of Approval for Marriage refused but granted after Judicial Review of that decision.

   Issues: Is the SSHD's "Certificate of Approval for Marriage" scheme compatible with article 12 ECHR (right to marry and found family)?

   Result: The "Certificate of Approval for Marriage" scheme introduced by SSHD (pursuant to s 19 of the Asylum and Immigration (Treatment of Claimants) Act 2004) that limited the rights of those subject to immigration control to enter into a civil marriage infringed the ECHR article 12 and was therefore unlawful. Scheme is not rationally aimed at its purported intention of preventing sham marriages (at [46]).

6. **R (Murungaru) v. SSHD** Court of Appeal Civil Division 12 September 2008 [2008] EWCA Civ 1015. Before: Lord Justice Sedley, Lord Justice Jacob, Lord Justice Lewison.

   Facts: Dr Murungaru was formerly a Kenyan government minister. His multiple-entry visa for the United Kingdom was revoked without notice and without giving reasons in July 2005, about 3 months after it had been granted. The public interest immunity (PII) certificate issued by the Home Secretary in relation to the material ("the closed material") which had satisfied him that it was contrary to the public interest to allow the claimant to re-enter the United Kingdom was at no stage challenged.

   Issues: whether a contractual arrangement such as that relied on by the claimant is capable of ranking as a "possession" within Art.1 of the First Protocol (A1P1) to the European Convention on Human Rights, requiring justification in the public interest.

   Result: A challenge to immigration controls cannot be disguised as an assertion of property rights. Where an individual wants to contest the revocation of his visa by challenging the reasons for it but is barred from doing so by a PII certificate nothing is added by invoking a freestanding Convention right to get around the prohibition on using Article 6 to challenge immigration controls. The fact that possessions can include contracts does not mean that all contracts are possessions and a contract for medical services did not enliven the right to property.

7. **RO (India) v Entry Clearance Officer** Court of Appeal Civil Division [2008] EWCA Civ 1525, 29 October 2008 Before: Lord Justice Laws, Lord Justice Sedley, Lord Justice Collins.

   Facts: Appellants sought to join their mother in UK but were refused under Immigration Rules as over 18 years old and could not show exceptional compassionate circumstances. Appellants had also not shown they were wholly or mainly dependent on their mother.

Issues: Whether the immigration judge made an error of law in allowing the appeal.

Result: No error of law as the judge had found that relationships of emotional dependency exceeding the natural bonds of affection that exist between parent and child. Consideration of the decision in NH (Female BOC's, exceptionality, Article 8 Paragraph 317) British Overseas Citizens [2006] UKIAT 00085 had not infected that decision with any error of law.

8. **MK (Somalia) v SSHD** Court of Appeal Civil Division 19 December 2008 [2008] EWCA Civ 1453. Before: Lord Justice Waller, Lord Justice Thomas, Lord Justice Maurice Kay.

   Facts: Appellants were children who had been informally adopted into their aunt's family prior to her flight from Somalia to UK.

   Issues: The children could not satisfy paragraph 297, the general provision for children seeking reunion with a relative, because they could not be maintained and accommodated by the Sponsor without recourse to public funds. They did not qualify under the Refugee Family Reunion provisions of the Immigration Rules because their status in the family amounts to no more than de facto adoption. Case addressed whether there still exists outside the Immigration Rules and outside of Article 8 consideration a free-standing policy that benefits de facto adopted children falling outside paragraph 309A of the Immigration Rules.

   Result: There is no policy independent of the rules because the former policy has been subsumed into the rules in the passage dealing with "other dependant relatives" and "compelling compassionate circumstances" which is expressed in terms that make clear that it relates to a category of leave outside the Rules. The passage requires an entry clearance officer to carry out a screening test which, if satisfied, results in his referring the case to the Home Office for a definitive decision on "compelling, compassionate circumstances". Case remitted to AIT for Article 8 consideration.

9. **ZB (Pakistan) v Secretary of State for the Home Department** [2009] EWCA Civ 834 (30 July 2009) Rix, Wall and Aikens LJJ

   Facts: 58-year old Pakistani mother applied under Article 8 for leave to remain with her daughter who was looking after her. Her husband, all her children and her 19 grandchildren all lived in the UK.

   Issues: was there family life between 58-year old diabetic mother who required daily care and her daughter with whom she cohabited? If so, was removal disproportionate?

   Result: More than normal emotional ties and thus family life exist where "*it is indisputable that the appellant is an insulin dependent diabetic who needs to be cared for and who is either wholly or largely financially dependent on her family in the UK*" and the matter of proportionality fell to be determined in the light of the ill-health of the appellant's husband and his likely difficulty in visiting her. Appeal allowed and remitted to tribunal for reconsideration.

   Complexity: the Court invited both parties after the hearing to undertake further research into relevant Article 8 case law on the existence of family life between adult children and their elderly parents, and both Counsel did so (see [37]).

10. **HK (Turkey) v. Secretary of State for the Home Department** [2010] EWCA Civ 583, Date: 27/05/2010, Before Sedley LJ, Rimer LJ, Baker LJ.

Facts: In 1994 HK arrived with his family in the UK from Turkey aged 6. Their asylum applications were dismissed but were granted exceptional leave to remain converted into indefinite leave to remain on 14 December 2005. HK was convicted of unlawful wounding and a deportation order made with removal directions. HK appealed successfully on Article 8 grounds. The SSHD sought reconsideration. After an initial refusal, reconsideration was ordered by Sales J. SIJ Nichols found on that the Tribunal had erred in law because the Article 8 analysis was flawed. She directed it to be re-heard. On 21 August 2009 it was re-heard by Immigration Judge Blackford, Immigration Judge Neuberger and Mr Jones JP. That is the decision now under appeal.

Issues: (1) whether HK had family and/or private life with his adult siblings; (2) should the circumstances surrounding an offence be considered when balancing Article 8 ECHR against the presumption in paragraph 364 of the Immigration Rules that deportation is in the public interest (and in these circumstances whether the Tribunal is entitled to superimpose its own view on the gravity of an offence (because it is a matter for the SSHD).

Result: Appeal by SSHD dismissed.

(1) Scope [16] Normal emotional ties will exist between an adult child and his parent or other members of his family regardless of proximity and where they live. Scrutinising the relevant facts, as one is obliged to do, it is apparent that the respondent had lived in the same house as his parents since 1994. He reached his majority in September 2005 but continued to live at home. Undoubtedly he had family life while he was growing up and I would not regard it as suddenly cut off when he reached his majority. Family life existed before the offence. Article 8 was engaged in both private and family life – however the Tribunal did not spell out the detail of HK's well developed and strong private life that they had found.

Complexity: This is an appeal by the SSHD which entailed a complex procedural history up to the Court of Appeal. In order to defend the grounds of appeal advanced by the SSHD, HK was required to argue the correct approach to both scope and proportionality (see below), both of which required detailed and careful examination by the Court of Appeal. In relation to scope – the Court of Appeal upheld the decision of the Tribunal that family life existed and crucially that there was no cut-off point at 18 but also found that the Tribunal should have carefully examined private life as well. In reaching this decision, the Court of Appeal paid close regard to the nature of the case and the factual matrix as well as the applicable law (domestic and Convention law).

11. **<u>Quila and others v. Secretary of State for the Home Department</u>** [2010] EWCA Civ 1482 Date: 21/12/2010, Before: Sedley LJ, Pitchford LJ, Gross LJ (unanimous)

    Facts: Case concerned 2 sets of couples who married and made applications for entry clearance which were refused on the basis that one or both of the parties were under the age of 21 under the forced marriage rules, where there was no suggestion that the marriage was forced.

    Issue: whether the ban contained in paragraph 277 of the immigration rules on the entry for settlement of foreign spouses between the ages of 18 and 21 is a lawful way of dealing with the problem of forced marriages.

    Procedure: [18.] Importantly, neither of the would-be entrants has appealed to an immigration judge. In Mr Aguilar's case this is because, instead of becoming an overstayer and acquiring a right of appeal, he left the country. In Ms Bibi's case an appeal was lodged but was abandoned in favour of judicial review proceedings because the principal challenge which it was desired to make was to the legality of the rule itself.

Result (Scope): Sedley LJ (judgment): [47] and [48] "*on this subject common law and Convention law are, as they should be, coextensive*" TPIs differed over whether Art 12 central to the argument, or whether Art 12 is brought into the Art 8 argument because: *one of the principal purposes of marriage, ……., is to live together,* or in the eyes of the common law that the "combined effect" creates the material right. "*In Convention terms the two rights are discrete, but their practical relation to each other is in my view very much the same."*

Complexity: in terms of Scope (a) of the material right in play – which the interveners and appellants differed on and the Court found to be the "combined effect" of the right to marry and the right to family life (b) relationship with common law right and Strasbourg jurisprudence

PROPORTIONALITY – GENERAL PRINCIPLES

12. **GN (Serbia) v Secretary of State for the Home Department** [2006] EWCA Civ 1886, 7 December 2006. Before: Lord Justice Scott Baker Lord Justice Wall.

    Facts: This was a permission application by a citizen of the former republic of Yugoslavia who had come to the UK in 2000 and claimed asylum. His claim was refused and he appealed, and the dismissal of his appeal was eventually quashed with the consent of the Tribunal (the reasons for this are not noted). His appeal was reheard on Article 8 grounds only. He was suffering psychological problems connected to his past trauma and he enjoyed family life with his wife and daughter in the UK. The AIT dismissed his appeal because his case was not sufficiently exceptional. GN appealed.

    Issues: (1) Whether the AIT had materially erred by applying the civil standard of proof to the question of whether there would be a breach of the appellant's Article 8 rights. (2) Whether the AIT had not given sufficient attention to the persecution suffered by the appellant in the past in its assessment of proportionality.

    Result: Permission refused. (1) The AIT had accepted the appellant's evidence and it was therefore unclear how applying a lower standard of proof would materially alter the outcome of the appeal. (2) The AIT had borne in mind the appellant's traumatic past.

13. **[1] Huang [2] Kashmiri v Secretary of State for the Home Department** [2007] UKHL 11, 21 March 2007, Lord Bingham of Cornhill, Lord Hoffmann, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton–under–Heywood

    Facts: Huang was a Chinese citizen. Her husband (from whom she was separated), daughter, son–in–law and two grandsons were British citizens living in the UK. Mr Kashmiri was an Iranian citizen. His parents and two siblings came to the UK in 2000 and were in due course granted indefinite leave to remain as refugees, but Mr Kashmiri's claim to asylum was refused. Neither of the applicants qualified for the grant of leave to remain. Both claimed that the refusal of leave to remain was unlawful because incompatible with their Convention right to respect for their family life.

    Issue: The scope of Tribunal's role when considering Article 8. Previous Court of Appeal authorities suggested that the Tribunal's role was a reviewing one, i.e. looking at the Secretary of State's decision and deciding if it was a reasonable one or one that was not perverse etc. 'Deference' to the SSHD was not a suitable reference to the need to weigh up the factors for both sides. The House of Lords concluded that s.65 of the Immigration & Asylum Act 1999 was plain that the Tribunal needed to decide itself whether the SSHD decision was unlawful or not – the Tribunal was not restricted to a reviewing function.

    Result: Huang – SSHD's appeal dismissed; Kashmir – his appeal allowed and remitted to Tribunal.

    Complexity: This authority illustrates the level of complexity in interpreting the role of the Courts in human rights / Article 8 cases. The House of Lords in this case came to the same conclusion as the Court of Appeal below (on this issue) but a different conclusion to at least one previous Court of Appeal judgment (<u>Edore v Secretary of State for the Home Department</u> [2003] EWCA Civ 716) in which it was found that s.65 allowed the Tribunal a more limited role as found in Huang. It was on the basis of Edore and other Tribunal cases that immigration judges for some time were routinely misinterpreting the power that s.65 gave to them. The complexity of the issue is underlined by the fact that it was the SSHD's appeal in Huang and the SSHD was putting forward an incorrect

proposition in law in which the SSHD was advocating that appeals against its decisions on article 8 should be decided.

14. **AG (Eritrea) v Secretary of State for the Home Department** [2007] EWCA Civ 801, 31 July 2007, Sedley LJ; Kay LJ; Collins LJ.

Facts: The Appellant appealed against a decision of the AIT at second-stage reconsideration that he was not entitled to refugee protection. He was of Ethiopian nationality and had been sent to the United Kingdom at the age of 14. It had taken the Home Office four years from the date of his arrival to refuse his asylum claim and order his removal. His appeal to an adjudicator succeeded both under asylum and human rights grounds. The AIT then held that the adjudicator's decision had been vitiated by two errors of law: deficiency of reasoning about risk, and failure to adopt a test of exceptionality in applying Art.8. It sent the entire case for second-stage reconsideration.

Issues: At the AIT stage the law was still taken to be what was set out by the Court of Appeal in Huang suggesting in the light of the decision in Razgar a need for exceptional circumstances in order to bring a case within Art.8. Despite the House of Lords in Huang having stated that there was no test of exceptionality in the application of Art.8, it was clear that there was continuing controversy about how the AIT should deal with Art.8 claims. The court considered it appropriate to set out the applicable law.

Decision: It was held Lord Bingham's statement in Razgar that "decisions taken pursuant to the lawful operation of immigration control [would] be proportionate in all save a small minority of exceptional cases" had led the Court of Appeal in Huang to say that an adjudicator should only allow an appeal against removal or deportation brought on Art.8 grounds if he concluded the case was "so exceptional on its particular facts that the imperative of proportionality" demanded an outcome in the appellant's favour. This, and subsequent decisions, led decision-makers to treat exceptionality as a threshold requirement. When Huang reached the House of Lords, the House explained that Lord Bingham was not laying down a legal test, but expressing an expectation that the number of claimants not covered by the immigration rules but entitled to succeed under Article 8 would be a very small minority. Huang set no formal test of exceptionality and raised no hurdles beyond those contained in Art.8 itself. The fact that in the great majority of cases the demands of immigration control were likely to make removal proportionate and so compatible with Article 8 was a consequence, not a precondition, of the statutory exercise.

What mattered was not that courts and tribunals should adopt a set formula for determining proportionality, but that they should have proper and visible regard to relevant principles in making structured decisions on a case by case basis.

While an interference with private or family life must be real if it was to engage Art.8(1), the threshold of engagement was not an especially high one.

In the instant case, the adjudicator had approached Art.8 entirely correctly. However, he had erred in determining the question of proportionality by introducing two factually incorrect findings. The AIT was right to find an error of law in the adjudicator's determination of proportionality, but its own substituted decision was vitiated by a larger, and at the time widespread, error of law. The appeal was remitted back to the AIT to determine the Art.8 claim according to law.

Complexity: Despite the House of Lords decision in Huang which set out that there is no ‘exceptionality test’, the SSHD and adjudicators were nevertheless continuing to misinterpret the law. The Court of Appeal in AG (Eritrea) was forced to clarify the law once again.

15. **Entry Clearance Officer, Mumbai v NH (India)** [2007] EWCA Civ 1330, 13 December 2007, Pill LJ; Sedley LJ; Rimer LJ.

    Facts: The Appellant's maternal grandfather was registered in Kenya as a British subject and a citizen of the United Kingdom and Colonies. The Appellant's mother, the sponsor, was born in Nairobi on 14 October 1959 and was then a citizen of the United Kingdom and Colonies (CUKCs). The sponsor married the Appellant's father an Indian national in 1975. The Appellant, their fourth son, was born on 6 May 1985. On 27 July 1998 the Appellant's mother obtained her British overseas citizen passport and she was registered as a British citizen with full rights on 9 September 2003. She had been prevented from obtaining citizenship previously due to legislation then repealed. The Appellant’s application was under the Immigration Rules which required, amongst other requirements, that he be living in the ‘most exceptional compassionate circumstances’. Entry clearance was refused for both the Appellant and his father. A notice of appeal was filed for both the Appellant and his father. The appeals were reviewed. The Appellant's father was granted a visa to settle in the United Kingdom as a dependent spouse of the Appellant's mother. The review of the Appellant's appeal changed nothing and his appeal was heard before an Adjudicator in December 2004 who decided that he was not living in the most exceptional and compassionate circumstances but found that the case was an exceptional one and allowed the appeal under article 8.

    The SSHD appealed but the Tribunal on reconsideration upheld the determination.

    Issues: In essence, it was the SSHD’s case and grounds that the AIT erred in law in finding that it was an exceptional case. The Court of Appeal found that the AIT was entitled to conclude that the case was an exceptional one and that the AIT were right to take into account the legislation which prevented the sponsor from becoming a British citizen earlier which would have allowed the Appellant to join his on much more favourable terms.

    Decision: The SSHD’s appeal was dismissed.

    Complexity: It should be noted that this case was the SSHD’s appeal. Although the AIT on reconsideration ultimately upheld the adjudicator’s decision, the Court of Appeal found that the adjudicator did not give adequate reasons at all for his decision. The Court found that the AIT on reconsideration did give more cogent reasons for the same conclusion that were sustainable. This matter also involved complex analysis of nationality law, and the SSHD had argued that the decision on proportionality was flawed by the AIT’s inclusion in its reasons of previous legislation, an argument that was rejected by the Court of Appeal.

16. **Beoku-Betts v Secretary of State for the Home Department** House of Lords 25 June 2008 UKHL 39. Before: Lord Bingham, Lord Hope, Lord Scott, Baroness Hale, Lord Brown.

    Facts: Beoku-Betts was adult Sierra Leone national studying in UK with leave who had adult family members also in UK. On 1 June 2001 (shortly after discovering that his leave had expired) the appellant claimed asylum and also the right to remain under articles 3 and 8 of ECHR. On 27 February 2002 the adjudicator refused both claims. Adjudicator then dismissed article 3 but allowed article 8 claim.

    Issue: should the immigration appellate authorities take account of the impact of his proposed removal upon all those sharing family life with him or only its impact upon him personally (taking

account of the impact on other family members only indirectly ie. only insofar as this would in turn have an effect upon him)?

Result: Section 65 of Immigration and Asylum Act 1999 requires appellate authorities, in determining whether article 8 rights have been breached, to take into account the effect of proposed removal on all the members of the family unit. Correct approach is not to consider family rights of some members for some purposes, other family members for other purposes, but to recognise that "*there is only one family life.*" (para 43)

17. **Chikwamba (FC) v Secretary of State for the Home Department** House of Lords 25 June 2008 UKHL 40. Before: Lord Bingham, Lord Hope, Lord Scott, Baroness Hale, Lord Brown.

    Facts: A a Zimbabwe national, failed asylum seeker, married to refugee from Zimbabwe with young daughter. SSHD contends she should return to Zimbabwe to apply for leave to enter as spouse from Zimbabwe.

    Issue: should an appellant, a failed asylum seeker who therefore could not regularise her status within the Immigration Rules from within the country but would otherwise qualify as a spouse be required to return to Zimbabwe to apply for entry clearance from there.

    Result: Only comparatively rarely, certainly in family cases involving children, should article 8 appeals be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave to enter the United Kingdom from abroad.

    Note commentary by Brown LJ at paras 41- 42 as to whether policy really serves a legitimate aim. *"41. Is not the real rationale for the policy perhaps the rather different one of deterring people from coming to this country in the first place without having obtained entry clearance and to do so by subjecting those who do come to the very substantial disruption of their lives involved in returning them abroad? 42. Now I would certainly not say that such an objective is in itself necessarily objectionable. Sometimes, I accept, it will be reasonable and proportionate to take that course. Indeed, Ekinci still seems to me just such a case."*

18. **TG (Central African Republic) v Secretary of State for the Home Department** Court of Appeal (Civil Division), 15 July 2008 [2008] EWCA Civ 997. Before: Lord Justice Buxton and Lord Justice Keene.

    Facts: Entry clearance case. Appellant's partner HIV positive and accepted she cannot be expected to move to Central African Republic. Appellant's representatives refused to agree consent order with SSHD to remit to AIT on grounds facts were so similar to Chikwamba that should be allowed, and proportionality should be decided by CA not remitted.

    Issues: Scope of Chikwamba guidance and whether CA should decide proportionality or remit.

    Result: (1) 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. (2) It is not for the appellate court but for the expert tribunal on whom that role is conferred to decide questions of proportionality, and where it is accepted that the AIT has erred in determining proportionality on a legally flawed basis the appropriate course must be that the matter returns to the AIT. It is not appropriate to rely upon the fact that Chikwamba was not remitted to argue that a case should not be remitted from the CA.

19. **RU (Sri Lanka) v SSHD** Court of Appeal Civil Division 10 December 2008 [2008] EWCA Civ 1551. Before: Lord Justice Pill, Lord Justice Scott-Baker, Lord Justice Richards.

    Facts: the appellant was a citizen of Sri Lanka. He arrived in the United Kingdom on 30 December 1993 and claimed asylum on arrival. His claim was rejected by the Secretary of State in 1996 and on appeal in 1997. He made a fresh claim in 1997 and there were considerable delays in dealing with it, during which the appellant also prompted no resolution of it. In this context he met and married a fellow Sri Lankan, also a failed asylum seeker, and had a child in 2006.

    Issues: Proportionality of interference in private life in context of a long delay in dealing with the appellant's case, during which he had established family and private life in the UK.

    Result: Judge was entitled to find no interference with family life on ground that entire family would be removed together and that interference with the appellant's Article 8 rights would be proportionate. She had in mind that he had forged a considerable private life albeit in the context he knew he was liable to removal at any time. Decisions on proportionality are matters of judgment on which an appellate court will only interfere if there is a material error of law.

20. **JO (Uganda) JT (Ivory Coast) v The Secretary of State for the Home Department** [2010] EWCA Civ 10 22/01/2010, Before**:** Mummery LJ, Richards LJ, Toulson LJ.

    Facts: *JO (Uganda*) is itself a deportation case and engages that case-law directly. *JT (Ivory Coast*) concerns removal of an illegal entrant who also committed criminal offences; the relevance to it of the case-law in question is one of the issues in dispute.

    Decision: dismiss the appeal in JO (Uganda) but would allow the appeal in JT (Ivory Coast) and would remit that case to the tribunal. Considered the Strasbourg jurisprudence concerning the seriousness of the difficulties of relocation in individual cases: the matter must be looked at as a whole and that no limiting test applied. Important distinction drawn between deport cases and those concerning administrative removal in terms of legitimate aim pursued.

    Complexity: Both appeals raise issues concerning the application of recent Strasbourg case-law on the compatibility with article 8 ECHR of decisions to deport, on grounds of criminal offending, foreign nationals who have spent most of their childhood in the host country. Judgment was being handed down at the same time in *KB (Trinidad and Tobago) v Secretary of State for the Home Department*, a week later than the appeals on an overlapping issue as to whether the application of article 8 requires a different approach in a deportation case as compared with a case of ordinary removal. Complexity in deciphering applicable test in relocation of family cases having surveyed Strasbourg jurisprudence and concluding that form of words not critical but that no limiting test should be applied.

21. **KB (Trinidad and Tobago) v. Secretary of State for the Home Department** [2010] EWCA Civ 11, 22/01/2010, Before: Mummery LJ, Richards LJ, Toulson LJ.

    Facts: Appeal by the SSHD against successful appeal by KB against deportation order on Article 8 grounds.

    Issues: Whether correct test applied in respect of relocation of KB's wife and child.

Decision: SSHD's appeal dismissed. By reference to *JO (Uganda) and JT (Ivory Coast)*, at [14]-[15] and [22]-[26], the Strasbourg court has not laid down any test of impossibility or exceptional difficulty. The seriousness of the difficulties that the family would have in relocating must be properly assessed as a whole and taken duly into account. In asking itself whether KB's wife and child could reasonably be expected to go with him to Trinidad and Tobago, the tribunal not only followed the required approach in substance but formulated the question in terms that have been expressly approved by the Court of Appeal in the context of deportation as well as removal. Distinction drawn between deport and administrative removal.

Complexity: In terms of reference to JO (Uganda) and JT (Ivory Coast), key distinctions drawn between deport and administrative removal requiring detailed knowledge of applicable tests in Strasbourg caselaw in relation to legitimate aims and proportionality.

22. **HK (Turkey) v. Secretary of State for the Home Department** [2010] EWCA Civ 583, Date: 27/05/2010, Before Sedley LJ, Rimer LJ, Baker LJ.

    Facts: See above.

    Issues: See above.

    Result: Appeal by SSHD dismissed. **Proportionality – deport**. [28-[29] It is necessary to form a view where on the scale of seriousness conduct comes so that the Article 8 considerations can properly be balanced against the Rule 364 presumption. Even in cases concerning serious offences the gravity may not be such that deportation is virtually inevitable albeit compelling reasons to allow the respondent to remain here would be required. It is clear that from *JO* (Uganda) & anr v Secretary of State for the Home Department [2010] EWCA Civ. 10, per Richards LJ at [29] that the actual weight to be placed on the criminal offending must depend on the seriousness of the offence (s) and the other circumstances of the case.

    Complexity: This is an appeal by the SSHD which entailed a complex procedural history up to the Court of Appeal. In order to defend the grounds of appeal advanced by the SSHD, HK was required to argue the correct approach to both scope and proportionality, both of which required detailed and careful examination by the Court of Appeal. Further, the clarity of the decision on the grounds, including "there is no ground of appeal" shows that HK, had he been unrepresented may have had a perfectly lawful determination upholding his Article 8 rights, appealed and overturned long before the matter got to the Court of Appeal.

23. **The Secretary of State for the Home Department v. Pankina** [2010] EWCA Civ 719, Sedley LJ, Rimer LJ, Sullivan LJ, 23.6.2010.

    Facts: PBS student cases involving maintenance requirement of £800 in the bank for three continuous months under the Home Office Policy Guidance.

    Issues: Whether the immigration rules could lawfully incorporate provisions in another document which had not been laid before Parliament, was a departmental policy, can be altered after the rule had been laid before Parliament, and if so the point at which the facts should be tested. Further, whether in applying the policy Article8 ECHR has any application, and if not whether Article 8 has any independent application?

    Result: Appeal allowed: Sedley LJ: at [46] "*The Home Office has to exercise some common sense about this if it is not to make decisions which disproportionately deny respect to the private and*

family lives of graduates who by definition have been settled here for some years and are otherwise eligible for Tier 1 entry. If the Home Secretary wishes the rules to be blackletter law, she needs to achieve this by an established legislative route." The Immigration Rules must be operated in conformity with s. 6 HRA 1998 (see para [47])

Complexity: Sedley LJ: at [1] "*Although the issue which each of these appeals raises looks on its face marginal almost to the point of triviality, it is an issue of* ***constitutional importance and of real difficulty****. The issue is whether the executive, in rules which are required, subject to parliamentary oversight, to set out how it proposes to exercise its statutory functions, can lawfully reserve to itself the power to add to or modify those rules. It raises questions about the constitutional status of the immigration rules and about their relation to departmental policy and human rights. and Home Office must exercise common sense in the application of policy when making decisions which disproportionately affect private and family life."*

24. **Valentin Batista v. The Secretary of State for the Home Department** [2010] EWCA Civ 896, 29/07/2010, Before: Maurice Kay LJ, Carnwath LJ, Black LJ.

    Facts: The appellant is a Portuguese national, born in Guinea Bissau in 1981. He moved to Portugal at the age of 8, when his parents separated, and then in 1994, when his mother became ill, he came to this country to live with an aunt and uncle. From 1998 he received a number of criminal convictions, culminating in a sentence of 4 years 3 months in 1999 for robbery and burglary, and 8 years for burglary and GBH in 2005. In 2002 he began living with his girlfriend, Tamara Deane, and had a child by her in June 2005.

    Issues: Whether the wrong legal test was applied to the question of whether removal was a disproportionate interference with Article 8. The other 3 grounds raised issues under the Citizens' Directive, given effect in the UK by the Immigration (EEA) Regulations 2006.

    Result: Appeal allowed and remitted to the Upper Tribunal for reconsideration. Carnwath LJ: The tribunal erred in several respects, including that they failed to give proper consideration to the position of the appellant's partner and child, applied the wrong test (*"insurmountable obstacles"* in moving to Portugal, *"rather than asking whether they would in fact do so and whether it was reasonable for them to be expected to do so.*"), wrongly proceeded on the basis that "family life can be expected to be enjoyed elsewhere, that is Portugal", and failed to consider the "overall consequences of an enforced family break-up" for the whole family, including particularly the mother and child. Carnwath further considered that points under the EU Citizens Directive may be taken into account in the overall balance of proportionality. It will be a matter for tribunal to consider whether they have any materiality in the present case.

    Complexity: Interface of EU free movement law and private and family life under Article 8 in the context of proportionality – in particular whether rights under or "points" under the Citizens Directive should be a relevant factor.

25. **Quila and others v. Secretary of State for the Home Department** [2010] EWCA Civ 1482 Date: 21/12/2010, Before: Sedley LJ, Pitchford LJ, Gross LJ (unanimous)

    Facts, Issues, Procedure (as above)

Result (Proportionality): Following a detailed assessment of proportionality. [62] *Proportionality is not gauged by headcount. The critical question was why the protection of the vulnerable justified a blanket rule which invaded the fundamental rights of a far greater number of innocent people.*

Complexity: Proportionality assessment in the context of a rule designed to protect against forced marriage which when applied in a blanket fashion breaches fundamental rights. Consideration of law, policy and evidence. Remedy At [4] Sedley LJ stated "*the rule cannot lawfully be applied to the present appellants or, by parity of reasoning, to others like them. But it is not the role of this court to rewrite it: that is for the Home Secretary to do in the light of the court's reasoning, unless she decides to abandon it altogether. We shall accordingly welcome the parties' submissions on consequential relief when we come to hand down this judgment*"

PROPORTIONALITY - REMOVAL IN FAMILY LIFE CASES

26. **<u>Chengjie Miao v Secretary of State for the Home Department</u>**, Court of Appeal (Civil Division) 16 February 2006 [2006] EWCA Civ 75. Before : Lord Justice Thorpe, Lord Justice Sedley and Lord Justice Thomas

    Facts: The appellant was a citizen of China who claimed asylum on political grounds. His father was already recognised as a refugee in the UK and was severely mentally ill. While A's asylum claim was pending, his father's condition deteriorated such that it was not safe for him to be cared for by his wife and daughter. A had sole responsibility for his father's care. A's asylum claim was rejected and his appeal only concerned his family life. In the Tribunal he had established that family life existed by applying *Kugathas*.

    Issues: (1) Whether the Immigration Judge erred in law in his approach to article 8(2) ECHR both in that he had unnecessarily elaborated the test of proportionality in a manner that was incompatible with the approach of the Strasbourg authorities and had erred with regard to the burden of proof. (2) The meaning of 'compelling compassionate circumstances' in the SSHD's family reunion policy. (3) Whether the judge had erred in his analysis of A's position under the family reunion policy and paragraph 317 of the Immigration Rules and whether that materially affected the judgement on proportionality.

    Result: Appeal allowed unanimously. The Immigration Judge had unfairly dismissed expert medical evidence that A's father's health would markedly worsen if A was removed and that he would be unlikely to access adequate care from the State due to his lack of English and his mental condition. The Judge wrongly concluded that A could apply for entry clearance under Rule 317. In the light of the evidence, no objective decision maker could fail to grant A leave to enter under the family reunion policy having regard to the compassionate circumstances. That was the correct footing on which to judge proportionality. Remitted to AIT.

27. **<u>N v Secretary of State for the Home Department:</u>** Court of Appeal (Civil Division) 24 March 2006 [2006] EWCA Civ 414. Before: Lord Justice Pill, Lord Justice Scott Baker and Lord Justice Neuberger.

    Facts: The appellant (N), a Vietnamese national, had been granted entry clearance into the UK as a student. Whilst in the UK she had a child who was registered as a British citizen on the basis that his father was settled in the UK. N contended that her removal would breach her right to family life because she would not be permitted to return here and her son had no other family. If she and her son were returned to Vietnam the fact that he was a British citizen would be held against him in some situations. An adjudicator found that removal would be disproportionate but the SSHD appealed and the Tribunal allowed his appeal, leading to the appellant's further appeal.

    Issues: The secretary of state accepted that there were errors of law in the tribunal's approach to the relevance of N's son being a British citizen but argued that the matter should be remitted for reconsideration. N submitted that, while the adjudicator had not applied the test laid down in *Huang [2005] EWCA Civ 105*, which had not been decided at the time, on the adjudicator's findings of fact the only reasonable conclusion was that the case was truly exceptional.

    Result: Appeal allowed unanimously but remitted for reconsideration. The fact that N's son was a British citizen should have been given more weight by the AIT. However, it was not possible to read

into the adjudicator's decision a test which was equivalent to that of true exceptionality since laid down in *Huang*. Nor was it such a clear case that the adjudicator would certainly come to the same conclusion applying *Huang*.

28. **A v Secretary of State for the Home Department** Court of Appeal (Civil Division)30 March 2006 [2006] EWCA Civ 554. Before: Lord Justice Ward, Lord Justice Maurice Kay and Mr Justice Bennett.

    Facts: The appellant was Turkish and claimed asylum in 2001 when he was 15. The SSHD refused asylum but granted him exceptional leave to remain until the day before his 18th birthday in 2004. Before the expiration of his leave, the appellant applied for indefinite leave to remain under the Immigration Rules, as the dependant of his brother R who was settled in the UK and had British citizenship. The appellant had some psychological difficulties which are not detailed. On appeal, his account of repeated detention on the grounds of his brother's political activities was accepted but he was held not to be at objective risk of serious harm if returned. An adjudicator allowed A's appeal on human rights grounds but the SSHD successfully appealed to the AIT. On reconsideration the appellant's appeal was dismissed.

    Issues: (1) Whether the AIT had been seised of the appeal before it; (2) whether the AIT had properly considered all the evidence relating to a contemplated breach of article 3 ECHR; (3) whether the AIT had misapplied the test for proportionality under article 8(2) set out in *Huang*.

    Result: Appeal allowed unanimously on article 3 grounds only. (1) The AIT was entitled to send the appeal for reconsideration because the appellant had not made submissions in response to the SSHD's contention that the adjudicator's decision was unlawful; (2) the evidence in relation to article 3 ECHR had not been properly considered; (3) the test of exceptionality set out in *Huang* had been properly applied.

29. **E v Secretary of State for the Home Department** Court of Appeal (Civil Division)[2006] EWCA Civ 835 (1 June 2006). Before: Lord Justice Neuberger.

    Facts: The appellant was an asylum-seeker who was married to a British citizen who had a 16-year old child, also a British citizen. His appeal had been dismissed by an adjudicator and by the AIT. E sought permission to appeal the AIT's conclusion that there had been no material errors of law in the adjudicator's judgement.

    Issues: (1) whether the AIT had erred in law in concluding that the adjudicator was correct not take into account the fact that E's wife had a son in the UK when considering the proportionality of removing E and his position under a policy of SSHD, on the ground that SSHD had not been made aware of this in the original application. (2) Whether the AIT had nevertheless decided that such an error was not material because it had thought the adjudicator could come to no other conclusion or because it had considered the issue itself. (3) whether it had been correct in its conclusions on (2).

    Result: Permission allowed. (1) The AIT had erred in law in holding that the adjudicator was right not to consider the fact of E's wife having a minor son in the UK. (2) It seemed to say in its determination that the adjudicator could not have come to a different conclusion. (3) it could not be said that the adjudicator would not have come to a different conclusion if he had considered the wife's son, his age and his circumstances.

30. **M v Secretary of State for the Home Department** Court of Appeal (Civil Division) 19 June 2006 [2006] EWCA Civ 898 Before: Lord Justice Richards and Lord Justice Auld.

    Facts: This was a permission application. The applicant was a citizen of Macedonia who came to this country in July 2002 at the age of 17 and claimed asylum. He was an orphan who claimed to have suffered abuse throughout his childhood (no note of whether this account was accepted or not). He was informally adopted in the UK by a family who continued to support him through his mental health problems. He was diagnosed with moderate to severe PTSD and depressive illness. His claim was refused by SSHD. An appeal on asylum and human rights grounds was dismissed by an adjudicator, but it was subsequently found that the adjudicator had erred in law and that aspects of the case should be reconsidered. The tribunal was directed to reconsider the Article 3 and Article 8 claims insofar as they related to the risk of suicide or self harm, and as to whether removal would be disproportionate and an interference with private and family life. The applicant sought permission to appeal the tribunal's decision on the Article 8 claim only.

    Issues: (1) whether the AIT had erred in treating the mental health aspect and family life aspect of the article 8 claim as discrete issues rather than cumulatively and (2) whether the AIT's finding that there was no dependence of A on his foster family was irrational in the light of the emotional support he received from them.

    Result: Permission refused. (1) The mental health element of the article 8 claim related to the physical and mental integrity of the appellant, i.e. his private life. This was distinct from his family life. The AIT had properly had in mind the effect on his mental health which the withdrawal of family support would have. (2) The finding on dependence was not irrational.

31. **U v Secretary of State for the Home Department** Court of Appeal (Civil Division), 19 June 2006 [2006] EWCA Civ 938. Before: Lord Justice Auld, Lord Justice Buxton and Lord Justice Richards.

    Facts: The appellant was a Kosovan national who had arrived in the United Kingdom and claimed asylum in 1998. In 2001 the claim was refused but an appeal to an adjudicator was not heard until 2003. He claimed that due to his close relationship with his brother and his brother's family, who were living in the UK, his removal would breach his rights under article 8. At the hearing the adjudicator refused to allow further evidence from U or his brother relating to the article 8 circumstances and held that the circumstances of his relationship with his brother were not sufficient to make it disproportionate to return him. The AIT dismissed U's appeal and held that the adjudicator should have heard the further evidence but that even if the evidence was taken at its highest the claim would not have been successful.

    Issues: U was granted permission to appeal on the ground of delay only. However, before the hearing he indicated that that point would not be pursued. U argued that the AIT's decision was not open to it as it had looked at the question of whether his brother and family could visit him in Kosovo and that had never been raised or investigated.

    Result: Appeal dismissed unanimously. U had not been granted permission to appeal in respect of the point now raised, but in the circumstances the Court agreed to consider it. Looked at as a whole, however, the Court believed the AIT's decision on proportionality was not materially affected by the issue of his brother visiting him in Kosovo.

32. **RA (Iraq) v Secretary of State for the Home Department (a.k.a. A v Secretary of State for the Home Department)** Court of Appeal (Civil Division), 22 June 2006 [2006] EWCA Civ 1144. Before: Sir Igor Judge, Lord Justice Scott Baker and Lady Justice Hallett

    Facts: The appellant was an Iraqi citizen of Kurdish ethnicity who came to the UK and claimed asylum and protection under article 3 ECHR in 1999. In 2000 he met a British national who was to become his wife. In 2001 SSHD rejected his claim. An adjudicator rejected the account of his experiences of persecution and torture but went on to consider his right to family life. The appellant had married his partner in 2002 and she had a teenage son. The couple were given approval for fostering. The adjudicator allowed the appeal on article 8 grounds. SSHD appealed against that decision on the ground that the adjudicator had failed to give adequate reasons for reaching the conclusion that it would be disproportionate for R to return to Iraq and apply for entry clearance from there. The IAT found that the adjudicator's analysis had been unsatisfactory, as he had failed to consider the fact that R could apply for entry clearance from abroad, as the British government could provide entry clearance for Iraqis via Jordan. The IAT allowed the appeal. The appellant appealed.

    Issues: Whether the IAT's decision on appeal was legally flawed in that it had failed to determine whether it would be proportionate to separate the appellant and his family whilst he made an application for entry clearance which might fail.

    Result: Appeal unanimously allowed. The IAT had never applied the proper exercise required by article 8(2). In particular it had failed to consider (i) that in the absence of removal directions, the appellant would have to make his own way to Iraq; (ii) the question of what documents he would require to travel to Jordan; and (iii) the mode or route of travel between Iraq and Jordan and its safety. The appellant therefore had not been given a fair hearing.

33. **Mukarkar v Secretary of State for the Home Department** Court of Appeal (Civil Division), 25 July 2006 [2006] EWCA Civ 1045. Before: Lord Justice Auld, Lord Justice Sedley and Lord Justice Carnwath.

    Facts: The appellant was a 64-year old from Yemen. He came to the UK as a visitor using false information, and applied for leave to remain as the dependent of his children who were settled in the UK. His application was refused because he did not have valid entry clearance under the Immigration Rules. He was suffering from arthritis, diabetes, forgetfulness and other conditions which required round-the-clock care from his children. His appeal to an adjudicator was allowed on article 3 and 8 grounds, on the ground that it would not be proportionate to expect the appellant to travel alone to the Yemen for an uncertain period of time to apply for entry clearance, or to expect his children to give up their jobs to accompany him. SSHD appealed. The IAT ordered a fresh hearing which was caught by transitional statutory arrangements so was heard as a fresh reconsideration hearing. The AIT dismissed the human rights appeal. The appellant appealed.

    Issues: Putting article 3 to one side, the issues on article 8 were whether there were indeed any errors in the adjudicator's original decision, including three found by the AIT and a further four submitted by SSHD. These concerned the proper application of *Ekinci v SSHD [2003] EWCA 765* and *Huang*, the burden of proof in relation to the availability of medical care in Yemen, the relevance of the availability of medical care, the relevance of the appellant's deception to gain entry, and the relevance of the uncertainty over the outcome of the proposed application for entry clearance from Yemen.

    Result: Appeal unanimously allowed on article 8. There were no errors in the adjudicator's original conclusion that removal would be disproportionate.

34. **EM (Lebanon) v Secretary of State for the Home Department**, House of Lords 22 October 2008 [2008] UKHL 64. Before : Lord Hope, Lord Bingham, Lord Carswell, Baroness Hale and Lord Brown

    Facts: Mother and child from Lebanon where, under sharia law, child will be removed from custody of mother at age seven.

    Issues: Does this come within circumstances where there would be a "flagrant denial" of article 8 rights due to discriminatory family law provisions on return? How should the rights of the child be weighed in the proportionality assessment?

    Result: There would be a flagrant denial. Furthermore the violation of the child's right to family life when separated from his mother was of greater weight than the violation of the mother's right. Children need to be brought up in a stable and loving home, preferably by parents who are committed to their interests. Disrupting such a home causes damage to their development, which is different to the damage done to a parent by the removal of their child. Arbitrary reasons that pay no attention to the interests of the child could never justify this under Article 8(2). A child is not to be held responsible for the moral failures of either of his parents.

35. **MA (Nigeria) v Secretary of State for the Home Department** Court of Appeal (Civil Division), 15 December 2006 [2006] EWCA Civ 1853. Before: Lord Justice Hooper and Lord Justice Maurice Kay.

    Facts: This was a permission application. The appellant's family had moved to the UK, leaving the appellant alone in Nigeria when he was 14 in the care of a friend. They intended for him to join them, but could not do so legally because by the time the family had settled status in 2000 the appellant was eighteen. He had a visitor visa for Ireland and entered the UK illegally. He applied to regularise his stay as an overstayer according to a policy of SSHD. This was refused on the wrong basis in 2002 and it took a further two years for SSHD to refuse the application on the correct factual basis. The appellant attended college and university and then applied for leave to remain so that he could continue his studies and remain with his family. The AIT allowed his appeal against refusal on article 8 grounds, saying the case was exceptional. SSHD appealed.

    Issues: (1) whether the AIT had erred by treating as material a factual mistake by the original immigration judge which was really not material; (2) whether the AIT had erred in its approach to the issue of delay and (3) whether the AIT had been entitled to characterise the immigration judge's judgement on proportionality in the absence of perversity.

    Result: Application unanimously allowed. (1) and (2) were arguable. Applying *Mukarkar v The Secretary of State for the Home Department [2006] EWCA Civ 1045*, the AIT could not find an error of law in a judgement on exceptionality unless the judgement was one which no reasonable judge could have reached, because the jurisprudence in Europe and the UK does not define the limits of what is or is not 'exceptional'. It was arguable that a reasonable immigration judge could come to the decision that this case was exceptional.

36. **Beoku-Betts v Secretary of State for the Home Department** House of Lords 25 June 2008 UKHL 39. Before: Lord Bingham, Lord Hope, Lord Scott, Baroness Hale, Lord Brown.

    Facts: Beoku-Betts was adult Sierra Leone national studying in UK with leave who had adult family members also in UK. On 1 June 2001 (shortly after discovering that his leave had expired) the

appellant claimed asylum and also the right to remain under articles 3 and 8 of ECHR. On 27 February 2002 the adjudicator refused both claims. Adjudicator then dismissed article 3 but allowed article 8 claim.

Issue: should the immigration appellate authorities take account of the impact of his proposed removal upon all those sharing family life with him or only its impact upon him personally (taking account of the impact on other family members only indirectly ie. only insofar as this would in turn have an effect upon him)?

Result: Section 65 of Immigration and Asylum Act 1999 requires appellate authorities, in determining whether article 8 rights have been breached, to take into account the effect of proposed removal on all the members of the family unit. Correct approach is not to consider family rights of some members for some purposes, other family members for other purposes, but to recognise that "*there is only one family life.*" (para 43)

PROPORTIONALITY - REMOVAL IN PRIVATE LIFE/MEDICAL CASES

37. **Shereni v Secretary of State for the Home Department** Court of Appeal (Civil Division), 3 February 2006 [2006] EWCA Civ 198. Before: Lord Justice Richards.

    Facts: This was a permission application. The applicant was a failed asylum-seeker from Zimbabwe who was HIV positive. He would probably not have access to any antiretroviral treatment in Zimbabwe and was expected to die within 12-18 months if removed. On the basis of expert evidence, the Tribunal had found he would die in distressing circumstances. However, he would have some family support and removal was proportionate.

    Issues: Whether the case was distinguishable from *N*. Whether the difficulties of obtaining available but scarce treatment in *N* are distinguishable from the absence of suitable treatment in this case, looking at the judgements of Hope LJ and Hale LJ in *N*.

    Result: Application refused. The Tribunal's decision that A's case was not exceptional was one which it was entitled to make, as it was based on the view that there was not certainly an absence of suitable treatment. Richards LJ said at the outset that A had lodged the application in person but that it was very helpful that he was represented at court.

38. **C v Secretary of State for the Home Department**, Court of Appeal (Civil Division), 9 February 2006, [2006] EWCA Civ 151. Before: Lord Justice May, Lord Justice Latham and Lord Justice Longmore.

    Facts: The appellant was a Turkish national who claimed asylum and resisted removal on the basis of her mental health. She was illiterate and spoke no English. She claimed to have been raped by Turkish gendarmes on account of her husband's political beliefs. Expert evidence suggested she was suffering from PTSD, depressive illness and might be at moderate risk of suicide if removed.

    Issues: (1) whether the Tribunal hearing had been unfair in that the Immigration Judge had advised the SSHD to withdraw a concession; (2) whether the Immigration Judge had unfairly drawn an adverse inference from the absence of evidence from A's husband; (3) Whether the Tribunal had made factual errors which amounted to errors of law according to the criteria suggested in *E v Secretary of State for the Home Department [2004] EWCA Civ 49*; (4) whether the immigration judge had unfairly taken issue with the expert's credibility; (5) whether IJ had given insufficient weight to the expert evidence; (6) whether removal was proportionate.

    Result: Appeal dismissed unanimously. (1) The Court examined notes from the IJ, SSHD's presenting officer and Counsel as to whether a concession had in fact been made and concluded that it had not; (2) the adverse inference drawn was fair; (3) No factual errors amounting to errors of law were made; (4) the IJ's approach to the expert was objectionable but not material to his conclusions; (5) sufficient weight was given to the expert's report and (6) removal was proportionate. In relation to the proportionality of removal, May LJ referred to the then test in *Huang* and the questions in *Razgar*. He relied on the expectations of Lord Bingham and Lord Walker in *Razgar* that the appellant would show something very much more extreme than relative disadvantage in medical cases. That was not shown here. The impact of A's mental health deterioration on her children was raised but the Court went no further than noting there would be no interference with family life because the children would be removed with their mother.

39. **A v Secretary of State for the Home Department**, Court of Appeal (Civil Division) 7 March 2006 [2006] EWCA Civ 482. Before: Lord Justice Laws.

    Facts: This was a permission application. The appellant was from Yemen. He had a child with leukaemia and sought permission for the family to remain for medical treatment following a successful bone-marrow transplant. Expert medical evidence suggested the son may suffer lethal complications without follow-up treatment.

    Issues: Whether removal of the family was proportionate. Whether the case was exceptional because of the rarity of the child's condition. Whether the case was analogous to *CA v Home Secretary [2004] EWCA Civ* in that the family's distress at their son's illness made it an exceptional case.

    Result: permission refused. Recent HIV cases confirmed that only a truly exceptional case will succeed on proportionality under Article 8 if outside the Immigration Rules. This is so even if there is no route by which the child could apply under the Immigration Rules. The AIT made no error in concluding the case was not exceptional.

40. **Kaydanyuk v Secretary of State for the Home Department**, Court of Appeal (Civil Division) 4 April 2006 [2006] EWCA Civ 368. Before : Lord Justice Brooke Vice-President of the Court of Appeal (Civil Division), Lord Justice Jonathan Parker and Lord Justice Maurice Kay.

    Facts: The appellant was Ukrainian and claimed he was at risk of persecution on account of his family's political activities. He failed on his asylum claim because his family was not accepted to be a 'particular social group' and because the objective risk was not real enough. There was expert medical evidence that he was depressed and genuinely feared persecution. After his appeal was dismissed, the appellant's mental health deteriorated markedly and he was admitted to psychiatric hospital to monitor his risk of committing suicide. There was updated evidence from various health professionals to the effect that there was a high risk of suicide if A was to be removed to the Ukraine. A consultant psychiatrist wrote that, '*I have been a psychiatrist for 24 years and have seen 150 asylum seekers. Of all the asylum seekers I have seen he is definitely the one who is most determined to end his life were his appeal for asylum unsuccessful. He is a very high risk for suicide. I do not make this comment lightly.*'

    Issues: Whether the AIT had been proceeding on a mistake of fact because it was not apparent at the hearing that A's mental state was as precarious as it in fact was. A contended this amounted to a legal error applying *E v Secretary of State for the Home Department [2004] EWCA Civ 49*. On a true understanding of the facts, A's removal may breach his rights under articles 3 and 8 ECHR.

    Result: Appeal dismissed unanimously. Looking at a number of authorities on factual mistakes amounting to procedural unfairness, the Court held that a fact needed to exist at the time of the hearing. In this case the risk of suicide had increased after and as a result of the outcome of the first appeal. In cases where there circumstances were moderately bad but with a risk of deteriorating, which then did deteriorate, there could not be said to have been a mistake at the hearing. It was not necessary to determine SSHD's argument that the fact of high suicide risk itself was not uncontentious and objectively verifiable. In limiting the right of appeal to the Court of Appeal to errors of law, Parliament intended the SSHD to consider fresh applications in those cases where fresh evidence became available after an appeal was dismissed.

41. **Vasilenko & Anr v Secretary of State for the Home Department Court** of Appeal (Civil Division) 26 April 2006 [2006] EWCA Civ 729. Before: Lady Justice Smith and Lord Justice Jacob.

    Facts: This was a permission application. The appellants were a 64-year old couple who left Latvia in 1997 to seek political asylum in the UK. At that time they were citizens of the Soviet Union. The SSHD refused their claim for asylum but retained their passports and took no action to remove them. In 2004 Latvia became a member of the European Union and SSHD informed the appellants that they were free to remain as EU citizens. Their solicitor informed SSHD that they had no Latvian passports and were in fact stateless Russians. In response, SSHD reconsidered their case and issued removal directions. By this stage the appellants had been in the UK for nine years and had a daughter here, employment and a property. The appellants sought permission to seek judicial review which was refused and they appealed that refusal.

    Issues: (1) Whether the statement of the solicitor that the appellants were not Latvian citizens was conclusive or whether it needed to be considered and (2) whether the decision to refuse leave to remain on the basis of private and family life in the UK was lawful.

    Result: appeal unanimously allowed. The statement by the appellants' solicitor was not conclusive and the nationality of the appellants needed to be determined. On article 8 SSHD had failed to consider proportionality at all. Jacob LJ doubted the public interest in requiring the appellants to return to Latvia to take citizenship examinations on Latvian history and language in order to determine their eligibility to reside in the UK.

42. **N v Secretary of State for the Home Department**, Court of Appeal (Civil Division)7 July 2006 [2006] EWCA Civ 1166. Before: Lord Justice Pill, Lady Justice Arden and Lord Justice Neuberger

    Facts: The appellant was a Kenyan who had moved with his mother to Uganda when he was nine months old. He did not know his father. When he was 17 his mother died and his house was burgled. N feared for his safety and came to the UK to claim asylum. His claim was rejected and refused also on human rights ground by the AIT. The appellant claimed his private and family life would be disproportionately affected by removal because he had a close family-like relationship with a British family who treated him as their son. He was said by medical experts to be extremely vulnerable and likely to suffer some kind of breakdown, possibly psychotic, if he was deprived of the constant support he was receiving. N was also a gifted athlete and wanted to continue his training.

    Issues: (1) whether the AIT had contradicted itself by accepting the psychiatric evidence and yet describing N as having no mental disability. (2) Whether in fact there was disruption to family life as well as private life. (3) Whether the AIT had given sufficient attention to the life which N would lead in Kenya, where he had never lived before and did not speak the language.

    Result: Appeal dismissed. (1) if one defined 'disability' as something which interfered with day to day life, the AIT's conclusions were consistent with the psychiatric evidence that N was coping at present because of the support he was receiving. He may have a disability in the future but that was a separate question. (2) It was not necessary to determine whether there was family life once private life was engaged and all the facts were understood. It was merely a question of labelling. (3) the AIT did not have to give very much attention to conditions in Kenya in general because that would not be relevant to the issue of exceptionality (applying *Razgar* and *Huang*).

43. **SK (Sri Lanka) v Secretary of State for the Home Department** Court of Appeal (Civil

Division), 15 December 2006 [2006] EWCA Civ 1855. Before: Lord Justice Maurice Kay and Lord Justice Hooper.

Facts: This was a permission application. The applicant was Sri Lankan. As to his background the judgement simply says that, '*It is not in doubt that, in Sri Lanka, he had an extremely difficult time, which has had a lasting effect on him*.' He claimed asylum in the UK but his claim was refused and dismissed on appeal. He suffered from post-traumatic stress disorder and was cared for by his cousin in the UK. His cousin nevertheless worked full-time. The applicant had family in Sri Lanka including his mother.

Issues: Permission to appeal to the then IAT had been granted on limited grounds, '*so the Tribunal can consider the evidence about the state of medical services in Sri Lanka, in the light of Razgar [2004] UKHL 27 and any decision reached by the Court of Appeal on DM(Croatia) CG* [2004] 00024, the leading decision on this point*.' The Appellant wished to appeal the IAT's decision on the grounds which it did not consider, namely family life and the proper approach in European law to domestic as opposed to foreign article 8 cases.

Result: Application unanimously refused. The IAT had been proper to consider only the limited grounds on which permission had been granted and on which (different) counsel had concentrated in submissions. The test for proportionality had been clarified in the intervening case of *Huang* and under the new test of 'true exceptionality' this applicant was bound to fail.

44. **AJ (Liberia) v Secretary of State for the Home Department** Court of Appeal (Civil Division), 15 December 2006 [2006] EWCA Civ 1736. Before: Lord Justice Maurice Kay and Lord Justice Hughes.

Facts: The appellant appealed against the decision of the AIT that his return to Liberia would not be a breach of article 3 or article 8. He was a Liberian who had claimed asylum on arrival in the UK when he was 16 or 17. He claimed he feared persecution as a former child soldier. He was referred to a clinical psychologist who believed he was suffering PTSD and was at a very high risk of suicide if removed. His claim was subsequently advanced on the ground that there was such a risk of suicide in the event of his return to Liberia that his removal would breach articles 3 and 8. On appeal, the AIT did not accept that he had been targeted for assault as a former child soldier and the Convention claims based on the risk of suicide were rejected as speculative. The AIT ordered a full reconsideration hearing at which all the appellant's claims were rejected.

Issues: (1) whether the AIT on reconsideration had undermined the psychologist's evidence whilst professing to accept it; (2) whether the AIT had wrongly elided the questions arising under Article 3 with those arising under Article 8; (3) whether the AIT gave insufficient consideration to the extent to which Liberia had in place mechanisms for reducing the risk of suicide; (4) whether there was any basis for the tribunal's finding that the appellant would have access to medication in Liberia.

Result: Appeal allowed unanimously on limited grounds. (1) There was no possibility that the tribunal had failed to appreciate that it was dealing with a case of risk of death, in accordance with the psychologist's opinion. The tribunal had then gone on properly to address the threshold set in a foreign mental health case by Article 3, applying *Bensaid v United Kingdom (44599/98), J v Secretary of State for the Home Department [2005] EWCA Civ 629* and *Tozlukaya [2006] EWCA Civ 379*. (2) Adverse treatment which might not amount to inhuman or degrading treatment for the purposes of Article 3 might amount to an interference with private life and engage Article 8. Justification and proportionality had to be considered under article 8(2) which do not arise under article 3. However, the same evidence was relevant to both articles and the tribunal did not confuse the issues. It correctly

applied the *Huang* test of truly exceptional circumstances. (3) The tribunal did proceed on the basis that the appellant would not have access to therapy or counselling in Liberia so there was no error in that regard. (4) There was no evidence to support the AIT's conclusion that the appellant would obtain the medication he needed in Liberia. The AIT's fining that he could take a supply of medication with him was also unsupported by evidence. The tribunal's reasoning in relation to the availability of medicine was thus flawed in law. The case should be reconsidered by the AIT in the light of this judgement.

45. **CL (Vietnam) v SSHD** Court of Appeal Civil Division 10 December 2008 [2008] EWCA Civ 1551. Before: Lord Justice Sedley, Lord Justice Keene, Lady Justice Smith.

    Facts: the appellant was a failed asylum seeker from Vietnam. His father had been killed in Vietnam in early 1997. About a year later, when the appellant was aged ten, his mother left him and his brother with their grandmother; she died in 2001. Their mother returned and made arrangements for the two boys to go to the United Kingdom. They were met at the airport in London by a friend of their mother's, with whom they then lived for a time before being placed in foster care by social services. In November 2005 they moved to semi-independent housing. SSHD proposed to remove him.

    Issues: How far the adequacy of reception facilities for an unaccompanied child on return is solely a matter for the Secretary of State after the statutory appeal process has been completed and does not arise in the context of the decision on the child's Article 8 rights.

    Result: The AIT required to determine the Article 8 appeal on the basis of the evidence put before him. The extent of suitable reception and care facilities in Vietnam was relevant to that determination. He was not entitled to put that aspect of the Article 8 claim on one side and to leave it for future consideration by the Secretary of State.

46. **AE (Ivory Coast) v Secretary of State for the Home Department**, Court of Appeal (Civil Division) 3 December 2008 [2008] EWCA Civ 1509. Before: Lord Justice Sedley, Lord Justice Keene, Lady Justice Smith.

    Facts: appellant is a woman from Cote D'Ivoire, now aged 41, who came here lawfully in October 2001 as a student, but who not long after her arrival became ill and was diagnosed as HIV positive. She had no family in Cote D'Ivoire and faced going blind if her treatment was discontinued.

    Issues: Whether adjudicator had erred in law in accepting that appellant's case was exceptional but holding that in order to rank for Article 3 protection it had also to be extreme, which in her judgment it was not.

    Result: adjudicator had plainly, albeit quite understandably, made an error in setting a double hurdle when it had become clear from the decision in N in the House of Lords, now effectively endorsed by the Grand Chamber of the European Court of Human Rights, that the single hurdle under Article 3 is exceptionality. Remitted for second stage reconsideration with guidance that this case possibly came within the exceptionality test in N v SSHD [2005] UKHL 31 *"It is one thing, and a harsh enough thing, to return an HIV-positive individual to a country where medical facilities are markedly poorer than they are here, with the result that he or she is likely to die an earlier and more wretched death. It is arguably another to return an HIV-positive individual in an unusually needy medical state to a*

county where there is not only a real risk that she will have no family or friends to look after her, but a near certainty that she will lose the little that remains of her eyesight.“ Sedley LJ

47. **RS (Zimbabwe) v Secretary of State for the Home Department**, Court of Appeal (Civil Division) 18 July 2008 [2008] EWCA Civ 839. Before: Lord Justice Pill, Lady Justice Arden, Lord Justice Longmore.

    Facts: Appellant was a Zimbabwe national who arrived in the UK on a visit visa and was diagnosed with HIV 6 months later. Adjudicator found that exceptional circumstances applied and it would be contrary to article 3 ECHR to remove her.

    Issues: relevance of whether treatment was generally unavailable or whether it was available but applied in discriminatory ways.

    Result: Great care would have to be taken to determine whether the lack of medical activities or food is due to the infliction of deliberate harm on the appellant (or whether there is a risk of that) or whether the lack of medical facilities is due to a lack of national resources for this purpose. The level of seriousness of any actual or threatened harm and the cause of such harm must be determined as would the question of whether any actual or threatened harm would be as serious were it not for the appellant's medical condition.

48. **BL (Serbia) v Secretary of State for the Home Department**, Court of Appeal (Civil Division) 22 July 2008 [2008] EWCA Civ 855. Before: Lord Justice Mummery, Lord Justice Wilson, Lord Justice Stanley Burnton.

    Facts: appellant was a failed Kosovo Albanian asylum seeker. She was suffering PTSD and receiving treatment in the UK. Appellant was pregnant and feared ostracism on return.

    Issues: factors to be considered in the proportionality assessment.

    Result: where article 8 is in play the Secretary of State accepted that factors such as ostracism, humiliation and deprivation of basic rights are in principle capable of being relevant to the question whether it is proportionate to remove a person in a "health case."

49. **DM (Zambia) v Secretary of State for the Home Department** [2009] EWCA Civ 474 (6 April 2009) Sedley, Stanley Burnton, Elias LJJ

    Facts: 61-year old HIV sufferer came to UK to visit her daughter, applied for leave to remain on health grounds and was granted this on two occasions for an overall period of about 7 years.

    Issues: whether Article 8 imposes a different standard from Article 3 in relation to HIV positive appellants. Whether the fact that SSHD had granted her leave to remain on two occasions on the basis of her poor health was relevant to the A8 assessment?

    Result: No error of law in the AIT's determination, appeal dismissed. But Sedley LJ stressed that "*Simply counting the number of friends that a person has in the United Kingdom is not how one establishes whether they have a private life. To remove an AIDS sufferer from free care and treatment in one of the best health services in the world, which had rescued her from what would otherwise have been a terminal condition, would have seemed to me, at least unless argument persuaded me*

otherwise, to have been a clear interference with her physical and psychological integrity and thus an invasion of her private life requiring justification ." (at [20]).

Complexity: a number of procedural issues arose in relation to the extent to which the tribunal upon reconsideration was bound by findings of fact made below which had not been affected by legal errors. Sedley LJ also stressed *"the gravity of the case for the appellant"* (at [19]).

REMOVAL IN FAMILY LIFE CASES

50. **NF (Ghana) v SSHD** [2008] EWCA Civ 906 (30 July 2008) Latham, Rix, Longmore LJJ

    Facts: this case concerned the relevance of the SSHD's policy outside the immigration rules to Article 8. The policy DP 5/96 provided that leave to remain would normally be granted to a family where children had been unlawfully present for a period of 7 years. Even though the mother had an appalling immigration history and had blatantly lied to the authorities about some of her background. The immigration judge had applied the pre-Huang exceptionality approach and the pre-Chikwamba proposition that the mother should apply for entry clearance from Ghana and dismissed the appeal.

    Issues: Did the tribunal err in failing to give consideration to the impact of the policy on Article 8, did it fail to have regard to the child's situation and did it apply the wrong test of exceptionality?

    Result: The Court allowed the appeal finding that the tribunal had failed to give proper regard to the policy, had failed to give sufficient consideration to the situation of the UK-based daughter, and had applied the wrong test of exceptionality.

    Complexity: this case required analysis of Home Office policy and in particular of the interaction between policy and Article 8.

51. **VW (Uganda) and AB (Somalia) v Secretary of State for the Home Department** [2009] EWCA Civ 5 (16 January 2009) Mummery, Sedley and Wilson LJJ

    Facts: VW was a Ugandan national who had claimed asylum in 2001 and was granted exceptional leave to remain. She had a child with a British citizen and applied for further leave to remain in 2002 which was refused in 2007. Her appeal was dismissed on the basis that there were no insurmountable obstacles to family life being enjoyed in Uganda. AB was a Somali national with six children living in Ethiopia who had been refused entry clearance to join her husband and the children's father who had exceptional leave to remain in the UK. The appeal was dismissed on the basis that there were no insurmountable obstacles to the family being reunited in Ethiopia.

    Issues: Whether in the light of recent HL case law, in particular the case of **EB (Kosovo) v SSHD** the tribunal had applied the wrong test, namely insurmountable obstacles, rather than enquiring whether it would be reasonable to expect family life to continue abroad.

    Result: Appeal allowed and remitted in VW, dismissed in AB. Sedley LJ had to clarify several stages of the analysis under Article 8 of the ECHR. Even though the House of Lords had laid down the tests to be applied in recent case law including **EB (Kosovo)** the tribunal was still applying a higher threshold than permitted. As regards the engagement of Article 8(1) Sedley LJ held [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.*" As regards Article 8(2) ECHR the Court ruled that the test of insurmountable obstacles no longer applies at [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."

Complexity: This case demonstrates the difficulties of the tribunal in interpreting House of Lords case law where a clear change in direction is required. The Court provided guidance on the test of proportionality and on the other stages of the test under Article 8 of the ECHR.

52. **<u>LL (China) v Secretary of State for the Home Department</u>** [2009] EWCA Civ 155 (4 February 2009)

    Facts: the appellant had been in the United Kingdom lawfully for a period of over 10 years and claimed that she qualified for leave to remain under the Home Office policy on long residence, although she did not qualify under the immigration rules for long residence due to her absence from the UK for more than 18 months. The tribunal had allowed her appeal and remitted the matter to the Home Office for consideration of the policy and the Home Office appealed against this, and the tribunal upon reconsideration dismissed the appeal.

    Issues: Whether the Appellant had an Article 8 case in relation to completing her ACCA exams? Whether the policy on long residence had an existence separate and in addition to the immigration rules on long residence.

    Result: the Court held that the Article 8 claim was not made out on the facts. And as the appellant had not made an application under the policy, but rather under the immigration rules (and she was extremely unlikely to succeed under the policy in any event), she could not show detrimental reliance on the policy and her appeal failed.

    Complexity: this case again required awareness of a not widely publicised Home Office policy, which the Secretary of State had failed to bring to the tribunal's attention, and the appellant thus required the legal expertise of a legal representative for the proper presentation of her case. The case also involved general principles of public law including the concept of detrimental reliance borrowed from the legitimate expectations doctrine, which a litigant-in-person would not be able to formulate and thus put his case properly.

53. **<u>JA (Ivory Coast) and ES (Tanzania) v Secretary of State for the Home Department</u>** [2009] EWCA Civ 562

    Facts: both appellants had been diagnosed with HIV after arriving in the UK and had thereafter been granted discretionary leave to remain on health grounds. Their applications for extension of leave on health grounds had been refused and they appealed unsuccessfully on the basis that the case <u>N v UK</u> had decided that only exceptionally can someone be granted leave to stay on health grounds under Article 3 of the ECHR.

    Issues: Did this case involve a different analysis under Article 8 than Article 3 because the State had at one stage accepted responsibility for the appellants' health?

    Result: the Court held that the assumption of responsibility was crucial at [23]: "*First, both have treated* N *as, if not dispositive, then as the dominant standard for deciding these claims. Secondly, both have marginalised a potentially material factor – not a legal assumption of responsibility but a*

de facto commitment, not indefinite but not strictly time-limited (save for the policy or practice of giving indefinite leave to remain after six years of exceptional or discretionary leave), and prompted initially by compassion and subsequently by a sense of moral obligation. The consequent passage of time, without any allocation of fault, may also have a bearing: see EB (Kosovo)[2008] UKHL 41, §14-15..."

Complexity: this was a significant new development where the court pronounced that HIV cases may fall within Article 8 under a different standard from Article 3. This can be contrasted with much of the earlier case law on HIV positive applicants and demonstrates the need for detailed and fact-specfic legal argument. Had this been an unrepresented litigant, the case would not have gone to the Court of Appeal and the appellants cases would have been decided on the wrong legal basis and quite possibly in breach of the United Kingdom's obligations under Article 8 of the ECHR.

DEPORTATION IN FAMILY LIFE CASES

54. **AB (Jamaica) v Secretary of State for the Home Department** [2007] EWCA Civ 1302 (06 December 2007) Sedley; Thomas; Gibson LJJ

    Facts: The Appellant appealed against a decision upholding the refusal of her application for leave to remain on the basis of her marriage to a British citizen. The Appellant was a Jamaican citizen who came to the United Kingdom on a six-month visitor's visa. She overstayed. The following year she was joined by her two daughters because her mother was ill and was no longer able to look after them. They lived in the UK with the Appellant's sister. The Appellant then met and married her husband, who was born in the UK and had lived in the UK all his life. Two months after the marriage the Appellant applied to the Home Office for leave to remain on the basis of her marriage. Three years later the secretary of state refused her application applying policy DP 3/96. The SSHD concluded that there were insufficient compassionate circumstances to justify a concession on the grounds of the marriage, that the couple ought to have been aware that her precarious immigration status meant that the persistence of their marriage within the UK was uncertain, and that, although the husband was a British citizen, they could reasonably be expected to live in Jamaica. An immigration judge dismissed an appeal to the Asylum and Immigration Tribunal and a full tribunal held that there was no error of law in that determination.

    Issues: The SSHD submitted that a failure to apply his own policy would render his decision not in accordance with the law but that if a decision failed that test before the AIT, the immigration judge had no power to apply the policy and was limited to remitting the case so that the SSHD could do so.
    Findings: The finding about the husband's ability to relocate to Jamaica was untenable. His rights under article 8 were engaged as much as the Appellant's and coexisted with Home Office policy DP 3/96. It was not permissible to give less than detailed and anxious consideration to the situation of a British citizen who had lived in the UK all his life before it was held reasonable and proportionate to expect him to immigrate to a foreign country in order to keep his marriage intact. No consideration had been given to those matters by the AIT at either stage.

    No principle of law made inadmissible on an appeal to the AIT a policy used by the secretary of state for the very purpose that the AIT was addressing. Applying the policy could not, however, have made it proper for the immigration judge to adopt a higher standard than Art.8(2) permitted in gauging the reasonableness and hence the proportionality of removal. If, having given full and structured consideration to the proportionality of a removal that was to affect both the overstayer and the settled spouse, the immigration judge formed the view that removal was proportionate but found too that the SSHD had failed to apply a policy that might realistically have resulted in non-removal, remission to the secretary of state would be the right course. Since, however, DP 3/96 was on balance tougher than Art.8, that scenario was probably unreal. It followed that the IAT's determination was flawed by its failure to bring into the assessment of the proportionality of removing the Appellant the fact that the executive as a matter of policy did not regard an overstayer who was in a qualifying marriage as ordinarily liable to removal if the settled spouse could not reasonably be expected to go too.

    The significance of the Appellant's breach of immigration control could not on any fair-minded view make it proportionate either to disrupt the family's life by the removal of her and her daughters to Jamaica, or to expect her husband, in order to keep the marriage intact, to go to a country where no evidence showed it to be reasonable to expect him to settle. The AIT ought to have held that the immigration judge had erred in law and allowed the appeal.

Importance and Complexity: This matter sought to clarify the relationship, in particular when before Immigration Judges, between policy matters and article 8. In this case ultimately the AIT had treated policy, DP3/96, in isolation and without reference to article 8. The policy was in fact more stringent to article 8 requirements and the AIT failed to consider the SSHD's policy that in certain circumstances it is a breach of article 8 to remove an overstayer / illegal entrant from her family. It should be noted that the Appellant had lost twice before the AIT, even though the Court of Appeal found some of its crucial findings 'untenable'. The SSHDs argument that policy matters were a matter for [her] was rejected and following this case it is standard practice before the Courts for the Judge to consider policy matters in the article 8 (as well as the 'not in accordance with the law') context.

AB was also a pre-curser to the later House of Lords decision in Beoku-Betts in which the House found, in very brief summary, that the article 8 rights of all the family, and not just the person being removed, should be considered as a whole.

55. **AF (Jamaica) v Secretary of State for the Home Department** [2009] EWCA Civ 240 (26 March 2009) Rix, Rimer and Toulson LJJ

Facts: Jamaican national married to a British citizen with three children, committed offence of conspiracy to supply Class A drugs and sentenced to 7 years imprisonment, deportation order made by SSHD.

Issues: Did the tribunal give adequate consideration to the rights of the wife and children following the case of *Beoku-Betts* (see 2008 HL) and whether it had asked the right question of reasonableness after *Beoku-Betts* and *NF (Ghana).*

Result: appeal allowed and remitted to tribunal for reconsideration. The Court referred to the House of Lords decisions in *Huang* and in *Beoku-Betts* as well as ECtHR such as *Uner v. The Netherlands, Sezen v. The Netherlands, Boultif v. Switzerland* as well as the Home Office policy's on deportation, including the 7-year child concession (see above *NF (Ghana)*) in finding that the tribunal had failed to apply the correct test.

Complexity: This case required knowledge of Home Office policies which often are not brought to the tribunal's attention by the Home Office , but requires expert legal knowledge on the part of the appellant's representative. It also required familiarity with relevant ECtHR case law.

56. **DS (India) v Secretary of State for the Home Department** [2009] EWCA Civ 544 (12 June 2009)

Mummery, Rix and Moses LJJ

Facts: DS was a compulsive gambler who had committed robberies to feed his habit. His marriage had broken down and he had previously lost contact with his son because of his gambling habit. He was remorseful during his 51-month custodial sentence and became reconciled with his ex-wife.

Issues: After the Court of Appeal decision in *VW (Uganda) and AB (Somalia) v SSHD* (below) the issue was, *inter alia,* whether the tribunal had applied the correct test of asking whether it would be reasonable to ask the family to return with DS to India.

Result: Appeal dismissed, the tribunal had had the relevant considerations in mind.

Complexity: The case required awareness of recent developments in the area of Article 8.

57. **AR (Pakistan) v. Secretary of State for the Home Department** [2010] EWCA Civ 816, Date: 15 July 2010, Before: The Chancellor of the High Court, Moore-Bick LJ, Jackson LJ.

Facts: The appellant is a Pakistani national, aged 38, who entered the UK in September 1999 as a spouse of a person settled here. He was granted ILR, had 3 children, the marriage failed, they separated and were divorced in 2006. His son(under 15) and twin daughters, 9, live with their maternal grandparents. His son has behavioral difficulties and special educational needs. The appellant was convicted of a number of convictions and finally served with a deportation order, which he appealed.

Issue: Correct approach to proportionality and consideration of the child's best interest as required by the UN Convention on the Rights of the Child.

Result: Decision: dismissed. Moore-Bick LJ: The panel had taken the correct approach to Article 8. The panel also took into account the particular nature and degree of that disability and the extent to which the appellant had been in contact with his children and had provided parental support.

Complexity: The evidence before the Tribunal included antecedents and probation reports. The tribunal heard evidence from the appellant, his brother and his former mother-in-law and considered the statement of another witness who was not called in person). It also considered various reports relating to the appellant's son, who suffers from behavioural difficulties and has special educational needs. This was a "hard case" because all parties accepted that the children could not move to Pakistan and that if deported the appellant and his son could not maintain effective contact due to his disability.

Vulnerability: Appellant's son and best interests of the child.

58. **HM (Iraq) v. The Secretary of State for the Home Department** [2010] EWCA Civ 1322, 20 October 2010, Before Pill LJ, Jackson LJ, Patten LJ (unanimous).

Facts: HM is Iraqi, now 25. He came to the UK aged 12 with his family who were granted leave to remain. HM was eventually granted ILR but convicted of drugs offences and sentenced to 16 months imprisonment.
Panel found he had not established family life with adult mother and sisters, nor with girlfriend (a serving prisoner). Panel found private life engaged but it could be continued in Iraq.

Issues: Whether Deport panel applied relevant criteria in proportionality asesment under Article 8.

Result: Appeal allowed. Case remitted to the Upper Tribunal for redetermination

Complexity: Review of Strasbourg jurisprudence and relevant criteria to be applied before determining that the panel had not undertaken the exercise required.

PARTICULAR FACTORS IN THE PROPORTIONALITY EXERCISE AND THEIR WEIGHT

59. **B v Secretary of State for the Home Department**, Court of Appeal (Civil Division) 1 March 2006 [2006] EWCA Civ 954. Before: Lord Justice Gage and Lord Justice Moses.

    Facts: this was a permission application. The Appellant applied for and was refused asylum in 2002. She appealed to the AIT but the AIT did not hear the appeal until 2005. In 2004 A married a refugee settled in the UK who could therefore not relocate with her to Turkey.

    Issues: Whether the Immigration Judge had erred in his judgement on the proportionality of removing A so she could make an application for entry clearance from Turkey, in the interests of effective immigration control. A relied on *Akaeke*, which concerned the effect of substantial delays in the immigration process on the proportionality of subsequently removing applicants simply to make in-country applications elsewhere.

    Result: Permission refused unanimously. Although another Immigration Judge might have come to a different conclusion, the instant judge had properly considered *Akaeke* without legal error.

60. **R. (on the application of Tozlukaya) v Secretary of State for the Home Department** Court of Appeal (Civil Division), 11 April 2006 [2006] EWCA Civ 379. Before: Lord Justice Buxton, Lord Justice Lloyd and Lord Justice Richards.

    Facts: This was an appeal by SSHD against an order of the High Court quashing SSHD's certification of an application for leave to remain as clearly unfounded. The applicants were a Turkish family who claimed asylum in Germany on political grounds in 1996. The German authorities had refused asylum and the family had come to the UK to claim asylum here in 1998. At that stage the couple had an eighteen-month old infant. The claim was certified on the basis of the Dublin Convention, as Germany accepted responsibility for them. However the applicants believed their claim would not receive fair consideration in Germany. They began a claim for judicial review of the decision to certify on the grounds of Article 3 ECHR but subsequent cases established that that claim could not succeed. However, in the meantime the applicant's wife had given birth to a second child in June 2001. In November, the applicants made further representations against removal on the basis of their family ties in the UK. The SSHD certified the representations as clearly unfounded but issued a right of appeal by mistake causing the certificate to be withdrawn and the matter to come before an adjudicator and the IAT. After dismissal of the appeal by the IAT removal directions were set. However removal was not possible because the applicant's wife had complications with her pregnancy leading to a miscarriage while in detention. Her psychiatric condition deteriorated and she was moved in and out of psychiatric hospitals and immigration detention. The applicant made further representations on article 3 and article 8 grounds. It was now 2004 and the applicant's first child had therefore lived in the UK for 6 years, and the second, UK-born child for 3. SSHD certified the representations as unfounded, and the applicants successfully sought judicial review of the certification. The High Court ruled the claim on article 8 was arguable. SSHD appealed.

    Issues: Putting article 3 to one side, the issues were (1) whether the claim was bound to fail on the mental health aspect of article 8, which rested on the question of engagement and (2) whether the claim was bound to fail on article 8(2) with respect to family life, when considering the SSHD had a concessionary policy which the applicants contended suggests the family ought to have been given leave outside the rules. SSHD sought to revisit the issue in in *Baig v Secretary of State for the Home Department* [2005] EWCA Civ 1246 as to whether her policy was in fact as described in a policy

document, suggesting each case would be considered on its own merits, or as in a subsequent parliamentary statement, which said that removal would be the exception to the rule where children of a young age had been continuously resident in the UK for 7 years.

Result: Appeal dismissed unanimously. The AIT could not realistically find that article 8(1) was engaged on the basis of Mrs T's mental health, given the conclusion that article 3 was not. On the family and private life of the applicants, the claim was not bound to fail. The court went through the statements of policy contained in the policy document and the subsequent parliamentary statement and the concession made by counsel for SSHD in *Baig*. There was a legitimate expectation that the policy was as contained in the parliamentary statement and the reported case of *Baig*. In those documents it was said that removal would not usually be appropriate in cases such as the present. SSHD had thus made her decision to remove the applicants without reference to her own policy. That did not directly affect the question of the lawfulness of the decision to certify the claim under article 8 as unfounded. However, the existence of that policy did mean that the case could properly be considered exceptional by a putative AIT, and therefore the claim was not bound to fail on the issue of proportionality.

61. **MA (Afghanistan) v Secretary of State for the Home Department (a.k.a. Afshar v Secretary of State for the Home Department)**, Court of Appeal (Civil Division, 3 October 2006, [2006] EWCA Civ 1440. Before: Lord Justice Pill and Lord Justice Moses.

Facts: the appellant was a 31 year old man from Afghanistan. In 1994 he went to Azerbaijan to study. He returned in 1999 and married. In 2000 he claimed to have fled from the Taliban, first to Tadjikstan and then to the United Kingdom, where he arrived on 14 May 2000. He was refused asylum both on refugee convention grounds and on human rights convention grounds. He lost his appeal to the adjudicator and AIT but for the Article 8 ECHR ground which was remitted for consideration by a different adjudicator, who in 2004 allowed the appeal on the basis of the appellant's private life in the UK. A had relied on letters of support from the public authorities for whom he worked as a Dari interpreter, to the effect that he was one of only two such interpreters in the North East region and his work was of great importance to those bodies. The adjudicator held that due to the length of time MA had spent in the UK and the public interest in his continuing to work here, it would be disproportionate to remove him. SSHD appealed successfully to the AIT. The appellant appealed.

Issues: (1) whether the adjudicator had applied the test of exceptionality and (2) whether MA's positive contribution to UK society was a factor which was relevant in the consideration of proportionality.

Result: Appeal dismissed. (1) in this case, the absence of the word 'exceptional' in the adjudicator's determination was an error of substance rather than style and he had therefore not applied the correct test of exceptionality and (2) MA's contribution to life in the UK had no bearing on his right to private life.

62. **OK (Afghanistan) v Secretary of State for the Home Department**, Court of Appeal (Civil Division) 18 October 2006 [2006] EWCA Civ 1500. Before: Sir Paul Kennedy.

Facts: The appellant was an Afghan who claimed asylum in 1999 on the basis of feared persecution by the Taleban. His claim was not decided until 2002, by which time the Taleban government had been defeated and SSHD had withdrawn her policy of granting failed Afghan asylum seekers exceptional leave to remain. The appellant made fresh representations upon which SSHD upheld her

decision to refuse leave to remain. In a judicial review hearing the High Court declined to quash the SSHD's decision. The appellant appealed.

Issues: Putting the asylum issues to one side, the issue was whether the delay in processing the original asylum claim had unfairly deprived OK of the benefit of SSHD's policy such that removal would be disproportionate under article 8(2), applying the case of *Shala.*

Result: Applying *Strbac & Anr v Secretary of State for the Home Department [2005] EWCA Civ 848*, the Court held that the proportionality issue was not affected by the delay and loss of SSHD's policy.

63. **The Secretary of State for the Home Department v The Queen on the Application of AA (Afghanistan)** Court of Appeal (Civil Division) 22 November 2006 [2006] EWCA Civ 1550. Before : Lord Justice May Lord Justice Laws and Lord Justice Gage.

    Facts: SSHD appealed against an order of the High Court quashing its decision to remove AA. AA had claimed asylum in Austria and left before the claim was determined to claim asylum in the UK. SSHD certified the claim in 2002 on the basis of the 'Dublin II' Regulation, which polices the responsibility of EU member states for asylum seekers who claim in more than one country. However, SSHD made no removal directions until 2005.

    Issues: AA argued that the High Court was right to find the decision to remove him was wholly unreasonable and disproportionate in view of the private life he had established during the long period of unexplained inactivity by SSHD.

    Result: Appeal allowed. There was no perversity, which is what is required to meet the high threshold of 'Wednesbury unreasonableness', even if the delay occasioned by SSHD was deplorable. Article 8 had not been argued before the High Court so the Court of Appeal was not prepared to consider it, though it doubted whether the case could be described as exceptional.

64. **DS (Afghanistan) v Secretary of State for the Home Department**, Court of Appeal (Civil Division) 22 November 2006 [2006] EWCA Civ 1767. Before: Lord Justice Scott Baker.

    Facts: This was a permission application. The applicant was an Afghan who applied for asylum in 2001. Asylum was refused in January 2002 because SSHD doubted that the appellant was an Afghan. SSHD later appreciated that that was an error and had the true position been known the applicant would have benefited from the Secretary of State's policy in force at that time to grant Afghans exceptional leave to remain for a period of four years. That policy did not change until April 2002 when the exceptional leave to remain was reduced to a period of one year. The applicant appealed and his appeal was rejected on both asylum and human rights grounds. He appealed again to the AIT who heard the appeal as a reconsideration hearing under the transitional provisions. The AIT found no error of law and upheld the original decision.

    Issues: Whether the AIT did not give adequate consideration to the arguments that were advanced and accepted in the cases of *Mugisha [2005] EWHC 2720 (Admin)* and *Rashid [2004] EWHC 2465 (Admin)* to the effect that circumstances can arise whereby it is conspicuously unfair not to deal with two applicants whose circumstances are identical in the same way. Whether this argument would have materially affected the judgement on proportionality because it took the effective operation of immigration control out of the public interest side of the balance.

    Result: Scott-Baker LJ said he was persuaded by counsel's 'admirable argument' to grant permission.

65. **AL (Serbia) v Secretary of State for the Home Department**, Court of Appeal (Civil Division) 28 November 2006 [2006] EWCA Civ 1619. Before: Lord Justice Ward Lord Justice Neuberger and Lord Justice Gage.

Facts: The appellant was an asylum-seeker from Kosovo who had been separated from his parents and arrived alone in the UK when he was 16 in 2000. SSHD refused asylum but granted exceptional leave to remain for two years. AL applied for further leave to remain in 2002 which was refused.

Issues: AL appealed on the basis that SSHD had a policy of granting leave to remain to asylum-seeking families which was discriminatory, because it denied him the same benefit on the ground of his not being accompanied by his parents. AL contended that this breached article 14 ECHR in conjunction with his article 8 right to private life.

Result: Appeal dismissed. Article 14 was engaged by the discriminatory treatment received by AL, although he had not identified the right comparator. However, the difference in treatment was justified by the object of the SSHD's policy, which evidence established was to reduce the costs of opposing sequential claims for asylum made by members of the same family. An individual did not present SSHD with the same administrative costs, so the rationale of the policy did not apply to AL.

66. [1] Huang [2] Kashmiri v Secretary of State for the Home Department [2007] UKHL 11 (21 March 2007)

Facts: As above

Issue in relation to proportionality: The Court found:

'20. In an article 8 case where this question is reached, the ultimate question for the appellate Immigration 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 all considerations weighing in favour of the refusal, prejudices the family life 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. The suggestion that it should is based on an observation of Lord Bingham in Razgar above, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test'.

This was a significant departure from the previous approach of not just adjudicators but of the superior courts, where it was previously considered that an article 8 case needed to be 'truly exceptional' to succeed. After Huang all article 8 cases that used the exceptionality test as a defining factor had to be re-examined and indeed re-litigated.

Complexity: Firstly the House of Lords found that the Court of Appeal below had misinterpreted the law on this issue. This alone highlights the complexity of the issue and article 8 generally. The judgment also highlights frequent misinterpretation of both statute and common law in article 8 cases. In this case the SSHD was submitting and arguing a false premise of law in which she was advocating article 8 cases should be decided. If this matter, or another like it, was not brought to the House of

Lords, then the SSHD and the judiciary, of all levels, would continue to decide article 8 cases on an incorrect legal basis and thus incorrectly.

67. **EB (Kosovo) (FC) v Secretary of State for the Home Department**, House of Lords 25 June 2008 [2008] UKHL 41. Before: Lord Bingham, Lord Hope, Lord Brown, Lord Scott, Baroness Hale.

    Facts: Kosovan claimed asylum aged 13 four days after arriving in country in 1999. Refused after a delay of over four and a half years, conditions in Kosovo then having changed. Had his case been decided before he turned 18 he would have had the chance, under policies then in place, of exceptional leave to remain.

    Issues: Relevance of delay in context of article 8 proportionality assessment.

    Result: (1) An applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of delay, the likelier this is to be true. (2) AIT should consider whether, and to what extent, a delay in resolving his asylum claim and the manner of its handling were relevant when considering the proportionality of an immigration decision. (3) Delay may be relevant in reducing the weight otherwise accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes.

68. **Ahmed Mahad (previously referred to as AM) (Ethiopia) and others v. Entry Clearance Officer** [2009] UKSC 16**,** Judgment given on: 16/12/2009, Before: Lord Hope, Deputy President, Lord Rodger, Lord Brown, Lord Collins, Lord Kerr (unanimous – appeals allowed)

    Issues/facts: 7 conjoined appeals. Question: Whether applications by various family members (e.g. para 281 (spouses or civil partners), para 297 (children), para 317 (parents, grandparents and other dependents) seeking leave to enter the UK to settle with other family members already settled in the UK permit third party support in order to meet the requirement that they will be able to be accommodated and maintained without recourse to public funds.

    Procedural history: Before the CoA some of the appellants argued that Article 8 ECHR required the rules to be read down as necessarily permitting third party support but article 8 also formed a separate ground of appeal. The CoA dismissed all appeals save for MB whose case was remitted on Art 8 where the sponsor was on DLA.

    Decision: Lord Brown: Would construe the Rules as permitting third party support (based on approach to constructing of the IR, status of the IDIs, policy considerations and comparative analysis of Part 8 IR with other Parts of the IR (in particular Parts 6 and 7). [31] . *Given, however, as already indicated, that I would in any* ***event construe the existing rules as permitting of third party support without any reference to article 8 of the Convention****, it is plainly unnecessary to decide the point. Obviously, were the Secretary of State now to amend the rules to exclude third party support – and Parliament not then disapprove them – it might well become necessary to do so. The argument could possibly be affected by the precise form of amendments made.*

    Complexity: The finding at [31] demonstrates that an Article 8 challenge to the Rules could be revived if the SSHD (with Parliament's approval) amended the IR to exclude third party support. However, whilst Article 8 was only siphoned off by the UKSC, clearly it was a ground relied upon all the way up the appellate structure. The UKSC disagreed with CoA on construction of the rules

showing complexity even for senior judiciary. It is plain that this process and argument would have been un-navigable if the applicants had been unrepresented.

69. **Patel, Modha & Odera v. ECO (Mumbai)** [2010] EWCA Civ 17, 25 January 2010,**Before:** Sedley LJ, Longmore LJ, Aikens LJ.

    Facts: entry clearance cases concerning members of the families of individuals who have only recently secured the British nationality which was taken away by the Commonwealth Immigration Act 1968.

    Issue: Whether Article 8 has purchase in a case where children were denied entry clearance to the UK because of their parent's wrongly being barred from settling in the UK

    Decision: Appeal of Riddhiben Patel allowed and decision that she is entitled to entry clearance substituted. Appeals of Pallaviben and Shital Modha allowed to the extent of remitting them to the AIT, differently constituted, for a fresh determination of the second-stage reconsideration. Appeals of Ramaji and Liluben Odedara dismissed.

    Complexity: Legal analysis of historical wrong of denial of citizenship to British overseas which impacted on family life. This is self-evident from the reasons upon which the decisions were based, namely that a historical wrong has a potential relevance to art. 8 claims. It does not make the Convention a mechanism for turning the clock back, but it does make both the history and its admitted injustices potentially relevant to the application of art. 8(2). The effect of the historical wrong was to reverse the usual balance of Article 8 issues because the adult children may no longer be part of the family life of British overseas citizens who have finally secured British citizenship. But if the low threshold of Article 8(1) is passed, the balance of factors determining proportionality for the purposes of art. 8(2) will be influenced, perhaps decisively, by the fact (if it is a fact) that, but for the history, the family would or might have settled here long ago.

70. **AP v. The Secretary of State for the Home Department** [2010] UKSC 24, 16 June 2010 Lord Phillips, President, Lord Saville, Lord Rodger, Lord Walker, Lord Brown, Lord Clarke and Sir John Dyson SCJ

    Facts: Appeal concerned control order with a condition that AP, who had previously lived in London, should now live in a town some 150 miles away with 16 hour curfew. In August 2008 Keith J quashed the residence requirement and the following day the Secretary of State served a modified control order in similar terms, except that the curfew had been reduced to 14 hours. The CoA upheld the SSHD's appeal. The appeal to the SC became academic because the SSHD revoked the control order upon a decision that AP should be deported on national security grounds and detained. AP was granted bail with an 18 hour curfew. However the appeal raised points of general importance. The UKSC upheld AP's appeal and restored the order of Keith J.

    Issue: Relevant for Article 8 purposes was question of relevance of Article 8 as a factor in assessment of arbitrariness of a deprivation of liberty when detention is not sufficiently long.

    Result: Lord Brown (with whom Lord Phillips, Lord Saville, Lord Walker and Lord Clarke agree). Principle: Art 8 can tip the balance in relation to Art 5 and is a question of fact for the decision maker. (see [4](a) and [12]). Sir John Dyson SCJ: [31] at [31] in " … *where the confinement is not sufficiently long of itself to amount to a deprivation of liberty, an assessment of the effect of the measures on the*

controlee may be decisive. If the Secretary of State fails to ascertain what the effect of an order will be, she runs the risk that there will be breach of article 5.1."

Complexity: Novel and complex Article 8 arguments considered in the context of assessment of arbitrary deprivation of liberty under the control order regime, which was varied overnight requiring legal argument and expertise (procedurally) in dealing with the varied order.

71. **ZN (Afghanistan) (FC) and Others (Appellants) v. Entry Clearance Officer (Karachi) (Respondent) and one other action** [2010] UKSC 21, Before Lord Phillips, President Lord Rodger, Lord Collins, Lord Kerr and Lord Clarke

    Facts: Applications of family member to join refugee in the UK who now obtained British citizenship.

    Procedural history: Dismissed by IJ Wiseman (paras 352A and 352D inapplicable because S acquired British nationality and not disproportionate under Art 8). SIJ Eshun made no order for reconsideration. Buxton LJ gave permission to the CoA on the basis that the issue as to the extent of paras 352A and 352D was important. CoA (Laws LJ, with whom Rix and Wilson LJJ) found paras 352A and 352D inapplicable and no breach of Art 8. CoA refused PTA. UKSC gave permission. TSOL correspondence – DL or ILR if succeeded on issues 1 and 2. Nevertheless, appeal not considered academic.

    Issue: Concerned question of applicability of paras 352A and 352D to a person who has been recognised as a refugee and granted asylum but has become a British citizen before the date of the relevant application/ decision for entry clearance (or whether paras 281 (spouses and civil partners) and 297 (children) of HC 395 (as asserted by the ECO) apply - which include maintenance and accommodation requirements).

    Decision: Lord Clarke (judgment of the Court). [36] the sponsor must have been granted asylum in order to fall under para 352A, 352D and 352E. [37] There is no additional requirement that the "person granted asylum" or the "person who has been granted asylum" must not have become a British citizen before the application for entry clearance is made, or perhaps determined.

    Complexity: Article 8 issue was not on appeal to the UKSC but significant that the UKSC were not persuaded by the approach of the CoA ([27] and [28]) to the construction of the IR and reached their conclusion on that basis. ([36]-[38]). Given procedural history and complexity of the issues (of general importance – hence why the case was not struck out as academic) had A not been represented then this result would not have been possible.

72. **QJ (Algeria) v. Secretary of State for the Home Department** [2010] EWCA Civ 1478, 21 December 2010, Before: Sedley LJ, Moore-Bick LJ, Sullivan LJ (appeal dismissed – unanimous).

    Facts: QJ is 44 and has been in the UK for at least 10 years. QJ's asylum claim failed and he appealed but that lapsed due to later events. His wife joined him and there are 2 children of the marriage who have known life only in the UK. One child, I has significant health problems. The UKBA intend to remove the entire family if QJ's appeal fails. QJ was convicted of terrorism related offences and subject to 11 years imprisonment and recommended for deportation. When eligible for release he was detained under immigration powers within the prison estate. Meanwhile he was convicted in absentia in Algeria for terrorism and sentenced to 20 years imprisonment. QJ's representatives requested that his asylum claim be decided and he was interviewed. It was certified under section 97(3) of the 2002

Act that the decision had been taken wholly or partly in reliance on information which should not be made public in the interests of the relationship between the United Kingdom and Algeria, so that any appeal by QJ lay to SIAC. SIAC granted bail, in principle, on stringent terms, including a 20-hour curfew and a geographical boundary during non-curfew hours. He has recently been released to an address in Coventry, where he resides with his family.

Issues: (1) Article 8 – Question whether Court below erred in (a) misapplying Huang (b) failing to consider children's interest as a primary interest and (c) holding that QJ's family had no right to remain; (2) Double jeopardy.

Result: Lord Justice Sullivan **:** Regarding (1) Article 8: the Court below had not erred as to Huang, the children's interests were a primary interest but not an overriding interest given C's convictions, and there was insufficient evidence as to whether or not QJ's family had a right to remain thus grounds disclosed no error of law. (2) Separate Art 6 double jeopardy ground also dismissed as well as alternative argument that arbitrariness of double jeopardy should be considered in the context of Article 8. This was also rejected.

Complexity: (1) in a procedural sense given outstanding asylum claim which was eventually subject to SIAC jurisdiction. (2) complex factual matrix upon which proportionality assessed, as well as (3) complex legal questions as to whether best interests of the child primary consideration or whether this consideration gives way to father's convictions. Also (4) question of whether risk on return of double jeopardy may be imported into Article 8 assessment. (5) Strasbourg jurisprudence influential in reaching decision.

Vulnerability: Children and de facto constructive removal of the entire family, including of 2 children, aged 8 and 7 at the time of the judgment, where one required intensive hospital operations and treatment.

Article 8 cases turning on procedural or jurisdictional issues

73. **S v The Secretary of State for the Home Department** Court of Appeal (Civil Division) 9 May 2006 [2006] EWCA Civ 695 Before: Lord Justice Brooke

    Facts: This was a permission application. The appellant and his wife are citizens of Tanzania aged 70 and 57. They entered the UK in October 2001 as visitors. In March 2002, they applied for indefinite leave to remain as the dependent relatives of their daughter, who was settled here. SSHD refused this application. He was not satisfied that they were dependent on the sponsors and that they had no other close relatives to turn to for financial support in their own country. An appeal was lodged but not decided until 2005. The appellant had been diagnosed with a brain tumour and an operation was performed in June 2005. The AIT held that removal would be disproportionate. SSHD appealed and on reconsideration the AIT held that removal would not be disproportionate.

    Issues: Whether the AIT on reconsideration had erred in proceeding to redetermine the appeal without hearing submissions or up-to-date evidence. The appellant had wished to argue that the case was exceptional because SSHD had not had regard to her own policy on removing relatives over 65 years of age.

    Result: Permission granted. It was arguable that the procedure adopted on reconsideration was unfair.

74. **JM v Secretary of State for the Home Department** Court of Appeal (Civil Division) 4th October 2006 [2006] EWCA Civ 1402. Before: Lord Justice Waller, Lord Justice Laws and Lord Justice Leveson.

    Facts: The appellant is a Liberian national who, until he left the country, was an Associate Justice and the second most senior judge of the Liberian Supreme Court. In May 2003 he gave judgment in a constitutional motion against the interests of the leading parties of President Charles Taylor's government. The appellant received death threats and intelligence reports confirmed that his life was indeed at risk. All the judges who sat on the case left the country. The appellant left Liberia and claimed protection in the United Kingdom. He had already been granted a visitor's visa before the controversial judgement had been given, so he had leave at the time he applied for asylum. The Secretary of State rejected his claim on the basis that circumstances had changed and risks had dissipated. The adjudicator dismissed the appellant's appeal, and the AIT upheld the adjudicator's determination. In addition to his case for asylum under the Refugee Convention, the appellant asserted before the adjudicator that his rights under ECHR article 8 were engaged because of his attachment to his grandchild and his daughter, the child's mother, in this country.

    Issues: Whether an "immigration decision" consisting in a refusal to vary leave, which is appealed pursuant to section 82(2)(d), is an immigration decision "in consequence of which" the appellant's removal would be unlawful under the Human Rights Act. If not, the article 8 claim would not be justiciable by the AIT.

    Result: Appeal allowed. The AIT did have jurisdiction to determine the article 8 claim. The interpretation of 'in consequence of which' may yield a broader accommodation of human rights than Strasbourg suggests in *Vijayanathan and Pusparajar v France (1992) 15 EHRR 62* with its reference to 'imminent removal'. The court came to this conclusion bearing in mind that under the immigration Acts of 1971 and 2002, it is a criminal offence not to leave the UK when SSHD refuses to vary leave. The appellant would therefore risk committing an offence if he were to wait for actual removal

directions to be set before airing his article 8 claim. He would also not be able to work or claim any kind of benefit. By a further section of the 2002 Act his appeal against removal directions may only be exercisable from abroad. The statutory 'one-stop' appeal process also envisaged all aspects of an appellant's claim being dealt with at one hearing.

75. **DK (Serbia) v Secretary of State for the Home Department** Court of Appeal (Civil Division), 20 December 2006 [2006] EWCA Civ 1747. Before: Lord Justice Latham, Lord Justice Longmore and Lord Justice Moore-Bick.

Facts: These were joined appeals against several decisions of the AIT in which the Tribunal had found errors of law in the decisions of adjudicators or immigration judges and had gone on to re-determine the substantive appeals. Appellants DK, JN and MS had won appeals on article 8 grounds by adjudicators or immigration judges and subsequently lost on reconsideration by the AIT. The other appellants (SP, PE and AI) did not rely on article 8.

DK was from Kosovo and arrived as an asylum seeker aged 16 in 1999. His case was eventually decided by the Tribunal in 2005. It held that although his account was truthful, the political situation in Kosovo had changed so that there was no longer any objective risk of serious harm. However, he had spent such a long time waiting for the outcome of his appeal that he had effectively become a part of the foster family with whom he was placed on arrival. An immigration judge held that the case was truly exceptional both because of the delay and the application of a discretionary policy which had now expired, that she held would have applied but for the delay. SSHD appealed. On reconsideration the AIT held that the immigration judge had erred in law and that in fact there was no proper basis for the conclusion that the appellant's case was exceptional.

JN was a Ugandan who came to the UK as a visitor and claimed asylum. Her asylum claim was not refused until 2 years later in 1995 and her appeal was not determined until 1998. The adjudicator recommended she be allowed to remain as a matter of discretion. SSHD wrote in 1998 that he would not follow the recommendation. No further action was taken until 2005 when SSHD decided to remove JM. The AIT found that removal would be a disproportionate interference with the appellant's well-established private life and that the case was exceptional because of the delay. SSHD appealed. On reconsideration the AIT held that the case was not exceptional.

MS was a Somalian lady aged 67 who came to the UK using false identification in 2001. She was later refused further leave to remain and claimed asylum and invoked article 8 because she had by then been living with her daughter who was settled in the UK for about 4 years. An adjudicator held that removal would be disproportionate under article 8(2). SSHD appealed. On reconsideration the AIT held that there was no proper basis for describing the case as exceptional.

Issues: The substantive article 8 appeals were not dealt with at this hearing, which concerned two complex procedural questions: (1) the scope of a reconsideration hearing under the new statutory scheme, and whether the AIT had the power to revisit findings of fact which had not been infected by any error of law and (2) the proper procedure to be adopted in reconsideration hearings. The appellants contended that they should have been given an opportunity to produce fresh evidence between the finding of an error of law in the determinations under review and the substantive reconsideration of their cases.

Result: The 2004 Act had created a single appellate body in immigration cases and removed a further right of appeal by replacing it with reconsideration by the same body. The only errors of lw which can be investigated are those on which reconsideration is ordered, and any obvious points as described in

Robinson. The procedure rules did give the AIT jurisdiction over the appeal on reconsideration which is not limited to matters infected by legal error (*AH(Scope of Section 103 Reconsideration) Sudan [2006] UKAIT 00038* applied). However, the CA also adopted Sedley LJ's opinion in *Mukarkar –v- SSHD C5 2005/2539* that uninfected findings of fact should not be reopened unless there is further evidence indicating that it is in the interests of justice to do so. This was because reconsideration is by the same body and not intended by Parliament to be a rehearing. The effect of Rule 32(2) was to limit factual matters to those before the original Tribunal, unless prior notice is given and permission granted for further evidence. Although there are practical difficulties with obtaining funding before a legal error has been identified, appellants should give a notice under Rule 32(2) on a contingency basis and then seek adjournment to instruct witnesses et cetera. Thus the reconsideration hearing can be heard in two parts, but that will not necessarily be the case. The Court also gave guidance on the proper procedure to determine how the reconsideration is fairly conducted, the use of replies and notices under the procedure rules and when and how directions should be given as to the structure and scope of the reconsideration hearing.

DK, JN and MS had their applications dismissed on the procedural grounds but adjourned for substantive consideration of the article 8 issues.

76. **AS (Somalia) v SSHD** [2009] UKHL 32 (17 June 2009)

Lords Phillips, Hoffman, Hope, Brown and Lady Hale

Facts: the appellants were Somali nationals who had been refused entry clearance from Ethiopia to join their cousin, a recognised refugee, in the UK under Article 8 of the ECHR. The appellants submitted that they should be able to rely on up-to-date evidence where their Article 8 rights are concerned.

Issues: the question was whether the s.85(5) of the 2002 Act meant that only facts as appertaining at the date of the refusal decision could be taken into account by the tribunal or whether, under Article 8 of the ECHR, facts post-dating the refusal decision could be considered.

Result: the relevant date for consideration in entry clearance appeals involving Article 8 of the ECHR is still the date of the refusal decision and not the date of hearing, even though human rights are involved. The appellants could make a new application if new facts had arisen.

Complexity: Even though they had in the meantime been granted entry clearance and arrived in the UK, the House entertained the application as it raised an important point of principle.

77. **BA (Nigeria) and PE (Cameroon) v Home Secretary** [2009] UKSC 7 (26 November 2009)

Before Lords Hope, Scott, Roger, Brown and Lady Hale

Facts: Both BA and PE had been unsuccessfully appealed against the SSHD's decision to deport and remove them respectively. After they were served with a signed deportation order they made further representations as to why their deportation would be in breach of Article 8 of the ECHR. The SSHD refused to revoke the deportation orders.

Issues: The question was whether they would be entitled to an in-country right of appeal against the refusal to revoke the deportation order.

Result: The Court explained that the statutory scheme now excludes repeat claims from a right of appeal under section 96 of the 2002 Act. Where submissions were refused but not certified as clearly

unfounded the applicant was entitled to an in-country right of appeal and did not have to demonstrate that the submissions also amount to a "fresh claim" under para.353 of the Immigration Rules.

Complexity: this was a landmark decision on Article 8 of the ECHR which required a comprehensive understanding of the procedural regime of statutory appeal rights in the Nationality, Immigration and Asylum Act 2002. The Court referred to the *"enticing submissions"* and *"excellent submissions"* of Counsel and stressed that they only reached their conclusion on the basis of the assistance received from Counsel.

MITRE HOUSE CHAMBERS

Allan Briddock, Justine Fisher, Keelin McCarthy,

Catherine Meredith, Stephanie Motz, Althea Radford

4th February 2011