HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 40

on appeal from: [2005]EWCA Civ 1779

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Chikwamba (FC) (Appellant) v Secretary of State for the Home Department

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
Michael Fordham QC
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(Instructed by TRP Solicitors)

Respondents:
Monica Carss-Frisk QC
Steven Kovats

(Instructed by Treasury Solicitors)

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Chikwamba (FC) (Appellant) v Secretary of State for the Home Department (Respondent)

[2008] UKHL 40

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I am in full agreement with it, and would for the reasons which he gives allow the appeal and make the order which he proposes.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I have had the advantage of reading in draft the opinion of my noble and leaned friend Lord Brown of Eaton-under-Heywood. I agree with it, and for the reasons he gives I would allow the appeal and make the order that he proposes.

LORD SCOTT OF FOSCOTE

My Lords,

3. I have had the advantage of reading in draft the opinion on this appeal prepared by my noble and learned friend Lord Brown of Eaton-under-Heywood and am in complete agreement with the reasons he has given for allowing this appeal. My astonishment that the case should have had to come this far for the, as it seems to me, obvious conclusion that the appellant and her four year old child should be permitted to remain in this country with the appellant's husband and the child's father prompts me to add a few words of my own.

4. Not many would dispute, and I do not, that would-be immigrants who desire to remain permanently in this country should apply for permission to do so before coming here. It is the Government's policy that that should be so and that a failed asylum seeker should return, or be returned, to his or her country and make from there any applications for the right to reside in this country that he or she desires to make. But policies that involve people cannot be, and should not be allowed to become, rigid inflexible rules. The bureaucracy of which Kafka wrote cannot be allowed to take root in this country and the courts must see that it does not.

5. The appellant, as Lord Brown has explained, came to this country as a refugee from Zimbabwe. Her asylum claim failed but on account of the conditions in Zimbabwe the removal of failed asylum seekers to Zimbabwe was temporarily suspended (see para 11 of Lord Brown's opinion). While she was in this country in that state of limbo she married Mr Magaya, a Zimbabwe national who had been granted asylum and, accordingly, the right to remain. The marriage was in September 2002. No one has suggested that this was a marriage of convenience or other than a genuine consequence of the attachment that had grown between these two young people. In April 2004 a daughter was born to the appellant and her husband. In November 2004 the Secretary of State lifted the suspension of forced removals to Zimbabwe and the question then arose whether the appellant, presumably with her little girl, should be required to return to Zimbabwe in order to apply from Zimbabwe for permission to come to this country in order to

resume her life with her husband. The Immigration Appeal Tribunal and the Court of Appeal held that that is what should happen.

6. The appellant, in her appeal, relies on article 8 of the Convention and, for my part, I regard the decisions of the lower courts as clearly unreasonable and disproportionate. It is, or ought to be, accepted that the appellant's husband cannot be expected to return to Zimbabwe, that the appellant cannot be expected to leave her child behind if she is returned to Zimbabwe and that if the appellant were to be returned to Zimbabwe she would have every prospect of succeeding in an application made there for permission to re-enter and remain in this country with her husband. So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that government policy requires that she return and make her application from Zimbabwe. This is elevating policy to dogma. Kafka would have enjoyed it. I would allow this appeal.

BARONESS HALE OF RICHMOND

7. For the reasons given in the opinion of my noble and learned friend, Lord Brown of Eaton-under-Heywood, with which I agree, I too would allow this appeal and make the order which he proposes.

8. In the case of *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, the House has decided that the effect on other family members with a right to respect for their family life with the appellant must also be taken into account in an appeal to the AIT on human rights grounds. Even if it would not be disproportionate to expect a husband to endure a few months' separation from his wife, it must be disproportionate to expect a four year old girl, who was born and has lived all her life here, either to be separated from her mother for some months or to travel with her mother to endure the "harsh and unpalatable" conditions in Zimbabwe simply in order to enforce the entry clearance procedures

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

The issue

9. In determining an appeal under section 65 of the Immigration and Asylum Act 1999 (the 1999 Act) (now sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 (2002 Act)) against the Secretary of State's refusal of leave to remain on the ground that to remove the appellant would interfere disproportionately with his article 8 right to respect for his family life, when, if ever, is it appropriate to dismiss the appeal on the basis that the appellant should be required to leave the country and seek leave to enter from an entry clearance officer abroad?

The basic facts

10. The appellant is a Zimbabwean national now aged 26 who arrived in the UK with a younger brother and sister on 22 April 2002 and sought asylum on the basis of her and her mother's involvement in the opposition Movement for Democratic Change (MDC). She had left behind in Zimbabwe two children by a man from whom she was estranged who were living with relatives.

11. On 5 June 2002 the Secretary of State refused her asylum claim, principally on grounds of credibility, and on 8 June 2002 refused her leave to enter. The Secretary of State added, however, that, because conditions in Zimbabwe had deteriorated, she had decided to suspend removals of failed asylum-seekers to Zimbabwe. (In the event, that suspension was not lifted for some two and a half years until 16 November 2004.)

12. On 26 September 2002 the appellant married Mr Magaya, a Zimbabwean national whom she had known in Zimbabwe since childhood and who had been granted asylum here on 13 June 2002.

13. On 4 February 2003 the Secretary of State refused the appellant's claim that to remove her to Zimbabwe would breach her article 8 right to respect for her family life. Just over a year later, on 14 April 2004, a daughter, Bianca, was born to the appellant and her husband.

The appeal proceedings below

14. The adjudicator dismissed the appellant's appeal on 14 May 2003 on the ground that, although conditions in Zimbabwe were "harsh and unpalatable", since the facts were insufficient to engage article 3, the appellant could not establish a case under article 8. The Court of Appeal was later to describe this, accurately, as "a plain error of law".

15. Although initially the IAT refused the appellant leave to appeal, later, following McCombe J's grant of permission to apply for judicial review of that refusal on 26 January 2004, and a consent order made by Gibbs J on the substantive judicial review hearing on 16 June 2004, leave to appeal was given on 22 November 2004 (just after the Secretary of State had lifted the suspension and forced returns to Zimbabwe) and on 4 January 2005 the appeal was heard.

16. Although it was common ground that the adjudicator had erred in his approach to article 8, the IAT dismissed the appeal essentially on the basis that the appellant could and should return to Zimbabwe to apply there for entry clearance to return to the UK. They believed that her separation from her husband (who they accepted faced "an insurmountable obstacle to his own return to Zimbabwe") would be for "a relatively short period".

17. On 16 November 2005 the Court of Appeal (Auld LJ, Jonathan Parker and Lloyd LJJ) dismissed the appellant's appeal, Auld LJ giving the single reasoned judgment.

18. The appellant had argued that because family life could not be constituted outside the UK in Zimbabwe and because there was doubt about whether she could comply with the substantive requirements of the immigration rules, her removal might cause the break-up of the marriage and Bianca's separation from one of her parents. Rule 352A, providing for leave to enter as the spouse of a refugee, required that the marriage had taken place before the refugee took flight from his home

country (which here it had not). Rule 281, providing general leave to enter as a spouse, required the applicant to show that the family would be accommodated and maintained without recourse to public funds, a requirement which the appellant might not be able to meet (the difficulties facing refugees being implicitly recognised in Rule 352A which contains no such requirement).

19. Auld LJ summarised the Secretary of State's argument (in paras 43 and 44) as follows:

> "[The appellant] confused two separate things: first, the substantive matter of permanent unity or break-up of a family and, secondly, the procedural means, such as entry clearance, for protecting the permanence of family unity. Procedural rules, the procedural aspect, is recognised in the immigration rules and instructions outside the immigration rules . . . [W]hat matters is the threat, if any, to the former of those two matters, to the permanent unity of the family, subject, as it is, to the provision of appropriate procedures for its protection, a matter for national resolution."

Auld LJ's judgment then continued:

> "45 . . .[T]he fact that someone who has arrived in this country without the required entry clearance may be able to show that he would have been entitled to one does not, in the absence of exceptional circumstances, allow him to remain here without it. As Laws LJ observed in *Mahmood [R (Mahmood) v Secretary of State for the Home Department* [2001] WLR 840] at para 26: 'It is simply unfair that he [or she] should not have to wait in the queue like everyone else.' Or, as Simon Brown LJ in *Ekinci [R (Ekinci) v Secretary of State for the Home Department* EWCA Civ 765 [2004] IAR 15], a case of a Turkish asylum seeker who had entered this country via Germany, put it at para 17:
>
> > '17 . . . It would be a bizarre and unsatisfactory result if, the less able the applicant is to satisfy the full requirements for entry clearance, the more readily he should be excused the need to apply . . .

> it is entirely understandable that the Secretary of State should require the appellant to return to Germany so as to discourage others from circumventing the entry clearance system . . .'

> "47 . . . [The appellant's] assertion that there is a presumption in such cases in favour of family unity cuts across the clear rule of *Mahmood* and *Huang*, that it is only in exceptional cases that an adjudicator or the IAT can allow article 8 considerations to prevail over the public interest in maintaining efficient and orderly immigration control."
>
> (The reference there was to *Huang* in the Court of Appeal; the House of Lords later allowed Mrs Huang's appeal and held that there is no additional requirement of exceptionality in article 8 cases—[2007] 2 AC 167.)

The governing legislation

20. Section 65 of the 1999 Act (since superseded by sections 82 and 84 of the 2002 Act) provides:

> "(1) A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, acted in breach of his human rights may appeal to an adjudicator against that decision . . .
>
> (2) For the purposes of this Part, an authority acts in breach of a person's human rights if he acts, or fails to act, in relation to that other person in a way which is made unlawful by section 6(1) of the Human Rights Act 1998."

Section 72(2) of the 1999 Act provides:

> "A person who has been, or is to be, sent to a member State or to a country designated under section 12(1)(b) is not, while he is in the United Kingdom, entitled to appeal—(a) under section 65 if the Secretary of State certifies that his allegation that a person acted in breach of his human rights is manifestly unfounded".

The rival arguments

21. (a) The appellant's case

Mr Fordham QC advances two alternative arguments. His first and wider submission is that in all human rights cases section 65 gives (subject only to section 72(2)(a)) an unqualified in-country right of appeal. True it is that certain of the immigration rules specify a requirement for entry clearance (as here, requirement (v) of rule 352A and requirement (vi) of rule 281) and that rule 28 provides that an applicant for entry clearance must be outside the UK at the time of the application. But in dismissing an appeal on the basis that the appellant must properly seek leave to enter from abroad, Mr Fordham argues that the appellate authorities are in effect depriving appellants of their statutory right to an in-country appeal. Such an appeal can be denied them only when the Secretary of State certifies, pursuant to section 72(2)(a), that the appellant's claim (here, that to remove her to Zimbabwe would breach her article 8 rights) is "manifestly unfounded". And such a certificate, he submits, can only properly be given when long-term removal is clearly permissible.

22. He submits in the alternative that even if in some cases it may be permissible to dismiss a section 65 appeal on the basis that the appellant should be required to apply for entry clearance abroad, this is not such a case: the interference with family life occasioned by the requirement here (even if only on a short-term basis) would be disproportionate to any legitimate objective of immigration control.

23. (b) The respondent's case

The respondent contests both submissions. There is nothing in section 65, submits Ms Carss-Frisk QC, to preclude the appellate authorities from deciding an appeal on the basis that the appellant must seek entry clearance abroad. The appellate authority is not thereby denying the appellant his or her in-country appeal; rather it is determining the appeal and deciding that it is necessary and proportionate in the interests of immigration control that any longer-term right to be in the UK should be decided whilst the appellant is abroad.

24. As for the appellant's narrower submission, the Secretary of State argues that there is nothing disproportionate in requiring the appellant to return to Zimbabwe on the particular facts of this case.

The possibility of successive section 65 appeals

25. Before turning briefly to the relevant authorities, it is, I think, worth pointing out that the argument before the Court of Appeal appears to have proceeded on the basis that, if and when an application for entry clearance came to be made in Zimbabwe, the ECO would decide it strictly in accordance with the immigration rules and, unless the appellant could satisfy all the requirements of a particular rule, her application would necessarily fail. But this, of course, is not so. As both sides recognised before your Lordships, even if the appellant could not bring herself strictly within the rules, the ECO would be bound to decide her article 8 claim in its own right (rule 2 of the Immigration Rules requiring entry clearance officers amongst others to comply with the provisions of the Human Rights Act 1998) and, if it were rejected, she would have a further section 65 right of appeal, albeit this time from abroad.

26. In short, the disposal of an in-country section 65 appeal on the basis adopted here carries with it the possibility of a subsequent section 65 appeal from abroad, in each case with the possibility of successive appeals to higher tribunals.

Authorities

27. As has been seen, Auld LJ in the Court of Appeal referred to *Mahmood* and *Ekinci*. *Mahmood* was the first case in which the Court expressed the view that only exceptionally should an applicant for leave to remain be able to escape the requirement under the rules for entry clearance to be obtained abroad by having his substantive application to remain—whether under the rules or under article 8—determined here. The case concerned a Pakistani citizen who entered the UK illegally and claimed asylum. A week before his claim was refused and he was served with removal directions he had married a British citizen of Pakistani origin. Two children were later born. Various features of the case should be noted. First, the decision to refuse leave to remain pre-dated the coming into force of the Human Rights Act, although the Secretary of State said that he had taken article 8 into account and

concluded that it would not be breached by removing the applicant to Pakistan: his wife and children could accompany him there. Secondly, the challenge was by way of judicial review, not statutory appeal. Thirdly, it appears to have been assumed that the immigration rules (including the requirement for entry clearance) themselves struck a justified and proportionate balance under article 8 except in wholly exceptional cases (a view which persisted until the House's decision in *Huang*). At para 23 of Laws LJ's judgment appears this:

> "Firm immigration control requires consistency of treatment between one aspiring immigrant and another. If the established rule is to the effect—as it is—that a person seeking rights of residence here on grounds of marriage (not being someone who already enjoys a leave, albeit limited, to remain in the UK) must obtain an entry clearance in his country of origin, then a *waiver* of that requirement in the case of someone who has found his way here without an entry clearance and then seeks to remain on marriage grounds, having no other legitimate claim to enter, would in the absence of exceptional circumstances to justify the waiver, disrupt and undermine firm immigration control because it would be manifestly unfair to other would-be entrants who are content to take their place in the entry clearance queue in their country of origin."

28. Lord Phillips of Worth Matravers MR, although accepting that it would be "harsh if the applicant is denied contact with his two young children for a lengthy period," and expressing the hope that any entry clearance application would be dealt with "with reasonable expedition," did not in the end consider "that the Secretary of State's insistence that the applicant should comply with the same formal requirements as all other applicants seeking an entry visa to join spouses in this country is in conflict with article 8".

29. *Ekinci* followed some two and a half years later. That was on any view an exceptional case. The appellant was a Turkish citizen who entered the UK illegally and claimed asylum here, untruthfully asserting that he had not previously sought asylum in another EC country. In fact he had been in Germany for some eight years and had twice unsuccessfully claimed asylum there. Shortly after arrangements had been made for his removal back to Germany under the Dublin Convention, he married a woman whom he had known in Turkey and

who had since come to the UK and acquired British citizenship. He then claimed the right to remain here with her under article 8. Later a child was born. This claim was certified by the Secretary of State pursuant to section 72(2)(a) to be "manifestly unfounded" and it was the dismissal of the judicial review challenge to that certification which came on appeal to the Court of Appeal.

30. The appellant argued that it would be wrong to return him to Germany to apply for entry clearance there because he would in any event fail to qualify. He (like the appellant in the present case) would probably be unable to show that he could live here "without recourse to public funds". It was in that context that I said what Auld LJ below cited from para 17 of my judgment (see para 19 above). Mr Ekinci, let it be clear, had an appalling immigration history; on granting him leave to appeal Sedley LJ had observed that "few claimants come to court with a track record of such prolonged evasion and mendacity". Having earlier in my judgment noted that there was scope for permission to enter outside the rules if article 8 required it and that the time taken to process entry clearance applications in Germany was something under a month, I concluded (at para 19) that there was:

> "nothing even arguably disproportionate in requiring this appellant to return to Germany for the relatively short space of time that will elapse before he is then able to have his entry clearance application properly determined, if necessary outside the strict rules. That the Secretary of State is not contemplating or intending any longer-term, let alone permanent, separation of the appellant from his family seems to me abundantly plain . . ."

31. Brief mention should be made of two subsequent Court of Appeal decisions. *Mukarkar v Secretary of State for the Home Department* [2006] EWCA Civ 1045, decided some three years after *Ekinci*, concerned a Yemeni citizen who obtained entry clearance as a visitor by deception and then unsuccessfully sought leave to remain as a dependent relative of his many children settled here. He had numerous ailments and his health was continuing to deteriorate. In allowing his appeal the adjudicator concluded that he needed "permanent and constant home help" and that it was not reasonable to expect any of his children "to run the risk of losing their jobs merely to accompany him back to the Yemen to stay for an indeterminate period of time whilst the application is being considered or whilst he is waiting for an appeal to be heard". Allowing his further appeal against the IAT's reversal of the

adjudicator's decision, Carnwath LJ, giving the leading judgment in the Court of Appeal, said (at para 32) that "*Ekinci* was a decision on its own facts; it did not purport to lay down any general proposition of law." The adjudicator was entitled to have regard to "the timescale likely to be involved and its consequences for the care of the appellant in the meantime. In considering the reasonableness of expecting one or more of his children to leave their commitments in this country to look after him on his return to the Yemen, it was material to consider whether such absence would be for a defined and limited period, or indeterminate."

32. *SB (Bangladesh) v Secretary of State for the Home Department* [2007] EWCA Civ 28 concerned a Bangladeshi woman who entered into an arranged polygamous marriage in Bangladesh and many years later dishonestly (at the behest of her husband) obtained entry clearance as a visitor before then unsuccessfully seeking leave to remain as being financially dependent upon a daughter settled here. She was also anxious to continue enjoying access rights to her younger son here. The AIT dismissed her appeal, taking the view that there was "no reason why a properly structured application under [the relevant rule] should be refused by an ECO. After 12 months the appellant would be entitled to make an application for indefinite leave to remain in the UK under [the rule], since [her son] would still be under 18 at that time." In those circumstances the tribunal did not think it disproportionate to return the appellant to Bangladesh to apply for entry clearance there.

33. The Court of Appeal (Ward, Neuberger and Gage LJJ) allowed the appellant's appeal and remitted the case to the tribunal on the single ground that the tribunal "should not have carried out, or taken into account, their own assessment of her prospects of coming back to the UK on an indefinite basis pursuant to an application which she might make from Bangladesh for entry clearance under the immigration rules" (para 36 of the Court's judgment given by Ward LJ). As the Court had earlier observed (at para 22):

> "It would . . . seem somewhat paradoxical if the stronger an appellant's perceived case for entry clearance under the immigration rules the more likely he or she is to be removed. Yet, . . . on the basis of the reasoning of the tribunal in this case, that would be the inevitable consequence."

The Court of Appeal's judgment referred to *Mahmood*, *Ekinci* and *Chikwamba* (the present case).

The wider argument

34. I do not accept Mr Fordham's submission that a section 65 appeal can never be dismissed on the basis that the appellant ought properly to leave the country to apply for entry clearance abroad. As Ms Carss-Fisk QC points out, that is not to deny the appellant his or her right to an in-country appeal but rather to dispose of it in a manner intended to promote immigration control.

The narrower ground

35. The question, however, of just when it may be appropriate and proportionate to dispose of a section 65 appeal on this basis is to my mind altogether more difficult.

36. As I observed in *Ekinci*, it would be bizarre if the weaker the appellant's case the readier should the Secretary of State and the appellate authorities be to excuse him the requirement to apply for entry clearance abroad. Similarly, as the Court later observed in *SB (Bangladesh)* (see para 32 above), it would be "paradoxical" if the stronger the appellant's case for entry clearance under the rules, the more appropriate would it be to remove him.

37. The Secretary of State's Asylum Policy Instruction on article 8, under the heading Consideration of Article 8 Family Life Claims, includes this:

Is the interference proportionate to the permissible aim?

> "In many cases, refusal or removal does not mean that the family is to be split up indefinitely. The . . . policy is that if there is a procedural requirement (under the immigration rules, extra-statutory policies or concessions) requiring a person to leave the UK and make an application for entry clearance from outside the UK, such a person should return home to make an entry clearance application from there. In such a case, any interference would only be considered temporary (and therefore more likely to be proportionate). A person who claims that he will not qualify for entry clearance under the rules is not in any

> better position than a person who does qualify under the rules—he is still expected to apply for entry clearance in the usual way, as the ECO will consider article 8 claims in addition to applications under the rules. See *Ekinci*...
>
> In addition, it may be possible for the family to accompany the claimant home while he makes his entry clearance application, in which case there will be no interference at all.
>
> For example, where a claimant is seeking to remain here on the basis of his marriage to a person settled in the UK, the policy is that they should return home to seek entry clearance to come here as a spouse under the relevant immigration rule. Where the spouse can accompany the claimant home while he makes his application, there will be no interference. Where this is not possible, the separation will only be temporary. The fact that the interference is only for a limited period of time is a factor that is likely to weigh heavily in the assessment of proportionality."

38. That, it would appear, is the policy applied in the appellant's case. There is no dispute as to the genuineness of her marriage, nor as to the "insurmountable obstacle" faced by her husband in accompanying her back to Zimbabwe whilst she applied for entry clearance there. We were told that it would be hoped to complete the entry clearance procedure within three months. In short, the policy requires the appellant to be separated from her husband (and Bianca from her father) for a "limited period of time", and regards this "temporary" interference with their family life as "proportionate".

39. Is the policy as a whole legitimate and proportionate? That is the first question to be asked. In answering it one must consider what its benefits really are. It is said to be necessary in the interests of the maintenance and enforcement of immigration control and indisputably that is a legitimate aim. But precisely what purpose is served and what in reality is achieved by this policy?

40. As we have seen, there is reference in some of the cases to jumping the queue, not having "to wait in the entry clearance queue like everyone else." It is not suggested, of course, that others are thereby put

back in the queue and thus delayed in obtaining entry clearance. On the contrary, the very fact that those within the policy do *not* apply for entry clearance shortens rather than lengthens that queue. What *is* suggested, however, is that it is unfair to steal a march on those in the entry clearance queue by gaining entry to the UK by other means and then taking the opportunity to marry someone settled here and remain on that basis. But is it really to be said that others would feel a sense of unfairness unless those like the appellant are required to make their claims to remain from abroad?

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. The appellant's immigration history was appalling and he was being required to travel no further than to Germany and to wait for no longer than a month for a decision on his application. Other obviously relevant considerations will be whether, for example, the applicant has arrived in this country illegally (say, concealed in the back of a lorry) for good reason or ill. To advance a genuine asylum claim would, of course, be a good reason. To enrol as a student would not. Also relevant would be for how long the Secretary of State has delayed in dealing with the case—see in this regard *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41. In an article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant. And there may be good reason to apply the policy if the ECO abroad is better placed than the immigration authorities here to investigate the claim, perhaps as to the genuineness of a marriage or a relationship claimed between family members, less good reason if the policy may ultimately result in a second section 65 appeal here with the appellant abroad and unable therefore to give live evidence.

43. As matters presently stand the published policy appears to apply routinely to all article 8 family life cases irrespective of whether or not the rules apply:

> "A person who claims that he will not qualify for entry clearance under the rules is not in any better position than a person who does qualify under the rules—he is still expected to apply for entry clearance…"

And for the reasons given in para 36 above it is, indeed, entirely understandable why someone outside the rules should not be better off. Oddly, however, when asked to explain why in those circumstances the appellant in *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, seeking to remain here to enjoy family life with his emotionally dependent mother, was not first required to apply for entry clearance abroad, the Secretary of State (in a post-hearing note) said:

> "Mr Betts did not . . . on the face of it fall within the scope of any relevant immigration rule designed to enable him to enjoy family life in the United Kingdom. In those circumstances it was not argued that Mr Betts should return to Sierra Leone to apply for entry clearance to join his family in the United Kingdom."

I cannot reconcile that explanation with the stated policy. Nor has any explanation been offered as to why the policy was not applied also to the appellant Mr Kashmiri in *Huang*, who did not qualify under a rule requiring entry clearance but who was asserting a family life claim to remain here under article 8.

44. I am far from suggesting that the Secretary of State *should* routinely apply this policy in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad. Besides the considerations already mentioned, it should be borne in mind that the 1999 Act introduced one-stop appeals. The article 8 policy instruction is not easily reconcilable with the new streamlined approach. Where a single appeal combines (as often it does) claims both for asylum and for leave to remain under article 3 or article 8, the appellate authorities would necessarily have to dispose substantively of the asylum and article 3 claims. Suppose that these fail. Should the article 8 claim then be dismissed so that it can be advanced abroad, with the prospect of a later, second section 65 appeal if the claim fails before the ECO (with the disadvantage of the appellant then being out of the country)? Better surely that in most cases the article 8 claim be decided once and for all at the initial stage. If it is well-founded, leave should be granted. If not, it should be refused.

45. Your Lordships have been made aware too of recent changes to the immigration rules which appear to involve substantial mandatory periods of exclusion following refusal of entry clearance or leave to enter in respect of those who have entered illegally or overstayed. Inevitably these changes will have an impact on the future application of the policy in article 8 family cases.

46. Let me now return to the facts of the present case. This appellant came to the UK to seek asylum, met an old friend from Zimbabwe, married him and had a child. He is now settled here as a refugee and cannot return. No one apparently doubts that, in the longer term, this family will have to be allowed to live together here. Is it really to be said that effective immigration control requires that the appellant and her child must first travel back (perhaps at the taxpayer's expense) to Zimbabwe, a country to which the enforced return of failed asylum-seekers remained suspended for more than two years after the appellant's marriage and where conditions are "harsh and unpalatable", and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the UK to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer.

Conclusion

47. I would allow the appeal and hold that to remove the appellant to Zimbabwe would violate her and her family's article 8 rights. It was agreed that in these circumstances the respondent must pay the appellant's costs.