

THOMAS · MORE · CHAMBERS

**DELAY AND ARTICLE 8
ISSUES: AN UPDATE**

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6pm to 7pm**

**IMMIGRATION AND
NATIONALITY GROUP**



7 Lincoln's Inn Fields London WC2A 3BP

T 020 7404 7000 F 020 7381 4606

DX 90 Chancery Lane E clerks@thomasmore.co.uk

www.thomasmore.co.uk

INTRODUCTION

Article 8 is perhaps the most misunderstood aspect of all human rights jurisprudence, in particular in the field of immigration and asylum law. Seen as a guaranteed ‘way in’ by many lay clients and as impossible to satisfy by many immigration judges, the truth ebbs and flows according to the whims of which Court and which political wing of that Court is making the decision. Immigration law, as we know, is highly politicised and Article 8 jurisprudence even more so.

However, we have seen in the last six months a great deal of jurisprudence on many Article 8 issues which need to be fully appreciated for Article 8 cases to be presented and argued in such a way as to prevent appeals.

This lecture will assess the new case law, in particular the new Huang decision of the House of Lords and offer guidance on the current state of play in regards to Article 8 jurisprudence in the field of asylum and immigration law.

DELAY CASES

1. Delay cases arise in circumstances where an Applicant makes an application for something, be it consideration under an amnesty, human rights representations, an application under the Rules or the like.
2. If the Secretary of State 'sits' on this application for a long period of time, it is sometimes possible to argue that the length of the delay becomes significant in determining the outcome of the appeal.
3. The starting point of assessing Delay cases is the case of HB (Ethiopia) vs The Secretary of State for the Home Department [2006] EWCA Civ 1713 per Buxton LJ:

"24. I draw the following conclusions from the authorities, binding on us, discussed above.

i) Delay in dealing with an application may, increasing the time that the claimant spends in this country, increase his ability to demonstrate family or private life bringing him within article 8(1). That however is a question of fact, and to be treated as such.

ii) The application to an article 8 case of immigration policy will usually suffice without more to meet the requirements of article 8(2) [Razgar]. Cases where the demands of immigration policy are not conclusive will be truly exceptional [Huang]¹.

iii) Where delay is relied on as a reason for not applying immigration policy, a distinction must be made between persons who have some potential right under immigration policy to be in this country (for instance, under marriage policy, as in Shala and Akaeke); and persons who have no such right.

iv) In the former case, where it is sought to apply burdensome procedural rules to the consideration of the applicant's case, it may be inequitable in extreme cases, of national disgrace or of the system having broken down [Akaeke], to enforce those procedural rules [Shala; Akaeke]

v) Where the applicant has no potential rights under specifically immigration law, and therefore has to rely on his rights under article 8(1), delay in dealing with a previous claim for asylum will be a relevant factor under article 8(2), but it must have very substantial effects if it is to influence the outcome [Strbac at §25].

vi) The mere fact that delay has caused an applicant who now has no potential rights under immigration law to miss the benefit of a hypothetical hearing of an asylum claim that would have resulted in his obtaining ELR does not in itself affect the determination of a subsequent article 8 claim [Strbac, at §32].

¹ This test must be read however in accordance with the Judgment of the House of Lords in Huang & Kashmiri (FC) vs The Secretary of State for the Home Department [2007] UKHL 11 which has removed the requirements for exceptionality, at paragraph 20.

vii) And further, it is not clear that the court in Strbac thought that the failure to obtain ELR on asylum grounds because of failure to make a timely decision could ever be relevant to a decision on the substance, as opposed to the procedure, of a subsequent article 8 claim. Certainly, there is no reason in logic why that fact alone should affect the article 8 claim. On this dilemma, see further §6 above.

viii) Arguments based on the breakdown of immigration control or of failure to apply the system properly are likely only to be of relevance if the system in question is that which the Secretary of State seeks to rely on in the present proceedings: for instance, where a procedural rule of the system is sought to be enforced against the applicant [Akaeke]. The same arguments do not follow where appeal is made in article 8 proceedings to earlier failures in operating the asylum system.

Does the Appellant have a potential claim under the Immigration Rules and/or has the Appellant suffered Prejudice?

4. As is clear from the judgment of Buxton LJ in HB(Ethiopia) and Collins J in R(S), the first question when considering delay is whether the Appellant could have an application under the Immigration Rules that could succeed. If the Appellant could have a claim under the Immigration Rules then delay becomes a factor. If there is no realistic application that can be made under the Immigration Rules, then (subject to a truly gross delay) the argument is doomed and general Razgar/Huang considerations apply.
5. As Freeman SIJ said in MM (Delay – reasonable period – Akaeke – Strbać) Serbia and Montenegro [2005] UKAIT 00163:

“g) Delay itself, if sufficiently gross, may take a case which would not otherwise be "truly exceptional" (either because it fell foul of the "anti-queue jumping rule" in Amjad Mahmood [2002] Imm AR 229, or for any other reason) into that category (following Akaeke); but it will only lead to a conclusion that removal is disproportionate if there is some free-standing claim to be allowed to stay on the basis of current family or private life, which together with the circumstances of delay could lead to a "truly exceptional" finding.”
6. There is little guidance yet on how this stage of HB applies. However, prudence would dictate that it will be necessary to point out to the SSHD/Immigration Judge how the Appellant would have a potential application under the Rules.

7. AA (Afghanistan)[2007] EWCA Civ 12 and SB (Bangladesh) [2007] EWCA Civ 28, however appear to settle the question that the loss of a right of appeal (e.g. by being denied a grant of ELR as a minor) does not amount to a particularly significant "disbenefit" unless there are practical disadvantages that can be demonstrated in the individual case (e.g. being prevented from working or being denied needed assistance under the Children Act 1989).
8. In those kinds of cases, therefore, the Appellant must point to actual prejudice ('disbenefit in the language of AA') evidentially with reference to policies extant at the time of the failure to look at the application expeditiously.

Evidential Matters

9. It may very well be prudent to put in relatively rigorous evidence as to what this potential immigration application actually is or what the prejudice suffered is. For instance, in a spouse case, evidence of marriage, means, accommodation and so forth.
10. It should not be for the Immigration Judge to assess whether that application would succeed (see SA(Bangladesh) as discussed below).
11. Of course, the difficulty is often that many people who have made marriage applications after failed asylum cases can barely survive let alone support their spouse under traditional entry clearance principles. *However, it may be arguable they could satisfy the Rules and that is enough.*
12. Those cases will still fall to be argued under proportionately, bearing in mind what was said about the importance of family life by their Lordships. More is said on this subject below.

13. Once an applicant can point to evidence of the delay, and what Immigration Rule he could qualify under (and therefore the prejudice he has suffered by the delay), the next stage is considering whether the Appellant has acquiesced to the delay, in essence been complicit in his own prejudice.

Acquiesce to the Delay

14. The question of acquiescence, although strictly not part of HB(Ethiopia) arises from the case of MM (Delay – reasonable period – Akaeke – Strbać) Serbia and Montenegro [2005] UKAIT 00163 and must be addressed.

15. As Freeman SIJ said in paragraph 21(h):

“h) Delay will rarely, if ever, appear gross enough to bring a case within the last principle unless, as in Akaeke, there is evidence to show it was not acquiesced in by the appellant. A claimant is not entitled to sit back and enjoy whatever this country has to offer, relying on no more than the administrative incompetence of its authorities, amazing as this may sometimes be. Evidence of some formal pressure on the Home Office (either by way of solicitors' (or other representatives') letters (as in Akaeke), intervention by an MP (as here), or personal appearance at the Home Office, resulting in an attendance note recorded on the file by an official) is likely to be required to show that an appellant has not acquiesced in delay.”

16. Therefore, it will be important to put in evidence of:

- a) attendance notes of phone calls;
- b) letters;
- c) evidence from the appellant of a similar nature;
- d) MPs letters chasing applications and any responses.

showing that the Home Office are being regularly chased.

17. The next question concerns whether the delay is sufficiently long enough to mean that the Home Office cannot rely upon the return (for perhaps a Mahmood 'queue jump' type case) being proportionate in terms of pursuing a lawful immigration policy because, in effect, the length of the delay shows that policy to be a shambles.

18. This is of course why the validity of a potential application under the Immigration Rules is of significance. The argument will be that Mr X should not be expected to leave the country and make an application to return as a spouse/father with contact rights etc with a reasonable expectation that will be successful because the policy being relied upon to argue why there should not be this queue jump is a shambles.

National Disgrace?

19. In Akaeke v Secretary of State [2005] EWCA Civ 947; [2005] INLR 575 Carnwath LJ analysed a factual situation in which there had been a delay for 3 years and 3 months. This delay was declared by Freeman SIJ who considered the case at second instance to be a “public disgrace”.

20. In Ajoh v Secretary of State for the Home Department [2006] EWHC 1489 (Admin) Collins J said that, at paragraph 10:

"There seems no excuse for the 2 year delay in dealing with the claimant's application for leave to remain and the lapse of time means that the Article 8 claim may have more substance."

21. In R(S) v SSHD [2007] EWHC 51 (Admin) Collins J was dealing with a delay of 4½ years and found that excessive. This case is also noteworthy because Collins J found that an Afghani could not return to Afghanistan to get entry clearance in any event as there were no facilities.

22. This argument is quite interesting and can be used with variations elsewhere. Iraqis could argue the danger of going to Jordan to get entry clearance; Turks might complain on return they might be conscripted into the army; Sudanese Darfurians perhaps that they might be forced into IDP camps with no means of making the application and so forth.

23. However, in Karas and Milanovic v SSHD [2006] EWHC 747 (Admin) a delay of two years and 9 months, Munby J found:

“ . . . But it is far from unusual, let alone exceptional. Nor, despite, the increased disappointment which it no doubts causes them, can the claimants plausibly claim that it has had any significantly adverse effect on them. Ms Giovannetti correctly points to Strbac as showing (see para [26]) that delay, although relevant, is not a determinative factor. And she equally correctly points to Janosevic as showing (see para [12]) that the effect of delay must be "very substantial" if it to drive the decision in the claimants' favour. In the present case the simple fact, I agree, is that the claimants have not demonstrated - cannot demonstrate - that the delay has had any significant, let alone a "very substantial", effect. Nor, I might add, is the delay in the present case the "public disgrace" which in Akaeke enabled the claimant to succeed.”

24. However it does not appear that Munby J was referred to the case of Ajoh in submissions (or indeed many other relevant delay cases). Also, there was no prejudice caused by the delay to that particular Appellant. In Akeake, for instance, the Appellant had a British spouse and so could return whereas Milanovic was returning with her spouse so there was no valid immigration rule she could seek re-entry.

25. The next principle is under paragraph 24(iv) is as follows:

“In the former case, where it is sought to apply burdensome procedural rules to the consideration of the applicant's case, it may be inequitable in extreme cases, of national disgrace or of the system having broken down [Akaeke], to enforce those procedural rules [Shala; Akaeke].”

Policy Cases – Shala and Iraq cases

26. The Courts have repeatedly held that Shala was a case on its own facts and has no particular authoritative force.

27. There is also a line of authority on policy cases, (such as Gashi and Rashid) and so forth which set out that delays which are suffered at times when, had an Appellant's case been looked at expeditiously, he would have been granted ILR. This, however, is outside the scope of this talk, being a very complex subject in of itself.

28. In terms of other policies, AA and KL (Article 8-Lekstaka-delay-near-misses) Serbia & Montenegro [2007] UKAIT 00044 establish that so called 'near misses' can be

factors. These are cases where "... one is entitled to see, whether in all the circumstances, this case falls within the spirit of the Rules or the policies, even if not within the letter. (per Collins J in Lekstata v SSHD [2005] EWHC 745)

29. Storey SJJ sets down the following principles in assessing so called 'near miss' cases when assessing delay:

“51. When considering the significance of a "near miss" it will always be imperative to examine the surrounding circumstances. Is the underlying purpose of the rule or policy one which can be seen as covering the individual by analogy? How closely analogous are the appellant's circumstances to those covered by the rule or policy? Is there an objective justification for a like case not being treated alike? Was there anything done by the appellant or those representing him to try and alert the Home Office to the relevance of an analogous rule or policy? These are some obvious questions which may arise. In the appellant's case we attach particular significance to the fact that at the time when relevant immigration rules and policies might have been seen to cover closely his situation by analogy, he was a minor who had made a claim for asylum on arrival and the action of his uncle and aunt in establishing and deepening family ties was one which was clearly in the best interests of the child, a consideration which United Kingdom legislation treats as a primary one: see AA (Afghanistan). Paragraph 351 of the Immigration Rules states that "[c]lose attention should be given to the welfare of the child at all times". The appellant's was not a situation where the family members concerned can be criticised for developing family ties at a time when it was known an appellant's immigration status was precarious.

52. From the above it will be clear that there were two relevant factors which the adjudicator failed to take into account when considering whether the decision appealed against represented a disproportionate interference with the appellant's right to respect for private and family life. The first was the factor of three years delay and its consequence that the appellant did not have an existent policy governing ELR unaccompanied minors applied to his benefit; this did not of itself amount to a weighty factor. The other factor was of course that the appellant, on the adjudicator's findings of fact, was a de facto son and so there were provisions under the Immigration Rules and under Home Office policies which analogously (albeit not wholly so) applied to him. Taken together and viewed in the broader context of the fact that the appellant had come to the UK as an unaccompanied minor aged 16 having effectively lost his own mother and father, we consider that the adjudicator's failure to treat as significant Home Office inaction on the appellant's case gave rise to a material error of law.”

30. These paragraphs show how therefore delay, near misses and policies can be argued in arguing Article 8 delay cases.

31. As we have seen, delay issues are quite complex and therefore need to be argued in stages as set out above.

32. The notes will now turn to the question of arguing Article 8 cases in light of current case law.

ARTICLE 8 CASES IN GENERAL

The Razgar Principles

33. As the House of Lords in Huang & Kashmiri (FC) vs The Secretary of State for the Home Department [2007] UKHL 11, paragraph 20 (per Lord Bingham) affirmed, as also said by the Tribunal in MM (Article 8 – family life – dependency) Zambia [2007] UKAIT 00040, the Razgar v SSHD [2004]UKHL27 questions are still the appropriate starting point for any assessment of Article 8 rights (at paragraph 17 onward):

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

34. These notes shall now turn to the application of the Razgar criteria with reference to recent case law interpretation.

The First Three Razgar Questions – Assessing a Breach of Article 8(1)

35. The first three Razgar questions are interlinked:

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

Is there an Article 8(1) Protected Right?

36. The most straight forward argument to run in terms of Article 8(1) rights concerns family life, and most often between spouses or partners and/or their minor children.

This seems to be a straight forward Article 8 (1)(protected right.

37. However, Salad v SSHD (and Kugathas) must be borne in mind which says that relationships between adult siblings or adult children have to be above and beyond the normal ties that exist in a normal relationship of that type. This will very often be a matter of evidence that will need to be adduced.

38. In MM (Article 8 – family life – dependency) Zambia [2007] UKAIT 00040, Storey SJ said as follows:

“17 . . . The need to view “private and family life” as a composite right has been a settled part of UK and Strasbourg case law: see Nhundu and Chiwera 01/TH/0613. However, as the adjudicator’s approach in this case illustrates, it is not one which is always borne in mind. So as to reinforce its importance, it is instructive to consider how the Strasbourg Court proceeded in the recent case of Sisojeva v Latvia [2005] ECHR 405. In this case the threatened break up of a family with adult children was considered as an interference with private life, since the age of the children precluded the Court from finding the continued existence of a family life. The Court noted that the applicants had spent most of their lives in Latvia and so had “developed personal, social and economic ties strong enough for them to be regarded as sufficiently well integrated into Latvian society”.

18. We do not find that the appellant’s private life circumstances show that she has developed strong enough ties to give rise to a protected right under Article 8(1) even considering her personal, family, social and other circumstances cumulatively.”

39. Further, Storey SJ reiterated in MM (Article 8 – family life – dependency) Zambia [2007] UKAIT 00040 that:

“However, at all stages of the Article 8 assessment – when deciding whether there is an existing private or family life, when deciding whether any existing private or family life is the subject of an interference having grave consequences (Lord Bingham’s question 2) and when deciding whether any such interference is proportionate to the legitimate public end sought to be achieved (Lord Bingham’s question 5) – the approach followed by the Strasbourg Court is to take account of a wide range of circumstances, including the applicant’s previous personal and family circumstances and the likely developments they will undergo in the future: Marckx v Belgium, Berrehab v Netherlands (1988) 11 EHRR 322, Keegan v Ireland (1994) 18 EHRR 342. That too must be our approach. Indeed it is for this reason that we accept that Mr Norton-Taylor is entitled, when urging us to view the appellant’s family circumstances in the UK as established enough to give rise to

family life, to pray in aid the fact that she has now been in the United Kingdom over 5 years.

Mental Health/Health and Article 8

40. As is well known from N v SSHD, in English jurisprudence, it is very difficult to argue that health related matters will cross the severity test of inhumane and degrading treatment sufficient to engage Article 3. However, there is still a somewhat neglected possibility for such an argument to be run under Article 8 principles.

41. In D v United Kingdom (1997) 24 EHRR 423, interestingly the ECHR said:

“47. Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.”

42. It is worth setting out a few paragraphs from the speech of Lord Bingham from Razgar v SSHD [2004]UKHL27 who said as follows:

“9. This judgment establishes, in my opinion quite clearly, that reliance may in principle be placed on article 8 to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties which the applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving country. The threshold of successful reliance is high, but if the facts are strong enough article 8 may in principle be invoked. It is plain that “private life” is a broad term, and the Court has wisely eschewed any attempt to define it comprehensively. It is relevant for present purposes that the Court saw mental stability as an indispensable precondition to effective enjoyment of the right to respect for private life. In *Pretty v United Kingdom (2002) 35 EHRR 1, paragraph 61*, the Court held the expression to cover “the physical and psychological integrity of a person” and went on to observe that

“Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.”

Elusive though the concept is, I think one must understand “private life” in article 8 as extending to those features which are integral to a person’s identity or ability to function socially as a person. Professor Feldman, writing in 1997 before the most recent decisions, helpfully observed (“*The Developing Scope of Article 8 of the European Convention on Human Rights*”, [1997] EHRLR 265, 270):

"Moral integrity in this sense demands that we treat the person holistically as morally worthy of respect, organising the state and society in ways which respect people's moral worth by taking account of their need for security."

10. I would answer the question of principle in paragraph 1 above by holding that the rights protected by article 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal does not violate article 3, if the facts relied on by the applicant are sufficiently strong. In so answering I make no reference to "welfare", a matter to which no argument was directed. It would seem plain that, as with medical treatment so with welfare, an applicant could never hope to resist an expulsion decision without showing something very much more extreme than relative disadvantage as compared with the expelling state.

When is the Family Life to Assessed?

43. In Razgar, Lord Bingham said in paragraph 20:

“On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State.”

44. In MM (Article 8 – family life – dependency) Zambia [2007] UKAIT 00040, Storey SJ made it clear that

“9. . . the existence of family life is to be assessed as at the date of hearing.”

45. Therefore, if the Appellant can establish a protected right under Article 8(1) at the time of the hearing, the next question is whether there will be an interference with that right.

Interference With a Protected Right

46. Inevitably, there will be a cross relation with proportionality issues here. However, this step of Razgar is often evidentially neglected and this can often be the fatal weakness of many Article 8 cases.

47. Let us remind ourselves of the Razgar questions again for this stage:

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?"

48. Of course, there is often a cross over with proportionately issues here, but Appellants will need to show that:

- a) there will be an interference with their protected right i.e. their family life;
- b) the interference will be of sufficient gravity to engage Article 8.

49. In WK (Article 8 – expulsion cases - review of case-law) Palestinian Territories [2006] UKAIT 00070, Storey SIJ said in paragraph 20:

“... it **must** be shown, in response to Lord Bingham's second question, that the interference will have grave consequences.”

50. It is also worth noting what Storey SIJ observes further in this paragraph:

“Yet in many cases and particularly where private life alone is at issue, the second question, if properly addressed, will result in a negative answer.”

51. Storey SIJ says in paragraph 21:

“But being able to show "grave consequences" will be harder where the claim turns on a threat to enjoyment of the right to respect for private or family life (or both) in the territory of the destination state. Conversely, it is a settled part of UK jurisprudence on Article 8 expulsion cases that the stronger a person's private and family life ties in the United Kingdom, the easier it will be for Lord Bingham's question 2 (concerning whether there is an interference having grave consequences) to be answered in the affirmative.”

52. It is harder to show a grave interference with private life rather than family life (paragraph 20 of WK).

53. One of the main hurdles will be establishing that there will be an interference. As was established in Mahmoud and Ekinci some time ago, it will need to be shown that:

- a) an Appellant could not return and seek entry clearance and come back;
- b) the protected right could not be enjoyed abroad.

54. In the language of Mahmoud, if an Appellant is in a marriage, they will need to show there are 'insurmountable obstacles' to the family life being enjoyed abroad.

55. Therefore, evidentially, this will need to be addressed with regard to such matters as:

- a) children's age and current education – the effect of taking children to a difference culture;
- b) cultural difficulties i.e. expecting a liberal western women to go to a strict Islamic country;
- c) difficulties with language;
- d) employment opportunities abroad and in the UK;
- e) existing British family members being infirm and requiring care.

56. Of course, any interruption is unlikely to be seen as an interference suffice to engage a breach of Article 8(1) or else a proportionate interference.

57. Interesting is Storrey SJ's comment in WVK:

"41. Conversely, factors which in a limited number of cases may justify attaching decisive weight to the appellant's rights under Article 8(1) so that they can override the normally imperative interests of the state include those where there are exceptional circumstances which (because there are insurmountable obstacles) prevent exercise of either of the normal options for the applicant of continuing family life aboard or of applying from abroad for entry clearance (Mahmood; MB [2005] UKIAT 00092, [29]; EH Iraq [2005] UKIAT 00062; MS (inability to make entry clearance application) Somalia [2005] UKIAT 00030; KJ (Entry Clearance- Proportionality) Iraq CG [2005] UKIAT 00066)."

58. However, this must also be considered in light of the current case-law on arguing that there is no realistic prospect of getting entry clearance to return (see below).

59. Lord Bingham said that inevitably the answer to the third question is 'yes'.

Therefore, if the Appellant can show that there will be an interference with a protected right the next question is whether that interference can be justified on behalf of the state.

Article 8(2), Proportionality and Applying House of Lords (Huang)

60. This issue was clarified by Lord Bingham in the Razgar questions as follows:

"(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?"

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

21. Lord Bingham clarified those questions as follows:

"19. Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognised in the Strasbourg jurisprudence (see *Ullah and Do*, para 6) and implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively.

61. Therefore, once Article 8(2) is engaged, it seems the question will always have to be argued in terms of proportionality:

"20. The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. In *Secretary of State for the Home Department v Kacaj* [2002] Imm AR 213, paragraph 25, the Immigration Appeal Tribunal (Collins J, Mr C M G Ockelton and Mr J Freeman) observed that:

"although the [Convention] rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate."

In the present case, the Court of Appeal had no doubt (paragraph 26 of its judgment) that this overstated the position. I respectfully consider the element of overstatement to be small. **Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."**

62. It is interesting that Lord Bingham specifically uses the phrase ‘striking a fair balance’ but then says that only a small minority of exceptional cases could succeed. Thus was born the ‘truly exceptional’ test espoused by Laws LJ in Huang (Court of Appeal).

Ability to Return and Make an Application for Entry Clearance or the protected life to be enjoyed elsewhere

63. This is a significant matter, discussed above in the section on interference,

The House of Lords Case of Huang

64. However, the House of Lords in Huang & Kashmiri (FC) vs The Secretary of State for the Home Department [2007] UKHL 11 said in their co-joined opinion, as follows:

“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.”

65. The following principles can be seen from this paragraph:

- a) Can the life of the family be reasonably expected to be enjoyed elsewhere;

- b) Account must be taken of all considerations weighing in favour of the refusal including prejudices to the family life of the applicant;
- c) Would such prejudice be sufficiently serious to amount to a breach of the fundamental right protected by article 8.
- d) 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.

66. This section is a little confused to say the least. It seems clear from Razgar, as quoted above that Lord Bingham was envisaging only exceptional cases would succeed. If only exceptional cases would succeed, they would, one would think logically, have to show that they were exceptional, which is not far off the 'truly exceptional' test espoused by Laws LJ.
67. However, the test (if it be a test) here is far more liberal on a plain reading. Not only does it suggest that arguments regarding future prospects of obtaining future entry clearance can be argued (contrary to SB, see below) but appears close to saying that interference is unlawful. This is said however, in the same paragraph where Lord Bingham envisages only exceptional cases can succeed.
68. Also, it also appears to an amalgamation of the Razgar criteria into one test, rather than separating it out, which is at odds in the apparent suggestion that the Razgar criteria still stand.
69. Perhaps the way of squaring this circle must be that the standard of interference must be high enough to render interference disproportionate. Their Lordships also say as follows in paragraph 18:

“But the main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group

seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved.”

Post Huang (HL) Cases

70. There have been a few cases since Huang was heard. In MM (Article 8 – family life – dependency) Zambia [2007] UKAIT 00040:

“We considered whether to invite further submissions from the parties relating to Huang, which post-dates the hearing before us, but decided it was unnecessary since that judgment, whilst rejecting the Court of Appeal’s view that the “truly exceptional circumstances” test is a legal one, otherwise reaffirmed the analysis it gave in Razgar [2004] UKHL 27 and also reaffirmed the importance of continuing reliance on established Strasbourg jurisprudence relating to Article 8: see [18]-[20]. Lord Bingham’s step-by-step approach in Razgar continues to apply to all expulsion cases. As before, while it is necessary first to establish whether there is a private or family life with which removal will interfere, Lord Bingham’s five questions should thereafter serve as the framework for deciding such cases.”

71. Storey SJ does not comment on the Huang test particularly but concluded that:

“ . . . Alternatively [the appellant] has a viable option of applying from Zambia under the immigration rules relating to visitors, although whether she would have real prospects of success is not a matter for us: see SB (Bangladesh) [2007] EWCA Civ 28”

62. Nor did Storey VJ seek to do any damage to the judgment in KL[2007]

The Question of the Viability of Making an Entry Clearances Case to return and its
agruability in assessing Proportionately

72. Sometimes, it can appear an attractive argument in assessing Article 8 proportionally arguments to run the argument that there is no real prospect of an Appellant succeeding under the Rules.
73. This is distinct however, from (as far as one can tell from the existing case-law):
- a) being able to show that an applicant could meet the Rules for the purposes of an HB argument;
 - b) being able to rely upon prejudice in terms of delay, as envisaged by Collins J in R(S);
74. A separate and distinct feature must be in cases where there is no mechanism for claiming entry clearance from abroad, (as in EH Iraq [2005] UKIAT 00062; MS (inability to make entry clearance application) Somalia [2005] UKIAT 00030; KJ (Entry Clearance- Proportionality) Iraq CG [2005] UKIAT 00066 and R(S))
75. In these cases, as Storey SIJ acknowledges in WVK at paragraph 41, if there are insurmountable obstacles to the family life being enjoyed in the country to which removal occurs such a case may be truly exceptional.
76. In SB (Bangladesh) [2007] EWCA Civ 28 at paragraphs 21 - 27 Waller LJ discusses the issues in regards of expecting Immigration Judges to weigh the strengths of a future putative entry clearance case when assessing proportionately in a similar way.

"21. On this second point, we consider that Ms Greaney was realistic to state, as she did in her skeleton argument, that "whether or not the applicant would satisfy the requirements for entry clearance was not a matter which the [Tribunal] ought to have taken into account". Although there are arguments (and first instance decisions) which support the opposite view, that statement seems to be right as a matter of principle, in terms of fairness and good practice, and in the light of authority.

22. So far as principle is concerned, the issue of whether the applicant satisfied the requirements of paragraph 246 of the Immigration Rules would be for an entry

clearance officer in Bangladesh to determine, if and when an application under that paragraph is made. In the absence of a requirement to that effect, **it is not an appropriate issue for determination, when no such application has been made, by a tribunal deciding a different question, at a different time, in a different country, and in different circumstances.** It would also 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, subject to the first point mentioned in paragraph [20] above, on the basis of the reasoning of the Tribunal in this case, that would be the inevitable consequence.

23. As to practicality, it would be unfortunate, in terms of time effort and expense, if a tribunal, when deciding whether a claim for leave to remain was truly exceptional, had to consider, almost as a matter of course, how likely an appellant, if removed from the United Kingdom, would be to succeed on a subsequent putative application for entry clearance to come back to this country. Yet, as we see it, such an exercise would have to be carried out in many, possibly most, appeals of the present type, if that issue was potentially relevant. And, if such an exercise is carried out, it is hard to see how a tribunal is to decide the weight or effect of such a factor if it decides that the prospects of success of such an application to enter are debatable or speculative.

24. There is also a real risk of unfairness to an appellant if such a factor is taken into account. Thus, the views expressed in paragraphs [66] and [67] by the Tribunal in this case may turn out to be wrong, either because an entry clearance officer takes a different view of the facts or the law, or because the Immigration Rules change, or because the facts change.

25. There are decisions of this court which appear to us to establish that an appellant should not be able to resist removal on the ground that he or she would have a very poor prospect of coming back pursuant to an application for entry clearance. We have in mind Ekinci v Secretary of State for the Home Department [2003] EWCA Civ 765, at paragraphs [16] and [17], and Chikwamba v Secretary of State for the Home Department [2005] EWCA Civ 1779, at paragraphs [42] to [46]. (See also Mahmood v Secretary of State for the Home Department [2001] 1 WLR 840 at paragraphs [25] and [26], on a slightly different, but similar, point). The "bizarre and unsatisfactory result" of an appellant being more likely to resist removal the weaker his future putative case for entry clearance was a strong factor in the reasoning (see paragraph [17] in Ekinci, quoted in paragraph [45] in Chikwamba). As mentioned in paragraph [37] above, the converse applies here.

26. We accept that the question of whether an appellant's circumstances are truly exceptional in an Article 8 case can fairly be said to be affected by the perceived strength or weakness of her prospects of getting back here if removed. That certainly appears to have been part of the thinking of Jackson J in R v Secretary of State for the Home Department ex p Hashim (unreported, 21 January 2000) and Collins J in Lekstaka v SSHD [2005] EWHC 745 (Admin).

27. However, we consider that the arguments the other way are stronger. It is not as if there is any logical or practical impediment to excluding from a tribunal's consideration the prospects of a successful putative future entry clearance application, in a case such as this. It merely involves limiting the scope of the inquiry as to whether the appellant's circumstances are truly exceptional, and limiting it in a way which can fairly be said to be justified for the reasons we have mentioned. In any event, there are the decisions of this court to which we have referred. In that connection, Hashim was disapproved on this point in paragraph [26] of Mahmood, and the observation of Collins J, relied on by the Tribunal here, was something of a throw-away point (as discussed in paragraph [36] of his judgment), which does not appear to us to have been essential to his decision". [emphasis added]

77. Therefore, it appears that this point has become settled – Tribunals cannot consider the effect of a putative future entry clearance application (other than in delay cases, presumably).

78. As Storey SJ said in:

“As Mahmood and Ekinici establish, if such an option exists, then removal will not be disproportionate unless there are exceptional circumstances which excuse a person from being required to pursue it and in this way take a place in the queue. What is disapproved in SB (echoing Ekinici) is evaluating that option's prospects of success.”

79. However, it may be possible to argue that the argument should be re-opened in light of the House of Lords’ observations in Huang in paragraph 18, as quoted above and the observation by Waller LJ in SB. Therefore, at the moment, it still may be possible to argue in cases where plainly someone would not meet the Rules to return, there will be an irrevocable break down of a protected right and whether that is proportionate.

80. Surely if one could argue that *prima facie* one could not meet basic entry clearance requirements, it must be permissible to argue that the interference may very well be permanent if the other requirements are met i.e. a spouse showing insurmountable obstacles to the family life being enjoyed abroad.

Simon Harding

7 Lincoln’s Inn Fields

London WC2A 3BP