

'A Thing Apart': Controlling Male Family Migration to the UK

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Abstract

While gender offers valuable perspectives for understanding migration law, masculinity has received little attention. In family migration, men are generally regarded as economic agents and family as marginal to their lives, a view that is difficult to dislodge because it serves the purposes of governments anxious to reduce unwanted immigration. In British immigration law, measures have often explicitly or implicitly relied on such gender-based assumptions. Recently, lawyers have utilised the gap between official and unofficial standards by promoting test cases involving either a woman or a vulnerable man but where the principles established will benefit all migrants. Gains may be short-lived however as new ways emerge of making distinctions. These arguments are demonstrated in this article through examination of British immigration control and judicial decisions. The article finds that, in this arena, new understandings of masculinity and fatherhood have yet to make much impact.

'A Thing Apart': Controlling Irregular Male Family Migrants in the UK

Introduction

This article examines how male family migrants, particularly those without immigration status (irregular migrants), have fared within the British immigration system. Two decisions made by the UK's highest court, now the Supreme Court but then the House of Lords, are the focus for a discussion of the difficulties in using law to challenge gender stereotypes in immigration control, in particular, the assumption that family migration is a predominantly female category and that male family migrants are liable to instrumentalise and manipulate their family ties for their personal advantage, including an immigration advantage.

These difficulties are even greater for irregular migrants, in the UK as elsewhere, a group that includes those who overstayed their visa, those who entered without leave (the term used in immigration law for permission to enter or remain in the UK) and, in particular, asylum seekers whose claim to refugee status has been refused. Living clandestinely or stranded for many years while questions of legal status are determined, they inevitably put down roots in the UK. Ties of intimacy and parenthood create a potentially powerful claim for permanent admission, particularly given the incorporation into British law of human rights norms, including the right to respect for family life. Yet recognition of such claims risks undermining national immigration controls, the effectiveness of which is commonly regarded as a signifier of governmental competence. This tension is inflected by gender as the majority of such irregular migrants are male and the way out of the dilemma for the government and, in almost all cases, the courts is through the minimisation of the strength of family ties. This is not new. Gender equality norms mean that open discrimination is both unlawful and unacceptable, but this article shows that men with family claims in general, not only irregular migrants, have been persistently excluded or marginalised by British immigration law, often in disguised or invisible ways.

Using the law to remedy such marginalisation is not straightforward. Test-cases which challenge the officially gender-neutral policies will usually be brought by those seen as likely to make the strongest possible impression on the court and, in family migration cases, this is most often a woman, usually a mother, or a man who possesses additional characteristics of vulnerability. In principle, this is a sensible strategy. Subsequent male applicants should benefit from the precedents established by their more favourably perceived predecessors. However, these advantages are less stable and secure than they might otherwise be; it is not

difficult to find factual differences between cases which mean that the precedent does not need to be followed in cases involving those men (the majority) who invoke less immediate sympathy. In addition, immigration law changes constantly and new gender dimensions are perceptible in recent policies which, as discussed at the end of this article, have reinforced the difficulties faced by men making applications to enter or remain in the UK because of family ties.

The introduction to this collection has shown that men and women experience migration and are treated by policy-makers in different ways, but that the male experience and official perceptions of men have not been much examined; 'gendered' has often meant 'female'. The obstacles and discrimination faced by women migrants (Piper 2006: 140) and the focus on them as the embodiment of culture and ethnicity (Yuval Davis and Anthias 1989; Roggeband and Merloo 2007) needed exploration. Yet, to overlook the specific male experience results in an incomplete picture, as conceptualisations of male migrants are an equally crucial part of the regulatory landscape. Masculinity, in general however, is largely invisible and rarely scrutinised (Mahler and Pessar 2006: 50-51; Kimmel 1993) and this is particularly the case in migration. This is not an abstract question. In family migration, the treatment of men has ramifications for the whole family unit, causing hardship and emotional pain for women (or men in same sex relationships) and children whose partners and fathers are refused admission. Another way to address this question would be to focus on the denial of the citizenship right to live in one's home with one's partner or parent, an insider perspective that is usually adopted when discussing family migration (Carens 2003; Lister 2010; De Hart 2009). However, this denial is partially enabled by the attribution of negative characteristics to men and this is the subject of study in this collection and this article.¹

Masculinity, like femininity, is a variable social construction that exists in relation to other social constructions. Academic commentators have been eager to stress the plurality and mutability of masculinities, and their relational and socially-constructed nature (Connell and Messerschmidt 2005). Nonetheless, there is a persistent risk of essentialism and stigmatisation as masculinity becomes associated with negative qualities and toxic practices (Connell and Messerschmidt 2005: 840). In this article, it is shown that the emotional attachments of migrant men are regarded as insufficient to overcome the barriers to admission

¹Women who marry 'unsuitable' men are themselves often the subject of dismissive judgments (see Wray 2006a).

created by their irregular status, despite sometimes compelling evidence that the men in question are deeply involved in child care and family life. This marginalisation of their emotional lives is reinforced by socially accepted renderings of masculinity and serves the larger purpose of justifying the exclusion of men whose presence is undesirable principally because of their economic, ethnic and immigration position.

Masculinity's intersection with other characteristics makes for hierarchical relationships not only between genders, but between men (Connell and Messerschmidt 2005: 846). Many of the negative qualities attributed to migrant men in situations of irregularity (insubordination, disobedience, obstinacy) might as easily be characterised positively (ambition, autonomy, resilience), had they belonged to more privileged categories in terms of class, race and status. Those men whose claims to admission are dismissed are viewed by the state, and often by courts, as masculine within a feminised arena and are penalised for it. As Connell (2010) and others have pointed out, the benefits of masculinity have always been unevenly distributed. The masculine characteristics attributed to them, far from being a source of power, are an instrument to be used against them, even if these characteristics are not, from a state perspective, their predominant defect.

This all takes place in a context in which transnational family life, in general, is regarded as highly problematic because it represents a significant challenge to state sovereignty over entry. This is even more the case when the migrant in question has not entered through state-approved channels but is an irregular migrant or asylum seeker. As this article will show, it is only through using a woman or vulnerable man as the paradigm that even a sympathetic court has been able to legitimise family life claims in this framework. The claims for admission of migrant men, irregular migrant men in particular, can be expressed in the feminised domain of family life and the contested arena of immigration law only through de-masculinisation or infantilisation (cf. Griffiths, this volume, on similar processes in the field of asylum). The problem is that the gains for all men have not been substantial.

In recent years, scholars have identified new models of fatherhood which, to some degree, reshape the characteristics of masculinity and which should have enabled some men to make a more powerful claim based on their family lives (see Dermott 2008, Collier and Sheldon 2008). The 'new fatherhood' does not replace but rather adds an extra layer to ideals of masculinity as De Hart's discussion of *Superdads* in this collection demonstrates. However, as the introduction to this collection shows, there is little consensus and much scepticism as to the social reality of these models (see, for example, Collier and Sheldon 2008: 103-137,

Drakich 1989, Fineman 2001; Dowd 2012) and, as this article will show, they have had relatively little impact on how migrant fathers are conceptualised. In most cases, the courts have been able to avoid recognising the complexity and depth of migrant fathers' relationships with their children and, in this way, have also avoided any fundamental challenge to the integrity of state control over immigration. The state meanwhile has resisted even limited incursions by the courts and has also proved adept at fashioning new forms of control that perpetuate the marginalisation of male family migrants.

The next section of this article provides a brief account of the common law and human rights framework in which the cases discussed in this article have been determined. The following section looks at the longstanding problematisation of migrant men seeking admission to the UK as family members. The article then traces the post-Human Rights Act case law on the position of irregular migrant spouses until the time that the House of Lords became involved. The section that follows analyses two key House of Lords cases that demonstrate how even judgments that advance the interests of migrants rely on gender in ways that, as the article goes on to show, risk diminishing the breadth of their impact. The article ends by briefly considering recent developments that reinforce the relative exclusion of men making claims to enter or remain on the basis of family life.

Migrants, Gender, the Courts and Human Rights

Both legislators and courts have, sometimes explicitly but more often implicitly, regarded the paradigmatic family migrant as female, and men who claim admission as a family migrant as suspect by reason of their gender. It will be argued that the UK's highest court partially succeeded in ameliorating the disadvantages caused by this heavily gendered perspective but did not dismantle the underlying gender assumptions. This argument relies on the relationship between fact and law in legal reasoning.

In common law jurisdictions such as the UK, US and Commonwealth countries, the doctrine of precedent applies. Lower courts and tribunals, when faced with 'similar fact' cases to those already decided by higher courts, must follow legal rules established in those higher courts. This ensures a degree of stability and predictability as well as gradual evolution in the law. Nonetheless, judicial reasoning is a flexible instrument. Judges can, at least within

limits, select from a range of factual narratives so as to fit the case within their preferred legal outcome. In essence, they are reasoning by analogy, but have some freedom to decide the extent to which an analogy exists.ⁱⁱ This task has been made more complex in British jurisdictions by the injection of human rights norms and jurisprudence by the Human Rights Act 1998. Human rights embody general principles rather than prescriptive rules, and the jurisprudence of the European Court of Human Rights does not operate a doctrine of precedent. Although it has adopted many principles to deal with recurring factual scenarios, compared to the jurisprudence of the English courts, the Strasbourg jurisprudence often appears inconsistent and open-ended.

In the years following implementation of the Human Rights Act, courts and tribunals in the UK had to integrate human rights norms and approaches to the law into their decision-making. This was a challenge in many areas but especially in immigration where there is a tradition of particular respect for government control (Bevan 1986, Legomsky 1987 and Griffiths 1997). Tribunals and lower courts were reluctant to use human rights laws to undermine policy on the admission or removal of migrants, particularly for family migrants whose claims were made under ECHR article 8, the right to respect for private and family life, a qualified right whose application to migrants had been developed only slowly and in sometimes inconsistent or confusing ways by the Strasbourg Court. That reluctance was expressed in two ways: by a narrow interpretation of the legal reach of article 8 and by the designation of almost all migrants as outside the limited range of factual situations in which article 8 could apply. The result was a series of appeals and judicial reviews brought by these migrants, which passed through the court hierarchy to the House of Lords (which later became the Supreme Court), who eventually ordered a broader approach to the application of article 8 to migrants.

In determining that almost all migrants fell outside article 8, judges constructed categories of meritorious and unmeritorious claims. Such constructions were based on attributions that were markedly, if implicitly, determined by gender. The argument is not that tribunals and courts discriminated openly against men; the minority of women who brought

ⁱⁱWhether judges have discretion at all, and, if so, its nature and extent, is a vastly contested field in jurisprudence although predominantly concerned with the application of legal rules. The critiques of legal realists and critical legal scholars are particularly relevant to a discussion of how judges determine facts (for a general discussion, see, for example, Penner 2008, chapters 4 and 10).

claims did not routinely receive more sympathy. However, in key cases that established precedents prior to the House of Lords' involvement, judges asserted a broad unmeritorious category based on the disobedient and opportunistic irregular migrant. Conversely, when the House of Lords sought to widen the deserving category, they justified their findings by creating a new and different figure, the individual with strong and vital family ties. In creating these contrasting types, there was a reliance on unspoken gender distinctions. The former category was typically male, the latter either female or male but with characteristics of vulnerability.

When bringing test cases, lawyers select parties who are most likely to elicit sympathy for their cause according to conventional norms, including those of gender, a common and sensible strategy. Gender is an inadmissible ground for treating cases differently and, if a test case using a woman or a de-masculinised man succeeds, all men in similar situations should benefit. However, it does mean that the marginalisation of these more representative but less sympathetic cases is never challenged. The danger is that unofficial gender distinctions can easily be resurrected. 'Facts' are unstable constructions; as demonstrated below, the same migrant may, in one light, appear as an opportunistic manipulator and, in another, as a victim. It is rarely difficult to rationalise consigning members of a less favoured group to the unmeritorious category. The result in this area was that decisions at the highest level had only a limited effect on lower level decision-making, and assumptions about the marginal character of men's emotional lives remained largely untouched.

The Problematic (Male) Family Migrant in the UK

In the past, British regulation of migration drew heavily on conventional gender norms, while family migration barely existed as a separate category. Prior to the Immigration Act 1971, alien workers were assumed to be male and could be accompanied by their wives and children. There was no corresponding right for women; they had to rely on administrative discretion. From the mid-nineteenth century until the British Nationality Act 1948, bi-national families were invisible as wives adopted (or were treated as adopting) the nationality of their husbands, and families were regarded as a single unit, either as citizens or aliens. Even after nationality law changed, the small numbers entering international marriages meant that migrant spouses were regarded as easily absorbed (see Wray 2011 28-32). Family migration only became an issue after the imposition of immigration controls on non-white

Commonwealth migrants under the Commonwealth Immigrants Act 1962. Before that time, all Commonwealth citizens had the legal right to enter and live in the UK (although, throughout the 1950s, there were attempts to limit the entry of Caribbean and South Asian workers through administrative means).

Many Commonwealth migrants had entered without their families and single non-white male migrant workers were seen as sexually predatory, dangerous, and responsible for a variety of ills including an increased incidence of sexually transmitted disease (Wray 2011: chapter 2). When immigration restrictions were first placed on Commonwealth nationals in 1962, there was no desire to restrict the entry of family members; quite the reverse, their entry was seen as essential, but on a gendered basis. The 1962 Act granted wives and minor children a statutory right to enter. Some women MPs suggested replacing the word 'wife' by 'spouse' but the government declined because '[i]n the Bill, as in our nationality law, we have assumed the husband is the head of the family and that the wife acquires his domicile' (quoted in Wray 2011:43). Husbands could enter only at the discretion of immigration officers, not under statute. In the following years, family migration increased vastly as migrants had to decide definitively whether to stay or leave, knowing that subsequent re-entry would be impossible. Many stayed and called for their families. Over time, their children became of age to marry and often turned to the country of origin for a spouse. As early as 1965, family migration was perceived as a problem and, once its restriction became a policy aim, men were the primary target. In part this was because the entry of women and children could not be controlled except by statutory amendment. Instead, administrative measures were used to prevent their entry, causing widespread anguish and damage to families. These included delays often of a decade or more, hostile interviews, absurd findings as to 'discrepancies' and intimate physical examinations ('virginity tests'; see Juss 1997 and Wray 2011: chapter 5). However, there was nothing in law to prevent the statutory provision being repealed (as eventually happened). The obstacles to repeal were political; there was still widespread acceptance that women and children had a strong claim so that refusals had to be semi-covert.

No such difficulties were engaged when the admission of men was in issue. Fathers aged between 60 and 65 were prohibited from entry in 1968 and, in 1969, the entry of all Commonwealth husbands was ended unless 'special features' were present. The latter change was instigated after 1,676 men were admitted for marriage in 1968, and it was believed that

marriage was being used 'as a means of entering, working and settling in the UK outside of the employment voucher scheme' (Wray 2011: 48, chapter 3).

The ban on Commonwealth husbands, exceptions to which favoured the husbands of white women, remained in place until 1974. After this, measures were adopted that were more refined in their ability to filter out the least desirable migrants: males from non-white countries. The 'primary purpose rule' required the applicant to demonstrate to official satisfaction that the primary purpose of the marriage was not to enter the United Kingdom (Sachdeva 1993). Many husbands were refused on primary purpose grounds despite years of married life and the birth of children. The rule became an emblem of institutional contempt for male migrants' claims to enter as family members, and caused immense emotional distress to their British wives (Menski 1992). Although some concessions were later introduced, the rule relied on assumptions about men's lack of emotional commitment to family life and the predominance of economic motivations so that significant numbers would make a vital, lifelong commitment primarily for immigration reasons.

The primary purpose rule was abolished in 1997 by the Labour government. This marked the beginning of a more complex and fluid period in the relationship between gender and family migration (for a discussion of family migration policy in the period, see Wray 2013a). In its immigration policy, as elsewhere, the government sought to present itself as responsive to the concerns of its ethnic minority electorate. Other differences with the past included a commitment to increases in skilled labour migration and to 'modern' forms of relationship, including recognition of same sex and unmarried relationships. Acceptance rates for migrant partners (male and female) increased, and overt gender discrimination was contrary to the spirit of the times as well as to the law. However, the government soon found itself under pressure from elsewhere. Concern about perceived failures of integration by minority ethnic communities soon brought marriage back into focus, this time through a cultural lens (cf Bonjour and De Hart 2013). In responding to these challenges, government discourse appeared more inclusive, language was neutrally formulated, and issues of gender and race were handled with more subtlety than before. For instance, in its consultation document *Marriage to Partners from Overseas* (Border and Immigration Agency 2007), case studies of forced marriages included male victims and a range of nationalities. However, debate did not take place in a vacuum. Particular combinations of race and gender were understood as highly problematic, and questions of forced and bogus marriage were associated in the popular imagination with oppression of women by non-white, often Muslim

men, an increasingly common policy frame in the UK and parts of Europe (Razack 2004; Roggeband and Verloo 2007; Bonjour & De Hart 2013).

Meanwhile, large if temporary increases in asylum claims and irregular migration resulted in near chaos in the asylum system (McKee 2005: 254; Somerville 2007: 65; Home Office 2008). Long delays became routine and the removal of failed asylum seekers was difficult for legal and practical reasons. Those who remained joined the growing pool of irregular migrants, which also included those who had entered without leave or had overstayed their visas. Woodbridge (2005) estimated that, in 2001, there were about 400,000 irregular migrants in the UK. Using similar methodology, Gordon *et al* (2009) suggested a population of about 600,000 by the end of 2007. There was thus a substantial and increasing pool of very poor, excluded migrants without status and unable to work legally. The gender ratio of undocumented migrants is unknown (Vollmer 2011) as they are not monitored. More is known about the subset of this group which comprised failed asylum seekers. In 2002, 74%, and, in 2007, 70% of asylum claims were made by men. 91% of asylum detainees in 2002, and 79% in 2007 were male. In 2007, 81% of those leaving voluntarily or removed were male (Home Office 2003; 2008). Not all irregular migrants were failed asylum seekers but it seems likely that men also formed a majority of this larger category.

Irregular migrants, whether failed asylum seekers, overstayers or others, might remain in the UK for many years. Many formed relationships with British citizens or residents. Until 2002, they could apply to remain in the UK on the basis of marriage but the rules then changed so that migrants without leave or with less than six months' leave (usually visitors) had to leave the UK and apply for a marriage visa from abroad. Although the rationale was the number of suspected sham marriages, claims about the extent of these were largely speculative (Wray 2006). Those most affected were not visitors or other regular migrants; they usually came from stable regions and had some financial security and were inconvenienced and delayed but not, on the whole, refused. More seriously affected were irregular migrants, for whom securing return to the UK was more difficult. Many came from troubled regions where political and economic conditions, absence of passport facilities or the need for exit visas, and the withdrawal of UK embassy facilities made obtaining the necessary visa difficult. In the meantime, family life, including with children, was disrupted with sometimes long term consequences.

Unsurprisingly, many affected migrants tried to rely on ECHR article 8, the right to respect for private and family life, to remain in the UK. This was a relatively recent possibility. Until implementation of the Human Rights Act 1998, those resisting removal on the basis of marriage to UK residents had only government policy or judicial review principles upon which to rely, and claims rarely succeeded (see Wray 2011: 175-190). New opportunities were presented by the ability to bring a domestic human rights claim based on respect for family life, which required interference in such family life to be lawful, necessary in the interests of one of a number of defined aims, and proportionate.¹ However, early immigration decisions under article 8 provided little assistance. For several years, the courts maintained that their function was to apply ‘anxious scrutiny’² to the government’s own decision and overturned only ‘exceptional’ cases. That position changed after the 2007 House of Lords decision in *Huang* which found that appellate bodies should reach their own decision on what article 8 requires and that they were not bound by a condition of exceptionality.³ This was a critical decision and the origin of well-publicised recent disputes between the judiciary and the government about the fate of irregular migrants and foreign criminals with family ties in the UK. As well as the legal questions in issue however, the case is notable for the way that the Court talked about family migrants, emphasising their humanity and the importance of their family lives:

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 (para. 18).

The two House of Lords cases, discussed in this article, *Chikwamba* and *EB (Kosovo)*, were decided after the decision in *Huang*.⁴ They involved a challenge under article 8 by irregular migrants to the policy of requiring them to leave the UK to apply for leave to re-enter as a spouse. The specific issues addressed in them were, firstly, whether a blanket policy was proportionate (*Chikwamba*) and, secondly, the effect of government delay on the proportionality of removal (*EB (Kosovo)*). They were among a series of cases on family migration heard by the UK’s highest court (see Wray 2013 for a wider discussion) and have been selected for discussion here because, unusually at this level, the judgments involved some detailed consideration of individual circumstances. They are therefore good examples of how gender norms can be subtly expressed through law. Before turning to these judgments

however, the next section will consider how such instances had previously been treated by the lower courts.

Decisions Before *Chikwamba* and *EB (Kosovo)*: Excluding the Problem Male Migrant

The issues in *Chikwamba* and *EB (Kosovo)* had already been litigated by migrants at length in the Tribunal and lower courts without success. Most were decided before *Huang* held that there was greater authority to intervene, and were unsuccessful. But, even after *Huang*, the majority failed. The protagonists in these cases were overwhelmingly male. For example, of 36 lower-level decisions on the issue decided in *Chikwamba* and surveyed for this article, 31 involved male applicants. The exclusion of this mainly male group was more palatable if they could be designated as generally unmeritorious. Constructing an undeserving applicant meant emphasising their misconduct, minimising the significance of their affective ties, and maximising their resilience to the hardship of removal. This was done in ways that relied implicitly on gender.

This is illustrated by two key Court of Appeal decisions. Both involved male failed asylum seekers. *Mahmood* in the Court of Appeal concerned a Pakistani national who had entered the UK clandestinely, made an asylum claim and, shortly before this was refused, married a British citizen born in Pakistan.⁵ The marriage was acknowledged as genuine and the couple had two children. The Court did not regard the case as meeting the demanding legal criteria by which it believed itself bound. In particular, it was considered reasonable for his family to accompany him to Pakistan, or for him to be separated from them while the application was processed, which might be a lengthy period. As already discussed, the idea that a wife and family should follow a husband has a long pedigree in immigration law, and was one reason why claims by men to enter the UK have been regarded suspiciously. Here, the separation of father and children seems to have been regarded as not very significant. In deciding against the migrant, the court did not have to overcome the dissonance on these questions that might have arisen had the appellant been female.

In the other leading Court of Appeal decision, the Court was faced with an unsympathetic appellant with a weak claim. In *Ekinici*, a Turkish asylum seeker resisted return to Germany, where he had previously made an asylum claim, because of his marriage to a British citizen.⁶ He lied in his new asylum claim to conceal the previous claim, absconded several times, and married his wife after lengthy proceedings to procure his removal. The claim against removal failed, but this was not a case in which family relocation

was possible, as Mrs Ekinici was confined to the UK by her caring responsibilities. Instead, the key finding was that Mr Ekinici should not 'jump the queue' by being allowed to make his application in-country. This finding was made in the knowledge that he faced return only to Germany, and a short wait for his claim to be considered. Mr Ekinici appeared to epitomise the manipulative male migrant prepared to use any means, including the opportunistic exploitation of family ties, to advance his case. While the case had some complexities (the marriage was genuine, the couple had a child, and the entry clearance application was not assured of success so that long term separation was possible), it was a set of facts that was mostly congruent with the popular image of the undeserving male migrant and there was again little or no dissonance to overcome between the facts of the case and the outcome.

These cases were subsequently interpreted in the tribunal and the lower courts as showing that removal of irregular migrants was justified either because the family did not face 'insurmountable obstacles' in relocating abroad, an almost impossible standard, or because an irregular migrant should not 'jump' the entry clearance queue by remaining in the UK. The consequence was that almost all subsequent claims, usually but not always involving male claimants, failed. This was not an inevitability. Lower courts and tribunals were bound by these precedents in similar fact cases but they also, for the most part, interpreted them expansively and were slow to find that cases also involving irregular migrants but where the facts were not the same should be treated differently ('distinguished'). The category of undeserving applicant thus widened and brought into its ambit many male applicants with compelling claims.

Even fathers and husbands who showed a strong commitment to their families, and whose presence was essential emotionally and practically, did not succeed. For instance, the Immigration Appeal Tribunal followed *Mahmood* in a case where important factual differences were present: the father was the primary carer of his son while his wife worked, the wife was a British citizen who had never lived in Pakistan and whose skin complaint was exacerbated by hot weather. The Tribunal considered return to be justified because the separation was likely to be only temporary, ignoring the disruption to the wife who might have to abandon her teaching job, and to the child, who would be separated from his daily carer, a hardship that barely merited mention.⁷ In another instance, the Tribunal upheld removal where the migrant's child was severely disabled, the father was deeply involved in her care, and the mother could not cope with this daughter and their other child on her own. The family would move on to benefits as a result of the father's departure, making a successful

application under the immigration rules less likely given the ‘no recourse to public funds’ requirement.⁸In dismissing the case, the Tribunal reduced the husband’s contribution to its practical elements, discussing how these might be overcome, and ignored the emotional connection between the family members. In yet other cases, it was conditions in the country of origin that were in issue and applicants were expected to show a high degree of physical and emotional resilience. For instance, an applicant was required by the tribunal to return to Iraq shortly after the second Gulf war, obtain travel documents in this unstable environment, undertake the expensive and dangerous journey from Iraq to Jordan, negotiate Jordanian border controls and then stay in a hotel while awaiting a visa decision that could have as easily been made in the UK.⁹

Those relatively few women who brought cases did not necessarily fare better. The same legal principles applied to both genders, but they had been established through reliance on the representation of the problematic and suspect irregular male migrant which then expanded to include all men and the few women who applied.

Chikwamba and EB (Kosovo)

The suggestion that gender was an important factor in establishing the foundations for this broad category is reinforced by the cases in which the House of Lords reversed these principles. The decisions in *Chikwamba* and *EB (Kosovo)* were made on the same day in 2008. *Chikwamba* concerned a married migrant present without leave in the UK. The sponsor was a Zimbabwean refugee who could not return, and the couple had a daughter. The appellant seemed as compliant an irregular migrant as it was possible to be, being a failed asylum seeker permitted to remain temporarily when removals to Zimbabwe were suspended. The issue of removal arose only after that policy was reversed. The period of separation would be at least of several months duration. The Court found that a blanket policy requiring return to the country of origin to make an entry clearance application was disproportionate and distinguished cases such as this one from *Ekinici*, finding 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’ (para 44). Lord Scott expressed himself even more memorably: ‘... 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’ (para. 4).

The appellant in *Chikwamba* was a woman. That was not an explicit factor, but the intention of selecting this case for appeal would be to present the Court with the opposite of the undeserving, male migrant epitomised by Mr *Ekinici*. This well-behaved female migrant was at the opposite end of the spectrum in all respects, including her gender. The impact this had on reasoning is sometimes discernible, particularly when it concerns the parent/child relationship. One of the judges, Baroness Hale, referred to the choice between separation of daughter and mother or joint travel to the 'harsh and unpalatable' (para 8) conditions in Zimbabwe. She did not mention the father's position. Another judge, Lord Scott assumed that she could not leave her daughter behind and did not mention the father's relationship with the child. Lord Brown also assumed that the girl would accompany her mother, and the painful separation of father and daughter was mentioned literally only in parentheses. It should be recalled that courts had previously regarded the likely separation of fathers and children with equanimity, as the cases just discussed show. It seems that the parental connection between mother and child was, without reflection, considered a more important tie.

Chikwamba was critical because it established that article 8 cases are always fact-sensitive, and that not all irregular migrants are like the appellant in *Ekinici*. Whereas previously almost all migrants, whatever the individual facts, had been classed as *Ekinici*-type cases, now courts were mandated to do the opposite: to show why migrants should not be treated in the same way as the appellant in *Chikwamba*. Gender was not a material fact that would justify departing from that principle, so male migrants should benefit. The reality, however, was somewhat more complex, as discussion later will show.

The second House of Lords case discussed here, *EB (Kosovo)*, considered the effect of government delay on the proportionality of removal, affirmed the importance of individual decision-making, and finally and definitively dismissed the 'insurmountable obstacles' test that had allowed so many claims to be dismissed. The appellant here was male, but the narrative unambiguously evokes sympathy for his predicament. Aged 13, he was forced from his home in Kosovo, lost contact with his family and lived in refugee camps with his cousin, of a similar age before fleeing to the UK where, after a foster placement, he began living with his uncle and resumed his education. Shortly before he turned 18, he began a relationship with a young Somali woman in receipt of humanitarian protection and pregnant by another man who had abandoned her. The couple started to live together at the uncle's house, the appellant raised the woman's daughter as his own and they hoped to marry. However, after consideration of his asylum claim had been delayed for many years, it was eventually refused

and the government planned to return him to Kosovo from where an entry clearance application might or might not succeed. Had his initial claim been dealt with more expeditiously, he would already have received indefinite leave to remain under previous policy.

To open a House of Lords decision with such a narrative is unusual. More common would be an analysis of the legal issue. If facts were the first consideration, it is, in immigration cases, more usual to focus on the appellant's immigration status, or lack of it, rather than their personal history. However on this occasion, the factual account, written by Lord Bingham in spare, elegant prose, immediately establishes the case as one concerning human interests and feelings, and the subsequent legal findings seem a natural and humane consequence of these. The appellant in this case is not the non-compliant and opportunistic male migrant of the lower court decisions, but a vulnerable and affectionate young man (a child when the story opens) seeking to create a family base with an equally insecure young woman and her child. The gender stereotype in this case had been subverted not by replacing the man with a woman, but by presenting a different kind of man, one who exhibited vulnerability and a capacity for caring extending beyond his own biological relatives that is more habitually associated with the feminine.

As with *Chikwamba*, the case established a new framework for evaluating all those who came within the same broad factual matrix as the appellant. Both *Chikwamba* and *EB (Kosovo)* thus brought significant benefits for irregular migrants with family ties in the UK. It was, for example, no longer possible to reject a claim merely because there were no insurmountable obstacles to living abroad.¹⁰ However, the next section will show that the decisions did not prefigure a brave new world in which the affective claims of irregular male migrants were given recognition.

Reconstructing the Undeserving Male Family Migrant

Anecdotal reports suggest that the immigration authorities did not change their practice more than marginally after these House of Lords cases. Subsequent legal challenges which relied on the principles in *Chikwamba* and *EB (Kosovo)* were also largely unsuccessful. Factors that counted routinely against applicants before *Chikwamba* and *EB (Kosovo)* would often count against them afterwards. These included lengthy periods of irregular residence, even if it did not involve absconding or deception, or an otherwise 'poor immigration history';¹¹ the absence of an 'unassailable' or 'invincible' right to live in the

UK;¹² failure to comply with reporting or other conditions;¹³ periods of delay which were not due to government failures, were shorter than the four and a half years that occurred in *EB (Kosovo)* or which did not result in unpredictable, inconsistent and unfair outcomes;¹⁴ failure to provide information about the claimed relationship at the appropriate time;¹⁵ failure to show that those in a comparable position to the appellant had received earlier favourable decisions;¹⁶ and that a relationship was entered in the knowledge that immigration status was precarious.¹⁷

The problem was that, just as the opportunistic male migrant was a construction, so were the appellants in the House of Lords cases. Factual ambiguities were glossed over in favour of an idealised presentation with the consequence that the category of successful claimants remained relatively narrow. While some of the later unsuccessful claims had weaknesses, almost all claims by irregular migrants are weak when viewed by the criteria discussed above. An irregular migrant, by definition, is non-compliant with immigration control. An asylum claim cannot be made unless the asylum-seeker is present on the territory and this almost always involves some form of illegal entry, as Lord Brown recognised in *Chikwamba*. However, the protection against prosecution provided by Article 31 of the Refugee Convention does not benefit those whose claims do not succeed and this is not always a predictable outcome. Asylum claims may fail because specific legal conditions have not been met or because of adverse credibility findings that reflect confusion and trauma rather than deceit. The quality of the asylum determination process in the UK has been widely criticised.¹⁸ Return by the failed asylum seeker to the country of origin, while the logical consequence in law, maybe very difficult in practice. Any relationship involving an asylum seeker or irregular migrant will be entered in the knowledge that immigration status is precarious. These kinds of objection effectively exclude almost all irregular migrants from consideration, the very situation that existed before the House of Lords' interventions. Of course, there are degrees of non-compliance, and some irregular migrants may not evoke much sympathy. But human beings are fallible and make mistakes. Immigration control is impersonal, changeable and inefficient. Legal advice is not always available or of high quality. The basic need for human connection and companionship does not conveniently suspend itself for long periods while questions of status are resolved. It is disappointing to see how quickly lower courts and tribunals succeeded in resurrecting many of the barriers that *Chikwamba* and *EB (Kosovo)* had appeared to dismantle.

Part of the problem is that *Chikwamba* and *EB (Kosovo)* had represented only a very partial deconstruction. This is not surprising. Courts have no legal or constitutional mandate to do more than ensure that immigration control is exercised in ways that comply with human rights obligations, including the qualified obligation in ECHR Article 8. The steps taken by the House of Lords in that regard, which include the two cases discussed here, met with much government hostility and attempts to reverse them through rule changes (Wray 2013). The Court would have been most anxious to avoid any suggestion that it was undermining government's ability to control immigration or condoning non-compliance. However, by establishing so clearly the successful appellants as the converse of the non-compliant irregular male migrant, the decisions risked creating a set of unrealisable expectations that most migrants cannot meet. In fact, it is possible that even the parties to these cases might not have met them, had their cases been considered from a different perspective. Mrs Chikwamba's asylum claim, for example, had been dismissed for lack of credibility, implying lack of honesty. She had two small children by a previous marriage and other family living in Harare. Her marriage had been entered and her daughter was born when she knew her status was precarious. She knew also that the suspension of removals to Zimbabwe was temporary. There was doubt as to whether, if she applied from abroad as a spouse, she could comply with the requirements of the immigration rules.ⁱⁱⁱ In other words, while Ms Chikwamba had not absconded or evaded the authorities, many of the other objections made against the later failed applicants could also have been made against her.

The appellant in *EB (Kosovo)* could as easily be described differently. He did not mention his relationship until after refusal of his asylum claim. The adjudicator, quoted at length in paragraph 17 of the House of Lords judgment, noted that he had made no attempt to contact his family in Kosovo, found that his girlfriend could return to Kosovo with him, and considered that her child, who was one year old, would not yet have bonded with him. On the question of delay, the Tribunal had considered that 'there is nothing in the nature of anything the appellant did or was done on his behalf by those representing or advising him to press for an earlier resolution of his claim' (see para 19). Again, this alternative representation of the appellant rendered him almost indistinguishable from the majority of his unsuccessful peers.

ⁱⁱⁱWhile her other children are mentioned in passing in the House of Lords judgment, the other facts here are mentioned only in the adverse Court of Appeal decision from which Ms Chikwamba appealed: *C (Zimbabwe) v SSHD* [2005] EWCA Civ 1779.

In fact, while a few claims are particularly compelling and some others evoke little compassion, there is, in practice, no easily identified category of ‘meritorious’ cases that can be justifiably privileged above the rest. Most migrant stories are capable of multiple interpretations. As Charsley (2012:7-8) points out, that immigration advantages may be a consequence of marriage or even one motive for it does not mean that the marriage is entirely instrumental and that deep emotions are not also engaged. The presence of thousands of irregular migrants presents an ethical dilemma for any society. Their predominant gender, their ethnicity and their status mean that they are often regarded as a potent threat to the social fabric and to values of legality (cf. Griffiths, this volume). However, their affective ties to British residents, often built up during long periods of state inactivity in respect of their claims, make their removal potentially traumatic. This is not a dilemma that can be solved by the courts, who operate within delicately balanced constitutional and legal constraints, or even easily by governments given the bidding war that is modern immigration policy, but it should not, for those reasons, go unacknowledged. It is also a dilemma that is tied to gender, a feature which, despite formal equality, has never disappeared and persistently re-emerges.

Gender Resurrected

The case of *TG (Central African Republic) v SSHD* was decided by the Court of Appeal less than a month after *Chikwamba*.¹⁹ The legal issue was not the applicant’s claim to remain under the *Chikwamba* principle, but which body should make the decision. However, in reaching its decision, the Court observed some differences with *Chikwamba*. In particular, it was assumed that Mrs Chikwamba could not have left her child behind, whereas this was seen as possible for the father in *TG*. That the child would inevitably accompany the mother had, in fact, been assumed not established in *Chikwamba* (see the discussion above). It seems that motherhood gave rise to presumptions that fatherhood did not: ‘... it is quite clear that 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’ (para.5). As discussed above, new models of fatherhood exist but they are not universally accepted and have been slow to permeate the contested arena of immigration control where the state’s interests in control are afforded such weight.

Parenthood thus permitted the legitimate expression of decision-making differentiated by gender and was becoming increasingly important in immigration claims. This was consonant with the growing priority awarded to the interests of children following the

removal of the UK's immigration exception to the UN Convention on the Rights of Child and the implementation of a statutory duty to safeguard and promote the welfare of children in the UK when making immigration decisions.²⁰ The 2011 Supreme Court decision of *ZH (Tanzania)* established that a child's interests must be a primary consideration in immigration decisions involving their parents.²¹ Their interests include the practical ability to remain in their country of nationality or residence and this may mean that the custodial parent must also be given to leave to remain, however weak their claim in other respects. Fathers, who are more likely to be non-resident parents, may find that their relationship, whatever its emotional intensity, does not meet the threshold.^{iv} European Union law on the question has also focused on the ability of the child EU citizen to exercise their free movement rights for which the presence of only the custodial parent is necessary.²² Even if the parents live together, while rights remain qualified (children's interests are only a primary consideration not the only one), the 'secondary' parent, who is more likely to be the father, has a weaker claim.

Gender has recently re-emerged in another way. It should be recalled that the removal of a family migrant is not the end of the story. The migrant can apply to return as a partner or, if separated, to exercise contact with a child. The problems are practical: the difficulty, delay and cost involved in accessing visa facilities in some countries and showing compliance with entry criteria. Many migrants have managed to overcome these hurdles and re-unite in the UK, but for others this was not possible and separation became long-term or permanent. In theory, leave to enter the UK should be awarded on article 8 grounds but this is, in practice, almost never granted on first application, only on appeal from which the migrant is forcibly absent.

The criteria for entry as a spouse have been recently made much more demanding, and this affects more male than female applicants. Since July 2012, sponsors of partners must show that they have an income of at least £18,600 (more if children are also being sponsored). This income must be earned for at least six months or a year, depending on the employment situation, and be the sponsor's own; welfare payments, third party support and the migrant's own potential earnings are not counted. This new criterion discriminates indirectly against female sponsors who earn, on average, less than men and are more likely to

^{iv} Compare for example, the treatment of the mother in *VW (Uganda) and AB (Somalia) v SSHD* [2009] EWCA Civ 5 and the father in *R (on the application of Wray)* [2010] EWHC 3301 (Admin).

have caring responsibilities which prevent them finding work. As a result of the changes, 47% of British citizens in employment do not qualify to bring in a partner but this rises to 61% for women compared to 32% for men.²³ The migrant's potential contribution either to income or child-care is completely disregarded.²⁴ The consequence for the mostly male irregular migrants that are the subject of this article is that fewer of them will now be eligible for a regular status. Those who have not yet been removed from the UK can at least provide childcare or other support to their partner, even if they cannot work legally, but their status remains precarious. Those who are removed can only watch from the side-lines while their spouse attempts to create the necessary conditions for return. The Court of Appeal recently found that the financial criterion does not breach article 8 ECHR and is not discriminatory, a controversial judgment that is likely to be further appealed.²⁵ In the meantime, gender, officially excluded from decision-making, remains a factor and male applicants in heterosexual relationships (the vast majority of men who apply as partners), are at a disadvantage. While the government's aim is to reduce all family immigration, not just by male migrants, and the new rules have had a serious impact on both genders, leading to much separation and distress (All Party Parliamentary Group on Migration 2013), the rule continues a longstanding narrative whose thread is consistent if not often articulated: the greater relative exclusion of male family migrants.

Conclusion

Some men pay a heavy price for the privilege of being masculine. Male family migrants, like other men in structurally weak positions, are attributed characteristics of masculinity which, if accepted, confirm the marginality of their emotional lives but which, if challenged, can result in criticism for instrumentalising their family lives. As this article has shown, the courts have only rarely allowed migrant men to transcend this bind, which serves vital purposes in terms of state interests in regulating migration. Even recent re-evaluations of the significance of parenthood to immigration decisions will usually assist mothers more than fathers.

Claims by male family migrants are at odds with longstanding and often invisible norms about how masculinity conditions participation in family life, upon which new models of fatherhood have made only a limited impression. For many decades, male family migrants were excluded specifically on the basis of their gender. When this became an inadmissible criterion for discrimination, more subtle legal distinctions were created with much the same effect. The dramatic increase in numbers during the late 1990s and early 2000s of mostly male

irregular migrants created a new scenario. No longer supplicants asking for admission, they were already present without status, could draw on human rights norms to found claims to remain, and were difficult to dislodge for both practical and legal reasons. They were regarded as illegitimate because they posed a threat to state control of migration and because they embodied fears about the readiness and capacity of men to exploit and manipulate emotional bonds for their own advantage. Given non-discrimination norms, such fears could only be expressed through general rules that implicated the entire category but whose justification was based, in part, on unspoken but widely shared beliefs about their masculinity. These rules were instigated by government and, in early years, upheld by the courts who were unwilling to challenge government hegemony and for whom the representation of applicants as male, non-compliant and opportunistic explained and reinforced decisions to exclude. Evidence of men's involvement in family life was discounted or reduced to its practical elements. The outcome was that claims to remain in the UK based on affective relationships almost always failed after as well as before implementation of the Human Rights Act 1998.

The House of Lords (now the Supreme Court), in the two cases discussed in this article, undermined these decisions not by explicitly deconstructing the non-compliant male migrant but by positing an opposing category of vulnerable family migrants, with deep-seated family ties to which more generous rules should apply. The judgments themselves set out general principles that should have assisted a wide range of migrants but were based on exemplars who were female or young, vulnerable and male. It was not difficult, in practice, for lower courts, anxious to avoid stepping into the taboo territory of immigration control, to distinguish subsequent cases because they did not match the apparently exacting factual standards of the successful claimants. In fact, even the successful claimants might, on a different reading, have failed to meet them. The exclusion of this category, and the gender assumptions that supported it, continued afterwards with relatively little impediment. In the meantime, gender distinctions began to be expressed in different ways, through a new, important but still relativized emphasis on parenthood and the imposition of much higher financial criteria which female sponsors of male applicants would find difficult to meet.

Historically, it has always been more difficult for migrant men to have emotional attachments recognised as sufficient to found a legal claim. Family migration has been a feminised field, the counterpart of male dominance in other routes. The pattern of excluding male family migrants has a protean character, re-emerging in different forms ever since immigration controls were first imposed. Even the intervention of the UK's highest court has had

limited impact because it did not address the underlying assumptions about these migrants. Gender is one of the most long-standing social categorisations of difference, 'operative since the dawn of existence' (Mahler and Pessar 2006: 29). While assumptions about femininity have been re-evaluated through a gender analysis, masculinity has only relatively recently started to receive the same attention. Scholarship on masculinity has not yet made much impact in an area such as immigration control, where state interests are so strongly asserted and where many beliefs are congruent with what it is expedient to assume about unwanted migrants. The result is that it is very difficult to eliminate from the regulatory regime the assumption that men who claim an immigration advantage through a family relationship are emotionally robust and can withstand separation, are opportunistic in their relationships and are less intensely involved than mothers with their children.

As discussed in the introduction to this collection, claims by men in family law and under asylum have evoked ambivalent or hostile responses connected to their gender (Collier 2010: chapter 7; Spijkerboer 2000; Griffiths, this collection; De Hart, this collection). To this list may be added men seeking admission or a right to remain as family members. As with asylum, there is particular resistance as states regard themselves as having an interest in minimising the strength of claims based on affective ties. Migrant men's emotional lives continue to be treated as marginal to their lives, 'a thing apart'.^v

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^vA phrase taken (ironically) from Lord Byron's poem, *Don Juan*: 'Man's love is of man's life a thing apart, 'Tis woman's whole existence'.

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²*R v SSHD ex p. Mahmood* [2000] EWCA Civ 315 [39].

³*Huang (FC) v SSHD* [2007] UKHL 11; in the later case of *R (on the application of Quila and another) v SSHD* [2011] UKSC 45, the Supreme Court confirmed that the same principle applies to judicial review.

⁴*Chikwamba v SSHD* [2008] UKHL 40; *EB Kosovo v SSHD* [2008] UKHL 41.

⁵*R v SSHD ex p. Mahmood* [2000] EWCA Civ 315.

⁶*R (on the application of Ekinci) v SSHD* [2003] EWCA Civ 765.

⁷*K (Pakistan)* [2003] UKIAT 00037.

⁸*LH (Truly exceptional- Ekinci applied) Jamaica* [2006] UKIAT 00019.

⁹*HC (Availability of Entry Clearance Facilities) Iraq* [2004] UKIAT 00154.

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¹¹*AZ (Bangladesh v SSHD)* [2009] EWCA Civ 158; *S (India) v SSHD* [2009] CSOH 72.

¹²*Re 'unassailable right' GA (Iraq) v SSHD; SZ (Zimbabwe) v SSHD* [2009] EWCA Civ 590 para. 18.

¹³*MH (Pakistan) v SSHD* [2011] CSOH 143.

¹⁴*SA (Iraq) v SSHD* [2011] CSOH 162; *AO (Iraq) v SSHD* [2009] CSOH 168; *R (on the application of Omoruyi) v SSHD* [2008] EWHC 3120 (Admin).

¹⁵*RQK (Iraq) v SSHD* [2011] CSOH 199.

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¹⁷*MH (Pakistan) v SSHD* [2011] CSOH 143.

¹⁸ref

¹⁹[2008] EWCA Civ 997.

²⁰Borders, Citizenship and Immigration Act 2009, s. 55.

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²²*Zambrano v ONEm* (C-34/09); *O & S* Case C-356/11 & 357/11; *Omotunde (Best Interests: Zambrano Applied: Razgar: Nigeria)* [2011] UKUT 247 (IAC) although in this case, the main carer was the father.

²³<http://www.migrationobservatory.ox.ac.uk/press-releases/women-young-people-and-non-londoners-are-most-affected-changes-family-migration-police> accessed 15th January 2013.

²⁴ HC 395, Appendix FM, paragraphs E.ECP 3.1-3.2.

²⁵ *MM and others v SSHD* [2014] EWCA Civ 985.