OUTER HOUSE, COURT OF SESSION

[2010] CSOH 172

P956/10

OPINION OF LORD STEWART

in the Petition of

SKM (Assisted Person)

Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department to refuse to treat further representations made on his behalf as a fresh asylum claim in terms of paragraph 353 of the Immigration Rules (HC 395)

Defender:

Petitioner: Forrest, advocate; Drummond Miller, LLP
Respondent: Olsen, Advocate; Office of the Solicitor to the Advocate General

23 December 2010

[1] This Petition for Judicial Review of a United Kingdom Border Agency determination dated 2 June 2010 called before me for a First Hearing on 25 November 2010. I allowed the Petition and Principal Answers to be amended in terms of the Minute of Amendment and the Answers thereto tendered at the Bar and

allowed prints of the Petition and Answers as amended to be received. The substantive effect of the amendment on the Petition was to add a new article to the Petition, Article 23, relating to apprehended violation of the Petitioner's Article 8 rights ECHR. Counsel for the Petitioner intimated that this would now be the only point in the Petitioner's application. In the course of the hearing Counsel for the Petitioner moved to allow the Petition as amended to be further amended at the Bar. There being no opposition I granted the motion with the effect of allowing further amendment of the Petition as follows: in Article 3(i) by deleting the word 'asylum' and by substituting the words 'violation of his rights under Article 8 ECHR'; in Article 6, first line, by deleting the word '2009' and substituting the word '2010'; in the Plea-in-Law by deleting the word 'asylum' and by substituting the words 'violation of his rights under Article 8 ECHR.'

[2] I heard parties' submissions. Counsel for the Petitioner moved the Court to sustain the Petitioner's Plea-in-Law, to repel the Respondent's Pleas-in-Law and to reduce the Border Agency decision of 2 June 2010 etc. Counsel for the Respondent made the counter-motion and moved for dismissal of the Petition. Having made *avizandum* my opinion is that the Petition should be dismissed.

History of claim for Asylum etc

[3] The Petitioner identifies himself as a national of the Democratic Republic of Congo [DRC] born on 14 June 1972. He claimed asylum at the Liverpool Asylum Screening Unit on 15 July 2008. He claimed to have left DRC on 12 July 2008 and to have travelled to Kampala, Uganda, by jeep and motorcycle. He claimed to have travelled by bus from Kampala to Nairobi, Kenya. He claimed that on 15 July he travelled by plane from Nairobi to London, Heathrow, and that, on landing, he took a

train to Liverpool where on the same day he made his asylum claim. He stated that he travelled on a passport in the name of Christian Badibanga and that his travel arrangements were made by an agent called Thomas and paid for by family and work colleagues. The Petitioner claimed to be married with three children. He stated that his mother was deceased, that his father resided in DRC and that he had eleven siblings.

[4] By Notice of Immigration Decision/ Reasons for Refusal Letter dated 4 November 2008 the Petitioner was refused asylum and ordered to be removed from the United Kingdom. The Petitioner appealed to the Asylum and Immigration Tribunal in terms of the Nationality, Immigration and Asylum Act 2002 s 82(1) on grounds specified in s 84(1). The Petitioner's appeal was heard at Glasgow on 15 January 2009 by Immigration Judge Bradshaw. The Petitioner was represented by Mr Winter of Messrs McGill & Co, Solicitors, Glasgow. By Determination dated 3 February 2009 and promulgated under cover of Notification Letter dated 4 February 2009 the Immigration Judge dismissed the appeal. The Petitioner appears to have sought leave to appeal and/ or to have applied for reconsideration but without success. The Petitioner was recorded by the Respondent as being 'rights of appeal exhausted' on 26 May 2009.

[5] First further submissions on behalf of the Petitioner were submitted to the UK Border Agency on 24 July 2009 and rejected by letter dated 26 August 2009. Second further submissions on behalf of the Petitioner were submitted to the UK Border Agency on 25 September 2009 and rejected by letter dated 19 October 2009. By letter dated 10 May 2010 Messrs Hamilton Burns WS on behalf of the Petitioner made third further submissions to the UK Border Agency. Additional documents were enclosed. The further submissions were considered in terms of the Immigration Rules, Rule 353. By decision letter dated 2 June 2010 an officer of the UK Border Agency,

Glasgow, acting on behalf of the Respondent, determined that the decision of 4 November 2008, upheld by the Immigration Judge on 4 February 2009, affirmed by the Tribunal on 2 March 2009 and by the Court of Session on 16 March 2009 should not be reversed; that the Petitioner's further submissions did not amount to a 'fresh claim' in terms of Rule 353; and that the Petitioner had no basis to stay in the United Kingdom and should make arrangements to leave without delay [§§46-47, 50.]

[6] The decision which the Petitioner now seeks to bring under Judicial Review is that part of the UK Border Agency determination of 2 June 2010 that relates to apprehended violation of the Petitioner's Article 8 ECHR rights.

Petitioner's further submissions to the UK Border Agency under Rule 353

[7] The Petitioner's original claim was for asylum etc founded on fear of persecution and risk of return to DRC due to the Petitioner's political opinion. That was the claim dismissed by Immigration Judge Bradshaw on 4 February 2009. In dismissing the claim Immigration Judge Bradshaw stated:

> I have as required taken into account as damaging, credibility elements of the [*Petitioner's*] behaviour. The [*Petitioner*] has, in my view, behaved in a way designed or likely to conceal information. This is because the [*Petitioner*] has failed without reasonable explanation to provide full and accurate information to the Respondent.

The further submissions on behalf of the Petitioner made to the UK Border Agency by letter dated 10 May 2010 included a new claim that the Petitioner had since 15 July 2008 established a private life in the United Kingdom and that 'it would be unreasonable and disproportionate for [*the Petitioner*] to be removed from the United Kingdom' and in violation of his Article 8 rights. The further representations enclosed

documents in connection with the Article 8 claim including the following support letters: 6/2/18, letter dated 24 March 2010 from an ESOL [*English for Speakers of other Languages*] Lecturer, Glasgow Metropolitan College; 6/2/7, letter dated 26 March 2010 from the Youth Project Co-ordinator, Bridges Programme, Glasgow; 6/2/8, letter dated 26 March 2010 from the Director, Diversity Films, Glasgow; 6/2/14, letter dated 29 March 2010 from the British Red Cross Refugee Unit, Glasgow; 6/2/30, letter dated 30 March 2010 from BTCV Scotland; 6/2/15, letter dated 31 March 2010 from the Community Development Officer, Scottish Refugee Council; 6/2/17, letter dated 31 March 2010 from the Events and Conference Manager, Destiny Church, Glasgow. The thrust of the third further submissions was that the additional Article 8-related material amounted to a 'fresh claim' for the purposes of the Immigration Rules, Rule 353.

Legislative framework

[8] The Human Rights Act 1998 Sched 1, Part 1 ('The Convention'), incorporated by s1, provides:

> *ARTICLE 8*
>
> *RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE*
>
> **1.** Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> **2.** There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is 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.

[9] The Immigration Rules 1994 (HC 395 as amended) made under the Immigration Act 1971 s 3(2) provide:

> **353. -** Where a human rights or asylum claim has been refused...and any appeal relating to that claim is no longer pending, the decision-maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

UK Border Agency's reasons for rejecting the Petitioner's further submissions under Rule 353

[10] The Border Agency determination of 2 June 2010 stated: 'Any private life, briefly established in the UK, has been done so [*sic*] in the knowledge that [*the Petitioner*] has no legal right to remain in the UK and was done so [*sic*] in the full knowledge that his immigration status was of the most precarious nature' [§ 25.] The decision-maker accepted that the removal of the Petitioner would interfere with his private life but stated that the interference would be proportionate and would not breach Article 8 ECHR [§ 28.] The decision-maker continued that 'considering the... documents in the round and applying the rule of anxious scrutiny... would not create a realistic prospect of success before another Immigration Judge.' The decision-maker reiterated similar

conclusions in relation to particular documents produced. In relation to the support letter dated 31 March 2010 from the Events and Conference Manager, Destiny Church, Glasgow, the decision-maker stated [§ 33]:

> ... Article 8 is not an absolute right. Individuals do not have a right to choose to pursue their private and family life in the UK, another fact another Immigration Judge would take into consideration with the material already considered.

[11] The decision-maker quoted *dicta* from *Razgar* v *Secretary of State for the Home Department*, [2004] 2 AC 368 at 389D-390D, §§ 17-20, *per* Lord Bingham of Cornhill (giving the opinion of the Appellate Committee) setting out a five point check list for determining whether a proposed appeal relating to alleged violation of Article 8 rights was 'manifestly unfounded' in terms of the Immigration and Asylum Act 1999 s 72 (2) (a) [§§ 35-38.] The decision-maker noted that removal in pursuance of a lawful immigration policy would almost always fall to be treated as being 'necessary in the interests of a democratic society, etc...' and that:

> ... implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state... Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases...

The decision-maker continued that it had not been demonstrated that the Petitioner had an 'exceptional case'.

[12] It was noted that the Petitioner had no dependants in the United Kingdom and that his wife and children were living in DRC and that he would be united with them on return [§§ 37, 41, 48.] The decision-maker also referred to the decision in *Chikwamba* v *Secretary of State for the Home Department* [2008] UKHL 40 and

distinguished the circumstances of Mrs Huang, first appellant, in *Huang* v *Secretary of State for the Home Department* [2007] UKHL 11 and of the appellant in *Beoku-Betts* v *Secretary of State for the Home Department* [2008] UKHL 39 [§§ 39-43.] The decision-maker stated: '[*The Petitioner's*] removal would plainly be in accordance with the law and would pursue the legitimate aim of maintaining effective immigration control' [§ 44.] The decision-maker added:

> ... it is not considered that there is a realistic prospect of an Immigration Judge concluding that removal would be disproportionate interference even if he were to give the terms of the [*further submissions letter*] as much weight as could be afforded to it. For these reasons it is not considered that there is a realistic prospect of an Immigration Judge, applying the rule of anxious scrutiny, finding that Article 8 might be breached.

Submissions for the Petitioner

[13] Mr Forrest, Counsel for the Petitioner submitted that the UK Border Agency decision-maker had erred in law in that (1) the determination did not demonstrate that the proposed interference with the Petitioner's Article 8 private life right was proportionate to a legitimate aim; and (2) the decision-maker had failed to give the further submissions sufficiently 'anxious scrutiny.'

[14] In support of the first submission Counsel drew attention to expressions in the determination, for example at paragraphs 34, 44 (quoted above) and 45, which indicated that the decision-maker had treated 'immigration control' as being in and of itself a legitimate aim for the purposes of ECHR Article 8.2. Clearly 'immigration control' was not specified in ECHR Article 8.2. Counsel accepted that 'immigration

control' could be an aspect of 'economic well-being', which *was* specified. Mere faulty expression on the part of the decision-maker would not be a good ground of review: but it came to more than that. It was clear from the way that the balancing exercise had been carried out that there was a substantive error. The balancing exercise had not really been carried out at all.

[15] The decision-maker accepted at paragraph 35 that the Petitioner had established a private life in the United Kingdom. By implication, Counsel continued, the decision-maker further accepted that the interference which removal would involve was bound to be of such gravity as potentially to engage Article 8. This could be inferred from the fact that the decision-maker moved on to consider whether the interference was lawful, necessary for a legitimate aim and proportionate. The questions of legitimacy and proportionality, Counsel submitted, had to be considered together.

[16] Under reference to *Huang* [*supra*] at 187 § 19, Counsel submitted that 'insufficient attention' had been paid in the instant case to the identification of the 'legitimate aim'; and that the decision-maker had not explained why it was thought necessary to interfere with the Petitioner's private life or why a measure as extreme as removal from the United Kingdom was proportionate. (It was not for the Petitioner to suggest what lesser measure would be proportionate.) The decision-maker stated five times at paragraphs 34 to 44 that the Petitioner's immigration status was precarious. That may have been so: but it was of questionable relevance. At paragraph 39 the decision-maker stated that the Petitioner had failed to demonstrate that the Petitioner's was 'an exceptional case.' This was erroneous: in *Huang* [*supra*] at paragraph 20 Lord Bingham of Cornhill made it clear that 'exceptionality' was not a legal test, merely an expectation that 'the number of claimants... entitled to succeed under Article 8 would be a very small minority.'

[17] In support of his second submission, namely that the Border Agency decision-maker had failed to give the further submissions sufficiently anxious scrutiny, Counsel for the Petitioner referred to *YH (Iraq)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116. At paragraphs 22 to 24 Carnwarth LJ (with whom the other judges agreed) considered the phrase 'anxious scrutiny' and stated: 'it has by usage acquired a special significance as underlining the very special human context in which such [*human rights and asylum cases*] are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of the applicant has been properly taken into account.' In the instant case, Counsel continued, the decision-maker had not taken every letter of support produced with the further representations into account: if the decision-maker had taken every letter into account then his conclusion was not rational. All he had done was to point out the existence of the additional material. If the material were properly considered, there would have been a realistic prospect of success. In any event it should not have been concluded that there was no realistic prospect of success.

[18] On the question of the approach to be taken by the Court in reviewing Rule 353 decisions by the UK Border Agency, Counsel for the Petitioner stated that, if pressed, he would say that the question in the instant case, involving as it now did an Article 8 claim only, was at large for the Court. Counsel made reference to the case of *R (Razgar)* v *Secretary of State for the Home Department* [2004] 2 AC 368.

[19] In reply to the submissions for the Respondent, Counsel for the Petitioner submitted that the questions of the engagement of Article 8 and of proportionality were independent of one another. The 'quality' of the Petitioner's private life, which was criticised by Counsel for the Respondent, touched on the issue of proportionality. In that connection Counsel accepted that it would not be irrelevant to take into

account, 'for what it was worth', the private and family life that the Petitioner still had in the DRC.

Submissions for the Respondent

[20] Mr Olsen, Counsel for the Respondent submitted (1) that the UK Border Agency determination of 2 June 2010 was correct; and (2) that the Petitioner had not demonstrated a 'realistic prospect of success' in terms of Rule 353.

[21] Counsel agreed with Counsel for the Petitioner that it was for the Court to make up its own mind as to whether the Rule 353 test was satisfied [*YH (Iraq)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116 at § 21 *per* Carnwarth LJ.] The 'realistic prospect of success' referred to in Rule 353 necessarily represented a relatively low threshold - otherwise the purpose of the rule would be defeated. Anything more than a fanciful prospect was 'realistic' for Rule 353 purposes [*AK (Sri Lanka))* v *Secretary of State for the Home Department* [2010] 1 WLR 855 at § 34 *per* Laws LJ.] Counsel pointed out that *AK (Sri Lanka)* was a Rule 353, Article 8, 'private life' claim which the Court of Appeal found had a 'realistic prospect of success'. For the purpose of affording insight into the aspects of personal autonomy and the kinds of social interaction which could, more generally, constitute 'private life' within the meaning of Article 8, Counsel provided me with a copy of the article by N A Moreham, "The Right to Respect for Private Life in the European Convention on Human Rights: a Re-examination", [2008] EHRLR 44.

[22] Counsel criticised the submissions for the Petitioner for failing to address the detail of the support letters: the detail had to be considered bearing in mind that the Article 8 issue was whether or not, balancing personal and societal considerations, removal from the United Kingdom would prejudice the Petitioner's private life in a

sufficiently serious manner to breach his Article 8 private life right. The 'quality' of an individual's private life, including the period over which that private life had been built up in the United Kingdom, was something that fell to be considered in determining the proportionality of the interference. The relevant date for the purpose of Judicial Review was the date of the UK Border Agency's determination, namely 2 June 2010. At that date the Petitioner had been in the United Kingdom for something short of two years.

[23] Counsel for the Respondent turned to the detail of the Petitioner's support letters. With one exception, the letters were from organisations or programmes dedicated to supporting asylum seekers and refugees. The exception was the letter from Destiny Church, Glasgow, where the Petitioner had been involved for one and a half years. Otherwise, the letters tended to be based on contact, intermittent or of finite and relatively short duration, while the Petitioner was undertaking courses along with others in a similar situation: 6/2/7, personal development and employment skills building for the asylum seekers and refugee community, 26 days contact at most at the date the testimonial was written; 6/2/8, film-making workshops for excluded individuals and communities, 'many hours with [*the Petitioner*]'; 6/2/14, assistance for newly arrived asylum seekers and refugees to adapt, integrate and access services, 'approximately two months'; 6/2/15, attendance at regular meetings, for a period of one year, of the Glasgow West Framework for Dialogue Group, giving refugees and asylum seekers a voice in issues including housing, community safety and education; 6/2/18, attendance at ESOL and citizenship modular courses over a period of eight months; 6/2/36, 'Introduction to Gardening Skills' with nine other refugees and asylum seekers during a five-day trip to Arran.

[24] All the materials referred to by Counsel for the Petitioner had been considered by the decision-maker. This was clear from paragraphs 26 to to 33 of the determination. What more was the decision-maker supposed to say? Counsel continued that the material, including the support letter from Destiny Church, was not really about the Petitioner's private life. It did not assist in assessing what kind of ties the Petitioner had. It did not persuade that the Petitioner was someone who was building up a significant private life that would be irreparably damaged if he were required to leave the United Kingdom. The support letter from Diversity Films, 6/2/8, stated: '[*The Petitioner is*] also a sad person and one who misses his family and whatever he left behind.' The material came nowhere near the standard required for a successful claim based on Article 8.

[25] The paradigm Article 8 'private life' expulsion or deportation case, Counsel submitted, was a case decided by the European Court of Human Rights, *Slivenko* v *Latvia* (2004) 39 EHRR 24. The facts are rehearsed at paragraphs 96 and 97. The applicants were Latvian residents of Russian origin. They were the wife and daughter of a former Soviet military officer who was required to leave Latvia when former Soviet troops were withdrawn. The applicants had their permanent residency status removed and became stateless. They were made subject to deportation orders and moved to Russia where they acquired citizenship. The wife had lived in Latvia for 40 years from the age of one month. The daughter was born in Latvia and had lived there until the age of 18. According to the Court's assessment: 'They were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being.' The Court held that there had been a violation of Article 8. (I note that even in *Slivenko* a powerful dissenting opinion was lodged by six judges

including Sir Nicholas Bratza.) Counsel submitted that the Petitioner's case was very far from the circumstances of *Slivenko*. The Petitioner had simply done what every asylum seeker does: he had made contact with, and sought assistance from various support organisations while his case was being considered and his immigration status remained precarious.

[26] Counsel continued that what was said in *Huang* [*supra*] at 186-187 § 18 about 'the core value that Article 8 exists to protect' mainly concerned 'family life': but the same principles applied to 'private life.' In particular, the 'crucial question' was likely to be 'whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved.' Applying what Lord Bingham of Cornhill had said, at 187 § 20, to private life, the question of proportionality would arise 'where the private life of the applicant cannot reasonably be expected to be enjoyed elsewhere.' It was clear from *Zagar* [*supra*] at 389 § 19 that removal 'in pursuance of a lawful immigration policy' would almost always be 'necessary in a democratic society', etc. In that passage Lord Bingham of Cornhill identified implementation of immigration policy with Article 8 'legitimate aims', probably meaning 'economic well-being.' In the instant case the decision-maker had used the same sort of shorthand. It was an unfair reading of the Border Agency determination to say that the decision-maker had applied a 'legal test' of exceptionality: following Lord Bingham of Cornhill in *Huang* [*supra*] at paragraph 20 the decision-maker had used 'exceptional' to signify not a requirement but a category.

[27] In conclusion Counsel for the Respondent submitted that the further Article 8 submissions to which the Petitioner's application for review was now restricted were entirely new matter that had not 'already been considered.' The question was whether the content 'created a realistic prospect of success.' The UK Border Agency

determination of that question did all it required to do; the outcome was in the negative; and neither the reasoning process nor the conclusion could be faulted on traditional *Wednesbury* grounds. The Court was invited to reach the same conclusion. The Court might take the view that there was no realistic prospect of Article 8 being found to be engaged at all; or the Court might take the view that there was no realistic prospect of it being found that the enforcement of the usual immigration regime as regards the Petitioner was disproportionate.

Discussion

[28] This is a paradoxical case. There is evidence that the Petitioner's home and family life remain in the DRC: to return him to the DRC would be, on the analysis presented to me, to respect one part of his Article 8.1 right and to disrespect another. As Counsel for the Petitioner pointed out, the UK Border Agency decision-maker simply assumed that Article 8 was engaged; and Counsel for the Respondent was clearly reluctant to present an argument to me that the Petitioner's predicament could not engage Article 8 at all, preferring to contest the application on the last-stage question of Lord Bingham of Cornhill's five point check list, namely proportionality. Lord Bingham's first question was: 'will the proposed removal be an interference... with the exercise of the applicant's right to respect for his private (or as the case may be) family life?' [*Razgar supra* at 389 § 17]. The question suggests that there are some claims that must fail at the outset before there is need for the proportionality balancing exercise. What the test for these claims may be will have to wait for a case where the Secretary of State elects to join issue on the point.

[29] As regards the balancing exercise, I have difficulty with the submission for the Petitioner that the decision-maker erred by failing to give the further submissions

'sufficiently anxious scrutiny.' 'Anxious scrutiny' is a forensic cliché struggling to attain the rank and dignity of a term of art. Its supporters would wish for it the status of its American cousins, 'intermediate', 'strict' and 'heightened strict' scrutiny. As yet, there is an unresolved tension between different 'anxious scrutiny' concepts operating in the United Kingdom judicial review field: there is 'anxious scrutiny' as a response to the extreme risks - persecution, death, torture and loss of liberty - that may result in certain cases if the wrong decision is made; and there is 'anxious scrutiny' as a distinct standard of review for decisions that engage fundamental rights. The two concepts come together where 'the most fundamental of all human rights' are involved: but otherwise they diverge [*Bugdaycay v. Secretary of State for the Home Department* [1987] AC 514 at 531G *per* Lord Bridge of Harwich, at 537H *per* Lord Templeman; *Smith and Grady* v *United Kingdom* (1999) 29 EHRR 493 at §§ 132, 138.]

[30] The potential for ambiguity is well-evidenced in one of the cases cited to me, *AK (Sri Lanka)* [*supra*.] At paragraph 29 Laws LJ quoted from the opinion of Buxton LJ in *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495 at paragraph 7, part of which reads:

> ... since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see *per* Lord Bridge of Harwich in *Bugdaycay*...

The *dictum* of Lord Bridge of Harwich in *Bugdacay* [*supra* at 531G] was: '...when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.' What Lord Bridge of Harwich was talking about was, with respect, the

intensity of review required of judicial decision-makers in asylum - by definition, extreme risk - applications. What Buxton LJ was talking about in *WM (DRC)*, on the other hand, was the approach to decision-making generally in asylum claims, not just by courts of review, but also by specialist immigration judges and even by the 'Secretary of State' - meaning in practice executive officers or higher executive officers of, nowadays, the UK Border Agency. After the quotation from *WM (DRC)*, Laws LJ, took matters a stage further by saying, about the Article 8 decision he was reviewing in *AK (Sri Lanka)*: 'There is no suggestion that any less "anxious scrutiny" is required in the case of a human rights claim than in one seeking asylum.'

[31] To be fair to Laws LJ, in *AK (Sri Lanka)* there was a mental health issue and a possible suicide risk. In the present case there is a human rights claim which, on the evidence that I have been asked to look at, did not involve any risk at all for the Petitioner, let alone extreme risk. Counsel for the Petitioner relied on some remarks of Carnwarth LJ which, certainly out of context, also appear to say that 'anxious scrutiny' applies in *all* human rights claims [*YH (Iraq) supra* at § 24]: but the context suggests that his lordship had in mind at the time 'asylum and Article 3 claims' [*YH (Iraq) supra* at § 23.] If Counsel for the Petitioner were talking about 'anxious scrutiny', not as a humane response to extreme risk, but as a standard of review, he did not explain how the standard, applied to a qualified right like Article 8, brings into play criteria any more exacting than the conditions for Convention compliance inherent in the provision itself.

[32] The Petitioner's application is now restricted to the Article 8 'private life' claim; and I have been asked by Counsel on both sides to make my own assessment of the 'fresh claim' merits of this restricted application. Accordingly, the question I have to ask myself is whether the content of the further submissions created a realistic

prospect of success, that is, of success before an Immigration Judge, properly directed. If there were no 'realistic prospect of success' for the purposes of Rule 353, there was no 'fresh claim' to be adjudicated on by an Immigration Judge. The previously considered asylum material is not relevant save for the established facts that the Petitioner's presence in the United Kingdom is precarious, that there would be no Article 3 and Article 8 risks on repatriation and except, theoretically, in relation to credibility issues. However, no credibility issues arise in relation to the content of the further submissions that I have to consider. I shall assume that Article 8 is engaged and that the issue is whether there is justification for interference with the Petitioner's private life.

[33] It is trite law that Article 8 does not guarantee the right of free movement or the right of settlement; and as Lord Bingham of Cornhill said in *Razgar* [*supra* at 381 § 4]

> If there is any doubt on this point, it should be dispelled. The Convention is directed to the protection of fundamental human rights, not the conferment of individual advantages or benefits.

The first issue to be addressed is about the human right to be respected in terms of Article 8.1 in this case: how substantial was the Petitioner's 'private life' in the United Kingdom, measured at the time of the UK Border Agency decision? At that time the Petitioner had been in the United Kingdom for something short of two years, always with precarious immigration status. The further submission material is persuasive to the effect that the Petitioner had not yet become integrated. If he were to have been removed he would not, on the information available, have suffered to a significant extent by removal, for the reason that the United Kingdom was not to a significant extent 'the country where he has developed the network of personal, social and economic relations that make up the private life of every human being' [*cf. Slivenko*

supra at § 97.] On the material provided, it could not be said of the Petitioner that his ties in the United Kingdom were such that his private life 'cannot reasonably be expected to be enjoyed elsewhere' [*cf. Huang supra* at 187G-H, § 20 *per* Lord Bingham of Cornhill.] The additional material did not disclose that his proposed removal would involve any, let alone a significant, health risk [*cf. Razgar supra*; *AK (Sri Lanka) supra.*] Having studied both the UK Border Agency decision and the additional material with care, I am unconvinced by the submission for the Petitioner that the UK Border Agency decision-maker failed to give the material 'sufficiently anxious scrutiny.' Contrary to what Counsel for the Petitioner submitted, the conclusion reached by the decision-maker was rational. In my view there was and is no scope for an Immigration Judge, properly directed, to take a materially different view of these matters.

[34] As to the aim to be served by the Petitioner's removal, I reject the submission for the Petitioner that the decision-maker failed to identify a legitimate aim (with which the removal of the Petitioner would be rationally connected.) The proposed removal of the Petitioner was and is pursuant to the lawful operation of the United Kingdom's immigration control. That is a 'legitimate aim' for the purposes of Article 8, serving as it does one or more, depending on the circumstances of the case, of the 'the interests of a democratic society' specified in Article 8. In *Razgar* [No. 1 in the Petitioner's bundle of authorities, *supra* at 396 § 45] Baroness Hale of Richmond said: 'Sometimes, the reason for expulsion will be immigration control, *which is a legitimate aim* 'in the interests of the economic well-being of the country'" [*emphasis added.*] The problem in *LD (Zimbabwe)* v *Secretary of State for the Home Department* [2010] UKUT 278 (IAC) [No. 2 in the Petitioner's bundle of authorities] was that the decision-maker 'failed to identify the aim *before going on to*

proportionality' [§§ 16-17, *emphasis added*.] I reject, as a fallacy, the implication that the removal of one individual, the Petitioner, is unnecessary for the maintenance of a 'firm and orderly immigration policy.' The waiver of immigration rules for individual benefit would disrupt and undermine firm immigration control. On my reading, the Border Agency decision-maker did identify a legitimate aim before going on to the question of proportionality. I do not envisage that an Immigration Judge, properly directed, would view the matter differently.

[35] Finally there is the question whether the interference with the Petitioner's Article 8 right to respect for his 'private life', which his removal would entail, has a necessary and proportionate relation to the public end sought to be achieved. The answer involves striking a balance between the Petitioner's rights and the interests of our democratic society as a whole. This is not a case in which any lesser interference is an option: but I reject the suggestion that the removal of the Petitioner to his home country would, for that reason, be an 'extreme' measure. I reject the suggestion because of the relatively insubstantial nature of the Petitioner's 'private life' in the United Kingdom and by reference to the fact that no adverse consequences to the Petitioner are envisaged. Weighing all the additional material, and the specific factors to which attention has been drawn by both sides, it cannot be said that the removal of the Petitioner would have been or would be unnecessary and disproportionate. On my reading, the Border Agency decision-maker weighed all the material and reached a conclusion that cannot be faulted [§§ 26-35; 37-46.] Nothing in the material I have been asked to consider gives me any reason to doubt that an Immigration Judge, properly directed, would reach the same conclusion. There is nothing which identifies the Petitioner's case as the sort of case in which it would be disproportionate to

enforce immigration control [*cf. Razgar supra* at 390, § 20, *per* Lord Bingham of Cornhill; *Huang supra* at 186-187, § 20, *per* Lord Bingham of Cornhill.]

Decision

[36] For the foregoing reasons I conclude that there was no error in the UK Border Agency determination; that the decision-maker's conclusion was correct; that the Petitioner's latest further submissions did not have a reasonable prospect of success; and that those further submissions did not and do not amount to a 'fresh claim' in terms of Rule 353. This is my conclusion even on the basis that an Immigration Judge would regard him/herself as being bound by the so-called 'rule of anxious scrutiny.'

[37] Nothing said above should be taken to reflect adversely on the Petitioner as a human being. The letters of support show the Petitioner to be an individual of worth; and Mr Forrest put his case well in a way that engaged my sympathy on a human level. However the matter must be decided according to law and the necessary consequence is that I shall repel the Petitioner's plea-in-law as amended, sustain the Respondent's pleas and dismiss the Petition.