**OUTER HOUSE, COURT OF SESSION**

**[2011] CSOH 143**

OPINION OF TEMPORARY JUDGE J BECKETT QC

in Petition of

MH (AP)

Petitioner:

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

for

Judicial Review of a decision of the Secretary of State dated 6 December 2010

---

**Petitioner: Caskie, Advocate, Drummond Miller LLP**
**Respondent: K. Campbell, Office of the Solicitor to the Advocate General**

30 August 2011

## Introduction

[1] In this petition for judicial review, the petitioner (MH), a citizen of Pakistan, seeks reduction of a decision of the Secretary of State for the Home Department dated 6 December 2010 to refuse his claim under Article 8 of the European Convention on Human Rights and Fundamental Freedoms for leave to remain in the United Kingdom. The first hearing took place on an amended petition, No. 14 of process, and amended answers, No. 13 of process. Mr Caskie, Advocate appeared for the petitioner and Mr Campbell, Advocate for the respondent.

**The facts of the case**

[2] The petitioner entered the United Kingdom in 2006 as a visitor on a visitor visa valid from 6 February 2006 until 6 August 2006. His leave to enter or remain was not extended and the petitioner became an over-stayer when he did not leave the United Kingdom on the expiry of his visa. He was arrested by the police in Brixton on 11 July 2007 in connection with immigration offences and was released on condition that he report at Becket House, London on 14 July 2007 and fortnightly thereafter. He failed to attend on that date or thereafter. The petitioner was arrested again in December 2007 in Grimsby in connection with alcohol licensing offences. The petitioner was released with a reporting requirement with which he again failed to comply. He applied for leave to remain under the Case Resolution Programme in September 2009 but his application was refused because he did not meet the criteria for consideration. The petitioner was granted a Certificate of Approval of Marriage and on 16 April 2010 he married Susan McQuade, a British Citizen. He made an application for leave to remain in the United Kingdom on 20 October 2010 which was refused on 6 December 2010.

[3] Residing with Susan McQuade is her daughter Suzanne McQuade, born on 1 March 1993, who accordingly was not aged 16 as the decision letter narrates, but was 17 years and 9 months at the date of the decision and was thus at that time a child in terms of the definition in section 55 of the Borders Citizenship and Immigration Act 2009 (the 2009 Act). She turned 18 on 1 March 2011.

[4] The petitioner was refused leave to remain on 6 December 2010. He did not qualify under the Immigration Rules. He was not granted discretionary leave and his argument that refusal of leave to remain would breach his rights under article 8 of the Convention was rejected for reasons given in a letter dated 6 December 2010. The material parts of that letter are in the following terms:
(I have inserted the enumeration of paragraphs as 4.1 to 4.9 for ease of reference.)

> "4.1 It is noted that you have remained in the United Kingdom unlawfully. You were issued with a visitor's visa valid from 6 February 2006 until 6 August 2006 but have shown no evidence that you entered the United Kingdom during this period of time. If it is considered that you did initially enter the United Kingdom using your visitor's visa you have nevertheless overstayed this leave.

4.2 Furthermore you were encountered by Brixton Police on 11 July 2007 and arrested for immigration offences. You were given temporary release to report to Becket House Reporting Centre on 14 July 2007 and every week thereafter but failed to attend any of these dates and were treated as an absconder. In December 2007 you were then encountered again when you were arrested and fined for selling alcohol to underage minors in Grimsby. Again you were given temporary release to report but failed to report at any time.

4.3 You should have been aware of the possibility that you might not be able to continue your family or private life here. Equally, knowing that you might be required to leave the United Kingdom, you should have been aware of the implications this might have on your family or private life. To allow you to remain here would benefit you over those who comply with the law.

4.4 It has been noted that you are now married to British Citizen and she has a daughter who is 16 years old who is currently dependent on her mother. However she is not your biological daughter and the relationship which has been built up between yourself, your spouse and her daughter has been done so whilst you have been remaining in the United Kingdom unlawfully. Even if family life has been built up whilst you have been in the UK, sufficient evidence of dependency has not been shown to warrant a grant of leave on a discretionary basis, especially considering your poor immigration history.

4.5 Your case has been considered in light of the House of Lords decision in the case of *Chikwamba* v *SSHD* [2008] UKHL 40. This case addressed the issue of the lawfulness of the Secretary of State's policy that people relying on article 8 should leave the UK in order to make an entry clearance application. We do not accept that your circumstances fall within the ambit of the case of *Chikwamba*. We pay particular attention to Lord Brown's comments in *Chikwamba* regarding how immigration history is a relevant factor to be considered when assessing proportionality. We note that you have only ever sought to engage with the UK Border Agency when Circumstances have forced you to do so. We note that you entered a relationship with Susan McQuade at a time when you knew your immigration status was uncertain and unlawful.

4.6 We are aware of the visa processing times in Pakistan and currently 100% of settlement visas are processed within 60 days. We therefore consider that any temporary interference with your family life whilst you seek Entry Clearance is proportionate in view of your immigration history.

4.7 It is open to your wife and her child to accompany you to Pakistan but should they choose not to then it is considered that it would still be proportionate to expect you to return to Pakistan to obtain the correct Entry Clearance.

4.8 Even accepting that you have established a family life in the United Kingdom, in light of your poor immigration history and blatant disregard for the immigration regulations it is considered that we are entitled to weigh such factors heavily against you when assessing whether interference with your family life is proportionate.

4.9 Given the circumstances of your particular case we are of the opinion that requiring you to return to Pakistan, thereby interfering with any family life, is a justifiable and proportionate course of action in pursuit of the legitimate aim of effective immigration control."

**The petitioner's case**

[5] Mr Caskie conceded that the petitioner could not have been granted leave to remain under the Immigration Rules. He did not challenge the respondent's decision not to grant leave to remain in the exercise of her discretion. It was the rejection of the petitioner's claim that refusal of leave would breach his rights under article 8 of the Convention which the petitioner sought to challenge. He sought reduction of the decision of 6 December 2010 so that the Secretary of State would reconsider the application. Mr Caskie based his challenge on the ground of irrationality, and he specified failure to have regard to relevant considerations, taking immaterial considerations into account, and failure to apply the law as explained in a number of cases decided in the House of Lords. He said that he did not seek to persuade me that the decision was unreasonable and he invited me, if upholding his plea in law, to do so under deletion of the words 'unreasonable *et separatim*'.

[6] Mr Caskie explained that his principal argument was based on the decision of the House of Lords in *Chikwamba* v *Secretary of State for the Home Department* *[2008] 1 WLR 1420*. He contended that a requirement for an individual to return to his country of origin in order to apply for leave to remain would, in a family case involving children, only rarely be proportionate in terms of article 8 of the Convention.

**The legal background**

[7] Article 8 of the Convention provides:

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.

[8] It was agreed on both sides that the approach which the respondent had required to take was the same as that described in relation to an adjudicator hearing an appeal against removal on article 8 grounds in *R (Razgar)* v *Secretary of State for the Home Department [2004] 2 AC 368* at paragraph 17 as explained by Lord Bingham of Cornhill in paragraph 7 of his opinion in *EB (Kosovo)* v *Secretary of State for the Home Department [2009] 1 AC 1159*:

"7 In R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368, para 17, the House summarised, in terms to which all members of the committee assented and which are not understood to be controversial, the questions to be asked by an adjudicator hearing an appeal against removal on article 8 grounds. It said:

'In a case where removal is resisted in reliance on article 8, these questions are likely to be:

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

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

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

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

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

In practice the fourth and fifth questions are usually, and unobjectionably, taken together, but as expressed they reflect the approach of the Strasbourg court which is (see *Boultif* v *Switzerland* (2001) 33 EHRR 1179 , para 46; *Mokrani* v *France* (2003) 40 EHRR 123 , para 27; *Sezen* v *The Netherlands* (2006) 43 EHRR 621 , para 41) that 'decisions in this field must, in so far as they may interfere with a right protected under article 8(1), be shown to be necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.'"

[9] On the fifth question, Mr Caskie submitted that there were further factors which required to be considered which are set out in *Üner* v *The Netherlands* (2007) 45 EHRR 14 in the judgment of the Grand Chamber at paragraphs 54, 55, 57 and 58. That case related to a Turkish national who had lived in the Netherlands since the age of 12 and who had fathered two children there, by a Dutch national, before he had been sentenced to seven years imprisonment for manslaughter when he was 25 years old, as a result of which he was made subject to a ten year exclusion order from the Netherlands and his residence order was revoked. In holding that there had been no violation of article 8, the court identified relevant considerations:

(i) the nature and seriousness of the offence committed by the applicant;

(ii) the length of the applicant's stay in the country from which he or she is to be expelled;

(iii) the time elapsed since the offence was committed and the applicant's conduct during that period;

(iv) the nationalities of the various persons concerned;

(v) the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

(vi) whether the spouse knew about the offence at the time when he or she entered into a family relationship;

(vii) whether there are children of the marriage, and if so, their age; and

(viii) the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

Two further considerations, which were implicit in those enumerated, were also indentified

- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.

[10] None of this was a matter of controversy between the parties and I noted that in one of the cases to which I was referred, *ZH (Tanzania)* v *Secretary of State for the Home Department* [2011] 2 WLR 148, Baroness Hale of Richmond considered how these factors would apply in an ordinary immigration case where a person was to be removed because he has no right to be or remain in the country. At paragraph 18 she noted that the Convention jurisprudence recognised that the starting point was the right of all states to control the entry and residence of aliens before observing:

> '...In these cases, the legitimate aim is likely to be the economic well-being of the country in controlling immigration, although the prevention of disorder and crime and the protection of the rights and freedoms of others may also be relevant. Factors (i), (iii) and (vi) identified in *Boultif* and *Üner* are not relevant when it comes to ordinary immigration cases, although the equivalent of (vi) for a spouse is whether family life was established knowing of the precariousness of the immigration situation.'

[11] Having regard to the case of *R (On the Application of Ekinci)* v *The Secretary of State for the Home Department* [2003] EWCA Civ 765*;* [2004] Imm. A.R. 15, and what was said about it in *Chikwamba*, Mr Caskie conceded that in assessing proportionality, the fifth question, the respondent would be entitled in an article 8 case to take account of the applicant's immigration history. A poor immigration history might reduce the weight to be attached to an applicant's rights under article 8 balanced against general public interest considerations such as the need to maintain effective immigration control for the economic well being of the country and for the prevention of disorder or crime.

**The petition for judicial review and the petitioner's submissions**

[12] In relation to the five *Razgar* questions, Mr Caskie suggested that whilst the real issue arose on the fifth question, it might be that the respondent in her decision letter had disputed whether the proposed interference would have consequences of such gravity as potentially to engage the operation of article 8, the second question, because there was a suggestion in the decision letter that the petitioner's wife could go to Pakistan. Mr Caskie submitted that the decision of the European Court of Human Rights in *Boultif* v *Switzerland* (2001) 33 EHRR 50 provided the answer to this point. That was a case in which an Algerian man, who had married a Swiss woman, committed offences in Switzerland which led the authorities to decline to renew his residence permit. Accordingly permanent expulsion from Switzerlandwas being considered. Amongst its evaluation of all of the relevant considerations, the court said this:

> "52. The Court has next examined the possibility for the applicant and his wife to establish their family life elsewhere.
>
> 53. The Court has considered, first, whether the applicant and his wife could live together in Algeria. The applicant's wife is a Swiss national. It is true that she can speak French and has had contact by telephone with her mother-in-law in Algeria. However, the applicant's wife has never lived in Algeria, she has no other ties with that country, and indeed does not speak Arabic. In these circumstances she cannot, in the Court's opinion, be expected to follow her husband, the applicant, to Algeria."

In this case, the petitioner's wife, Susan McQuade had no contacts with Pakistan and she could not be expected to go there and nor could her daughter. Mr Caskie

also made reference to the opinion of the Court of Appeal given by Lord Justice Sedley in *VW (Uganda)* v*Secretary of State for the Home Department* [2009] EWCA Civ 5 where he explained that the expression 'consequences of such gravity' in *Razgar* question 2 simply meant that more than a technical or inconsequential interference with one of the protected rights is needed if article 8 is to be engaged. In the event Mr Campbell treated the issue between the parties as relating only to the fifth question, proportionality.

*Paragraph 5*

[13] The first criticism is found in paragraph 5 where the petitioner avers that what are said to be failures by the respondent to take action against the petitioner at various stages undermined her position that removal was necessary in order to maintain an effective system of immigration control. Reference is made to *EB (Kosovo)* and *Secretary of State for the Home Department* v *Osman Omar* [2009] EWCA Civ 383; [2009] 1 W.L.R. 2265.

[14] Mr Caskie sought to persuade me that the history in this case disclosed a dysfunctional system. He criticised the inaction of the respondent's department from the petitioner's release in Grimsby onwards. Mr Caskie asked me to note that the petitioner had applied for a Certificate of Approval of Marriage which had been granted and the respondent had not used the information in his application as intelligence and had not taken the opportunity to detain the petitioner. Even after the refusal of his claim on 1 December the petitioner had not been detained.

[15] Mr Caskie founded on *EB (Kosovo)*, particularly at paragraphs 14, 15 and 16 of Lord Bingham's opinion, and *Omar* and he submitted that inaction on the part of the Secretary of State and dysfunctionality in the system weighed against the respondent and this should have been taken into account and referred to in the decision letter. Mr Caskie sought to distinguish the petitioner's immigration history from the 'appalling' immigration history of *Ekinci*.

*Paragraph 7*

[16] In paragraph 7 it is contended that if the respondent took account of the petitioner's precarious immigration status when he married, the respondent should also have taken account of the petitioner's knowledge that he was unlikely to be removed as he had a good

case to remain in the United Kingdom. Reference is made to *Chikwamba* and *MA (Pakistan)* v *Secretary of State for the Home Department* [2009] EWCA Civ 953; [2010] Imm. A.R. 196. In her answers, the respondent suggested that she could not be expected to know what the petitioner's state of knowledge was. No argument was presented in support of this paragraph by Mr Caskie. Mr Caskie did not refer me to the case of *MA Pakistan*, which would not appear to add much to any part of his argument in any event. In that case the Court of Appeal set aside a determination of an immigration judge and ordered reconsideration where the test of insurmountable obstacle had been applied (that test no longer being appropriate), in the absence of recognition and consideration of particular difficulties founded on by the applicant, and where there had been no consideration of *Chikwamba*.

*Paragraph 8*

[17] In paragraph 8 it is contended that the suggestion in the decision letter at 4.3 *'To allow you to remain here would benefit you over those who comply with the law'* represented an error of fact and law which vitiated the decision. Further it is suggested that weighed against the recent allowance of leave to remain to 161,000 failed asylum seekers, the decision was unfair and arbitrary and the only reason to require the petitioner to return to apply for entry clearance was the application of a policy which had been disapproved in*Chikwamba*.

[18] Mr Caskie submitted that the sentence complained of demonstrated that the decision was irrational. It involved taking an irrelevant matter into account. The House had explained in *Chikwamba* that this was erroneous as a matter of fact, there was no queue and there was no benefit to other applicants.

*Paragraphs 9-12*

[19] Paragraphs 9-12 address the position of the petitioner's wife's daughter. It is pointed out that the decision letter makes no reference to section 55 of the 2009 Act, and that there is no statement of what would be in the best interests of the child and so, it is averred, the reasons are inadequate. Further, the respondent is said to have erred in visiting on the child the petitioner's precarious immigration status and his immigration history. Reference is made to *ZH (Tanzania)*.

[20] Mr Caskie submitted that it followed from *ZH (Tanzania)*, that the interests of the child was a primary consideration, it should be dealt with first and if it was in the interests of the

child to remain in the United Kingdom, it would take powerful considerations to outweigh that. If that was the view which the respondent had come to then the basis for that ought to have been explained in the decision letter. With reference to paragraph 35 in the opinion of Mr Justice Blake in *R (on the Application of Mansoor)* v *Secretary of State for the Home Department* [2011] EWHC 832 (Admin), Mr Caskie submitted that the terms of the Immigration Rules were not a legitimate aim in their own right and general considerations of economic well being are unlikely to be of great weight where other factors are strongly in favour of a claim. He also drew to my attention the observation in paragraph 27 that it is not the case that all family life is cut off when a member of a household turns 18.

[21] Mr Caskie submitted that having regard to the terms of section 55 of the 2009 Act, the petitioner's step-daughter was a child when the decision was made on 6 December 2010. Section 55, which was intended to give effect to article 3(1) of the United Nations Convention on the Rights of the Child, required the Secretary of State to make arrangements for ensuring that immigration functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.

[22] With reference to the part of the decision letter set out in paragraph 4.4 above, Mr Caskie submitted that the respondent had erred by visiting the behaviour of the petitioner on the child, in a manner which was not in keeping with what was said in *ZH (Tanzania)* at paragraph 33. The terms of paragraph 4.4 also suggested that the respondent had approached the case on the basis that it was only family life with dependency which is protected.

*Paragraph 13*

[23] In paragraph 13 it is suggested, with reference to the opinion of Lord Malcolm in *AH* v *The Secretary of State for the Home Department* [2011] CSOH *7* at paragraphs 33 and 34, that the respondent erred by concentrating only on factors adverse to the claim.

[24] In his submissions, Mr Caskie acknowledged that *AH* was a Rule 353 case. He went on to submit that if only negative factors were highlighted in the decision letter, one would not know what was made of positive factors and the reasons for the decision would be inadequate.

*Paragraph 14*

[25] In paragraph 14 it is contended that by virtue of the case of *Chikwamba*, removal of the petitioner would amount to a breach of article 8 and would be unlawful. Mr Caskie suggested that in the present case the respondent had adopted the approach in the policy instruction quoted in paragraph 37 of the opinion of Lord Brown of Eaton-under-Heywood in *Chikwamba*. He drew attention to the observations of Lady Hale in paragraph 8 and submitted that the position of the petitioner's wife and her daughter must be taken into account. Their interests were not the same as the petitioner's, they have a private life in Scotland which must be given specific consideration.

[26] Mr Caskie observed that the category of spouse under consideration in *Chikwamba* was one with no leave to remain. He submitted that within that category, an applicant's immigration history must be exceptionally bad before he would be one of those exceptional cases where it would be proportionate to require him to return to his home country to apply for leave to remain.

[27] Mr Caskie submitted that effective immigration control was not a legitimate aim in itself and he criticised the last paragraph of the decision letter (4.9) for failing to explain which article 8 justification was relied on.

*Paragraph 15*

[28] In paragraph 15 it is said that the respondent erred in distinguishing *Chikwamba* having regard to Ms Chikwamba's poor immigration history and precarious situation. It is further said that the respondent failed to have regard to the petitioner having overstayed as opposed to having entered the United Kingdom illegally

[29] Mr Caskie submitted that the respondent had misapprehended the law in equating the petitioner's immigration history with the type of exceptionally bad immigration history which would justify, albeit rarely, a requirement to make an application from Pakistan.

*Paragraph 16*

[30] In paragraph 16 it is said that there is a comparatively high rate of failure of applications from Pakistan and that such applications can take months or years to resolve and that this is a relevant factor which was left out of account.

[31] The respondent in her decision letter referred to 100% of applications being processed within sixty days and reference is made to this in the answers to paragraph 14. In the amended answers for the petitioner, No. 13 of process, it is explained that in 2010 the refusal rate for settlement applications from Pakistan was 32.9%. The figure of 46% in paragraph 16 of the petition related to all visa applications, and not just those for settlement. Further the answers suggest that in 2010, 10708 of 10950 applications for settlement made fromPakistan were determined within sixty days, in excess of 98%. Mr Caskie did not dispute these figures and was content that the court should proceed on this basis.

[32] Mr Caskie referred to the opinion of Lord Brodie in *Billah, Petitioner* [2010] CSOH 64, as offering an example of what might happen if a spouse sought leave to enter from his home country and how long it might take. In that case the spouse had been detained and removed in November 2008, he had married the petitioner in Pakistan in December 2008, he had applied for leave to enter on 19 March 2009 which application was refused on 24 March 2009. Mr Caskie advised that after various legal proceedings, the spouse was eventually granted leave by a tribunal in October 2010. That may not be a particularly apt example as in that case the application could not be granted under the Immigration Rules because the petitioner was less than 21 years old.

[33] Mr Caskie contended that worldwide the average rate of refusal was 18% and so it should have been noted that there was a 32.9% chance that the petitioner would not succeed in making an application from Pakistan and he reminded me of what had happened in the case of *Billah*. The respondent was in error in having regard to the speed with which applications were processed without having regard to the high failure rate.
*Paragraph 17*

[34] In paragraph 17 it is contended that the suggestion that it is open to the petitioner's wife to accompany him to Pakistan without having regard to FCO Travel Advice, was inappropriate and failed to have regard to his wife's daughter having a significant life of her own in the United Kingdom. This is said to involve leaving a relevant matter out of account. It is further contended that narration of visa applications from Pakistan being dealt with in sixty days was only relevant if the respondent would undertake that the petitioner's application would be granted.

[35] The submissions presented were to somewhat different effect. Mr Caskie criticised the observation '*It is open to your wife and her child to accompany you to Pakistan'* as rendering it impossible to know if the correct test had been applied in relation to a country which posed serious dangers for visitors. The correct test was whether that course would be reasonable

**Answers and submissions for the respondent**

[36] Mr Campbell for the respondent founded on *Ekinci*, particularly paragraph 17. In that case, the applicant had in this country a 3 year old son by his British wife. Whilst this case pre-dated the House of Lords decision in *Chikwamba*, the decision in *Ekinci,* and what was said in paragraph 17, was not overruled. Further, the observation that immigration history was a relevant consideration in striking the balance under article 8 remained valid. Whilst in paragraph 29 of *Chikwamba* Lord Brown had described *Ekinci* as an exceptional case, it was not unique. Mr Campbell conceded that the petitioner's immigration history was not as bad as Mr Ekinci's.

[37] Mr Campbell took me through paragraphs 34, 35 and 38-42 of *Chikwamba*. He submitted that there was no striking down of the policy to require people to return to make their application and that it was plain that such a course is not in itself necessarily objectionable and in some cases it will be reasonable to take that course.

[38] Mr Campbell drew attention to the particular circumstances of the applicant in *Chikwamba*. That case involved Zimbabwe, a country to which the Secretary of State had suspended removal of applicants for at least part of the time comprising Ms Chikwamba's immigration history. Ms Chikwamba would have had to take her four year old child to Zimbabwe or leave her behind.

[39] So far as Mr Caskie's argument based on *EB (Kosovo)* was concerned, Mr Campbell submitted that there was no indication of failures or inordinate delay in the present case and no basis for concluding that the process had operated dysfunctionally. It was not the practice to detain all applicants who have made an unsuccessful claim for leave to remain and there would be many reasons for that including Convention rights and the sheer logistics given the large numbers involved.

[40] In relation to *ZH (Tanzania),* Mr Campbell noted that this judgment post-dated the

decision of 6 December 2010. Whilst it might be that it should be treated as expressing the law as it had always been, it did not necessarily demonstrate that the respondent had erred in law in the present case. Regard should be had to the particular facts of *ZH (Tanzania)*, and what that case was dealing with. In the present case, the position of the petitioner's wife and daughter was not left out of account, even if the best interests of the child were not addressed in terms in the way which *ZH (Tanzania)* would desiderate. What could be seen in the decision letter was a recognition by the Secretary of State that the petitioner is married to a British citizen whose daughter is dependent on her mother and the relationship amongst the petitioner and his wife and daughter has developed whilst the petitioner has been here precariously from an immigration point of view, and that on the premise that family life has been built up, it is not, on the evidence before the Secretary of State, of sufficient development to warrant a grant of leave, especially considering the poor immigration history.

[41] The respondent's answer to paragraph 17 observes that whilst the FCO advises against travel to some areas of Pakistan, it was not, at the date of the decision, advising against travel to Pakistan at all. Mr Campbell submitted that in noting in paragraph 4.7 that *'It is open to your wife and her child to accompany you to Pakistan but should they choose not to then it is considered that it would still be proportionate to expect you to return to Pakistan to obtain the correct Entry Clearance'*, the respondent was identifying that there is a choice, she was not saying that they must go to Pakistan , the petitioner's wife may choose to go and take her daughter with her, but even if she chooses not to do so, the decision would still be proportionate. This was a reference to the suggestion in paragraph 4.6 as to how long it might take for an application to be determined and therefore that any temporary interference was proportionate. It was not appropriate for the respondent to speculate as to what would happen when the petitioner made his application from Pakistan. Should the petitioner fail in such an application he would have options open to him and there was no reason to assume simply on the basis of the case of *Billah* that further consideration would necessarily take such a long time. The respondent had properly had regard to concrete experience.

[42] Mr Campbell submitted that it was necessary to look at the particular facts of the individual case in the round. The decision letter ought to be read as a whole and when read as a whole there were no errors of law.

**Discussion**

[43] It has frequently been emphasised that cases of this sort are fact-sensitive and that there

must be a careful evaluation of the particular facts in any given case, for example in *Huang* v *Secretary of State for the Home Department* [2007] 2 AC 167 at paragraph 12 of Lord Bingham's opinion. It is important in determining how to apply the various dicta in the cases to which I was referred to have regard to their factual context.

*Paragraph 5*

[44] So far as paragraph 5 of the petition is concerned, I was not persuaded that the decision of the House of Lords in *EB (Kosovo)* had the effect contended for by Mr Caskie in the circumstances of the present case. In *EB (Kosovo)*, a claim for asylum made by a boy of 13 took almost five years to be determined, on account of a series of failures by the Secretary of State, by which time he had turned 18 and had lost the opportunity of being granted exceptional leave to remain on that basis. His cousin who had arrived at about the same time as him in similar circumstances was timeously granted exceptional leave to remain. The applicant's claim had been woefully mishandled and could be shown to be the result of a dysfunctional system. It is perfectly clear that the period of delay being discussed, which had the various effects described by Lord Bingham in paragraphs 14-16 of his opinion, was delay by the Secretary of State in response to an application. In the present case, it has not been suggested that there has been any material delay in determining the petitioner's application. It was made on 20 October 2010 and was refused on 6 December 2010.

[45] The petitioner's failures to comply with requirements to sign on, and his delay in applying for leave to remain, cannot be blamed on the respondent. What was identified as dysfunctionality in *EB (Kosovo)*, is wholly different from the circumstances of the present case. The fact that the respondent did not at various points in time detain and seek to remove the petitioner does not, on the basis of *EB (Kosovo)* and *Omar*, materially undermine the respondent's position. The respondent acknowledged that the petitioner had developed a private and family life over time. I am not persuaded that the approach of the court in *EB (Kosovo)* required her to go further and note that she had not detained the petitioner or sought to remove him. I did not find that the case of *Omar* added much support to Mr Caskie's argument. That was a case involving a somewhat different issue, deportation for the commission of a criminal offence, in which there was a failure by the Secretary of State timeously to mark an appeal against an immigration decision. The court refused to grant fresh leave to appeal after a delay of eleven months.

*Paragraph 8*

[46] So far as paragraph 8 was concerned, this part of the argument seemed to be based on the premise that the sentence complained of, '*To allow you to remain here would benefit you over those who comply with the law*', meant that the respondent erroneously considered that the granting of the petitioner leave would have disadvantaged others 'in the queue'.

[47] It was not clear to me that that was what was meant. In *Chikwamba*, it was of course noted that there would not be such an effect. It was doubted that applicants from abroad would feel that they had suffered unfairness if those who were unlawfully present in the United Kingdom gained an advantage. Nevertheless, this does not appear to me to mean that the respondent would be in error if she sought to take such unfairness into account. Lord Brown, who gave the leading opinion in *Chikwamba*, concluded that a legitimate rationale for the policy of requiring applicants to be returned to make their applications from their home country would be to deter people from entering the country illegally before doing so. That was the view of the court in *Ekinci*, as can be seen at paragraph 17.

[48] The phrase complained of may mean no more than that someone who stays in this country unlawfully may obtain the benefits of living in this country which are denied to those who wish to live here but remain in their own country, perhaps in less advantageous circumstances, whilst making an application for entry clearance. That does not appear to be an objectionable observation and in any event may be consistent with the judicially recognised objective of maintaining firm and fair immigration control.

[49] In Huang, in the House of Lords, Lord Bingham made the following observations at paragraph 16, in discussing the role of the Secretary of State in an article 8 case:

> '16. The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on...'

[50] At most the observation complained of was one amongst many reasons offered and it does not impugn the decision which was made.

[51] It was not explained to me why the allowance of leave to remain to large numbers of asylum applicants under the Case Resolution Programme demonstrates that the decision in the petitioner's case was arbitrary. I was offered no detail to allow me to make the sort of direct comparison which troubled the court in *EB (Kosovo).* The petitioner's case appears to have been assessed on its own merits and I am not able to say that there is anything arbitrary or unfair about it.
*Paragraphs 9-12*

[52] The decision in *ZH (Tanzania)* had not been issued when the letter of 6 December 2010 refusing the petitioner's article 8 claim was prepared. Nevertheless section 55 of the 2009 Act was in force and even on the basis of existing case law it might have been better if the respondent had spelled out in terms that the best interests of child and mother had been considered. It is now plain, following *ZH (Tanzania)*, that since Suzanne McQuade was still a child in terms of section 55, and the United Nations Convention on which it was based, her interests ought to have been considered first and this should have been spelled out. The respondent, in refusing the application, ought then to have set out what considerations outweighed the interests of the child. Reading the decision letter as a whole, it is plain that the respondent considered that there were material considerations which justified refusal of the claim under article 8 and they are articulated. They are not specifically stated to outweigh the best interests of the child. However, I do not regard this as a material error when regard is had to the whole circumstances.

[53] The circumstances of *Chikwamba, ZH (Tanzania)* (in which there was a concession by the Secretary of State) and the other cases to which I was referred, can be seen to be very different to the present case.

[54] In *Chikwamba*, the claimant who was a national of Zimbabwe, had been refused asylum, principally on grounds of credibility, but removals of failed asylum seekers to Zimbabwe had been suspended for a period because of deteriorating conditions there. She married a Zimbabwean national, who had been granted asylum in 2002 but her claim that removal would breach her article 8 rights was refused in 2003. She had a daughter in April 2004.

In January 2005 her appeal was dismissed on the basis of the current policy that she should return to Zimbabwe to apply for entry clearance. It was accepted that her husband faced insurmountable obstacles in returning to Zimbabwe. In the hearing before the House of Lords, it was accepted that the claimant would inevitably succeed if she was returned and sought entry clearance. The court was of the view that if the claimant was returned, it was inevitable that her four year old daughter would accompany her to Zimbabwe where conditions were regarded as harsh and unpalatable.

[55] The applicant in *ZH (Tanzania)* had made three unsuccessful claims for asylum, two of them in false identities, having arrived in this country in 1995. Lady Hale regarded the immigration history as appalling. In 1997 ZH formed a relationship with a British citizen and they had two children, born in 1998 and 2001. Both of the children were British citizens who had lived all of their lives with their mother in this country. The parents separated in 2005 but their father continued to see his children regularly. He was diagnosed as HIV positive in 2007, lived on disability living allowance and drank a lot. In 2009, the Court of Appeal had thought that the children could reasonably be expected to follow their mother to Tanzania. It is recorded at paragraph 13 of the decision of the House of Lords that the Secretary of State conceded that it would be disproportionate to remove the mother given the particular facts of the case.

[56] Given that the question of proportionality must in each case be assessed against the particular circumstances, it does not appear to me that the interests of a child aged 17 and 9 months at the date of decision, and now aged 18, who was not the daughter of the applicant and was not dependent on him, are necessarily the same, or must necessarily be given the same weight, as the interests of the four year old child in *Chikwamba* or the children in *ZH (Tanzania)*. Indeed the criteria identified by the court in *Üner* confirm that the age of a child is a material consideration. This is not to say that all family life is cut off when a member of a household turns 18, it is rather a question of how much weight is to be accorded to family life involving children of different ages. No information was put before me, and no suggestion was made that material was put before the respondent, to suggest that there was any special closeness or dependence between the petitioner and his wife's daughter. Nevertheless her position was noted. The factors which were adverse to the petitioner's claim were also noted, and fell properly to be weighed against the article 8 rights of the petitioner, his wife and her daughter. The propriety of taking account of immigration history, the precariousness of the position when a relationship was entered into, and the need to maintain immigration control

is confirmed by Lady Hale at paragraph 33 in *ZH (Tanzania)*. Accordingly, I am not persuaded that the respondent erred by visiting on the child the behaviour of the petitioner in the present case. Nor do I accept that the respondent misunderstood the nature of what is protected under article 8 as Mr Caskie contended. In referring to dependency, the respondent was simply evaluating the nature of the petitioner's family life and comparing it to cases where article 8 claims have succeeded.

[57] I agree with what was said by Mr Justice Blake in *Mansoor* at paragraph 35, another case in which the Secretary of State conceded that the applicant ought to have been granted indefinite leave to remain. In that case, the applicant had seven children in the United Kingdom, all with indefinite leave to remain. Her application was refused essentially because her husband lost a job and therefore she did not satisfy the Immigration Rules. The additional cost to the public purse caused by her presence was marginal. A number of errors in the decision-making process were identified by the court. In the present case, it is not protection of the Immigration Rules which is offered as a justification for refusing the claim and the arguments in favour of leave to remain are not nearly as compelling as those in *Mansoor,*where there were no factors adverse to the claim of the sort which are accepted to be present in the petitioner's case.

[58] Taking account of the whole circumstances of the case I am not persuaded that what might be seen as an error, the omission of reference in the decision letter to considering the interests of the child first, is of sufficient materiality to vitiate the decision reached.
*Paragraph 13*

[59] In relation to the argument advanced in paragraph 13 of the petition, Mr Caskie acknowledged that the case of *AH* was a Rule 353 case concerning an asylum claim, where the issue for the Secretary of State was to consider what an immigration judge might make of new material applying anxious scrutiny. In the petitioner's case I am not persuaded that only factors adverse to the petitioner were given weight. The length of time he has been in this country, his marriage and family life which includes his wife's daughter are all noted and considered. Those factors noted which are adverse to the petitioner are soundly based in the case law to which I was referred and factors favourable to the petitioner were also noted.
*Paragraph 14*

[60] The complaint made in paragraph 14 can be seen to be linked to the question posed in

paragraph 8 of the petition '*...so what on earth is the point of sending the Petitioner back? Why cannot this application simply be made here*?' This passage appears to be incompletely quoted from paragraph 6 of the opinion of Lord Scott of Foscote in the House of Lords in *Chikwamba*. He posed his questions having noted that the claimant's husband could not be expected to return to Zimbabwe, that the claimant could not be expected to leave her child to return to Zimbabwe, and that if she returned she would almost certainly succeed in her application.

[61] In those particular circumstances, it was viewed as disproportionate to require Ms Chikwamba to return. The circumstances of the petitioner's case are very different. What was necessary was for the respondent to consider proportionality in the factual context of the petitioner's case and that is what the respondent did. Whilst it is true that in his opinion in *Chikwamba*, Lord Brown opened paragraph 44 with these sentences:

> 'I am far from suggesting that the Secretary of State *should* routinely apply this policy in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad...'

he did not say that it would always be wrong to require an applicant to be returned to make an application from his home country. Lord Brown, with whose opinion Lord Bingham, Lord Hope of Craighead, Lord Scott and Lady Hale expressed agreement, had also begun paragraph 42 with these comments:

> 'Now I would certainly not say that such an objective is in itself necessarily objectionable. Sometimes, I accept, it will be reasonable and proportionate to take that course. Indeed, *R (Ekinci)* v *Secretary of State for the Home Department* [2004] Imm AR 15 still seems to me just such a case.'

[62] Justification for such a policy was identified in Lord Brown's opinion at paragraph 41. Relevant factors to be considered are mentioned in paragraph 42: immigration history, whether the claimant has arrived in the country illegally, whether there was a genuine asylum claim, how long the Secretary of State had delayed in dealing with the case with regard to *EB (Kosovo)*. In an article 8 family case the prospective length and degree of disruption involved in going abroad for an entry clearance certificate will always be highly relevant; whether an entry officer abroad is better placed to investigate the claim and whether the applicant would be disadvantaged in an appeal are also said to be relevant considerations.

[63] It is true of course that 'effective immigration control' is not listed as a justification in article 8(2). However, the way in which it relates to the article 8(2) justifications is explained by Lady Hale in *ZH (Tanzania)* at paragraph 18, which I have quoted at paragraph [10] above. Indeed, in the House of Lords and Supreme Court cases to which Mr Caskie referred, 'effective immigration control' is frequently recognised as having the potential legitimately to curtail article 8(1) rights. In paragraph 33 of *ZH (Tanzania)*, Lady Hale explains that considerations of the need to maintain firm and fair immigration control could outweigh the interests of a child. In paragraph 32 of *EB (Kosovo)* Lady Hale acknowledged that the need for firm, fair and consistent immigration control is a legitimate aim which will normally carry great weight in immigration cases. In *Chikwamba* at paragraph 39, Lord Brown accepted that the maintenance and enforcement of immigration control is indisputably a legitimate aim.
*Paragraph 15*

[64] Reading the decision letter as a whole, I am not persuaded that the respondent misunderstood the decision in *Chikwamba* or erroneously distinguished it when regard is had to the circumstances of that case. On the contrary, the terms of the decision letter tend to confirm that appropriate considerations were taken into account. The respondent was entitled to take the view that the petitioner had a poor immigration history which could have adverse consequences for his claim and Mr Caskie conceded as much. I was not addressed on Immigration Rule 395C which would not, in any event, seem to add much. There can be no doubt that the respondent was aware of the petitioner's immigration history. It was not necessary for the respondent to spell out precisely how the petitioner's immigration history compared with Ms Chikwamba and I do not detect the error suggested.
*Paragraph 16*

[65] It is plain from the factors listed in paragraph 42 in *Chikwamba* that the likely length of separation pending the determination of an application for leave to remain made from abroad is a relevant consideration. It was accordingly relevant to note the very high likelihood that the petitioner's claim would be determined within sixty days. Whilst in the particular circumstances of *Chikwamba* the court were prepared to proceed on the basis that an application from abroad would be granted, there is some force in Mr Campbell's contention that it was not appropriate for the respondent to speculate as to what the outcome would be in the present case. That approach receives support from the opinion of the Court of Appeal

in *SB (Bangladesh)* v *Secretary of State for the Home Department* [2007] Imm AR 491 at paragraph 36, which is quoted without any obvious disapproval by Lord Brown at paragraph 33 in *Chikwamba*:

> "33. The Court of Appeal (Ward, Neuberger and Gage LJJ) allowed the applicant's appeal and remitted the case to the tribunal on the single ground that the tribunal
>
> > 'should not have carried out, or taken into account, their own assessment of her prospects of coming back to the United Kingdom on an indefinite basis pursuant to an application which she might make from Bangladesh for entry clearance under the Immigration Rules': para 36 of the court's judgment given by Ward LJ.
>
> As the court had earlier observed, at para 22:
>
> > 'It would ... seem somewhat paradoxical if the stronger an appellant's perceived case for entry clearance under the Immigration Rules the more likely he or she is to be removed. Yet ... on the basis of the reasoning of the tribunal in this case, that would be the inevitable consequence.'"

Accordingly, I am not persuaded that the respondent was in error in not spelling out the comparative percentage of applications for leave for settlement from Pakistan which are refused.

*Paragraph 17*

[66] The respondent did not make the error of applying the test, disapproved in *Huang*, of whether there were 'insurmountable obstacles' preventing the petitioner's wife accompanying him to Pakistan. It was simply noted that that course was open. Given the approach of the House of Lords in *Chikwamba*, that the relevant factors to be considered include the prospective length and degree of family disruption (paragraph 42), I am not persuaded that it is an error simply to identify that option and I prefer the submissions for the respondent on this point. In *Chikwamba*, that option was not open to the applicant's spouse. In the petitioner's case, the respondent concluded, at paragraph 4.7 of the decision letter, that her decision was proportionate even if the petitioner returned unaccompanied. That view receives some support from the opinion of Lady Hale in *Chikwamba* at paragraph 8 if it is legitimate,

as I think it is, to distinguish the position of the seventeen year old Suzanne McQuade from Ms Chikwamba's four year old daughter.

[67] In so far as the European case of *Boultif* may be relevant, that was a case in which deportation and permanent expulsion were under contemplation.

**Decision**

[68] For these reasons I am not persuaded that there is any basis for the court to intervene. Having considered the criticisms advanced both individually and cumulatively, I conclude that the Secretary of State's decision of 6 December 2010 was neither unreasonable (which is conceded) nor irrational. I shall therefore repel the plea in law for the petitioner and sustain the second and third pleas in law for the respondent and refuse the petition.