OUTER HOUSE, COURT OF SESSION

[2011] CSOH 20

P666/10

OPINION OF LORD MATTHEWS

in the petition of

D E F K

Petitioner;

for

JUDICIAL REVIEW OF A DECISION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT DATED 30 APRIL 2010

Petitioner: Forrest; McGill & Co
Respondent: McIlvride; Office of the Solicitor to the Advocate General f or Scotland

1 February 2011

Introduction

[1] The petitioner is D E F K who was born on 24 December 1974 and is a national of Cameroon. He entered the UK on or about 21 January 2007 and claimed asylum, which claim was refused by the respondent. An immigration judge heard and rejected his appeal but on 29 November 2007 senior immigration judges held that that judge had erred in law in ordered that his appeal be heard afresh. Another immigration judge heard the appeal of new on 23 June 2008 but dismissed it in terms of a decision dated 18 July 2008 on the basis *inter alia*, that he did not believe the account of the petitioner in regard to the circumstances in which he alleged he had been detained by

the authorities in Cameroon and had thereafter escaped from captivity. Nor did he believe that the petitioner would be of any interest to the authorities in Cameroon. An application to the tribunal for leave to appeal to the Court of Session was refused on 3 September 2008. An application for leave to appeal the decisions of 18 July 2008 and 3 September 2008 was lodged in this court and on 24 February 2010 the Inner House affirmed the decision to refuse permission to appeal and dismissed the application.

[2] The petitioner now claims that on or around 21 July 2009 he received a copy of a newspaper entitled "Eden" dated 13 to 15 April 2009. This is said to be a newspaper circulating in Cameroon. The extract which is produced contains an article entitled "*New Analysis - political activists still oppressed in Cameroon*" in which the petitioner is referred to as a person who was politically active following an incident in 2004. It goes on to narrate that the authorities detained the petitioner and that he has not been heard of since. The article was not considered by either the original immigration judge or the second one. The petitioner claims that he took both the newspaper and the envelope in which it had arrived to his solicitor as soon as possible after he had received it. The application for leave to appeal to this court was pending at that time and for reasons which are not entirely clear it was agreed not to do anything about the letter until that application was resolved.

[3] On 30 April 2010 the respondent issued a decision rejecting submissions made on behalf of the petitioner, in a letter dated 8 April 2010, that the further information contained in the newspaper article and certain further information presented to her amounted to a fresh claim for asylum and that his rights under the European Convention on Human Rights would be infringed if he were returned to Cameroon.

[4] He now seeks, *inter alia*, reduction of that decision dated 30 April 2010.

Submissions for the petitioner

[5] Mr Forrest considered first the immigration judge's decision of 18 July 2008. In particular he drew my attention to paragraph 45 thereof, which is in the following terms:

> "The Appellant is very probably from the New Town Airport District, Douala. He may have been a member of the SDF. Beyond that, for all the above reasons, his account is not credible even to the lower standard of proof. He fails to establish that the authorities of Cameroon detailed and ill-treated him; that he escaped from detention and travelled to the UK through the help of Cardinal Tumi; that he left Cameroon because of fear of the authorities; or that the authorities would have any interest in him if he returns."

[6] Mr Forrest submitted that while the appeal process was ongoing until its exhaustion the petitioner established a life here. He lived in this country since January 2007 and met a lady G MacV and her son. In April 2009 he was sent a copy of the newspaper to which I have referred but he did not send it to the respondent until after his appeal rights were exhausted. In fact, it was sent with the letter of 8 April 2010. The article is contained in a photocopy of what appears to be a newspaper called "Eden" and the relevant issue covers Monday 13 to Wednesday 15 April 2009. The main article relates to the detention of 400 Cameroonians in Equatorial Guinea after they were accused of hatching a plot to attack the presidency with purported rebels from Mali and Cameroon who reached Equatorial Guinea by boat. The piece which purportedly refers to the petitioner, headed "*Political activists still oppressed in Cameroon*" runs as follows:

> "Even with the advent of multipartism in the early 1990s political activists are still been (*sic*) oppressed, arrested, tortured and detained in Cameroon. The

situation was even worse during the launching of the Social Democratic Front, SDF in 1990 during which six people were killed in Bamenda.

Veteran politician Mboa Massok who spearheaded operation 'ghost towns' of the early 1990s, pressuring the government to liberalise the political sector has been tortured on several occasions.

Since then activist (*sic*) have not found it easy with the Biya regime. They are either killed or forced to flee Cameroon. Southern Cameroons National Council, SCNC, activists clamouring for the restoration their statehood (*sic*) are often brutalised and detained every year especial (*sic*)around the month of September as the braze (*sic*) up to celebrate October 1, the day they claim the two Cameroons united.

In 2005 and 2006 students of the University of Buea who were demanding university reforms were seen as SCNC activists with four of them killed during demonstrations.

But the greatest target seems to be SDF militants who have been opposing the Biya regime calling for a change of the status quo.

In 2001, in the wake of the operational command unit (a force that was created to fight armed banditry) SDF militants were severely tortured and detained after they staged a serious of demonstrations to demand the whereabouts of some 9 youths the government declared missing.

Diehard SDF militants like Nitcheu Syapze Pauline, Caroline Lum Atanga, Sub Eric and ... tured (presumably tortured-some of the typescript cannot be read) and detained by security forces acting on behalf of the ruling Cameroon People's Democratic Movement, CPDM. In fear for her lives (*sic*), many of them Cameroon (*sic*) ran away from to (*sic*) the United States where reports

say they were seeking asylum. The torture of political activist (*sic*) took a different twist in 2004 when President Buea was rumoured dead, months to the 2004 presidential election (*sic*). Those who openly expressed joy by designing and distributing leaflets and banners for SDF, spreading news of Mr Buea's death faced the wrath of the Biya regime. SDF militants like FKDE and a certain Manka Agnes, and Evaline Nchang who felt it was their duty to express themselves and bring about a change of regime called for the respect of the Constitution.

FKDE who was a self-employed youth in New Town Airport in Douala where he has been a member of SDF since 2002 paid a heavy price for his activism in the wake of the rumours about Biya's death, as it spread like wildfire in Yaounde Douala and other parts of Cameroon. He printed leaflets which he distributed on behalf of the SDF. So sure of himself, and that President Paul Biya had died, early June 2004 FKDE and Tchudom went into a bet against a certain Garbo (*sic*) Dankio. A fight then broke out leading to the deaths of both Tchudom and Gardo *(sic*), after the release from the Presidency denouncing the rumours of Biya's death. Those who were at the Newtown (*sic*) Airport neighbourhood where the incident occurred were immediately rounded off for questioning. Some two locals including FKDE, known for his activism for the SDF and his opposition to the Biya regime were taken away from the crowd by the police and accused of masterminding the bet and for organizing a series of demonstrations. Witnesses even said they overheard security forces saying they were been (*sic*) transferred directly to Yaounde for detention. Since then they have not been seen and nothing has been heard of them. There was the belief that they might have been killed just as the nine

youths were eliminated and declared in the same by the Government. Political analyst (*sic*) said Mr Biya is the one who organized the scenario about the rumour for his death to test his popularity. CPDM cohorts blamed a certain Cameroonian Nzana Seme now in exile for putting the information on the internet."

While I have anonymised the petitioner by using his initials, it should be noted that the spelling of his second name, like that of Garbo or Gardo, was not consistent.

[7] Mr Forrest submitted that the author of the article did not know what had happened to the petitioner and this was the issue which lay at the heart of the immigration judge's assessment of his credibility. This material was not before the immigration judge. New information could take two forms. There might be an entirely different claim based on different material or there might be information which was substantially the same but in a different form. As I understood his argument this material fell into the latter category. I was referred to the letter from the petitioner's solicitors dated 8 April 2010, No 6/16 of process. In paragraph 1 the solicitors asked for discretionary leave on the basis of long term residency in the United Kingdom and article 8 of the ECHR on the basis that he was entitled to have his case considered/reconsidered in light of the policy announced by the Secretary of State in July 2006 in respect of case resolution. They did not say in terms that they were making a fresh claim but the respondent has treated the letter as containing submissions that the further information amounted to a fresh claim and Mr Forrest accepted that that was the correct way for the respondent to proceed. The reply from the respondent, dated 30 April 2010 is No 6/1 of process. Mr Forrest submitted that two issues arose. The first was whether the respondent had applied the correct test that

the further information did not amount to information sufficient to found a fresh claim for asylum or under ECHR and the second was whether she had applied the test properly, particularly in relation to the question whether the petitioner would be at risk of persecution on return or at risk of violation of his article 3 rights. Furthermore, was the correct test applied in considering whether the rights of the petitioner under article 8 would be violated by his removal.

[8] I was referred to paragraph 353 of the Immigration Rules (HC 395, as amended by HC 112) which Mr Forrest accepted was correctly set out at paragraph 6 of the respondent's letter. Paragraph 353 runs as follows:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules 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 would 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. ..."

The nub of the response was at paragraph 13 of the respondent's letter as follows:

> "The documents enclosed with your client's submission have not previously been considered but taken together with the material which was considered in the letter giving reasons for refusal dated 19 February 2007 and the appeal

determination prepared on 18 July 2008, they would not have created a realistic prospect of success."

Was the respondent right to say that there was no realistic prospect of success? Two tests could be applied. The first was set out in the case of *W M (DRC)* v *Secretary of State for the Home Department* [2007] Imm AR 307. In that well-known case the first claimant applied for asylum on the ground that he feared persecution by the government and his application was dismissed by the Secretary of State. His appeal was dismissed by an adjudicator and he produced further evidence which the Secretary of State refused to accept as grounding a fresh claim. An application for judicial review proceeded in the Court of Appeal. Paragraphs 6-8 of the leading judgment delivered by Buxton LJ run as follows:

"[6] There was broad agreement as to the Secretary of State's task under Rule 353. He has to consider the new material together with the old and make two judgements. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under Rule 353(i) according to whether the content of the material has already been considered. If the material is not 'significantly different' the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material

relates to other material already found by the adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.

[7] The rule only imposed a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol, QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, 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 decision 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* v *SSHD* [1987] AC 514 at p.513F.

The task of the court

[8] There is no provision for appeal from a decision of the Secretary of State as to the existence of a fresh claim. The court has therefore been engaged only through the medium of judicial review. The content of such an application was first addressed by this court in *R* v *SSHD ex p Onibiyo* [1996] QB 768. The applicant in that case argued that whether or not a fresh claim for asylum had

been made was a matter of precedent fact, on the same level as for instance a decision on whether an applicant was an illegal entrant, and thus to be decided, in case of dispute, by the court. The Secretary of State argued that the decision on whether a fresh claim had been made was for him, to be challenged only on grounds of irrationality. Sir Thomas Bingham MR, giving the judgment of the court, inclined tentatively and 'with some misgivings' to the latter view, concluding therefore that the decisions of the Secretary of State were challengeable only on '*Wednesbury"* grounds."

Paragraph [11] goes on to specify the matters which a court has to address when reviewing a decision of the Secretary of State as to whether a fresh claim existed. It runs as follows:

"[11] First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: See [7] above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative, they

will have to grant an application for review of the Secretary of State's decision."

[9] Paragraph 11 of the respondent's letter in the current case set out the test which the Secretary of State purported to apply in considering the petitioner's representations. Effectively what was said there was lifted from *WM*.

[10] However, another test was set out in the case of *R (YH)* v *Secretary of State for the Home Departmen*t [2010] EWCA Civ 116. This case was not exactly on a par with *WM*. The issue was whether or not the Secretary of State had correctly categorised a claim as clearly unfounded. However, there was a debate as to whether there was any material difference between the two tests *viz* whether a claim was "clearly unfounded" and whether it had a "realistic prospect of success". At paragraph 8 of his judgment Carnwath LJ said the following:

"Arising from this wealth of authoritative guidance, the arguments before us point to at least five questions on which arguable doubts may be thought to remain:

i) Is there any material difference between the two tests: 'no realistic prospect of success' and 'clearly unfounded'?

ii) What weight in the consideration is to be given to a previous appellate decision?

iii) Should the Secretary of State apply his own judgment to the relevant question, or should he put himself in the shoes of a hypothetical immigration judge considering a possible appeal?

iv) On judicial review of the Secretary of State's decision, should the court apply its own judgment to that question, or is it limited to *Wednesbury* review of the Secretary of State's judgment?

v) What is the 'anxious scrutiny' principle, and does it make any difference to the answers to any of these questions?"

At paragraph 10 his Lordship said the following:

> "Whatever the theoretical difference between the two legal tests, I agree with Laws LJ that it is so narrow that 'its practical significance is invisible' (*AK (Sri Lank*a) supra para 34), which I take to mean that it can for practical purposes be ignored. I propose to proceed on that basis."

Mr Forrest submitted that sub-paragraphs (iii) and (iv) of paragraph 8 were of relevance in the present case. He then drew my attention to paragraphs 15-21 of Carnwath LJ's judgment as follows:

> "15 *WM (Congo)* has been treated as authority that, in deciding whether to treat a submission as a fresh claim, the Secretary of State should in effect put himself in the shoes of an adjudicator or immigration judge. The judge quoted the following passage from the judgment of Buxton LJ:
>
> 'The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator [allowing the appeal]. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting point for that enquiry; but that is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind.' (para 24).
>
> It was no doubt in deference to such guidance, that the decision-letter of 17th. April 2008 (see below) spoke of the view to be expected from 'the hypothetical judge'.

16 The concept of a 'hypothetical judge' deciding an appeal can be a helpful discipline, insofar as it makes clear that the Secretary of State is acting simply as the gate-keeper to a process leading to a possible appeal, and it emphasises the objectivity which that requires. However, it is no more than a guide, not a legal formula. In law, whether under the rules or the statute, the Secretary of State is standing in his or her own shoes in deciding this threshold question.

17 In *WM* the court emphasised that the court's task was not to reach its own conclusion on the threshold test but rather to review the rationality of the Secretary of State's conclusion. Buxton LJ said:

'... in borderline cases, particularly where there is doubt about the underlying facts, it would be entirely possible for a court to think that the case was arguable ..., but accept nonetheless that it was open to the Secretary of State, having asked himself the right question and applied anxious scrutiny to that question, to think otherwise; or at least that the Secretary of State would not be irrational if he then thought otherwise'. (para 18).

18 As I explained in *AS (Sri Lanka)* (para 32-41), subsequent judgments following *ZT (Kosovo)* seem to have shifted the emphasis. Thus in *SSHD* v *QY (China*) [2009] EWCA Civ 680, the court had rejected the argument that the judge had erred in deciding that the issue of certification was 'an issue on which he must reach his own conclusion' rather than 'by applying a traditional *Wednesbury* test to the Home Secretary's judgment'. Sedley LJ said (of the speeches in *ZT (Kosovo)*):

'All, it seems to me with respect, considered that, because of the essentially forensic character of the judgment he has to make, the court is generally as well placed as the Home Secretary and so, at least where there are no issues of

primary fact, can ordinarily gauge the rationality of a certification decision by deciding whether it was right or wrong.'

19 One notes the possible qualification in respect of cases where there are 'issues of primary fact'. This is perhaps a fair reflection of the speeches in *ZT* itself, as neatly summarised in a footnote by MacDonald (para 12.177 n 11): "Lord Phillips, para 23 'where, as here, there is no dispute of primary fact' and Lord Neuberger, para 83 'in a case where the primary facts are not in dispute'. Lord Brown entered no such caveat in his own analysis of the Court's role in judicial review in this context but did express agreement with para 23 of Lord Phillips's opinion".

Logically, however, the existence of such unresolved issues of primary fact is not a reason for the court's deferring to the Secretary of State at the threshold stage. Such unresolved issues are likely of course to make it more appropriate to leave the door open for them to be determined by an immigration judge after a full hearing. The position is not dissimilar to that under the rules of court, where a claim may be struck out not only if it is unfounded in law, but also if it is clear on the available material that the factual basis is entirely without substance (see *Three Rivers DC v Bank of England (No 3)* [2001] 2 All ER 513, para 95) per Lord Hope). In most cases, the court is at least as well equipped as the Secretary of State to decide either question.

20 More recently in *KH (Afghanistan)* v *Secretary of State* [2009] EWCA Civ 1354 (handed down on the 12th. November 2009), Longmore LJ (with the agreement of his colleagues) stated the position in unqualified terms:

'It is now clear from *ZT (Kosovo)* v *SSHD* [2009] 1 WLR 348 ... that the court must make up its own mind on the question whether there is a realistic

prospect that an immigration judge, applying the rule of anxious scrutiny, might think that the application will be exposed to a breach of Article 3 or 8 if he is returned to Afghanistan. So the question is not whether the Secretary of State was entitled to conclude that an appeal would be hopeless but whether, in the view of the court, there would be a realistic prospect of success before an adjudicator.' (para 19).

21 It seems therefore that on the threshold question the court is entitled to exercise its own judgment. However, it remains a process of judicial review not a *de novo* hearing, and the issue must be judged on the material available to the Secretary of State."

[11] In summary, said Mr Forrest, the court could now take the view that the Secretary of State was wrong and if so it could interfere.

[12] In relation to the newspaper article, however, Mr Forrest submitted, as I understood him, that it did not matter whether the *Wednesbury* approach or the "new" approach was taken. The question was whether there was a realistic prospect of success standing this article, bearing in mind that it was material which was not before previous immigration judges. Those judges had said that the petitioner would be no interest to the authorities but if the supporting material in the article was before another judge there was a realistic prospect of success and I was invited to read the article as a whole. While the second part of it was entirely about the petitioner and might bear some resemblance to the rejected evidence, if it was taken in the context of an author making a general point it could be held that a realistic prospect of success existed. Had it only related what the petitioner claimed then it would not be new but it appeared to be from a responsible source.

[13] The respondent complained that it had not been submitted as soon as it had been received. It had been felt appropriate only to submit it if the appeal failed but in hindsight it might have been preferable to have sent it in at the time. No adverse conclusion could be drawn from these circumstances, however.

[14] The decision letter challenged the article on a number of grounds.

[15] Mr Forrest referred to paragraph 26 which runs as follows:

> "Your client has submitted a newspaper entitled 'Eden' dated 15 April 2009 (item xvii). An article from page 5 of the paper has been highlighted which is entitled 'Political Activists Still Oppressed in Cameroon'. It is noted that this article names your client and recounts many of the details of your client's asylum claim as told to the Secretary of State and the Immigration Judge at your client's appeal hearing. It is not clear why a newspaper article dated 15 April 2009 wishes to recount the details of an incident that is said to have occurred almost five years previously. It is also noted that the newspaper states it is 'The Nation's Foremost Newspaper for Sustainable Development'. It is not clear therefore, why a newspaper concerned with sustainable development would choose to recount the details of an alleged incident to your client which appears to be in no way related to sustainable development. The article is entitled "'Political Activists Still Oppressed in Cameroon' but does not recount any specific current incidents of oppression, preferring instead to briefly comment on incidents from 1990, 2001, 2005 and 2006 before allocating approximately half of the article to the incidents which are very similar to those recounted by your client. It is also noted that the section of the paper in which the report appears is entitled 'News Analysis by Solomon Amabo in Doula', no indication has been given as to the objectivity of the newspaper, the

circulation of the newspaper or how your client acquired the newspaper. It is therefore considered that another Immigration Judge, applying the rule of anxious scrutiny, would find that, without evidence to the contrary, the article highlighted is a piece of subjected opinionated journalism rather than a piece of objective journalism."

Mr Forrest submitted that the article should be construed in its own context. It was unfair to highlight the newspaper's concern with sustainable development. A newspaper might boast, for example, that it was the best for sports coverage but it could still comment on political matters. While it was considered by the Secretary of State that another judge would find the article subjective and opinionated, there was no basis for that conclusion. It was irrational and quite wrong. She had therefore failed the *WM* test. It was a relatively modest test and there were realistic prospects that if another judge were alerted to the concerns about oppression disclosed in the newspaper the petitioner's claim would succeed.

[16] Mr Forrest then turned to the question of interference with the petitioner's right to respect for his private and family life, his home and his correspondence under article 8 of the Convention. That was dealt with extensively in the respondent's letter from paragraph 31 onwards. She accepted that the petitioner had established a private life but concluded that the proposed interference with it was proportionate. No issue was taken with that decision. However, issue was taken with her conclusion that the petitioner had failed to establish the existence of a family life. That decision was irrational, said Mr Forrest. The information she had before her was contained in 6/5, 6/6 and 6/8 of process which consisted of three letters. 6/5 was a letter from G MacV in the following terms:

"Re: F K D E,

I have known the above-named since March 2007, where we met at a meeting. Since then our friendship has developed into a love relationship since about August 2007 till present time. I am UK citizen and in full time employment.

D has become a part of my family - being a good guardian to my 7 year old son, J-J A. He has become close to my relations and friends. We have spent time together with them in Ayrshire and London in the past 3 years since we began dating.

D and I have also been disappointed with loss of babies through miscarriage in early stages of pregnancy in 2008. Without him around, the sorrow of miscarriage would have been hard to bear ... but he has been a real source of emotional and practical support in these difficult times despite his own issue relating to his immigration status.

In all the time that I have known D, he has been able to talk about some of his worries - he explained to me what he suffered in Cameroon, and what he continues to endure today. I have tried to be a supportive partner where I can in this relationship. It is not easy being with a person who is a victim of torture.

D has been trying to seek medical help to assist him with his traumatic past. I know he has tried to go to college so see if that will help him from feeling low and depressed too much.

Without status in UK, D is unable to plan ahead with his life. Thus we are not in the position to enjoy our life together stress-free at the moment. I would ask that D case be reviewed, with full consideration being given to his efforts to live as a law-abiding & family man who has been trying to deal with his trauma and stress issue as best he can by way of engaging with college,

church, community and medical services in Glasgow. He is making the effort to speak English and to integrate into Glasgow society where he can manage. Yours sincerely."

[17] 6/6 is a letter dated 12 April 2010 from Baillie Phil Greene and it runs as follows:

"I have interviewed Mr E on three occasions in regards to his application to stay in Glasgow as I believe he has had a refusal from yourselves and could well face deportation. This is a letter of support, attempting to ensure that he continues his residence in the United Kingdom.

He has been in Glasgow now since January 2007 and has an established relationship with a lady, whom, I believe, is pregnant with his child. He has a number of qualifications which would ensure that he could be a viable citizen of this Nation and contribute towards our wellbeing if he were permitted to stay. He is presently involved in a considerable amount of community work as a football coach, which he undertakes in Hampden through Glasgow Culture and Sport's Organisation. He has been doing this for some time now and is apparently is now applying for his Section 4 football qualification, which would qualify him as a referee in this country.

He states that he has been a refugee from Cameroon and where he stayed in Cameroon, a town called Douala, he has the wrong political affiliations and if returned to Cameroon and to his town of birth, could well be at risk. He is most anxious about his next interview and now considers himself very much as a part of the Glasgow scene and I, and he, can see no reason why he shouldn't be given the right to remain in this country. As previously said, I believe he would make a viable contribution, both through his voluntary

activities on behalf of the children of Glasgow and as a worker once he is given leave to remain...".

6/8 is an undated letter bearing to be from someone called Salemah Mfumu. It is unsigned and is in the following terms:

"Dear Sir/Madam

Re: D E F K

I know D since September 2007. I met him through my friend g macv-A. They have been through a lot together and he is a great support to g and her son j-j, taking j-j to football, collecting him from school and cutting his hair, doing father-like activities.

They are good couple they enjoy family times together. Since G and D are together I know to the best of my knowledge that their relationship is sincere and genuine. In 2008 i had to be real valued friend when they had difficulties attached to the loss of pregnancy, I was there in there in the hospital with comforting them for their loss.

Through all that D showed dedication and love for g. Since he is been in Glasgow he has been attending college and has been really active in the community (both host and African) where he thinks he can contribute to make a difference.

If D to be sent back in Cameroon it will deeply affect J-J and G because it will be just like separating the body and soul for them."

[18] These pieces of correspondence are dealt with by the respondent at paragraphs 31-41 of her letter and I will look at that in more detail later. Suffice it to say for the moment that Mr Forrest submitted that it was irrational for the respondent

to hold that there was no family life. In this connection he referred to the case of *X, Y and Z* v *United Kingdom* 24 EHRR 143.

[19] The purpose of referring to that case was to draw my attention to paragraph 1 of the rubric which runs, *inter alia*, as follows:

> "The notion of family life in article 8 is not confined solely to families based on marriage and may encompass other *de facto* relationships. When deciding whether a relationship can be said to amount to family life, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means..."

Mr Forrest said that in the present case there was at least a realistic prospect that another judge would say that family life had been established here for the purposes of article 8. Paragraph 41 of the decision letter runs as follows:

> "It is acknowledged that in principle, family life can exist between an unmarried couple, even when, as in your client's circumstances, the parties are not cohabiting. However, for the reasons given above at paragraphs 32 to 38 it is considered that another Immigration Judge would find that there are serious doubts regarding the nature of your client and Ms MacV's relationship. On the available evidence, another Immigration Judge, applying the rule of anxious scrutiny, would find that Ms MacV and her son can not properly be considered to be family members of your client for the purposes of Article 8. It is noted that your client does not claim to have any other family members in the UK and claimed to live with his girlfriend and siblings in Cameroon. Your client also stated that his mother and father were still alive and living in Cameroon."

[20] Mr Forrest submitted that the test to be applied to this aspect of the case was the *YH* one rather than the *WM* one. There were a number of issues where the primary facts were in doubt. If there was no family life then the respondent was correct not to consider the proportionality of any interference with it. But she was wrong to say that there was no realistic prospect that another judge on the evidence would hold that family life existed. I was entitled to exercise my own judgment on the matter on the basis of the *YH* test. It might be argued that even if family life were established then any interference with it might still be proportionate but the respondent had closed the door on that.

[21] Paragraphs 56 and 57 of the decision letter run as follows:

> "56 The guidance in **Chikwamba** is that specific consideration should be given to whether returning an applicant to his/her home country to make an application for entry clearance is indeed proportionate but that it could well be proportionate to enforce removal in a case where there is an appalling immigration history or an abusive asylum claim. As it has not been accepted that your client has established a family life in the UK he cannot benefit from the rulings in **Chikwamba.**
>
> 57 The issue in the case of **Beoku-Betts** is to what extent the human rights of third party family members should be considered by the Asylum and Immigration Tribunal. As it has not been accepted that your client has established a family life in the UK he cannot benefit from the rulings in **Beoku-Betts**."

[22] Mr Forrest submitted that the respondent had summarised accurately the guidance in *Chikwamba*. In that case (*Chikwamba* v *Secretary of State for the Home Department* [2008] UK HL 40) the claimant sought asylum, having arrived in the

United Kingdom from Zimbabwe. The Secretary of State refused her claim and leave to enter. At that time the removal of failed asylum seekers to Zimbabwe was suspended. The suspension was not lifted until November 2004. In September 2002 she married a Zimbabwean National who had been granted asylum. In 2003 the Secretary of State refused her claim that to remove her to Zimbabwe would breach her rights under Article 8 of the Convention and the adjudicator dismissed her appeal. A daughter was born to the couple in April 2004 and in January 2005 the Immigration Appeal Tribunal dismissed her appeal on the basis that she could and should return to Zimbabwe to apply there for entry clearance to return to the United Kingdom and that her separation from her husband, who faced an insurmountable obstacle to his own return to Zimbabwe, would be for a relatively short period. Her appeal was dismissed by the Court of Appeal but the House of Lords allowed an appeal against that decision. They held that, while the maintenance and enforcement of immigration control was a legitimate aim of the Secretary of State's policy in relation to Article 8 family life claims, an Article 8 appeal should not be dismissed routinely on the basis that it would be proportionate and more appropriate for the applicant to apply for leave from abroad and that to remove the claimant to Zimbabwe where conditions were harsh and unpalatable and disrupt her family life would violate her and her family's Article 8 rights and was not justified by the need for effect immigration control.

[23] Mr Forrest said that it might be that the rule from *Chikwamba* would apply in this case, although it might not. Interference might be justified but we did not know because the door had been closed to that matter by the decision that no family life existed. The thrust of the *Beoku-Betts* case (*Beoku-Betts* v *Secretary of State for the Home Department* [2008] UK HL 39 was that, where a breach of a claimant's right to

respect for his family life was alleged, the appellate authorities were to consider the complaint with reference to the family unit as a whole and if his proposed removal would be disproportionate in that context each affected family member was to be regarded as a victim. The door had been closed to such consideration because of the finding that there was no family life. G MacV and the child she was said to be pregnant with had to be considered. Although she herself had not said she was pregnant, Baillie Greene had in his letter. There was a realistic prospect of establishing a family life. There were a number of issues of primary fact which had to be resolved and I could exercise my judgment by holding that the decision that there was no realistic prospect of success was wrong, no matter which test was applied. Although the petitioner's position was precarious when he embarked on his family life that was simply a factor to be taken account of in assessing the proportionality of the removal.

Submissions for the respondent

[24] Mr McIlvride invited me to uphold the third plea-in-law for the respondent and refuse the petition. He submitted that the respondent had correctly identified the test to be applied when further submission were being considered and referred to paragraphs 11 and 12 of the decision letter. He also submitted that she had correctly applied the test. There were two branches to the case. Was there a real risk of persecution and was there an Article 8 claim? As far as my role was concerned, Mr McIlvride referred to the case of *FO, Petitioner* [2010] CSIH 16 and in particular to paragraph 22 of the Opinion of the Court delivered by Lord Mackay of Drumadoon. That runs as follows:

> "[22] A decision of the Secretary of State for the Home Department under Rule 353 as to the existence of a fresh claim for asylum can be challenged before the court only by way of judicial review. The scope of such a challenge was discussed in the two cases to which counsel for the reclaimer referred, *Onibiyu* v *Secretary of State for the Home Department* and *WM (DRC)* v *Secretary of State for the Home Department*. On the basis of these authorities it is clear that the decision of the Secretary of State for the Home Department is capable of being impugned before the court only on *Wednesbury* grounds. However it is also clear from the judgment of Buxton LJ in *WM (DRC)* that the Secretary of State had to make two judgments, (a) whether the new material was significantly different from that previously submitted and (b) if it was, whether it created a realistic prospect of success in a future asylum claim when taken with the material previously considered (paras 6 and 8)."

Lord Mackay of Drumadoon went on at paragraph 23 to quote from the well-known judgment of Buxton LJ in *WM (DRC).*

[25] Mr McIlvride said that the issue had been considered in a number of recent Outer House cases and the view had been taken that the test had been refined. He referred in particular to the case of *IM, Petitioner* [2010] CSOH 103. Having considered the authorities, the Lord Ordinary, Lord Tyre, went on at paragraph 11 of his Opinion to say the following:

> "Like *ZT (Kosovo), R (YH)* was a certification case. However, in the light of my conclusion that observations made in certification cases can provide guidance as to the proper approach to be taken by the court in the present case, I propose to adopt this approach in the present case and to make my own assessment of how an immigration judge might have decided the matter on the

basis of the material available to the Secretary of State. This appears to me to be consistent with the approach taken recently by Lady Dorrian in *LA, Petitioner* [2010] CSOH 83 at paragraph 14 and by Lord Doherty in *SY, Petitioner* [2010] CSOH 89 at paragraphs 14-15 (both Rule 353 cases) and by Lord Malcolm in *JS, Petitioner* [2010] CSOH 75 at paragraph 30 (a certification case). I am not satisfied, in the light of the subsequent case law to which I have referred, that the observation by Buxton LJ in *WM (DRC)* at paragraph 18 that 'it would be entirely possible to think that the case was arguable..., but accept nonetheless that it was open to the Secretary of State, having asked himself the right question and applied anxious scrutiny to that question, to think otherwise' still affords sound guidance."

[26] Mr McIlvride very fairly indicated that he was prepared to accept for the purposes of the hearing before me that I was not bound to follow the *Wednesbury* test but even on the "new" basis he submitted that the decision was not unlawful. Before moving on from the *IM* case, I should note that at paragraph [5] of the judgment Lord Tyre said the following:

"It is common ground that the standard to be applied in assessing whether a claim has a 'realistic prospect of success' is a modest one. In *R (AK (Sri Lanka))* v *Secretary of State for the Home Department* [2010] 1 WLR 855, Laws LJ observed at paragraph 34:

"A case which has no realistic prospect of success ... is a case with *no more than a fanciful* prospect of success. "Realistic prospect of success" means only more than a fanciful such prospect." (Emphasis in original.)

> That description of the standard has been adopted in a number of Scottish applications for judicial review of decisions taken by the Secretary of State in pursuance of Rule 353 and I adopt it for the purposes of this application."

[27] Mr McIlvride went on to consider first the question of the risk of persecution. As the Secretary of State had to consider all of the material she had to take account of the original findings of the immigration judge. These were extremely adverse to the petitioner's credibility. He referred in particular to paragraph 2 of the determination promulgated on 18 July 2008, setting out the broad nature of the petitioner's claim. In short, he said that he joined the Social Democratic Front (SDF) in 2001. In early June 2004 there were rumours that President Biya had died and the petitioner produced banners and leaflets to celebrate this. He and a friend were involved in a bet as to whether or not the President would return and on 8 June he was summonsed by a local representative of the government and warned about spreading information that the President was dead. On 9 June the petitioner heard that the President was back in the country. A large crowd gathered at a major crossroads where everyone was talking about the bet and fighting broke out. During the fight his friend was stabbed. The petitioner called the police and ambulance but was arrested himself and held in solitary confinement, beaten and kept without any contact with the outside world until 18 January 2007. Two nuns came to get him on behalf of Cardinal Tumi and they took him to the cathedral where he met the Cardinal. The latter gave him a priest's robe and his head was shaved. On 20 January 2007 the Cardinal took him and three nuns to the airport and he was given a passport which did not have his name or photograph. The Cardinal also gave him a photocopy of his Cameroon identification document. The petitioner understood that his girlfriend had been constantly in touch with the Cardinal pleading with him to secure his release. He boarded a flight which arrived at an

unknown airport in the UK on 21 January 2007. After leaving the airport the nuns took him to a restaurant, saying that they would arrange accommodation and then return for him, but they never did. He was surprised when he was abandoned because he believed he was coming with the nuns to the UK to preach. The judge's determination goes on to indicate that, in a handwritten letter, a gentleman writing from the petitioner's home area said that he had heard nothing of him since 9 June 2004 and that until recently the petitioner's family had also been without news of him since his arrest. The gentleman referred to a report, dated 10 June 2004, in a satirical newspaper called *Le Popoli*. The respondent produced a copy and translation of part of this newspaper which caricatured the President's reappearance after the rumours of his death. It contained a short item reporting the death of the petitioner's friend and the other person involved in the bet and made reference to the bet. There was no mention of the petitioner in the article.

[28] Reference was made by the judge to a medical report. It confirmed that the petitioner had multiple small patches of increased pigmentation on the soles of both feet which could have been caused by the torture which he described but the doctor could not exclude other causes. His body also had other scars which were consistent with his account and a psychiatric report described him as having symptoms of a post-traumatic disorder.

[29] The judge analysed the evidence from paragraph 30 onwards and criticised the credibility of the petitioner's claims on various bases. There was no good reason for him to have been singled out over rumours about the President's death because they were common national currency. He claimed that he was in solitary confinement in the dark but was able to tell night from day. Although he explained this away the explanation was not credible. It was a common feature of asylum claims from West

Africa that members of religious orders of the Roman Catholic Church were said to enable victims of persecution to escape. For obvious reasons such acts of benevolence might not be publicised but it might be expected that some evidence that they actually occurred might have emerged over the years. None had ever been found. It was strange that nuns would use a preaching visit as cover for an asylum seeker illegally entering the UK but thereafter to abandon him on the pretext of seeking accommodation defied belief. Cardinal Tumi was a well-known figure at international level and it was conceivable that he would be interested in obtaining the release of someone subject to detention and torture. It was another proposition altogether that he would put the petitioner on a plane for the UK with a false passport. Although his girlfriend appeared to be instrumental in his release he did not communicate with her from his escape in January until March 2007 and it appeared that he had not communicated with her since. The medical reports did not assist, being based on what the petitioner himself had said.

[30] At paragraph 45 the judge said the following:

> "The appellant is very probably from the New Town Airport District, Doula. He may have been a member of the SDF. Beyond that, for all the above reasons, his account is not credible even to the lower standard of proof. He fails to establish that the authorities of Cameroon detained and ill-treated him; that he escaped from detention and travelled to the UK through the help of Cardinal Tumi; that he left Cameroon because of fear of the authorities; or that the authorities would have any interest in him if he returns."

[31] In short, on a number of bases the account was held to be a fabrication. All of this had to be considered in the round along with the new evidence. The sole piece of new evidence relied on was the alleged newspaper. Helpful guidance on the weight to

be given to a document like this was to be found in the case of *YH* to which I have already referred. That case dealt with a document which purported to be an arrest warrant and at paragraphs 46 and 47 Carnwath LJ said the following:

> "46 The only significant new element is the arrest warrant, and the report relating to it. The judge referred to the guidance in *Tanveer Ahmed* v *Secretary of State* [2002] UK IAT 00439, which, as he said, established that it is for the claimant to establish the reliability of a document if it is at issue; and that a document should not be viewed in isolation but in the context of the evidence as a whole (para 35). He also referred to *Asif Naseer* v *Secretary of State* [2006] EWHC 1671 in which Collins J in a similar context had emphasised the importance of 'evidence indicating how the relevant documents came into existence and supporting their genuineness' (para 37).
>
> 47 Dr Fatah's report falls far short of that test. I accept that it reads at a reasonably objective consideration of the issues, by someone who, on the face of it, appears adequately qualified for the task. There are no obvious errors or deficiencies of approach, which would justify discounting it altogether at the threshold stage. However, it proves very little. It says no more in substance than that the document is sufficiently plausible on its face to justify taking it seriously. There is nothing to indicate how it came into existence, or how it came into the hands of the applicant's family."

[32] The Court of Appeal were adopting the tests in *Tanveer Ahmed* and *Asif Naseer* and Mr McIlvride referred me in particular to paragraph 22 of the judgment of Collins J in *Asif Naseer* and thereafter to paragraphs 28 to 34. The documents in question in that case were an FIR and an arrest warrant, which were produced in an attempt to show that the claimant was still the subject of adverse attention from the

authorities. If they were genuine they tended to support the contention that he might be at some risk if he was returned. It was held that the Secretary of State was entitled to reject them. They were curious documents because they related to alleged incidents a year after the claimant had left Pakistan. It was very useful to the claimant's case that suddenly the documents were produced. It was not known how they came into existence and how they were obtained by the claimant's brother. At paragraph 31 Collins J said the following:

> "In all the circumstances, this is a case in which, in my view, the Secretary of State was fully entitled to say to himself: 'I have had no proper explanation of how these documents came into existence. I note how useful they suddenly are, produced at this late stage. I note too that there has still been no production of the August 2004 FIR. In all those circumstances, I take the view that I am entitled to reject the genuineness of these documents and to take the view that there is no real prospect of success'."

[33] At paragraphs 32 to 37 Collins J referred to a previous decision of his, *viz Rahimi* v *Secretary of State* [2005] EWHC 2838. That was a case in which the claimant relied on a newspaper article which referred to him and perhaps his father and indicated that he was being sought by the authorities. He also had a statement from a respected expert who had examined the original newspaper and expressed the opinion that it could well be genuine. Since there was the evidence of the expert and since it meant that the new claim would have a realistic prospect of succeeding on appeal before an immigration judge, he held that the Secretary of State had no good reason to reject it.

[34] Mr McIlvride submitted that it was not enough just to produce a document with no explanation about its provenance or evidence as to the weight which could be attached to it. The Secretary of State was entitled to reject the article produced by the

petitioner. The entirety of the explanation as to the provenance of the newspaper article was contained in 6/16 of process, the letter from the petitioner's solicitors dated 8 April 2010, at paragraph 3 on page 3 as follows:

> "He has attached this letter a newspaper to show that his claim is supported by a newspaper which is enclosed. We also enclose a copy of the DHL envelope which the newspaper was sent in."

That was not good enough. Why was it only produced after the appeal rights were exhausted? Furthermore, there was no evidence of who the publisher was or how reputable. What was the circulation of the newspaper and where was it is circulated? Was it a genuine document? Was it reliable? There was simply no evidence about that. The article bore to be dealing with contemporary events but no event later than the 2004 incident was referred to. (That is not correct since reference was made in the article to events in 2005 and 2006 but that merely dilutes the point to a limited extent). That was enough to justify the view that there was no realistic prospect of success. Even if another immigration judge would recognise it and accept it as corroborating the petitioner about the stabbing and his arrest, there was still the problem about his account of his conditions of detention and his flight. That account was inconsistent and implausible and was plainly a fabrication. The Secretary of State had not fallen into error in connection with this branch of the claim.

[35] Mr McIlvride then turned to the Article 8 claim. He invited me to focus on the further submissions before the respondent when she made the decision. On any fair reading of 6/16 the only claim that was asserted related to the petitioner's private life. Family life was not claimed. In the first three paragraphs reference was made to an application for discretionary leave on the basis of long term residency and Article 8.

The history of the processes which the petitioner went through was set out and paragraph 3 of the letter went on as follows:

> "In terms of his Article 8 case we enclose a letter from his MP, educational certificates to show that (the) applicant has integrated within the educational system and has obtained qualifications. We also enclose letter from Glasgow 2014 Commonwealth Games Director of Communications and that the applicant is involved in local groups to assist. We also enclose supporting letter from G MacV, the Cameroonian Association and Sympathisers in Scotland to show that he has integrated together with a letter from Salemah Mfumu. He also appears to be involved in a relationship with G MacV."

It was not suggested that any family life had been established nor was there a suggestion that G MacV was pregnant. The only person who suggested pregnancy was the Baillie, who appeared never to have met her. At paragraph 3 on page 2 of the letter it was asserted that Article 8 imposed a duty on the State not only to refrain from interfering with an individual's private and family life but also to act positively to protect that family.

[36] Mr McIlvride submitted that that was simply a case of the agents summarising the whole of Article 8. The last three paragraphs at page 2 go on as follows:

> "Therefore, we would urge you to consider the personal circumstances of this applicant in accordance with the principles enshrined in Article 8 for the protection of private life which is of course linked with personal autonomy, physical and psychological integrity for which the protection afforded by Article 8 is primarily intended to ensure the development, without outside interference, of the personality of each individual in his or her relations with other human beings. We refer you to *Botta* v *Italy* 1998 26 EHRR 241.

> Our client has been resident now in the United Kingdom for a period of 3 years. He has spent his time in the Country to good purpose and advancing himself to establish himself as a person who would contribute to the country. We are advised that his private life is most definitely in the United Kingdom with none in Cameroon, having resided in the United Kingdom this length of time.
>
> We would submit that to attempt removal of this man now, against the period of time in which he has been allowed to remain in the United Kingdom, would be dis-proportionate in all the circumstances."

[37] It was plain that the submission to be considered was whether removal would infringe the petitioner's right to respect for his private life, not his family life, and it was accepted that the Secretary of State did not err in connection with private life.

[38] The Baillie was only saying that G MacV was pregnant because the petitioner told him. The letter from Salemah Mfumu was undated and unsigned and very little, if any, weight could be attached to it. That was a view which the Secretary of State was entitled to take. G MacV's letter disclosed that her address was not the same as the petitioner's. That might not be fatal but it was an important factor. The parties were said to have been in a "love relationship" since about August 2007. What was an immigration judge to take from that? It was possible that they could love each other but simply be in a courtship and not a family relationship. It was also possible that they had a sexual relationship but that did not necessarily mean a family relationship. Paragraph 2 of her letter, as I have indicated, ran as follows:

> "D has become a part of my family - being a good guardian to my 7 year old son, J-J A. He has become close to my relations and friends. We have spent

time together with them in Ayrshire and London in the past 3 years since we began dating."

[39] The immigration judge would have to take from the reference to dating that they saw each other from time to time. It was not a question of staying overnight or on a permanent basis and it was in that context that the reference to the petitioner's being a part of her family had to be considered.

[40] One also had to bear in mind that she chose not to give evidence before the immigration judge in June 2008 and the petitioner made no mention of her at that hearing. Even if the family life question arose, and Mr McIlvride said it did not, and the Secretary of State considered it, the evidence before her was not sufficient.

[41] Mr McIlvride accepted that there was a duty to consider the question of family life through the application of the principle of anxious scrutiny but even if it was considered the Secretary of State was correct. It was a factor to be borne in mind that he only contended he had a private life but the Secretary of State had gone beyond that and had tried to see if she could make out a family life claim on his behalf. She reached the view that there were no realistic prospects of success and that was the correct view.

[42] In construing the letter from G MacV it was legitimate to consider it on the basis of what the petitioner was not even saying that she was talking about family life. It was difficult to see how the Secretary of State could say other than that there was no real prospect of persuading an immigration judge that family life had been established.

[43] The Secretary of State went on to consider the test set out in *R (Razgar)* v *Secretary of State for the Home Department* [2004] UKHL 27. Broadly speaking, a

reviewing court had to ask itself a number of questions as set out at paragraph 17 of the speech of Lord Bingham of Cornhill. These were as follows:

> "... (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?"

At paragraph 20 he went on as follows:

> "The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. In *Secretary of State for the Home Department* v *Kacaj* [2002] Imm AR 213, 228, para 25, the

> Immigration Appeal Tribunal (Collins J, Mr C M G Ockelton and Mr J Freeman) observed that: 'Although the [Convention] rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate.' In the present case, the Court of Appeal had no doubt [2003] Imm 529, 539, para 26, that this overstated the position. I respectfully consider the element of overstatement to be small. Decisions taken pursuance to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only a case by case basis."

[44] The Court of Appeal had indicated that the onus was on a claimant to prove exceptional circumstances but Mr McIlvride fairly pointed out that in *Huang* v *Secretary of State for the Home Department* [2007] UK HL 11, the House of Lords said that that was not a rule of law. In fact, however, one would expect that there would be very few cases where exceptional circumstances were made out.

[45] In the present case nothing had been put before the respondent to suggest that removal would be disproportionate. The Secretary of State had gone through the five stage *Razgar* test and reached the correct conclusion. That conclusion is basically set out at paragraph 60 of the decision letter as follows:

> "After considering the cases of **Razgar, Huang, Chikwamba, Beoku-Betts and Nnyanzi** another Immigration Judge would conclude that returning your client to his home country would indeed be proportionate. It is not accepted that your client's case is so exceptional that an Immigration Judge, taking all these facts into account, would find that your client would be exposed to a real risk of persecution or treatment contravening Article 8 of the ECHR if returned to his home country."

[46] Mr McIlvride then referred again to the case of *IM*. In that case the petitioner sought leave to remain in the United Kingdom, under reference to a right to respect for a family life under Article 8. She sought reduction of a decision that her representations did not constitute a fresh claim. She claimed that she had formed a relationship with a person who was born in Libya but who had been granted asylum in the United Kingdom in 2003 and who had become a naturalised British citizen in May 2009. They had known each other since their early teenage years in Libya. After her arrival in the United Kingdom this gentleman made contact with the petitioner. Their relationship developed and they underwent a marriage ceremony on 23 September 2009. The marriage was not recognised as valid under English or Scots law. She also stated that she and the gentleman had cohabited and that she suffered a miscarriage in December 2009. Mr McIlvride referred to paragraphs [15] to [17] of Lord Tyre's Opinion.

[47] His Lordship set out the observations of Lord Bingham of Cornhill in *R (Razgar)*, to which I have already referred. It was submitted that although the Secretary of State had accepted that removal would be an interference with the petitioner's private life and had given reasons why he considered there was no realistic prospect of an immigration judge finding that such interference was disproportionate, he had failed properly to consider interference with the petitioner's family life. The Secretary of State ought to have appreciated that there was more than a fanciful prospect that an immigration judge would conclude, in relation to the petitioner's family life, that Lord Bingham's first and second questions fell to be answered in the affirmative and might then go on to find the interference disproportionate. Reference was also made to *Beoku-Betts*.

[48] His Lordship quoted the paragraph in the decision letter which narrated the Secretary of State's conclusions in relation to the petitioner's claim, so far as it was founded upon family life. These were as follows:

> "A new Immigration Judge in considering your client's right to respect for family life would note that your client is a single female who has entered into a relationship with a British national and that they have undergone an Islamic marriage, which as mentioned above, is not recognised under British law. Your client has provided photographs to evidence the Islamic marriage but has provided no further evidence to substantiate that the relationship is genuine and subsisting or any evidence that they are in fact residing together. As such a new Immigration Judge would conclude that your client formed her relationship in the full knowledge of her immigration history, knowing that she had no right to be here and could be removed at any time. As such, your client's removal from the United Kingdom would not breach her Article 8 right to family life."

[49] His Lordship held that on a fair reading of the paragraph the Secretary of State was indicating a conclusion that the judge would find that removal of the petitioner would not engage the operation of her Article 8 right to family life. If that were so then an appeal would have no realistic prospect of success. From a reading of the remainder of the paragraph his Lordship took the view that in reaching this conclusion the Secretary of State was influenced by a number of factors. The petitioner had entered into the marriage without having applied for a certificate of approval. At the time of the marriage she had no valid leave to remain, her asylum application had been refused and her application for reconsideration had also been refused. Her relationship with the gentleman began at a time when she had no valid leave to

remain. She did not apply for a certificate of approval until she was facing removal from the United Kingdom. She had been resident in the United Kingdom and, separately, in a relationship with the gentleman for only a short period of time and she failed to provide further evidence to illustrate a genuine and subsisting relationship or evidence of co-habitation. His Lordship went on to say the following in paragraph [16]:

> "In relation to this last factor, it should be noted that in support of her application for leave to remain, the petitioner provided an affidavit of Mr M sworn on 14 December 2009. Mr M states unequivocally that the marriage was genuine. His description of his relationship with the petitioner is, however, more equivocal. The nature of the relationship is not specified and he states that since the date of the marriage the petitioner has 'mostly' been living with him although when from time to time he is away working she has lived with her brother."

[50] His Lordship held that an appeal to an immigration judge would have no realistic prospects of success. An immigration judge

> "would conclude that the petitioner's removal would not constitute an interference with the exercise of the petitioner's rights to respect for her family life or, at best for her, that such interference would not have consequences of such gravity as potentially to engage the operation of Article 8. It seems to me that, taking the view most favourable to the petitioner of the material supplied to the Secretary of State, there is insufficient evidence to satisfy an immigration judge that she and Mr M have family life which is such as to engage Article 8. The material supplied to the Secretary of State seems to have been directed towards establishing the genuineness of the marriage rather than

> the genuineness of the relationship. I consider that an immigration judge would find nothing in either the letter dated 15 December 2009 or Mr M's affidavit which vouches the existence of a relationship of a nature that could reasonably be described as family life. It follows that I am also satisfied that an immigration judge would distinguish the decision of the House of Lords in *Beoku-Betts* on the ground that Mr M is not a family member whose Article 8 rights are engaged. For these reasons the appeal would in my view have no realistic prospect of success." (paragraph [17])

[51] Mr McIlvride submitted that the evidence referred to by Lord Tyre echoed the type of evidence which was available in the present case and that the same analysis could be applied to it. There was not enough evidence to give rise to any real prospect of establishing a family life and no evidence about the consequences of any interference with such family life, if established, to G MacV.

Reply for the petitioner

[52] Mr Forrest submitted that the circumstances in *IM* could be distinguished. In the present case the Secretary of State had foresworn the whole issue of family life, thus preventing herself from examining a number of matters arising from the three letters. The position was clear in *IM* but in the present case there were far too many primary facts still to be established. The Secretary of State had not gone through the five tests set our in *Razgar* in relation to family life. It could not be said that if she had done so the result would be bound to have been the same.

Discussion

[53] I should make, I think, two preliminary observations.

[54] The first of these is that in light of the concession made by Mr McIlvride I propose to approach this case on the basis of the test set out in *IM* rather than on *Wednesbury* grounds. In other words, I propose simply to ask myself the same question which the Secretary of State had to ask herself.

[55] In the second place, I do so in the context of recognising that the standard to be applied in assessing whether a claim has a realistic prospect of success is a modest one. I respectfully adopt the observations of Laws LJ in *AK (Sri Lanka)* referred to by Lord Tyre in *IM* that a "case which has no realistic prospect of success ... is a case with *no more than a fanciful prospect of success*. 'Realistic prospect of success' means only more than a fanciful such prospect".

[56] I propose first to consider the question of the newspaper article. There was no controversy between the parties as to the nature of the question to be asked in relation to that. I have already quoted rule 353. It is plain that the newspaper article had not already been considered so the issue for me is whether, taken together with the previously considered material it creates a realistic prospect of success. That is a question which I can only answer based on the material which was submitted to the Secretary of State.

[57] The Secretary of State criticised the article on a number of bases. She said it was not clear why a newspaper concerned with sustainable development would choose to recount the details of the alleged incident. The article did not recount any specific current incidents of oppression referring instead to comment on incidents from 1990, 2001, 2005 and 2006 before allocating approximately half of the article to the incidents which were similar to those recounted by the petitioner. No indication was given as to the objectivity of the newspaper, its circulation or how the petitioner acquired it. It was considered that another immigration judge would find that without

evidence to the contrary the article was a piece of subjective opinionated journalism rather than a piece of objective journalism.

[58] Reference was also made to the production of the other newspaper, *Le Popoli*, which referred to same incident with mentioning the petitioner. It was also noted that the article was produced approximately two weeks after his appeal rights were exhausted and over a year after the article was published. There was no explanation as to why the document was not submitted for consideration at the earliest available opportunity.

[59] I do not agree with every criticism made by the Secretary of State. In the first place, I think it unreasonable to hold that a newspaper which purports to deal with sustainable development would not be expected to comment on political matters. The two are sometimes inexplicably linked. In any event, a newspaper might proclaim itself to be the country's leading organ for sports journalism but that would not preclude it from discussing other issues.

[60] Secondly, the conclusion that an immigration judge would find the article to be a piece of subjective opinionated journalism rather than a piece of objective journalism seems to me to be baseless.

[61] Nonetheless, in considering the question for myself it seems to me that there are a number of formidable difficulties in the way of the petitioner. There is no evidence whatsoever as to the genuineness of this newspaper article. As matters stand it is simply a piece of paper with no vouching as to its authenticity.

[62] Secondly, the explanation as to how it came into the hands of the petitioner is scant in the extreme.

[63] Thirdly, the fact that the petitioner chose not to submit it as soon as possible throws doubt on its genuineness, or at least on the good faith of the petitioner.

[64] Fourthly, the article, if genuine, tends to corroborate the petitioner's account of the bet and the stabbing but it is difficult to see how it could support his account of his detention and his escape. I find that there is no realistic prospect that another immigration judge would reach a different conclusion from the original one even with the benefit of the article. It does not add very much to the article from *Le Popoli* other than to refer to the petitioner as having been involved, and another immigration judge would in my opinion discount the petitioner's claim on the same basis as the original one.

[65] All of this added to the complete lack of vouching of the document leads me to the conclusion that it falls foul of the tests set out in *YH*, *Asif Naseer* and *Tanveer Ahmed*. I am of opinion, therefore, that on this branch of the case the petitioner must fail, even applying the *IM* rather than the *Wednesbury* test.

[66] I turn now to the question of the alleged interference with the petitioner's family life.

[67] Mr McIlvride, as I have indicated, made certain submissions to the effect that the petitioner had not in fact claimed family life. As I understood his argument it was to the effect that the only claim made was in respect of private life and since it was conceded that the Secretary of State's decision on that was correct, then there was nothing more to be said. With respect, I disagree.

[68] The letter from the solicitors does indeed concentrate on private life but the relationship with G MacV is referred to therein and documents which could be said to support a claim to family life were submitted with it.

[69] The first paragraph of page 3 of the letter runs as follows:

> "Lastly, but by no means least, we refer you to the recent House of Lords (*sic*) of **Huang 2007 UK HL 11** which has most recently clarified the law in this

area with Lord Bingham directing 'the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to legitimate end sought to be achieved (*sic*)'. Proportionality is a subject of such importance to require separate treatment. The issue is whether the refusal of leave to remain/enter in circumstances where the family/private life or the home of the applicant or his family members cannot reasonably be expected to be enjoyed elsewhere taking full account of all considerations weighing in favour of the refusal, prejudices the family life the applicant in a manner sufficiently serious to amount to a breach of the fundamental rights as protected by Article 8 (*sic*). One need not ask in addition whether the case makes a test of exceptional circumstances."

[70] Despite the inelegant use of language in that paragraph it seems to me that it could be construed as making a claim based on interference with the petitioner's family life. Even if that is not the case, the Secretary of State has in fact proceeded to consider the question of family life and in light of the principle of anxious scrutiny I consider that she was right to do so. The letter along with the documentation appears to me, however, to amount to a claim for family life and even if that were not expressly set out by the petitioner I would, I think, be duty bound to consider it nonetheless.

[71] The Secretary of State deals with the question of family life between paragraphs 31 and 41 of the decision letter.

[72] At paragraph 32 it is noted that G MacV states that she has known the petitioner since March 2007 and that their friendship developed into a "love relationship" since about August 2007. Thus the "love relationship" was entered into some 3-7 weeks after the promulgation of the first appeal hearing determination on 5 July 2007,

meaning that the petitioner entered into a relationship knowing he had no legal basis to remain in the UK. That was a matter which another immigration judge would take into consideration. It is noted that she appears to contradict her previous account of the love relationship by stating that they had spent time together "in the past three years since we began dating".

[73] It is noted that G MacV's letter refers to miscarriage but the criticism is made that it is not made explicitly clear from the wording of the letter as to whether the petitioner was the expected father of the miscarried child. I am bound to say that I disagree with that criticism. It is a matter which could be the subject of reasonable inference.

[74] As far as the letter from Baillie Phil Greene is concerned, it is noted that the Baillie interviewed the petitioner on three occasions. It is assumed by the Secretary of State that the petitioner intimated to Baillie Greene that G MacV was pregnant but it was surprising that no mention of that was made in her letter of 25 March 2010. The letter from Baillie Greene was dated 12 April 2010. It was not clear why no mention of the petitioner's alleged expectant fatherhood had been made in the form of a statement and enclosed with the numerous other documents etc handed into the Home Office in person on 15 April 2010.

[75] The letter from Salemah Mfumu was unsigned and undated and no information was known about the reputability or credentials of the author. It was considered that another immigration judge would attach little weight to that document.

[76] While G MacV stated that she had been in a "love relationship" with the petitioner since either March or August 2007 the petitioner had made no mention of this relationship with her at any point prior to his appeal rights becoming exhausted on 8 April 2010. Paragraph 36 goes on:

> "Your client submitted a signed supplementary witness statement dated 12 June 2008 as part of the appeal bundle for your client's reconsideration appeal hearing on 23 June 2008 and there is no mention whatsoever of his relationship with Ms MacV, of his expecting a child with Ms McE (I assume this is meant to refer to Ms MacV) or of Ms MacV miscarrying your client's child. Furthermore it is noted that Ms MacV has not previously submitted any supporting documentation nor did she appear as a witness during your client's appeal hearing. Moreover, it is noted that despite Ms MacV claiming to be in a relationship with your client for approximately 3 years and stating that he 'has become a part of my family - being a good guardian to my 7 year old son, J-J A', he has continued to live separately from Ms McE (again presumably Ms MacV is meant) and has instead chosen to reside within state provided accommodation."

[77] Reference is made to four photographs purporting to show him with Ms MacV, her son and a woman known as "granny". They are annotated in biro with the dates January 08, February 08 and May 08. The Secretary of State considered that there was no way of ascertaining the dates of the photographs or the timescale between them. Another immigration judge would find that the photos were no evidence of a subsisting three year relationship between the parties and would attach little weight to them.

[78] Reference was also made to the fact that while the petitioner's girlfriend in Cameroon appeared to be a key figure in his escape, if he was telling the truth, he made no attempt to contact her and approximately two months after arriving in the UK he embarked on a relationship with Ms MacV.

[79] I do not agree with all the criticisms set out by the Secretary of State. As I have indicated, the question of the fatherhood of the expected child is a matter which can reasonably be inferred. Furthermore, I do not think it is legitimate to base a criticism on the fact of a relationship commencing within two months of the petitioner's arrival in the United Kingdom. These things happen.

[80] The fact that no reference was made to Ms MacV in June 2008 would not of itself necessarily be significant. It is not clear whether Ms MacV was pregnant at that time. Although it is fair to say that her letter indicated miscarriage in the early stages of pregnancy in 2008. Nonetheless it is a factor to be taken into account.

[81] I consider that the letter from Baillie Greene does not add anything to the petitioner's account, being obviously based on what the petitioner told him. It is, though, a remarkable feature that the Baillie appears to have been told that Ms MacV is pregnant and referred to this in his letter of 12 April while Ms MacV, in her letter of 25 March makes no reference to it.

[82] The letter of Salemah Mfumu can have no weight attached to it, being unsigned and undated. It is effectively little more than a piece of paper.

[83] The petitioner's claim, therefore, seems to me to come down fairly and squarely to the letter from Ms MacV. I think it fair to take from it that the parties have some sort of relationship. An immigration judge would be entitled to hold that they love each other and indeed that their relationship is a sexual one which has resulted in miscarriage. The reference to the parties' "dating" tends to suggest that they have not in fact established a family life although the petitioner is referred to in the letter as "a part of (Ms McV's) family". There is no suggestion in the letter that the parties are cohabiting.

[84] The letter does come somewhat late in the day, although once can envisage that it might not have been considered that a family life had been established much earlier.

[85] On the whole matter, it seems to me that, given the contradictions in the letter, the fact that Ms McV has not figured anywhere in any previous submissions, despite the alleged three year relationship, and the distinct lack of detail as to the nature of the relationship, which does not appear to involve cohabitation, there is no realistic prospect of the petitioner's establishing a family life before another immigration judge.

[86] That is not quite an end of the matter. If I am wrong in the above, the *Razgar* tests would have to be considered in deciding whether any interference with such family life as had been established was necessary and proportionate. Mr Forrest suggested that the Secretary of State had foreclosed that issue by holding that no family life had been established and not going any further. With respect, I am not clear that that is the case.

[87] Her remarks based on *Razgar* covered both private and family life. Paragraph 44 of the letter introducing the references to *Razgar* refers both to private and family life and both of these concepts are also mentioned in paragraphs 45 and 46. Admittedly, in paragraph 46, it is said that there would be no interference with his family life since it was not accepted that he had a family life in the UK. However, paragraph 47 indicates that any private or family life which was established was done in the knowledge that the petitioner had no legal basis of stay and was liable to be returned to his own country. Both private and family lives are referred to thereafter, reference being made to the case of *Chikwamba*.

[88] In my opinion, when the Secretary of State's letter is read as a whole it is clear that she has considered the question of proportionality both in relation to private life and family life.

[89] Even if I am wrong in that then I am bound to say that in my own opinion there is no material which has been submitted to the Secretary of State which would amount to the sort of exceptional circumstances referred to in *Razgar*. It seems to me therefore that even if an immigration judge were to find that family life had been established he or she would have no basis for holding that any interference with it would be anything other than according to law, necessary and proportionate, bearing in mind that any relationship was entered into when the petitioner's status was precarious. The documentation submitted is quite insufficient to show otherwise and it seems to me that the question could only be answered one way.

Decision

[90] I shall uphold the third plea-in-law for the respondent, repel the plea-in-law for the petitioner and refuse the petition.