Neutral Citation Number: [2010] EWHC 238 (Admin)

Case No: CO/9346/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st February 2010

Before :

THE HON MR JUSTICE COULSON

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Between :

The Queen on the application of Kadima Tshiteya	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

(**Mr Peter Jorro** instructed by **Wilson & Co**) for the **Claimant**
(**Ms Sarah Hannett** instructed by **Treasury Solicitor**) for the **Defendant**

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Judgment

Mr Justice Coulson:

A. INTRODUCTION

1. The claimant is a Citizen of the Democratic Republic of Congo ("DRC"). He has remained without leave in the UK since October 2002. During that time he has made a number of immigration and asylum applications, all of which have been unsuccessful. He has served an 18 month sentence of imprisonment for fraud. Also during that time, he has been happily married to his wife, Fifi Ndoko, with whom he has two children, one with a significant medical condition.

2. The claimant applies, with the permission of Stadlen J, for judicial review of the defendant's decision, originally made on 22nd September 2008, to refuse to accept his submissions of 18th July 2008 as a fresh Article 8 claim under the **Immigration Rules** HC 395 paragraph 353. I propose to set out the relevant law in **Section B** below and the relevant facts in **Section C** below. My analysis is at **Section D** and my conclusions at **Section E**. I have been greatly assisted in this process by the full written submissions and succinct oral submissions from both counsel and I am very grateful to them both.

B. THE APPLICABLE LAW

B.1 Family Life

3. Article 8 of the **Human Rights Convention** states as follows:

'(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 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.'

4. In ***Beoku-Betts v SSHD*** [2008] UKHL 39, the House of Lords held that, in all cases concerned with Article 8, the AIT must take full account of the family life rights of all the family members, who themselves may be British Citizens or settled here.

5. In ***EB (Kosovo) v SSHD*** [2008] UKHL 41, [2008] 3 WLR 178, Lord Bingham said:

> "It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child."

6. It should also be noted that the **Borders, Citizenship and Immigration Act 2009** at section 55, which came into force in November 2009, makes plain that, in relation to immigration and asylum matters, the Secretary of State must have regard to the need to safeguard and promote the welfare of children who are in the UK.

B.2 Criminal Convictions

7. Paragraph 364 of the **Immigration Rules** provides that:

> '…while each case will be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant facts in considering whether the presumption is out-weighed in any particular case, although it will only be in exceptional circumstances that the public interest in deportation will be out-weighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport.'

The claimant in the present case is subject to a deportation order issued under section 3(5)(a) of the **Immigration Act 1971** following his fraud conviction.

8. Thus, in the appropriate case, the right to a family life has to be balanced against the defendant's right to decide that in any given case, the deportation of someone who has criminal convictions is necessary to maintain public order and to prevent disorder and/or crime. In the recent case of ***DS (India) v SSHD*** [2009] EWCA Civ 544, the Court of Appeal dismissed an appeal in a case with at least some similarities to this one, largely because of the claimant's criminal convictions, and consequently, what was referred to as 'the resulting bias in favour of removal'.

9. In this context, it should also be noted that, with effect from 30th June 2008, paragraph 391 of the **Immigration Rules** was amended by HC 607 paragraph 40, which meant that a person deported with the kind of criminal convictions that the claimant has would be subjected to a continued exclusion of at least 10 years following the making of the deportation order. The previous rule identified a minimum period of 3 years.

10. In ***AS (Pakistan) v SSHD*** [2008] EWCA Civ 1118, Moore-Bick LJ said that a similar change in policy provided the appellant in that case with grounds for making a fresh application against his deportation order, and went on to say:

> "….the parties may think that its significance could more appropriately be taken into account by the tribunal when reconsidering the current appeal."

11. During the course of oral argument this morning, I was referred to two very recent decisions of the Court of Appeal that touch on this topic. In ***KB (Trinidad and Tobago) v SSHD*** [2010] EWCA Civ 11, the inter-play between criminal convictions and Article 8 was addressed and, in particular, whether deportation cases required a different approach from the approach to non-criminal removals. Richards LJ held that they did not. He said at paragraph 16:

> "In my judgment Mr Slater's submissions confused the question of approach with the question of weight to be given to relevant factors. Deportation cases do not call for a materially different approach from that required for ordinary removal cases. The issues arise under the same legal framework and involve the same essential question as to whether, if expulsion would interfere with rights protected by Article 8.1, such interference is proportionate to the legitimate aim pursued."

He made plain that the question was one of weight and, in particular, the weight to be given to the effect and importance of the claimant's criminal conduct.

12. In ***JO (Uganda) and JT (Ivory Coast) v SSHD*** [2010] EWCA Civ 10 a similar question arose, in the appeal of JT, as to the proper treatment of an Article 8 claim in conjunction with criminal convictions. In that case, although there was both illegal entry and criminal convictions, the Court of Appeal referred the claim back to the AIT for further consideration of the Article 8 claim. In other words, they concluded that, on the facts of that case, there was at least a realistic prospect that the Article 8 rights might outweigh both the illegal entry and the criminal convictions.

B.3 Fresh Claims

13. Paragraph 353 of the **Immigration Rules** HC 395 reads as follows:

> 'When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
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> (i) had not already been considered; and

(ii) when taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas.'

13. The right approach of the defendant and the Court in any subsequent judicial review application, in circumstances where a fresh claim had been asserted but not accepted as such by the defendant, was addressed by Buxton LJ in ***WM (DRC) v SSHD*** [2006] EWCA Civ 1495. He identified at paragraphs 6 and 7 the relevant task of the Secretary of State:

'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 judgments. 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 judgment will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material…..

7. The rule only imposes 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….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 decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in ***Bugdaycay v SSHD*** [1987] AC 514 at p 531F.'

14. When dealing with the Court's task on any subsequent judicial review application he said this:

"First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks the claim is a good one and 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……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 inquiry, 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. Secondly, 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, it will have to grant an application for judicial review of the Secretary of State's decision."

15. There are a number of cases in the judicial review/immigration context, as to the meaning of 'realistic prospect of success'. In ***AK (Sri Lanka v SSHD*** [2009] EWCA Civ 447, Laws LJ said that it meant "only more than a fanciful" prospect of success. In so doing, it seems to me, Laws LJ was only confirming the approach to this same test adopted in numerous parts of the CPR, including CPR Part 24 (Summary Judgment). As Lord Hobhouse of Woodborough put it in ***Three Rivers DC v Bank of England (No. 3)***, the criteria which the court has to apply in considering that test "is not one of probability; it is absence of reality".

16. Finally, on this topic I was referred to the speeches of the House of Lords in ***ZT (Kosovo) v SSHD*** [2009] UKHL 6. At paragraph 75 the position was summarised by Lord Brown of Eaton under Heywood in the following terms:

> "As I have said, the critical question for the court's determination in these cases is: could the AIT possibly allow an appeal against the rejection of the claim, or would it be bound to dismiss it (again, the opposite sides of the same coin)? Could the court ever reach the position of saying: we ourselves do not think an appeal to the AIT would have been bound to fail, but we think it was reasonable for the Secretary of State to decide that it would? In my opinion it could not. If the court concludes that an appeal to the AIT might succeed it must uphold the challenge and allow such an in-country appeal to be brought."

C. CHRONOLOGY

17. On 21st April 2002 the claimant arrived from Canada with a visa permitting him to stay until 19th October 2002. From the papers, it seems that he has not legally remained in the UK since that date. He had a number of convictions for fraud in Canada. The information as to those offences is sketchy, and that may be because the principal source of the information is the claimant himself. The fullest summary is set out in the determination of the AIT at paragraph 10, where it records that the claimant had a number of separate convictions in Canada; the first in March 1999 for falsification of documents, and the second in January 2001 (which is described as a 'set of convictions'), for which he received an 8 month prison sentence. Again, the offences appear to relate to the falsification of documents. It also seems that a later decision was made to deport the claimant from Canada.

18. In January 2003, the claimant underwent a traditional marriage to his wife, Fifi Ndoko, who is a refugee with indefinite leave to remain in the UK. Later that same month he was arrested for overstaying and claimed asylum. His asylum claim was refused in August 2003 and he appealed. He married Fifi Ndoko in the UK in October 2003. His appeal was dismissed in December 2003. He did not appeal further or seek judicial review. Thus, his principal claim was exhausted some six years ago.

19. In March 2004, the claimant and his wife had a son, Wegge, who suffers from *Nephrotic Syndrome*, which is a condition which affects the level of protein in the blood and has

potentially dangerous consequences for the kidneys. In May 2005, the claimant sought leave to remain in the UK on the basis of his marriage. That application, too, was subsequently refused.

20. Unhappily, at the same time, during 2005 and 2006, the claimant embarked on a lengthy series of frauds, apparently involving the Post Office. Although the specimen offences were committed in November and December 2006, the claimant admitted 78 similar offences. He was convicted on a plea of guilty on 26th February 2007 and sentenced to 18 months imprisonment. The judge at Chelmsford Crown Court, who was not apparently aware of the fraud offences in Canada, said that he had "very grave doubts" as to whether the claimant was capable of living here honestly in the future, but he made no deportation recommendation.

21. On 6th September 2007, the defendant made a decision to deport the claimant. The claimant appealed to the AIT, principally by reference to Article 8. The appeal was dismissed on 21st January 2008. It is unnecessary for me to set out large parts of that decision, but it is of some relevance to the matter before me. Accordingly, I read into the judgment paragraphs 16, 20, 24, 25 and 27 as follows:

> '16. The appellant's son Wegge is nearly aged 4. He is also a British Citizen. He has childhood Nephrotic Syndrome which is a condition that affects his kidneys and results in significant protein loss in the urine and secondary disturbances of the circulation. Dr Mervyn Jawson who is the treating consultant at the Whittington Hospital NHS Trust indicates that the appellant's son is more susceptible to infectious disease as a result of his condition. He indicates in a letter dated 9 October 2007 that Wegge receives regular treatment with steroids and hypertensive therapy and requires regular visits to the hospital for monitoring of his condition. The prognosis is apparently difficult to ascertain and it is stated in the letter that in the majority of cases the disease process tends to "burn out" after several years and so long as the child receives treatment during the period of active disease the long term outlook is good. The letter states that Wegge has frequent relapses and requires intensive treatment and frequent hospital review. The writer states that Wegge's mother needs the support of the appellant to assist in Wegge's care. A further letter dated 10 January 2008 from Dr Jawson gave greater detail about the disease and concludes that he did not consider that Wegge would be able to receive the appropriate level of medical care in the DRC…
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> 20. When dealing with the appellant's general credibility at the time of the appellant's asylum appeal Mr Kinloch, Adjudicator (as he then was) gave extensive reasons for fnding that the appellant demonstrated a lack of credibility (paragraph 13 onwards). At paragraph 19 of the determination (page 48 of the appellant's bundle) there are five clear reasons why the appellant lacked credibility. Those findings we consider are still attributable to the appellant at the present time. We consider that Judge Ball's doubts about the appellant being able to live honestly in the future also remain valid…
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> 24. We find that this appellant has lived a life of deception for any years both in Canada and in the UK. We find that there is no reason to believe his way of life has changed. We have concluded that the appellant has sought to continue in his deceit during the course of this appeal. There is also evidence that he attempted to deceive when presenting his previous asylum claim and when dealing with the

> court appointed Probation Officer and Judge in the UK criminal proceedings. We are naturally concerned that the appellant's son will grow up without his father's presence but in view of the appellant's criminality and his continuing deceptive conduct that consequence may not in this case be a negative factor.
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> 25. We have accepted that the appellant has a family and/or private life in the UK. We note that it has developed during a period when the appellant had no legal right to be present in the UK. We find that removal/deportation to DRC is in accordance with the respondent's declared intention of maintaining effective immigration control into the UK…
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> 27. We have weighed the evidence placed before us but take the view that there is very little evidence that weighs positively in the appellant's favour. We conclude that the Secretary of State's decision to deport the appellant is a proportionate decision in the context of the appellant's rights under Article 8 of the European Convention. When considering the Article 8 claim we confirm that we have applied the "stepped" approach put forward in the case the ***Razqar***.'

22. On 18th July 2008, the claimant made written submissions to the defendant asserting that, for a variety of reasons, the submissions constituted a fresh human rights claim. On 22nd September 2008, the defendant refused to accept those submissions as constituting a fresh claim. On 2nd October 2008, the claimant lodged an application for permission to apply for judicial review of the decision of 22nd September. The following month, a daughter, Kafirah was born to the claimant and his wife.

23. On 5th December 2008, the defendant issued a further refusal letter. Permission to bring this application was refused by Sir Michael Harrison on 6th February 2009. The claimant renewed his application for an oral hearing. There was then a second further refusal letter from the defendant dated 24th March 2009.

24. On 8th May 2009, following an oral hearing, Stadlen J granted permission to the claimant to apply for judicial review. In his short judgment, the judge referred to the detailed report, which I shall come to, of a Ms Cohen, a social worker and psychotherapist dealing with the claimant's family life. It was that report which had been attached to the claimant's written submissions of 18th July 2008. Stadlen J described that document as "a striking document with stark conclusions" and referred to its summary that the claimant's deportation would have "disastrous consequences" for Wegge. The judge concluded in trenchant terms that, in view of that report, and what he saw as the defendant's wholesale failure to address it, this was clearly a case in which permission for judicial review should be granted.

25. Notwithstanding the force of the judge's remarks and the claimant's solicitor's subsequent letter of 16th July 2009, the claim for judicial review was, and remains, contested by the defendant. A fourth refusal letter was sent on 3rd August 2009.

26. As I have indicated, the most recent refusal letter (the fifth in all) is dated 10th December 2009. This does not differ very greatly from the earlier letters although it does refer to the ***WM (DRC)*** case to which I have previously referred. I shall come back to the detail of that letter later in this judgment.

D. ANALYSIS

D.1 Is there new material which is significantly different to that already submitted?

27. In my judgment, there are a number of matters which are new and which are significantly different from the material previously considered by the AIT. I outline those briefly below.

28. It seems to me, just as it seemed to Stadlen J, that the principal element of the new material is the report from Ms Cohen following an interview with the claimant and his family on 27th March 2008. The report needs to be considered in full, but I note the following specific matters:

    (a) Ms Cohen's comments on the close relationship between the claimant and his son and the calming effect that the claimant has on his son, who is hyper-active because of his condition.

    (b) The reference to Fifi Ndoko, saying how difficult she finds it to look after her son on her own and the importance of the claimant in that role.

    (c) The closeness of the family unit, observed by Ms Cohen in a number of ways, and her opinion that the claimant's deportation would destroy that family life and, in particular, have a devastating effect on his son, particularly in view of his medical condition.

    (d) The equally devastating effect that deportation would have on Fifi Ndoko, given her emotional dependence on him.

    (e) Her opinion that the importance to the claimant of this settled family life would act as a disincentive to him to offend further.

    It seems to me that all of that material was new because it comprised the first detailed analysis of the claimant and his family life and pattern of living.

29. There are also other new matters raised in the submissions and later material from the claimant. There are the rights of the claimant's son, Wegge. Given the ruling in ***Beoku-Betts*** to which I have referred, all members of the family unit must be considered in any Article 8 claim. Although there is a passing reference in the AIT determination to Wegge, and indeed to the suggestion that he may do better without his father, there is no sustained analysis of his rights at all. Mr Jorro makes the point that, of course, at the time that the AIT were dealing with this matter (before ***Beoku-Betts***), the rights of children were not separately considered.

30. The same point can also be made in relation to the claimant's wife, Fifi Ndoko. It is true, as Miss Hannett has pointed out, that there is a reference in the AIT determination to her, but there is no exploration or analysis of her own rights and her own position in relation to the proposed deportation of the claimant. That is a matter, so it seems to me, that is only fully dealt with in Ms Cohen's report.

31. Finally on this topic, the claimant now has a daughter too. She is a separate individual, who, again, has rights that require to be considered under Article 8. Of course, Kafirah was not born at the time of the AIT determination so those rights were not dealt with in the original determination. Although Miss Hannett claimed that Kafirah's position was

dealt with in the refusal letter of 24th March 2009, I do not accept that. The reference to her there is extremely brief and gives no indication that there has been any consideration of Kafirah's rights separately from those of anybody else.

32. Although it is of a slightly different effect, I also accept that the change of the policy in relation to any continued exclusion – the change whereby the minimum period has gone from 3 years to 10 years – is capable of creating a significant difference for the purposes of any fresh consideration of the claimant's claim. That is really for the same reasons as Moore-Bick LJ noted in ***AS (Pakistan)***. Although I accept Miss Hannett's point that the AIT referred to the exclusion as being for "in excess of 3 years", it seems to me that that was simply a proper description of the minimum period then in force. It seems to me that a minimum period of 10 years is of a totally different nature and effect and does, therefore, amount to a significant change in the claimant's position.

33. For completeness, I should say that, although the alleged change of attitude on the part of the claimant was urged on me as a significant difference, I do not consider that – on its own - it is. That was a point which was noted, even if it was not accepted, by the AIT in the original determination. I should also add that, given the range of the claimant's previous offending in the UK, where he now wishes to remain, I would have expected nothing less. It is inevitable, as I am sure the claimant realises, that the significant damage to his credibility caused by his previous convictions cannot be repaired overnight and, therefore, his statements of future intent are of limited relevance to this application.

34. However, notwithstanding my reservation on that point, for the reasons that I have given, I accept that there is significant new material since the original determination.

D.2 (i) Has the Secretary of State asked himself the right question, i.e. that there is a realistic prospect of success applying the test of 'anxious scrutiny'?

(ii) Does the claimant have a realistic prospect of success if the matter were referred back to the AIT?

35. For the reasons set out below, I consider that the answer to the first question is 'No, the right question was not asked', and the answer to question two is 'Yes, there is a realistic prospect of success in the AIT'.

36. First, I think it is only necessary to consider the chronology to see that the defendant has not asked himself the right question. The original response was dated 22nd September 2008. It was very brief and failed to address the Cohen report at all. It was then followed by a string of further letters, four in all, each trying to make good the omissions in the previous letter. If the right question had been properly asked and 'anxious scrutiny' applied at the outset, there would have been no need for such a piecemeal approach. When taken as a whole, it seems to me, the elongated chronology alone demonstrates that the right question has never been properly considered.

37. Secondly, I am not persuaded that the last refusal letter of 10th December 2009 (on which, for perfectly understandable reasons, both parties have concentrated), asked itself the right question or properly engaged with the real issues. Although it is right that part of the letter refers to ***WM (DRC)***, there is no attempt to answer what I consider to be the critical question: "if this case were referred back to the AIT, in the light of the

new material and the existing material, does the claimant have a realistic prospect of success?". Indeed, to cite Lord Brown again, if the question is "could the AIT possibly allow an appeal?", then that is not a question which the defendant has either asked himself or attempted to answer in any of these letters.

38. Thirdly, it seems to me that the refusal letters, starting with the letter of 22nd September 2008, fail to address the principal new material advanced in support of the fresh claim, namely the Cohen report. As I have indicated, there is no mention of it anywhere in the letter of 22nd September. In addition:

    (a) In the refusal letter of 5th December 2008, the report was referred to but there was no attempt to engage with any of its findings.

    (b) There was no mention of the report in the refusal letter of 24th March 2009.

    (c) Although the letter of 10th December 2009 does, for the first time, engage with at least some of the contents of the report, it does not seem to me it provides any cogent grounds for challenging the report itself or disputing its findings.

39. The stance taken by the defendant in the letter of 10th December 2009 seems to be to suggest that Ms Cohen has been 'taken in' by a claimant with a lengthy record of dishonesty. I am bound to say that I cannot accept that this is a fair response to the report, particularly given Ms Cohen's detailed descriptions of the claimant's interaction with his son. It cannot possibly be suggested that that is something that has somehow been falsified simply to deceive Ms Cohen.

40. In addition there is a criticism of Ms Cohen for failing to address the other side of the coin, namely the public interest in the claimant's deportation. It seems to me that that is a wholly unfair criticism: that is not a matter for Ms Cohen at all. She is dealing with the claimant's family life. It is for the defendant and, subsequently now, the AIT, to reach conclusions as to the balancing exercise between the claimant's right to a family life, on the one hand, and the public interest on the other.

41. As I have indicated, the report of Ms Cohen was described by Stadlen J as "a striking document" with "stark conclusions". He concluded at the time of the permission hearing last year that that report had never been properly considered by the defendant. I share that view. It seems to me therefore, that the report must be a relevant factor in any balancing exercise and must, on its own, mean that the claimant has a more than fanciful chance of success in front of the AIT.

42. In addition, I note that in the refusal letter of 22nd September 2008, which was the original refusal letter, and the one that set the tone for the following letters, the Article 8 claim was not dealt with by reference to the AIT decision of 21st January 2008, but the decision of the adjudicator on the original claim, made as long ago as 5th December 2003. It seems to me that so much had happened since then that that was a completely false basis on which to deal with the Article 8 claim. Although later letters have moved away from that first adjudication, for the reasons I have given, it does not seem to me that there has been any real engagement by the defendant in the five refusal letters with the changing and changed nature of the claimant's family life.

43. That omission can, I think, be best illustrated by the passing references in the refusal letters to the claimant's wife and his daughter, Kafirah, with no attempt to engage with their individual Article 8 rights. Again, therefore, following ***Beoku-Betts***, that must be something which gives the claimant a more than fanciful prospect of success in front of the AIT.

44. The later refusal letters make some brief reference to the claimant's son and his medical condition and the issue as to his need for his father's presence. The defendant continues to rely heavily on the finding of the AIT that: "We are naturally concerned that the appellant's son will grow up without his father's presence, but in view of the appellant's criminality and his continuing deceptive conduct that consequence may not, in this case, be a negative factor." Miss Hannett submits that that is a finding which has already been made by the AIT, and cannot now be reviewed. I disagree: it is put only as a possibility (i.e. *may not* be a negative factor), so the new material may make a significant difference to that opinion.

45. Finally, in all of this, I remind myself that the test "realistic prospect of success" is, on any view, a relatively low one. It is the hurdle a defendant needs to clear in order to obtain unconditional leave to defend a civil action. Like Stadlen J, I cannot see how it could be said that the claimant, armed with, amongst other things, the Cohen report, did not have a realistic prospect of success in any new hearing in front of the AIT.

D.3 Summary

46. For those reasons, it seems to me that the claimant has demonstrated that the new material is significantly different to that which existed before and, when taken together with the existing material, gives him a realistic prospect of success in front of the AIT.

47. In reaching this conclusion, I have not taken Mr Jorro's proffered short-cut to the effect that, given the terms in which Stadlen J granted permission, the only real issue was whether there was anything in the subsequent refusal letter of 10th December 2009 to cause me to reach a different view to his. I have instead looked at the entire matter afresh. However, for the reasons that I have given, I find that there is nothing in that letter that leads me to any such conclusion. This is a matter which needs to be referred back to the AIT.

48. I make plain one important *caveat.* The AIT will have to perform the necessary balancing exercise. Inevitably, for the purposes of this application, I have concentrated on those new matters which may make a difference to the strength of the claimant's Article 8. But, on the other side of the scale, there are going to be the issues relating to the defendant's criminality, the presumption in relation to deportation, the difficulties with his credibility and the fact that his rights and his family's rights have been acquired throughout an illegal stay in this country, in circumstances where the claimant was always aware of the risk of deportation. All of those matters remain largely unchanged and remain on the other side when the balancing exercise comes to be reconsidered. However, for present purposes, I cannot conclude that those matters, of themselves, would automatically and inevitably defeat the claimant's claim.

E. CONCLUSIONS

49. For the reasons I have given, I grant judicial review of the decision of 22nd September 2008, as advanced and re-stated in the subsequent refusal letters, up to and including the letter of 10th December 2009, to refuse to consider the application of 18th July 2008 as a fresh claim. I find that it was a fresh claim and should, therefore, be referred back to the AIT for determination.

50. I would add one final observation. One of the main causes of case-overload in the Administrative Court is the endless cycle of fresh applications and reconsiderations sought by disappointed claimants in immigration and asylum cases. The vast majority of these claims are hopeless and serve only to clog up the lists and delay the determination of other, more deserving applications.

51. On the other side of the coin, however, there will sometimes be claims for judicial review which are plainly well-founded. In those circumstances, particularly where a judge, following an oral hearing, has given permission to apply for judicial review in trenchant terms, the defendant needs to consider carefully whether it would be a better use of resources to concede the claim for reconsideration and let the matter be referred back to the AIT. It seems to me that, in all the circumstances, that is precisely what should have happened here.