Case No: (1)CO/5119/2009 and (2)CO/12009/2009

Neutral Citation Number: [2010] EWHC 718 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2010

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
THE HON MR JUSTICE FOSKETT

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Between :

The Queen on the application of **(1) ZA (Nigeria)** **(2) SM (Congo)**	**Claimants**
- and -	
(1) Secretary of State for the Home Department **(2) Secretary of State for the Home Department**	**Defendants**

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- -

(1) Mr M.S. Gill QC and Mr D Bazini (instructed by **Trott & Gentry**) for the **Claimant**
(2) Miss N Nnamani (instructed by **Nathaniel & Co** for the **Claimant**
(1) and **(2) Mr D Blundell** (instructed by **the Treasury Solicitor**) for the **Respondents**

Hearing date: 16th March 2010

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Judgment

This is the judgment of the Court

Introduction:

1. The first question, which is common to each of these claims for judicial review, is whether the Secretary of State is entitled to refrain from making an appealable immigration decision in response to an asylum claim or a human rights claim which he judges rationally to be merely repetitious of an earlier claim whose rejection has been unsuccessfully challenged in a concluded appeal. This requires an analysis of Part 5 of the Nationality Immigration and Asylum Act 2002, consideration of the recent Supreme Court decision of the House of Lords in *BA (Nigeria) v Home Secretary* [2009] UKSC 7; [2009] 3 WLR 1253, and an attempt to rationalise that decision with the earlier Supreme Court decision in *ZT (Kosovo) v Home Secretary* [2009] UKHL 6; [2009] 1 WLR 348.

Facts:

2. SM is a national of the Democratic Republic of the Congo, who arrived in the United Kingdom on a false passport on 7th May 2007 and applied for asylum. His application was refused on 4th June 2007 and on 5th June 2007 he was given formal notice of Refusal of Leave to Enter with a decision to make removal directions. His appeal was dismissed by an Immigration Judge on 28th August 2007. Reconsideration of this decision was refused on 28th November 2007. On 24th July 2008, his former representatives made further submissions. In early 2008 he had entered into a relationship with a woman who was a refugee from the Democratic Republic of the Congo and with whom he underwent a traditional wedding ceremony on 31st January 2009. The further submissions were refused on 30th April 2009. He was detained on 20th May 2009. Further submissions based on Article 8 of the European Convention on Human Rights were made on 26th May 2009, and the present judicial review proceedings were begun on 27th May 2009. On the following day an injunction was obtained restraining his removal. A further letter dealing with and rejecting the Article 8 submission was served on 22nd June 2009. Blake J granted permission on 8th July 2009. He indicated that it was arguable on the basis of the Court of Appeal decision in *BA (Nigeria)* [2009] EWCA Civ 119; [2009] QB 686, that SM had an in-country appeal, although there was force in the Secretary of State's submission that the Article 8 claim did not outweigh the need for immigration control.

3. ZA is a Nigerian national, who arrived illegally in the United Kingdom in April 2002. He sought asylum on 28th May 2003 after he had been arrested for working illegally. The Secretary of State rejected his claim on 5th June 2003, on which date the Secretary of State gave him written notice in compliance with the Immigration (Notices) Regulations 2003 of a decision to remove him as an illegal entrant or other immigration offender. On 13th August 2003, his appeal was dismissed by an adjudicator. At some stage he absconded and he was recorded as an absconder on 22nd June 2005.

4. On 20th September 2008, ZA was arrested for suspected immigration offences and possession of drugs, although no charges were ultimately brought against him. On 23rd September 2008, his representatives made further submissions based on Article 8 of the European Convention on Human Rights and claimed that he fell within the Secretary of State's Legacy Programme. The Secretary of State rejected these further

submissions in a letter dated 24th September 2009. Removal directions were set for 17th October 2009, but these were cancelled when he began judicial review proceedings on 14th October 2009. On 11th December 2009, Dobbs J refused permission finding that the claim was hopeless. Further removal directions were set for 21st December 2009, but ZA renewed his application for permission orally and an injunction was granted preventing his removal. We grant his renewed application for permission to bring these proceedings.

5. Each claimant contends that they have a right of appeal against the Secretary of State's rejection of their Article 8 claims. The Secretary of State contends that he has made no immigration decision which attracts a right of appeal and that he is not obliged to make one. He relies on the original decisions to remove the claimants.

Legislation:

6. Section 82 of the 2002 Act enables a person to appeal to the Tribunal "where an immigration decision is made in respect of [him]". Section 82(2) defines "immigration decision" to include (a) refusal of leave to enter the United Kingdom; (b) refusal of entry clearance; (c) refusal of a certificate of entitlement under Section 10 of the Act; (d) and (e) refusal to vary or variation of a person's leave to enter or remain in the United Kingdom if the result is that the person has no leave to enter or remain; (f) revocation of indefinite leave to enter or remain; (g) to (i) various removal decisions; (j) a decision to make a deportation order; and (k) a refusal to revoke a deportation order. Thus, subject to section 83 which is not material for present purposes, a decision rejecting an asylum or human rights claim is not itself an immigration decision under section 82. It is a consequent refusal, variation, revocation or removal decision which is an immigration decision which generates a right of appeal.

7. Section 84 provides grounds upon which an appeal against an immigration decision must be brought. These include, by section 84(1)(g) "that removal of the appellant … in consequence of the immigration decision … would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

8. Section 92 has general provisions for appeals from within the United Kingdom. It provides that a person may not appeal under section 82(1) while he is in the United Kingdom, unless his appeal is of a kind to which section 92 applies. The section applies to appeals against some of the particular immigration decisions in section 82(2), but those do not apply in the present cases. It also, by section 92(4), applies "to an appeal against an immigration decision if the appellant (a) has made … a human rights claim while in the United Kingdom". Section 113 defines a human rights claim as "a claim made by a person to the Secretary of State … that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with his Convention rights". By section 12(3) of the Immigration, Asylum and Nationality Act 2006, this definition in section 113 of the 2002 Act is prospectively to be qualified by amendment so as not to include "a claim which, having regard to a former claim, falls to be disregarded for the purpose of this part in accordance with immigration rules". The amendment has yet to be brought into force, and Lord Hope said in paragraph 19 of his judgment in *BA (Nigeria)* that it was to be ignored for present purposes.

9. The Secretary of State, through Mr Blundell, contends that section 92(4) of the 2002 Act does not give the present claimants the right of appeal because, although they may have made a human rights claim, the Secretary of State has not made an appealable immigration decision and is not obliged to do so.

10. Section 94 of the 2002 Act applies to an appeal under section 82(1) where the appellant has made one or both of an asylum claim or a human rights claim. By section 94(2) a person may not bring an appeal to which the section applies in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims is or are clearly unfounded. Sections 95 and 94(9) taken together provide that a person who is outside the United Kingdom may not appeal under section 82(1) on the ground that removal would breach his rights under the European Convention on Human Rights, unless he is a person in relation to whom the Secretary of State has issued a certificate under section 94. In that event, such an appeal is to be considered as if he had not been removed from the United Kingdom. Section 96 provides that an appeal under section 82(1) against an immigration decision may not be brought if the Secretary of State or an immigration officer certifies that the claim relies on a matter that could have been raised in an appeal against an earlier immigration decision where the person was notified of a right of appeal against that earlier decision, whether or not an appeal was brought.

11. In *R v Secretary of State ex parte Onibiyo* [1996] QB 768, an applicant whose original asylum claim had been rejected by the Secretary of State and on appeal made a fresh claim based on further material. The Secretary of State considered that the basis of the claim had not altered and indicated that, since he had made no fresh decision, there was no available avenue of appeal. The Court of Appeal, considering the matter under earlier legislation which did not contain provisions equivalent to those in sections 94 and 96 of the 2002 Act, held that it was open to an applicant to make more than one asylum claim. The administrative judgment whether a fresh claim had been made should be assimilated to the class of judgment reviewable by the court only on rationality grounds. Sir Thomas Bingham MR, giving the single substantive judgment said, at page 783B:

> "It was accepted for the applicant that a fresh "claim for asylum" could not be made by advancing an obviously untenable claim or by repeating, even with some elaboration or addition, a claim already made, or by relying on evidence available to the applicant but not advanced at the time of an earlier claim. There had, counsel acknowledged, to be a significant change from the claim as previously presented, such as might reasonably lead a special adjudicator to take a different view. If the fresh claim depended on new evidence, then it had to satisfy tests, analogous to *Ladd v Marshall* [1954] 1 WLR 1489, of previous unavailability, significance and credibility."

Sir Thomas Bingham then quoted and agreed with a passage from the judgment of Stuart-Smith LJ in *R v Secretary of State ex parte Manvinder Singh* [1996] Imm AR 41. He was content with the formulation that a change in the character of the application was required, provided that it was not taken to mean that there must necessarily be a change in the nature of the persecution said to be feared. The acid

test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim.

12. The current version of paragraph 353 of the non-statutory Immigration Rules reflects the *Onibiyo* decision. It provides:

> "When a human rights or an 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 which has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

13. In *Cakabay v Secretary of State (No 2)* [1999] Imm AR 176, the Court of Appeal held that there was no right of appeal to the appellate authorities to challenge a decision of the Secretary of State that further evidence did not in a particular case constitute a fresh application for asylum. Such a decision was capable of challenge in judicial review proceedings on rationality grounds. The issue fell to be considered under the provisions of the Asylum and Immigration Appeals Act 1993. Schiemann LJ said at page 180 that the statute made no express provision as to what was to be done in the case of repeated claims for asylum by the same person. The second claim may be a repetitious claim identical with the first, or may be a different fresh claim. It was common ground that a fresh claim attracted all the substantive and procedural consequences of an initial claim whereas a repetitious claim did not. Schiemann LJ then said at page 181:

> "In the case of a repetitious claim no more is required to be done: the first decision has ensured that the United Kingdom has complied with its obligations under the Convention. Section 6 of the 1993 Act creates no inhibition on the claimant's removal: the Secretary of State has on the occasion of his decision on the first claim decided the repetitious claim. So far as the decision on the claimant's repetitious application for leave to enter is concerned, the claimant will be told that leave has already been refused and that there is no need for any new decision."

It was submitted on behalf of the claimant that categorisation by the Secretary of Sate of a claim as repetitious rather than fresh was in substance a refusal of leave to enter. Of this submission, Schiemann LJ said at page 182:

> "I accept that the substantive effect of categorising the claim as repetitious is that the claimant is left in the position that he has no leave to enter. That was the position in which he found himself as a result of the decision on his first claim and the negative results of the appellate and judicial review processes in relation to that first claim. This fact however seems to me of no help one way or the other in deciding whether Parliament has given a right of appeal on the merits to one who is disadvantaged by the Secretary of State's categorisation decision."

He went on to hold at page 185 that, potentially severe though the consequences might be, Parliament had not provided for an appeal on the merits against a categorisation decision. A challenge to the legality of the decision was sufficient and there was no need to create also the possibility of an appeal on the merits of the decision.

14. Subject to decisions of the House of Lords or the Supreme Court, *Cakabay* is binding on this court. It is an important plank of Mr Blundell's submission that the Secretary of State is not obliged to make an appealable immigration decision to determine that further submissions do not constitute a fresh claim, and that, if there is no appealable immigration decision, sections 92(4), 94 and 96 do not apply.

15. *ZT (Kosovo) v Home Secretary* was a decision of the House of Lords under the 2002 Act in which the applicant's asylum and human rights claims had been rejected and certified under section 94(2) as being clearly unfounded. He made two further submissions, but the Secretary of State maintained her certification of the claims as clearly unfounded. The Court of Appeal allowed the applicant's claim for judicial review, holding that she should have followed the procedure in rule 353 of the Immigration Rules to determine whether these were fresh claims. The House of Lords held by a majority, Lord Hope dissenting, that rule 353 applied to the further submissions. The Secretary of State had been wrong to apply section 94(2) rather than rule 353, but the "clearly unfounded" test in section 94(2) was more generous to the applicant than the "realistic prospect of success" test in rule 353, so that the Secretary of State would inevitably have come to the same conclusion.

16. In paragraph 8 of his opinion, Lord Phillips of Worth Matravers referred to the decision of the Court of Appeal in *WM (Democratic Republic of the Congo) v Secretary of State* [2007] Imm AR 337, which related to refused asylum applications in cases where the Secretary of State had not issued certificates under section 94 of the 2002 Act. Further representations with fresh evidence had been made to the Secretary of State. "The Secretary of State had, *quite correctly*, treated those further representations as being covered by rule 353 of the Immigration Rules" (our emphasis). In paragraph 16, Lord Phillips reached the explicit conclusion that the Court of Appeal was correct to proceed upon the basis that rule 353 applied to the further submissions.

17. Lord Hope dissented on the issue of the application of rule 353. He said at paragraph 27 that the answer to the problem was really quite simple once the true purpose of rule 353 was understood. He said in paragraph 37 that the need for rule 353 arises only where, because the claim is no longer alive and an appeal is no longer pending, a determination that this is a fresh claim is required for the person to appeal. He said in paragraph 43 that:

> "… it was necessary to provide a means for determining whether, if the Secretary of State was not persuaded to alter the decision that had already been taken, the further submissions amounted to a fresh claim. If they did not, there would be no reason for re-opening the matter. But if they did amount to a fresh claim, they would have to be dealt with as such and the right of appeal under Part 5 of the 2002 Act would then have to be made available. Rule 353 provides a mean of achieving this by franking the further material as requiring a fresh determination in accordance with the procedures that the statutes lay down."

Mr Blundell points out that this passage is to substantially the same effect as the passages from *Cakabay* to which we have referred. A decision under rule 353 that further submissions do not amount to a fresh claim does not by itself generate, and does not need to generate, an appealable immigration decision.

18. In paragraph 59 of *ZT (Kosovo)*, Lord Carswell explicitly recognised the purpose of rule 353 and considered that, where there is no certificate under section 94, or decision under the rule that the submission of additional material did not constitute a fresh claim, no right of appeal arose. He said:

> "A claimant may seek to adduce further material in support of his claims which may or may not constitute a significant addition to those which he had earlier submitted without success. To meet this situation rule 353 was made … This is relatively straight forward to operate where the Secretary of State has not given a certificate under section 94, its object being to obviate the necessity for her to reconsider every further submission as a fresh claim attracting the full panoply of the appeal process."

19. Lord Brown of Eaton-under-Heywood agreed that Rule 353 applied to further submissions advanced in respect of a claim which had been certified under section 94 (paragraph 70). He said at paragraph 74 that the object of certification under section 94 is to shut out in-country appeals in the case of hopeless claims. The object of rule 353, at the same time as enabling truly fresh claims to be brought and, if rejected, nevertheless to proceed to appeal, is to prevent fresh in-country rights of appeal arising in the case of reasserted but still hopeless claims. In both cases (i.e. consideration under both section 94 and rule 353) it would be appropriate, even though ex hypothesi the claims are being rejected by the Secretary of State, to allow them to proceed to an in-country appeal if there is any reasonable chance of an appeal being successful, but not otherwise.

20. Lord Neuberger, in paragraph 94, agreed with Lord Phillips, Lord Carswell, Lord Brown and the Court of Appeal, that the Secretary of State should have considered the further submissions under rule 353. Thus the majority decision was that the Secretary of State should have addressed the further submissions under rule 353, which necessarily therefore had its part to play. It appears to have been the unanimous opinion that a decision adverse to the applicant under rule 353 did not attract a right of appeal. This, in our judgment, appears to accord with the wording and structure of the relevant sections of the 2002 Act and in particular section 92(4) which requires not only an asylum claim or a human rights claim, but an immigration decision under section 82(2). On the face of it, an adverse decision under rule 353 that further submissions are not a fresh claim is not, and does not require, an immigration decision. Further, if there is no right of appeal, sections 94 and 96 do not arise for consideration.

21. In *BA (Nigeria)*, there *were* immigration decisions in each of the cases under consideration. The applicants' asylum or human rights claims had been rejected and appeals had been unsuccessful. The Secretary of State made deportation orders against them. They each made further representations seeking to have the deportation orders revoked. Those representations were rejected. They sought judicial review of the Secretary of State's refusal to revoke the deportation orders, contending that they had in-country rights of appeal under section 92(4)(a) because they had made an asylum claim or a human rights claim within that sub-section. The judge held that only a first or fresh claim gave an in-country right of appeal under section 92(4)(a). The Court of Appeal allowed the claimants' appeals. The Supreme Court by a majority, Baroness Hale of Richmond dissenting, dismissed the Secretary of State's appeal. The court held:

> " that the 2002 Act contained a range of powers which enabled the Secretary of State or an immigration officer to deal with the problem of repeat claims, including, under sections 94 and 96, the power to issue certificates preventing a person raising an asylum or immigration claim which was clearly unfounded or raising an issue which ought to have been dealt with on an earlier appeal. Since, when read as a whole, the carefully interlocking provisions of the 2002 Act set out a complete code for dealing with repeat claims, there was no need to read words into the Act so as to exclude further claims which had not been held under rule 353 of the Immigration Rules to be fresh claims. Rejected claims which were not certified under sections 94 or 96 should be allowed to proceed to appeal in-country under sections 82 and 92, whether or not they were accepted by the Secretary of State as fresh claims."

Both *Cakabay* and *ZT (Kosovo)* are referred to in the judgments without any suggestion that they were wrongly decided, although on the face of it, as we think, *BA (Nigeria)* and *ZT (Kosovo)* do not stand obviously together as to the purpose and effect of rule 353.

22. Lord Hope of Craighead gave the leading judgment. Lord Scott of Foscote and Lord Rodger of Earlsferry agreed with Lord Hope, as did Lord Brown, who gave a substantive judgment. Lord Hope said in paragraph 2 that the question was whether

the expression "an asylum claim or a human rights claim" in section 92(4)(a) includes any second or subsequent claim that the asylum seeker may make, or only a second or subsequent claim which the Secretary of State has accepted as a fresh claim under rule 353. The question thus was not whether an adverse decision under rule 353 would necessarily generate an appealable immigration decision. On the facts of *BA (Nigeria)*, there was an appealable immigration decision under section 82(2)(k) in the Secretary of State's refusal to revoke the deportation orders – see paragraph 14 of Lord Hope's judgment.

23. Lord Hope set out the competing arguments in paragraphs 14-23 of his judgment. The Secretary of State's submissions concentrated on the extent of the expression "an asylum claim or a human rights claim" in section 92(4)(a), arguing that it did not extend to further submissions which did not amount to a fresh claim. Ms Laing QC for the Secretary of State relied on *Cakabay* and *Onibiyo*. She submitted that the approach in *Onibiyo* should apply to the words in section 92(4)(a). The opposing submission was that the legislative context had changed from that of the 1993 Act by the inclusion of the certification provisions in sections 94 and 96 of the 2002 Act, and human rights considerations would not be available on an out of country appeal if there had been no certificate under section 94(2) to trigger the operation of sections 94(9) and 95.

24. Lord Hope said in paragraph 27 that the scheme of the 2002 Act was not the same as that of the 1993 Act to which Lord Bingham had addressed himself in *Onibiyo*. The 1993 Act had no provision to prevent abuse. But the new system contained a range of powers to enable the Secretary of State or an immigration officer to deal with repeat claims. Lord Hope referred to sections 94(2) and 96. The words "an asylum claim or a human rights claim" were not qualified, and there was no need for a qualification such as was found in *Onibiyo* (paragraph 29). Further, the construction contended for by the Secretary of State would deprive the claimant of the benefit of section 94(9) on an out of country appeal (paragraphs 30, 31).

25. Lord Hope summarised his opinion in paragraph 33 of his judgment as follows:

> "There is no doubt, as I indicated in *ZT (Kosovo) v Secretary of State for the Home Department* [2009] 1 WLR 348, para 33, that rule 353 was drafted on the assumption that a claimant who made further submissions would be at risk of being removed or required to leave immediately if he does not have a "fresh claim". That was indeed that case when this rule was originally drafted, as there was no equivalent of section 92(4) of the 2002 Act. But Mr Hussain's analysis has persuaded me that the legislative scheme that Parliament has now put in place does not have that effect. Its carefully interlocking provisions, when read as a whole, set out the complete code for dealing with repeat claims. Rule 353, as presently drafted, has no part to play in the legislative scheme."

26. Baroness Hale, who dissented, explained why it was common ground that sections 94 and 96 were not apt to cater for repetitious claims. Lord Brown observed that the cases before the court were agreed not to be certifiable under those sections. But he accepted that making a repeat claim does involve making a claim for the purpose of

section 92(4)(a) so that the Secretary of State could certify such a claim as clearly unfounded under section 94. His main reason for agreeing with Lord Hope was because Parliament had in the 2002 Act incorporated express provisions to deal with abusive claims, but split up different aspects of possible abuse between sections 94 and 96. The clear advantage of dealing with repeat claims in this way, rather than by rule 353, was because section 95 and 94(9) enabled appeals on human rights grounds to be brought out of country.

27. The proposition that rule 353 has no part to play in the legislative scheme does not chime with the enactment of section 53 of the Borders Citizenship and Immigration Act 2009, which will amend section 31A of the Senior Courts Act 1981 to enable transfer from the High Court to the Upper Tribunal of judicial review applications where "the application calls into question a decision of the Secretary of State not to treat submissions as an asylum claim or human rights claim … wholly or partly on the basis that they are not significantly different from material that has previously been considered …". This provision has not yet been brought into force, but its prospective operation is not, we think, to be ignored in the way that the as yet unimplemented amendment to section 113 of the 2002 Act is to be ignored, for it is predicated on the continued useful operation of rule 353.

28. ZA's and SM's recent submissions have been rejected by the Secretary of State on the basis that they are not fresh claims. There have been no certificates under sections 94 or 96 of the 2002 Act. They each contend that, by virtue of *BA (Nigeria)*, they have an in-country right of appeal. Mr Gill QC also submits on behalf of SM that the rejection of his Article 8 submissions constitutes a refusal of leave to enter the United Kingdom and a decision to remove him, each of which is an immigration decision under section 82(2). Mr Gill accepts, as we understand him, that an expansive reading of *BA (Nigeria)*, cannot be reconciled with *ZT (Kosovo)* and he submits that *BA (Nigeria)* must be taken as having departed from *ZT (Kosovo)*.

29. Mr Blundell submits that *BA (Nigeria)* decided the location of a right of appeal which was in that case undisputed because there had been a refusal to revoke a deportation order. It did not address the question when a right of appeal arises. He submits that a right of appeal does not arise unless there has been an immigration decision. Where there has been no fresh claim, there is no need for the Secretary of State to make an immigration decision and rule 353 provides the mechanism for determining whether there has been a fresh claim. If there is a fresh claim, the Secretary of State will make an immigration decision in order to generate a right of appeal, but not otherwise, and he has not done so in these cases. Sections 94 and 96 do not provide an answer to the abuse of repetitious claims because those sections concern appeals and there can be no appeal (and therefore no certificate) if there is no immigration decision. Mr Blundell submits that this analysis accords with the decisions in *Cakabay* and *ZT (Kosovo)* – as we think it does – and that *BA (Nigeria)* should be seen as limited to the question in issue which was whether, where an immigration decision had been made, there could be an in-country appeal if the further submissions did not constitute a fresh claim.

30. We have not found this an easy matter to resolve. The difficulty in large part is derived from the fact that Lord Hope in *BA (Nigeria)* made the general statement that the 2002 Act contains a complete code for dealing with repeat claims and that rule 353 has no part to play in the statutory scheme, whereas the actual decision in *BA*

(Nigeria) was limited to rejecting the contention that "an asylum claim or a human rights claim" did not include a second or subsequent claim which was not a fresh claim. The decision did not address specifically the question whether a decision that a second or subsequent claim is not a fresh claim is an immigration decision, which plainly, taken alone, it is not.

31. It is, we think, plain that an expansive application of paragraph 33 of *BA (Nigeria)* is not consistent with *ZT (Kosovo)*, the effect of which was both that rule 353 had a useful and necessary existence, and that a decision that a renewed submission is not a fresh claim does not have to generate an appealable immigration decision. We do not accept Mr Gill's submission that *BA (Nigeria)* must be taken to have departed from *ZT (Kosovo)*. The judgments come nowhere near saying so, and we do not think that departure from so recently a decided case can be implied, especially where there is explicit reference to *ZT (Kosovo)* in more than one of the judgments in *BA (Nigeria)*.

32. In our judgment, resolution of the dilemma is to be found in the limited ambit of the actual decision in *BA (Nigeria)*. Certainly, where there is an appealable immigration decision, on a renewed asylum or human rights submission there will be an in-country appeal under section 92(4), unless the Secretary of State has certified under section 94(2) or 96. Where however, as in the present cases, there has been no appealable immigration decision upon a renewed submission which the Secretary of State has decided is not a fresh claim, there is no right of appeal, but the decision may be challenged in judicial review proceedings on rationality grounds. Rule 353 has no part to play in determining whether a renewed submission is an asylum claim or a human rights claim – which is what *BA (Nigeria)* decided. It does have a part to play in determining whether the Secretary of State should make an appealable immigration decision consequent on the renewed submission – which *BA (Nigeria)* did not address.

33. We should say for completeness (a) that we do not read the Secretary of State's letter of 22nd June 2009 and in particular its paragraph 29 in the case of SM as constituting a fresh refusal of leave to enter; and (b) that paragraph 126 of the decision of the European Court of Human Rights in *Vilvarajah v United Kingdom* [1991] EHRR 248 is sufficient to dispose of Ms Nnamani's muted suggestion that ZA's Article 8 claim may not, on the Secretary of State's case, have been amenable to sufficient judicial scrutiny.

34. For these reasons therefore, in our judgment, the claims fail in so far as they seek to contend that the Secretary of State's decisions give the claimants an in-country right of appeal.

The individual judicial review claims

35. The primary basis of the present proceedings having been resolved against each claimant, each seeks judicial review of the grounds upon which the Secretary of State decided that their submissions did not constitute fresh claims. Certain issues are common to each claimant.

36. Rule 353 is set out in paragraph 12 above. The required approach to issues of this nature is set out in *WM (DRC) v The Secretary of State for the Home Department* [2006] EWCA Civ 1495, where the Court of Appeal considered the circumstances in which it was legitimate to say that a "fresh claim" within rule 353 was made. Buxton LJ (with whom Jonathan Parker and Moore-Bick LJJ agreed) said this:

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

In relation to how the court, when reviewing a decision of the Secretary of State as to whether a fresh claim exists, should approach the matter, it was said that the questions to be asked and answered were these:

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

37. That approach must now be read in the light of the *ZT (Kosovo) v Secretary of State for the Home Department*, where differing views were expressed about whether there was a material difference between the "clearly unfounded" test under section 94 and the "no realistic prospects of success" test under rule 353, the view of the majority being that there was no material difference. The majority of the House of Lords were of the view that for the court to be satisfied that "anxious scrutiny" had been shown by the Secretary of State it had to ask itself the question of whether, in its own view, the claim has a realistic prospect of success. The matter was put thus by Lord Phillips of Worth Matravers (with whom on this issue Lords Brown of Eaton-under-Heywood and Neuberger of Abbotsbury agreed):

> "Must the court substitute its own view of whether the claim … has no realistic prospect of success, for that of the Secretary of State or is the approach the now familiar one of judicial review that involves the anxious scrutiny that is required where human rights are in issue? [The Claimant] is seeking judicial review and thus I would accept that, as a matter of principle, the latter is the correct approach. I consider, however, that in a case such as this, either approach involves the same mental process."
>
> …
>
> Where … there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational.

38. Each Claimant seeks to rely upon Article 8 and, as each contends, the disproportionate interference with their rights to a family life (and to the rights to a family life of others with whom they are associated) which would be caused by their exclusion from the United Kingdom.

39. The principles applicable to the approach to be adopted to issues of this nature has been the subject of authoritative consideration in recent years. We will refer briefly to the principal cases upon which, to a greater or lesser degree, each claimant and the Secretary of State places some reliance.

40. In *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, in which the opinion of the Committee was delivered by Lord Bingham of Cornhill on 21 March 2007, the following was stated to be the ultimate question:

> "In an article 8 case ... the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8."

41. In *Chikwamba v Secretary of State for the Home Department* [2008] 1 WLR 1420, Lord Brown of Eaton-under-Heywood, with whom all members of the House agreed, in an opinion delivered on 25 June 2008, referred to the Secretary of State's Asylum Policy Instruction on article 8 which, under the heading "Consideration of Article 8 Family Life Claims", contains the following:

> *"Is the interference proportionate to the permissible aim?* … In many cases, refusal or removal does not mean that the family is to be split up indefinitely. The … policy is that if there is a procedural requirement (under the Immigration Rules, extra-statutory policies or concessions) requiring a person to leave the UK and make an application for entry clearance from outside the UK, such a person should return home to make an entry clearance application from there. In such a case, any interference would only be considered temporary (and therefore more likely to be proportionate). A person who claims that he will not qualify for entry clearance under the rules is not in any better position than a person who does qualify under the rules—he is still expected to apply for entry clearance in the usual way, as the entry clearance officer will consider article 8 claims in addition to applications under the rules. See *Ekinci* … In addition, it may be possible for the family to accompany the claimant home while he makes his entry clearance application, in which case there will be no interference at all. For example, where a claimant is seeking to remain here on the basis of his marriage to a person settled in the UK, the policy is that they should return home to seek entry clearance to come here as a spouse under the relevant immigration rule. Where the spouse can accompany the claimant home while he makes his application, there will be no interference. Where this is not possible, the separation will only be temporary. The fact that the interference is only for a limited period of time is a factor

> that is likely to weigh heavily in the assessment of proportionality."

In relation to that policy Lord Brown said this:

> " ... it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad. Besides the considerations already mentioned, it should be borne in mind that the 1999 Act introduced one-stop appeals. The article 8 policy instruction is not easily reconcilable with the new streamlined approach. Where a single appeal combines (as often it does) claims both for asylum and for leave to remain under article 3 or article 8, the appellate authorities would necessarily have to dispose substantively of the asylum and article 3 claims. Suppose that these fail. Should the article 8 claim then be dismissed so that it can be advanced abroad, with the prospect of a later, second section 65 appeal if the claim fails before the entry clearance officer (with the disadvantage of the appellant then being out of the country)? Better surely that in most cases the article 8 claim be decided once and for all at the initial stage. If it is well founded, leave should be granted. If not, it should be refused."

42. In *Beoku-Betts v Secretary of State for the Home Department* [2009] 1 AC 115, in opinions delivered on the same day as those in *Chikwamba*, Lord Brown of Eaton-under-Heywood, with whom again all members of the House agreed, said this:

> "20. The appellant submits that the legislation allows, indeed requires, the appellate authorities, in determining whether the appellant's article 8 rights have been breached, to take into account the effect of his proposed removal upon all the members of his family unit. Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims.
>
> ...
>
> 43. ... Once it is recognised that ..."there is only one family life", and that, assuming the appellant's proposed removal would be disproportionate looking at the family unit as a whole, then each affected family member is to be regarded as a victim, section 65 seems comfortably to accommodate the wider construction.

> 44. I would accordingly adopt the wider construction to section 65 contended for by the appellant ....”

43. In *EB (Kosovo) v Secretary of State for the Home Department* [2009] 1 AC 1159, in opinions also given on the same day as those in *Chikwamba* and *Beoku-Betts*, Lord Bingham of Cornhill said this:

> “Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. 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. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.”

44. There is no need to extend this judgment by reference to any further authorities or illustrations of the approach to be adopted. As we have indicated, each party, including the Secretary of State, has made reference, to a greater or lesser degree, to the statements of principle to which we have referred.

SM’s case

45. We have set out a brief summary of his immigration position in paragraph 2 above. SM, who was born on 15th April 1977, did not claim in his original asylum claim that he had any family ties in the United Kingdom. This was reflected in the initial refusal letter of the Secretary of State and in the ‘Determination and Reasons’ for the dismissal of his appeal by the Immigration Judge in August 2007. On the merits of his appeal the Immigration Judge said that, having considered the evidence as a whole, he found “that the core of the appellant’s account of persecution lacks credibility and is a fabrication designed to gain access to the United Kingdom.”

46. In a letter dated 24th July 2008 his former solicitors made further representations to the Secretary of State submitting that further information about the situation in the Democratic Republic of Congo showed that it would be unsafe for him to return and invited the Secretary of State to grant him leave to remain in the United Kingdom or to treat the letter as a fresh claim for asylum, drawing attention to the case of *WM(DRC)*. Those solicitors also wrote on 28th August 2008 requesting permission for SM to be able to work.

47. That correspondence was responded to substantively in the letter from the United Kingdom Border Agency dated 30th April 2009. In relation to the question of whether the new information was sufficient to make the representations a "fresh claim" and/or whether it created a realistic prospect of success before an Immigration Judge, the letter concluded that it did neither. Reference was made to the Operational Guidance Note for the Democratic Republic of Congo dated 23rd December 2008 which suggested that failed asylum seekers did not face a real risk of persecution or serious harm and drew attention to the proposition that the letter provided no evidence to show that SM faced risks on his return. The conclusion was that the Secretary of State had decided not to reverse the decision on the earlier claim and that the further submissions did not amount to a fresh claim.

48. Whilst the decision reflected in that letter is the subject of challenge in these proceedings, we are quite unable to see how there could be any sustainable complaint about it. It addressed the relevant issue and gave an obviously sustainable answer to it.

49. It was that response that elicited further representations on SM's behalf from new solicitors instructed in May 2009. Those solicitors wrote to the UK Border Agency on 26th May 2009 raising for the first time the suggestion that SM had now established a private life in the United Kingdom by virtue of his marriage and cohabitation with a recognised refugee from the Democratic Republic of Congo who (it seems, coincidentally) arrived in the UK on the same day as SM, namely 7th May 2007. The suggestion in the letter and the material accompanying the letter was that they went through a traditional marriage on 31 January 2009.

50. The letter asserted that "in the years since his arrival in the UK SM has established [a] substantial private life in the UK and that his removal would have a disproportionate interference with his right to private life as protected under Article 8…". Although no reference was made in that letter to the situation in the DRC, it seems that on 28th May 2009 his solicitors made further representations saying that he would not be safe if he returned to the DRC (relying on an article in *The Guardian*) and on 1st June 2009 further newspaper articles were submitted concerning men who had been returned to the DRC. Material was also advanced showing his participation in protests and involvement in what was called the 'African Congress Association'.

51. These representations were responded to on behalf of the Secretary of State in a detailed letter dated 22nd June 2009. So far as the situation in the DRC was concerned, the letter (i) referred to the Country Guidance case of *BK(failed asylum seekers)* [2007] UKAIT 00098, subsequently upheld by the Court of Appeal, in which the veracity of accounts of detention and torture were considered unreliable and (ii) asserted also that untested newspaper accounts reflected no more than anecdotal evidence which would not be likely to have a material effect on SM's case. The letter contained a closely argued refutation of the assertion effectively made on his behalf that he would risk persecution or serious harm if returned to the DRC and concluded that the new information advanced about this created no realistic prospect of success before an Immigration Judge. The overall conclusion on this aspect of the representations made on SM's behalf was that those representations failed to meet the requirements of rule 353.

52. Having reviewed the material upon which the Secretary of State formed this view on this aspect of SM's case, we agree with the analysis to which we have referred and consider that the conclusion was entirely justified.

53. Turning to the Article 8 claim, the Secretary of State's response is encapsulated in paragraphs 17, 19, 20 and 22 of the letter to which have referred. We set them out in full as follows:

> "17. On the basis of [his partner's] account, it appears that she and your client had been living together for nearly 4 months at the time of his detention, following the development of their relationship over the previous year and some limited previous acquaintance. The Secretary of State therefore accepts that your client and [his partner] have established family life together. Clearly your client's removal to the DRC would interfere with that family life, since [she] is a refugee from that country and could not be expected to accompany him. The question that arises is whether the family life between them, whether viewed from the perspective of your client or [his partner], is such that your client's removal would amount to a disproportionate interference with the family life of either or both.
>
> …
>
> 19. The Secretary of State has decided that, even though your client's circumstances are such that "the life of the family cannot reasonably be expected to be enjoyed elsewhere," your client's removal would not amount to a disproportionate interference with his family life. The relationship on which he relies was formed at a time when his immigration status was uncertain, and that uncertainty has pervaded its existence. The relationship was formed at a time when your client had exhausted his rights of appeal against the refusal of his asylum claim, and so was well aware that he had no lawful right to be in the UK. As an asylum seeker herself, [she] would have been aware of the precariousness of your client's situation from the beginning. The relationship has been 'serious' for less than 18 months, and the couple were living together as husband and wife for less than 4 months. It is therefore relatively short-lived. They are not lawfully married and they have no children between them. The Judgment of the House of Lords in *Beoku-Betts* … does not assist your client as these factors are equally relevant whether your client's family life is viewed from his own perspective or that of [his partner]: their family life is not such that it weighs heavily in favour of setting aside the public interest in your client's removal and allowing him to stay.
>
> 20. On the other hand, the public interest in the removal of foreign nationals who do not qualify to remain in the UK but refuses to leave of their own accord is well established. Weight

> is added to the public interest in this case because your client gained entry to the UK on the basis of an asylum claim that was found by the AIT to have been a fabrication. It is important to the integrity of the protection system that those who fabricate claims should not be allowed to use them as a stepping stone to status. Your client's appeal rights were exhausted in January 2008. Knowing that he had no basis of stay he should have left the UK, but instead he embarked on the relationship on which he now relies.
>
> …
>
> 22. For all these reasons, having set the factors weighing against your client's removal alongside those weighing in favour, the Secretary of State takes the view that he has not established that his removal would amount to a disproportionate interference with his right to family life, or with that of [his partner], even though the result may well be that they cannot pursue their family life together. As you rightly indicate in your grounds for judicial review, in the case of *Chikwamba* … the House of Lords was concerned with the Secretary of State's then policy of requiring Article 8 applicants in the UK to go abroad and make their applications to an entry clearance officer, instead of having them determined in the UK. By contrast, your client's application has been determined in the UK. The Secretary of State does not say that he should instead make an application for entry clearance and therefore *Chikwamba* does not apply. Even in the event that your client were to go abroad and apply for entry clearance, the grant of entry clearance would be by no means assured given your client's failed asylum claim, the findings of deception made against him on appeal, the fact that he has not voluntarily left the UK, and the findings made above in respect of his private and family life, and so *Chikwamba* would not assist your client in any event."

54. As Mr Blundell rightly points out, in SM's case there is no question of splitting a family unit involving a child, although there is, of course, the inevitable split of SM and his partner if he was to return to the DRC. However, as we see it, the Secretary of State balanced that factor against the other relevant factors, including the need to remove foreign nationals who do not qualify for residence in the UK. In our judgment, the conclusion of the Secretary of State in this respect was unassailable, and it would be the conclusion to which we would have come.

55. The Secretary of State, having rejected the further representations, considered whether there was any realistic prospect of success before an Immigration Judge notwithstanding their rejection by the Secretary of State. The conclusion as to that was that they would not offer any realistic prospect of success. Again, in our judgment, that was also an unassailable decision.

56. We understand that yet further representations have been made on SM's behalf to which the Secretary of State will be responding in due course. Our decision relates, of course, to the question of whether the letters of 30th April 2009 and 22nd June 2009 are susceptible to challenge. For the reasons we have given, they are not.

ZA's case

57. We have set out a summary of SA's immigration position in paragraphs 3 and 4 above. He is a Nigerian national aged 38 or thereabouts, who arrived in the United Kingdom illegally in, it is thought, April 2002. He was apprehended working illegally by the police in May 2003 when he claimed asylum. This was refused in June 2003 and an appeal to an Adjudicator was dismissed in August 2003. The Adjudicator said that ZA and his application were "wholly lacking in genuineness and credibility". His appeal rights were exhausted on 1st September 2003. As from March 2004 he failed to continue reporting to the immigration authorities and was treated as an absconder. He did not surface again until, through solicitors, he submitted an application in September 2008 for leave to remain in the United Kingdom. The application was based on the assertion that he had acquired an established family life in the UK, although there was no reference at that time to the fact that he had a partner.

58. That application was acknowledged on 13th December 2008, but was not considered until he was arrested about a year later for being drunk and disorderly. A decision letter dated 24th September 2009 was issued which represents one decision the subject of challenge in these proceedings. By the time of that letter ZA had made the Secretary of State aware that he and his partner, with whom he claimed to have cohabited since 2005, had had a son who was born on 11th May 2009.

59. In the letter of 24th September 2009 the Secretary of State explained why the decision had been made as it was. Since the effect of that letter of rejection is effectively superseded by the letter of 5th January 2010 we will say nothing further about it. ZA launched this application for judicial review on 14th October 2009 and an injunction against removal was granted on 16th October. Dobbs J gave her decision on the papers on 11th December and removal directions were set for shortly thereafter. However, ZA sought to renew the application for permission to apply for judicial review and a further injunction was granted on 21st December, one of the reasons given being that, in the light of *BA(Nigeria)* there might be an in-country right of appeal.

60. Further evidence was submitted about the relationship with his partner and the fact that they had a 7-month old son. It was also said that she had three other children aged 17, 15 and 12 by another man with whom they had a strong relationship and it would not be a viable option for all of them to relocate to Nigeria if ZA was required to return there.

61. In the decision letter of 5th January 2010 the Secretary of State gave reasons for doubting the assertion that ZA had been cohabiting with Ms S since 2005. It was, however, accepted that he "may have established a family life in the United Kingdom", but it was asserted that he had done so "in full knowledge that he had no lawful basis to stay here". In considering the issue of the proportionality of removal

from the United Kingdom, the following factors were said (in paragraph 21 of the letter) to be material based upon the approach in *Chikwamba*:

> "a. your client's poor immigration history.
>
> b. his failure to provide detailed evidence himself or from any friends to establish his relationship with [his partner].
>
> c. his failure to provide any independent evidence including bills, council tax or bank statements, letters and photographs confirming your client's relationship and that has been cohabiting with [his partner] since 2005 as claimed.
>
> d. despite claiming that he has been cohabiting with [her] since 2005 his failure to make submissions in relation to Article 8 until his lodged his judicial review proceedings. Whilst his human rights submissions made under the cover of a letter dated 23 September 2008 make a bland reference to establishing a family life, no details are provided and [his partner] is not mentioned despite the fact that he claims to have been cohabiting with her for three years at that point.
>
> e. the letter from [his partner] was not provided until the renewal grounds were served and after several sets of removal directions had been served on your client and the summary grounds of defence were lodged which noted the lack of evidence that had been forthcoming from her. No explanation was provided for the delay in providing the letter.
>
> f. the lack of evidence about the nature of your client's contact and relationship with his child and the other children of [his partner] including the lack of evidence to indicate why the relationship could not be continued in or from Nigeria by modern means of communication.
>
> g. your client's blatant disregard for the Immigration Rules (which you yourselves acknowledge in your grounds of renewal dated 18 December 2009)."

62. The letter dealt with the issue of relocation in the following way:

> "22. Your client's case has also been considered in the light of the judgment in *VW Uganda v SSHD* [2009] EWCA Civ 5. The judgment in *VW Uganda* relates to the consideration of the applicability of the "insurmountable obstacles" test when dealing with the issue of proportionality. More specifically, the judgment considered whether a person can point to hardship or difficulties of a nature and degree as to make it unreasonable to expect his or her family to join them in the country to which they are being removed. The Court concluded in *VW Uganda* that what must be involved is more than a mere degree of

hardship and the matter is not simply one of "choice or convenience". In her letter dated 17 December 2009 [the partner] provides no reason for any hardship or unreasonableness in returning with your client to Nigeria to continue their family life. It is noted that [she] has 3 other children with a previous partner and that they are aged 17, 15 and 12. Although it is understandable that your client's partner would prefer that your client remain in the UK and would prefer not to relocate to Nigeria with your client's son and her 3 other children, it would alternatively be open for your client to return to Nigeria to seek entry clearance to return to the UK as [her] partner.

23. Your client is an immigration offender who was notified of his liability to removal in May 2003 and continues to have no lawful basis of stay in this country. Although it is accepted that your client may have established a family life in the United Kingdom, I am satisfied that the decision to proceed with his removal would not breach Article 8 of the European Convention on Human Rights."

63. There are two other paragraphs in the letter to which we will refer:

"24. It is noted that your client claims to have been in the United Kingdom since May 2003. It is accepted that during the time he has been in the United Kingdom that he may have established a private life, however it is considered that the private life had been established in the knowledge that he had no legal basis to remain in the United Kingdom. In order to protect the wider interests and rights of the public, it is vital to maintain effective immigration control. In pursuit of that claim and having weighed up your client's interests, it is believed that any interference with his family and/or private life, would be a legitimate, necessary and proportionate response and in accordance with the law.

…

27. It is considered that your client is a 38 year old male who has been in the United Kingdom for 7 years and 8 months without lawful and legitimate leave. Your client claims to have arrived in the United Kingdom in April 2002, but claimed asylum on 28 May 2003 only after he was arrested and detained by police for working illegally. After his appeal rights were deemed to be exhausted he absconded from reporting for 4½ years and only came to light in September 2009 when he made further submissions for leave to remain in the United Kingdom on human rights grounds. Although it is accepted that your client is the father of [a son] born 11 May 2009, it is not considered to be disproportionate in light of all the circumstances to remove your client from the United Kingdom

> in order for him to seek entry clearance to return to the United Kingdom as the partner of [his partner]. After careful consideration, it is concluded that there are no compelling circumstances to justify allowing your client to remain in the United Kingdom and therefore it is considered that your client's removal from the United Kingdom is entirely lawful and proportionate."

64. The further submissions made by ZA were rejected and the conclusion reached that they did not create a realistic prospect of success before an Immigration Judge.

65. Ms Nnamani submits that the assessment reflected in the Secretary of State's letter does not constitute a proper assessment of the impact that the suggested relocation of the family to Nigeria would have on the other children of ZA's partner who had a right to education and their own private lives in the UK. She submitted that the decision was not considered properly or rationally.

66. We do not consider that that proposition fairly encapsulates what the Secretary of State was saying in the letter. The Secretary of State had, as we have assessed the evidence, ample grounds for questioning the length of ZA's true association and cohabitation with his partner and, accordingly, of the extent to which he and her other children represented a true and effective family unit. However, what was being said was that, to the extent that they represented one element of the family unit (albeit a somewhat tenuous one vis-à-vis ZA), there could be no objection to him being returned to Nigeria and making a claim for entry clearance as her partner from there. The same conclusion was reached notwithstanding the existence of his own natural son. Again, there were legitimate grounds for questioning the length of the period of cohabitation with his partner. All the matters to which reference was made in paragraph 21 of the letter (see paragraph 61 above) were legitimate matters put into the balance and, in our judgment, this was a case where the Secretary of State was entitled to conclude that the balance lay in favour of requiring ZA to return to Nigeria to make his application for entry clearance from there. It would be our decision too.

67. For the reasons we have given, we can see nothing in the Secretary of State's reasoning or approach which is susceptible to challenge by way of judicial review.

68. For these reasons, each of the claims are dismissed.