OUTER HOUSE, COURT OF SESSION

[2010] CSOH 103

P487/10

OPINION OF LORD TYRE

in the cause

I.M. (A.P.)

Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department dated 31 March 2010

Defender:

Petitioner: Caskie; Drummond Miller LLP
Respondent: Webster; Office of the Solicitor to the Advocate General

30 July 2010

[1] The petitioner is a citizen of Libya who arrived in the United Kingdom on 31 October 2008 with leave to enter as a visitor. On 9 April 2009 she sought asylum. Her application was refused by the Secretary of State on 28 April 2009 and her appeal against refusal was dismissed by an Immigration Judge on 24 June 2009. Her appeal rights ended on 11 November 2009. On 10 December 2009 she was detained pending removal but, in the light of submissions made on her behalf, her removal was cancelled and she was released from detention. Those submissions were made in a letter dated 15 December 2009 in which the petitioner sought leave to remain in the

United Kingdom under reference to her right to respect for her family life under Article 8 of the European Convention on Human Rights. She was further interviewed on 18 February 2010. By a decision letter dated 31 March 2010 addressed to the petitioner's solicitors, the Secretary of State refused to accept that the petitioner's removal from the United Kingdom would give rise to a breach of her Article 8 rights. The Secretary of State further declined to accept that the petitioner's representations constituted a fresh claim with a consequent right of appeal against removal. In this application for judicial review the petitioner seeks reduction of the latter decision and the matter came before me for a first hearing.

[2] The petitioner's claim for asylum in 2009 was based upon a fear of exposure to a risk of persecution on her return to Libya. The Immigration Judge who refused her appeal made certain adverse findings regarding the petitioner's credibility. The claim for asylum now constitutes no part of the representations made on her behalf. Rather, the petitioner asserts that her removal would give rise to a breach of her Article 8 right to family life for the following reasons. She states that she has formed a relationship with a person to whom I shall refer as Mr M, who was born in Libya but who was granted asylum in the United Kingdom in 2003 and became a naturalised British citizen in May 2009. The petitioner and Mr M have known one another since their early teenage years in Libya, when Mr M was a friend of the petitioner's older brother. After her arrival in the United Kingdom, Mr M made contact with the petitioner. He visited her on a number of occasions and their relationship developed. The petitioner states that on 23 September 2009 she and Mr M underwent a marriage ceremony at the Manchester Islamic Centre. This marriage is not recognised as valid under English or Scottish law because the petitioner and Mr M have not obtained a certificate of

approval from the Secretary of State. The petitioner further states that she and Mr M have cohabited and that she suffered a miscarriage in December 2009.

Statutory provisions and the test to be applied by the Secretary of State

[3] The statutory background to the making of a "fresh claim" on asylum or human rights grounds has been before the courts on many occasions. The relevant provision is Rule 353 of the Immigration Rules (made by the Secretary of State in exercise of powers contained in the Immigration Act 1971), which provides 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:
>
> (i) had not already been considered; and
> (ii) 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."

[4] There is therefore a two-stage process for the decision maker. First, he or she must decide whether or not to accept the asylum or (as the case may be) human rights claim. Where the claim is rejected, the decision maker must then consider whether it is "significantly different" from the material previously considered, as defined in the Rule, i.e. whether the content (a) has not already been considered and (b) taken together with previously considered material creates a realistic prospect of success in an appeal to the First-tier Tribunal (Immigration and Asylum Chamber) against the refusal. If so, the decision maker must treat the claim as a fresh claim notwithstanding his or her decision to reject it, with the consequence that the refusal is appealable.

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

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

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

[6] During the hearing, there was discussion of whether the standard to be applied by the Secretary of State in fresh claim cases considered under Rule 353, where the test is "a realistic prospect of success", is the same as that to be applied in cases concerning certification by the Secretary of State under section 94(2) of the Nationality, Immigration and Asylum Act 2002, where the statutory test is that an asylum or human rights claim is "clearly unfounded". The two tests were closely analysed and compared by the House of Lords in *ZT (Kosovo)* v *Secretary of State for the Home Department* [2009] 1 WLR 348 and differing opinions were expressed. In *AK (Sri Lanka)* (above), Laws LJ cited passages from each of their Lordships' opinions in *ZT (Kosovo)*. Having observed at paragraph 33 that "these are deep waters", Laws LJ concluded at paragraph 34 that there was a difference between the two tests but that the difference was "so narrow that its practical significance is invisible". For my part I find it unnecessary to venture far into these waters: this application is concerned with the "realistic prospect of success" test, and as I have already noted the standard to be applied in Rule 353 cases seems to have been clearly established. There does, however, remain the difficult question of whether the role of

this court is the same in Rule 353 cases as in certification cases and, in particular, whether observations made in certification cases regarding the role of the court can safely be applied in a Rule 353 case such as the present application. In respectful agreement with Carnwath LJ in *R (YH)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116 at paragraph 10, I propose to proceed on the basis that, whatever theoretical difference there may be between the two tests, it can for practical purposes be ignored, and accordingly that observations made in certification cases can provide guidance as to the proper approach to be taken by the court in the present case.

Scope of the review by the court

[7] Parties were in agreement that the approach to be adopted by this court was as explained by Buxton LJ in *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495 at paragraphs 8-11: that is, that the decision of the Secretary of State is challengeable only on *Wednesbury* grounds, with the rider that a decision will be challengeable as irrational if not taken on the basis of "anxious scrutiny". At paragraph 11, Buxton LJ set out the matters which the court must address as follows:

> "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... 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 these questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

This approach has been adopted by the court in Scotland, notably in the decision of the Second Division in *FO, Petitioner* [2010] CSIH 16 at paragraph 23. It has also

been reaffirmed by the Court of Appeal in England in *R (TK)* v *Secretary of State for the Home Department* [2009] EWCA Civ 1550 at paragraph 10.

[8] It respectfully appears to me, however, that the approach described by Buxton LJ in *WM (DRC)* requires some elaboration in the light of recent decisions of the House of Lords, the Supreme Court and the Court of Appeal. In the first place, I have derived assistance from the following explanation of the expression "anxious scrutiny" by Carnwath LJ in *R (YH)* (above) at paragraphs 22-24:

> "22. The expression "anxious scrutiny" derives from the speech of Lord Bridge in *Bugdaycay* v *Secretary of State* [1987] AC 514, 531, where he said: "The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."
> 23. It has since gained a formulaic significance, extending generally to asylum and article 3 claims (see e.g. MacDonald, Immigration Law and Practice, para 8.6). Thus, in *WM (DRC)*, Buxton LJ explained that where asylum was 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."
>
> It has now become an accepted part of the canon, but there has been little discussion of its practical significance as a legal test.
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> 24. As I suggested in *AS (Sri Lanka)* [*R (AS (Sri Lanka))* v *Secretary of State* [2009] EWHC 1763 Admin] (para 39), the expression in itself is uninformative. Read literally, the words are descriptive not of a legal principle but of a state of mind: indeed, one which might be thought an 'axiomatic' part of any judicial process, whether or not involving asylum or human rights. However, it has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account. I would add, however, echoing Lord Hope [in *BA (Nigeria)* v *Secretary of State for the Home Department* [2009] UKSC 7], that there is a balance to be struck. Anxious scrutiny may work both ways. The cause of genuine asylum seekers will not be helped by undue credulity towards those advancing stories which are manifestly contrived or riddled with inconsistencies." (References added.)

[9] In *ZT (Kosovo)* at paragraph 75, Lord Brown of Eaton-under-Heywood addressed the question: in this particular context is there any material difference between a

supervisory and an appellate jurisdiction? His Lordship's answer (in the context of a certification case) was as follows:

> "Could the court ever reach the position of saying: we ourselves do not think that an appeal to the AIT in this case would have been bound to fail but we think that 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."

Other members of the Judicial Committee expressed a similar view albeit in somewhat less forthright terms. Lord Phillips of Worth Matravers stated at paragraph 23:

> "Where, as here, 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."

Lord Neuberger of Abbotsbury similarly observed at paragraph 83:

> "...I agree that, if, in a case where the primary facts are not in dispute, the court concludes that a claim is not 'clearly unfounded' or (which is, of course, the same thing) that a claim has some 'realistic prospect of success', it is hard to think of any circumstances where it would not quash the Secretary of State's decision to the contrary. However, I would again be reluctant to suggest that there is a hard and fast rule to that effect."

However, Lord Hope of Craighead, with whom Lord Carswell agreed, distinguished (at paragraph 50-51) certification cases from Rule 353 cases and saw no reason to disagree with Buxton LJ's observations as a guide to the approach that should be taken in Rule 353 cases.

[10] For a summary of the approach to be taken by a court in the light of the various observations in *ZT (Kosovo),* I again refer to the analysis of Carnwath LJ in *R (YH),* at paragraphs 19-21:

> "19. One notes the possible qualification in respect of cases where there are 'issues of primary fact'...
>
> Logically, however, the existence of such unresolved issues of primary fact is not a reason for the courts deferring to the Secretary of State at the threshold stage. Such unresolved issues are likely of course to make it more appropriate to leave the door open for them to be determined by an immigration judge after a full hearing. The position is not dissimilar to that under the rules of court, where a claim may be struck out not only if it is unfounded in law, but also if it is clear on the available material that the factual basis is entirely without substance (see *Three Rivers DC* v *Bank of England (No 3)* [2001] 2 All ER 513 para 95, per Lord Hope). In most cases, the court is at least as well equipped as the Secretary of State to decide either question.
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> 20. More recently in *KH (Afghanistan)* v *Secretary of State* [2009] EWCA Civ 1354 (handed down on the 12th November 2009), Longmore LJ (with the agreement of his colleagues) stated the position in unqualified terms:
> "It is now clear from *ZT (Kosovo) v SSHD*...that the court must make up its own mind on the question whether there is a realistic prospect that an immigration judge, applying the rule of anxious scrutiny, might think that the applicant will be exposed to a breach of Article 3 or 8 if he is returned to Afghanistan. So the question is not whether the Secretary of State was entitled to conclude that an appeal would be hopeless but whether, in the view of the court, there would be a realistic prospect of success before an adjudicator." (para 19).
> 21. It seems therefore that on the threshold question the court is entitled to exercise its own judgment. However, it remains a process of judicial review, not a *de novo* hearing, and the issue must be judged on the material available to the Secretary of State."

[11] Like *ZT (Kosovo), R (YH)* was a certification case. However, in the light of my conclusion that observations made in certification cases can provide guidance as to the proper approach to be taken by the court in the present case, I propose to adopt this approach in the present case and to make my own assessment of how an immigration judge might have decided the matter on the basis of the material available to the Secretary of State. This appears to me to be consistent with the approach taken recently by Lady Dorrian in *LA, Petitioner* [2010] CSOH 83 at

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

The Secretary of State's decision

[12] It is a feature of the present case that the petitioner's application to make a fresh claim proceeded on entirely different grounds from the claim which had previously been refused by the Secretary of State and, on appeal, by the Immigration Judge. There was accordingly no dispute that the material contained in the letter dated 15 December 2009 had not already been considered. The issue was whether the Secretary of State was entitled to conclude that this material, taken together with that which had been considered previously, created no realistic prospect of success in an appeal by the petitioner against his refusal of leave to remain in the United Kingdom.

(i) Did the Secretary of State ask the correct question?

[13] The first matter that I have to address is whether the Secretary of State asked himself the correct question. Counsel for the petitioner argued that he had not done so. Counsel drew attention to a number of passages in the decision letter which indicated that the Secretary of State had not gone beyond forming his own view on the merits of the application and had then attributed those views to the immigration judge hearing

an appeal. This was most apparent in the concluding paragraph of the Secretary of State's consideration of the applicant's Article 8 rights, where it is stated:

> "In conclusion, taking into account also that Article 8 is not an absolute right, a new Immigration Judge would not accept, given the particular facts of your client's case that there would be a realistic prospect of success in concluding that the removal of your client would constitute a disproportionate interference with your client's private and family life and consequently that your client's Article 8 rights would be breached."

This is undoubtedly a garbled and inaccurate formulation of the question that the Secretary of State was obliged to ask himself. It is, unfortunately, not the only passage in the decision letter where the test of realistic prospect of success is either misstated or omitted altogether. The test is, however, stated accurately on page 3 of the letter where it is said that:

> "With regards to your client's particular case, the question is not whether the representations are good or should succeed, but whether there is a realistic prospect of a new Immigration Judge, applying the rule of anxious scrutiny, thinking that on the submissions lodged on behalf of your client she would be exposed to a real risk of persecution on return to Libya. The question is therefore when these submissions are taken together with the previously considered material and the actions of your client, would they create a realistic prospect of success, notwithstanding its rejection."

Unfortunately even here, where the test itself is accurately stated, it is inaccurately applied to the circumstances of the petitioner's case because, as I have already noted, and as is readily apparent from the remainder of the decision letter, risk of persecution played no part in the fresh claim which was based instead on the right to family life under Article 8. I have to say that there appears to have been a disappointing lack of attention paid to accuracy of expression by the person responsible for drafting the decision letter on the Secretary of State's behalf.

[14] In spite of these shortcomings in the phraseology of the decision letter, I have concluded that, reading the letter as a whole, it is apparent that the Secretary of State

did ask himself the correct question. As I have noted, the test is accurately stated at the outset of the letter. It is accurately stated again on page 8 of the letter where the Secretary of State is addressing the prospect of an immigration judge finding that removal to Libya would constitute a disproportionate interference with the petitioner's private life. References throughout the decision letter to what an immigration judge would or would not take into account afford, in my view, a further indication that the Secretary of State had in mind the correct test even where there is a regrettable lack of clarity of expression. I should add that my criticisms of the exposition of the Secretary of State's reasoning in the decision letter should not be taken as implying that I consider that "anxious scrutiny" was not given to the merits of the case, to which I now turn.

(ii) Was the Secretary of State's decision irrational?

[15] I accept the submission of counsel for the petitioner that the starting point in addressing the rationality of a decision of the Secretary of State in an Article 8 claim is the following well-known dictum of Lord Bingham of Cornhill in *R (Razgar)* v *Secretary of State for the Home Department* [2004] 2 AC 368 at paragraph 17:

> "...The reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be: (1) will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life? (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (3) If so, is such interference in accordance with the law? (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

Counsel for the petitioner submitted that although the Secretary of State had accepted that removal would be an interference with the petitioner's *private* life and had given reasons why he considered that there was no realistic prospect of an immigration judge finding that such interference was disproportionate to the legitimate public end of maintaining an effective immigration control, he had failed properly to consider interference with the petitioner's *family* life. The Secretary of State ought to have appreciated that there was a more than fanciful prospect that an immigration judge would conclude, in relation to the petitioner's family life, that Lord Bingham's first and second questions fell to be answered in the affirmative, and might then go on to find the interference disproportionate to any legitimate public end. The Secretary of State also failed properly to address Mr M's Article 8 rights (in accordance with the decision of the House of Lords in *Beoku-Betts* v *Secretary of State for the Home Department* [2009] 1 AC 115). Although reference was made to *Beoku-Betts* in the decision letter, the Secretary of State ought to have recognised that there was a more than fanciful prospect that an immigration judge would take the view that removal of the petitioner would constitute a disproportionate interference with Mr M's right to family life.

[16] Since the petitioner's challenge to the Secretary of State's decision is founded upon her Article 8 right to family life, it is appropriate to quote the paragraph in the decision letter which narrates the Secretary of State's conclusions in that regard:

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

> client's removal from the United Kingdom would not breach her Article 8 right to family life."

It seems to me that on a fair reading of this paragraph, the Secretary of State is indicating a conclusion that an immigration judge would answer either the first or second of Lord Bingham's questions in the negative, i.e. that the judge would find that removal of the petitioner from the United Kingdom would not engage the operation of her Article 8 right to family life. If that were so, then it would indeed follow that an appeal would have no realistic prospect of success. From a reading of the remainder of the decision letter, it appears to me that in reaching this conclusion the Secretary of State was influenced by the following factors:

- The fact that the petitioner entered into her Islamic marriage without having applied for a certificate of approval;
- The fact that she entered into her Islamic marriage at a time when she had no valid leave to remain, her asylum application had been refused and her application for reconsideration had also been refused;
- The fact that her relationship with Mr M began at a time when she had no valid leave to remain;
- The fact that she did not apply for a certificate of approval until she was facing removal from the United Kingdom;
- The fact that she had been resident in the United Kingdom and, separately, in a relationship with Mr M, for only a short period of time; and
- The petitioner's failure to provide further evidence to illustrate a genuine and subsisting relationship or evidence of cohabitation.

In relation to this last factor, it should be noted that in support of her application for leave to remain, the petitioner provided an affidavit of Mr M sworn on 14 December

2009. Mr M states unequivocally that the marriage was genuine. His description of his relationship with the petitioner is, however, more equivocal. The nature of the relationship is not specified and he states that since the date of the marriage the petitioner has "mostly" been living with him although when from time to time he is away working she has lived with her brother.

[17] Adopting the approach to the court's task which I have described above, I am satisfied that an appeal by the petitioner to an immigration judge against the Secretary of State's refusal of leave to remain in the United Kingdom would have no realistic prospect of success. I bear in mind that I too must give the matter anxious scrutiny and that the test is whether the prospect of success is no more than fanciful. Nevertheless I am in no doubt that an immigration judge would conclude that the petitioner's removal would not constitute an interference with the exercise of the petitioner's right to respect for her family life or, at best for her, that such interference would not have consequences of such gravity as potentially to engage the operation of Article 8. It seems to me that, taking the view most favourable to the petitioner of the material supplied to the Secretary of State, there is insufficient evidence to satisfy an immigration judge that she and Mr M have family life which is such as to engage Article 8. The material supplied to the Secretary of State seems to have been directed towards establishing the genuineness of the marriage rather than the genuineness of the relationship. I consider that an immigration judge would find nothing in either the letter dated 15 December 2009 or Mr M's affidavit which vouches the existence of a relationship of a nature that could reasonably be described as family life. It follows that I am also satisfied that an immigration judge would distinguish the decision of the House of Lords in *Beoku-Betts* on the ground that Mr M is not a family member

whose Article 8 rights are engaged. For these reasons the appeal would in my view have no realistic prospect of success.

[18] Counsel for the petitioner placed reliance on the decision of the House of Lords in *Chikwamba* v *Secretary of State for the Home Department* [2008] 1 WLR 1420. This case concerned a Zimbabwean national whose asylum claim was refused at a time when removals of failed asylum seekers to Zimbabwe were suspended. While in the United Kingdom she married a Zimbabwean national who had been granted asylum and who could not return to Zimbabwe, and they subsequently had a child. Her claim that removal to Zimbabwe would breach her Article 8 rights was refused by the Secretary of State and her appeal against refusal was dismissed by the adjudicator, by the tribunal and by the Court of Appeal. The basis of the Court of Appeal's decision was that there were no exceptional circumstances to disapply the Secretary of State's policy that applicants for entry clearance should be required to seek leave from abroad. It appears to have been accepted by all concerned that there was no doubt that the claimant would be granted entry clearance in order that the family could live together in the United Kingdom. The House of Lords allowed the claimant's appeal, Lord Scott of Foscote describing the policy which required the claimant to return and make her application from Zimbabwe as something that Kafka would have enjoyed. Lord Brown of Eaton-under-Heywood, with whose opinion the other members of the Judicial Committee agreed, did not regard the policy as objectionable in itself. However, he stated at paragraph 44:

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

[19] As this case had been referred to in support of the petitioner's application in the letter dated 15 December 2009 from her solicitors, it was also addressed by the Secretary of State in the decision letter. The Secretary of State considered that the case was distinguishable on its facts, and that in any event even if an immigration judge accepted that the petitioner and Mr M had a genuine and subsisting relationship it would not be disproportionate to require the petitioner to return to Libya for a short period of time in order for her to apply for the correct entry clearance. Counsel for the petitioner criticised this reasoning as failing to take into account the view of the House of Lords quoted above, which was of general application and not restricted to the facts of *Chikwamba*. It seems to me that it was a crucial feature of *Chikwamba* that no-one doubted that an application by the claimant for entry clearance after having been removed to Zimbabwe would be successful because of the strength of her Article 8 case. That feature appears to me to be absent in the present case. The policy quoted at paragraph 37 of Lord Brown's opinion assumes that the claimant's Article 8 right to family life is engaged, and it seems to me that this is the context in which his Lordship's observations at paragraph 44 fall to be read. If, as I have held, an immigration judge in the present case would decide that the petitioner's Article 8 rights would not be breached by removal *per se*, then it does not appear to me to make a difference that, after having been removed, she may apply from Libya for entry clearance with a right of appeal against any refusal. Moreover, it seems clear from the remainder of paragraph 44 that Lord Brown was addressing a situation where the only reason given for requiring an Article 8 claim to be made from abroad was the application of the quoted policy. It is in my opinion clear from the terms of the decision letter read as a whole that the same cannot be said in the present case and accordingly I do not regard *Chikwamba* as being in point.

[20] Finally, I should record that I was addressed by counsel for the petitioner on the distinction drawn between what have been termed "foreign" cases and "domestic" cases, i.e. cases which concern, respectively, violation of a person's Convention rights in another country (such as risk of torture if returned to that country) and violation of a person's Convention rights in the United Kingdom (such as disproportionate interference with family life in this country by removal). The terminology originated in the opinion of Lord Bingham in *R (Ullah)* v *Special Adjudicator* [2004] 2 AC 323 and was applied by an Extra Division of the Inner House in *KBO* v *Secretary of State for the Home Department* [2009] CSIH 30. The point being made, as I understand it, was that an observation by Lord Bingham in *Razgar* at paragraph 20 that "decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis" was made in the context of a "foreign" case, and that a less exacting threshold applies in "domestic" cases. I did not, however, understand counsel for the Secretary of State to rely upon this *dictum* and, as will be apparent from what I have said, it has not played any part in my own reasoning.

Disposal

[21] For these reasons I hold that the Secretary of State has satisfied the requirement of anxious scrutiny and that his decision not to treat the representations made on behalf of the petitioner as a fresh claim was neither unreasonable nor irrational. I shall therefore repel the plea in law for the petitioner, sustain the third plea in law for the respondent and refuse the petition.