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CO/3370/2006

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 14th August 2008

B e f o r e:

SIR MICHAEL HARRISON

THE QUEEN ON THE APPLICATION OF DESMOND OSARIEMEN OMORUYI
Claimant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

Computer-Aided Transcript of the Palantype Notes of
WordWave International Limited
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(Official Shorthand Writers to the Court)

The Claimant appeared on his own behalf
Miss Susan Chan (**Miss Eve Naftalin** appeared for judgment only) (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As approved by the Court)

SIR MICHAEL HARRISON:

Introduction

1. This is an application by the claimant, Mr Omoruyi, for judicial review to quash two decisions of the defendant, the Secretary of State for the Home Department, dated respectively 10th February 2006 and 23rd June 2006. The later decision was made following the application for judicial review of the earlier decision and it was expressed to be supplementary to the earlier decision. The claimant amended his grounds following the later decision and permission was granted by Pitchford J following the amendment of the grounds. In granting permission, Pitchford J remarked that, in his view, the proportionality point should be argued.

2. This case is unusual in that the claimant, who comes from Nigeria and who represented himself during the hearing, has now qualified as a solicitor since he came to this country in 1996 although he has never been granted leave to enter or remain. It is right that I should pay tribute to the manner in which he conducted his case which was well prepared and competently presented.

Immigration history

3. As may be expected from the fact that the claimant came to this country in 1996, there is a considerable immigration history to this case. There are really two strands to that history — the history of immigration applications and decisions, and the history of the claimant's legal studies — but the two intertwine and it would not really be helpful to try and separate them out.

4. On 14th May 1996 the claimant arrived in the United Kingdom and claimed asylum, having been returned from New York because he was using a false British passport. Asylum was refused in September 1996 and a subsequent appeal was dismissed by an adjudicator on 19th May 1998. There followed appeals to the Immigration Appeal Tribunal and to the Court of Appeal, the former being dismissed in March 1999 and the latter being dismissed in October 2000. During that time the claimant had begun his undergraduate law degree at the University of East London in September 1998. On 20th July 2000 he applied for exceptional leave to remain which was subsequently refused on 17th March 2001.

5. Shortly before that, on 12th January 2001, the claimant had raised human rights grounds following the coming into force of the Human Rights Act 1998 on 2nd October 2000. That application was refused by the defendant and the claimant's subsequent appeal was dismissed by an adjudicator on 20th March 2002. About a month previously the claimant had graduated, having obtained his undergraduate law degree.

6. Having been granted leave to appeal against the adjudicator's determination, the Immigration Appeal Tribunal dismissed his appeal on 19th November 2002. It will be necessary to refer to parts of those determinations as they feature in the decisions to which this application relates. Permission to appeal to the Court of Appeal was refused on 6th January 2003.

7. In September 2002, shortly before the Tribunal appeal decision, the claimant had started a Master's degree at the London School of Economics. In February 2003 he applied for leave to enter and remain as a student to complete his Master's degree.

8. On 5th August 2003 he wrote to the defendant inquiring about the progress of his application, informing the defendant that, after completion of his Master's degree, he intended to undertake the Legal Practice Course at the College of Law in London where he had been offered a place. He stated:

> "I understand that I will be required to leave the UK at the completion of my LLM, and to apply for a student visa from outside the UK for any further course of studies.
>
> Sir/Madam, I would appreciate it if you would please let me know the status of this application as I would need my passport to leave the UK and apply for a student visa from abroad in order to follow the proposed course of studies. My passport was submitted with the application."

9. The claimant graduated with his Master's degree in November 2003. Shortly before that, in September 2003, he had enrolled on the Legal Practice Course at the College of Law in London. On 8th March 2004 he submitted a further application for leave to remain as a student in order to complete that course. He subsequently completed the Legal Practice Course in September 2004.

10. About a month after he had applied for leave to remain as a student to complete the Legal Practice Course, there occurred an event upon which the claimant places considerable reliance. In April 2004, having received a letter requiring him to report at Becket House every Friday, which clashed with his law class, the claimant telephoned Becket House on 17th April 2004 and spoke to a Mr Baker who told him that the computer records showed that he had been granted exceptional leave to remain prior to his last application and that there was therefore no need to report. He advised the claimant to contact the defendant's Croydon office for a copy of the decision letter.

11. On 19th April 2004 the claimant spoke to a Mr Alex at the Croydon office who confirmed that there was a "progress decision" on his file but, for policy reasons, he could not give any further details over the phone. He advised the claimant to write in for a copy of the decision. The claimant immediately wrote to the defendant on the same day, asking for a copy of the decision letter.

12. That account is confirmed by Mr Baker and by the records which have been produced. The computer records show the following entries:

> "There seems to be large discrepancies with this case. The system shows that the subject was refused asylum and granted ELR. There is no date on the file or system for the expiry of this leave. Furthermore, according to the system the subject currently has an outstanding HRA and two outstanding LTR applications. ...
>
> I advised the subject to contact the HO through his solicitor to establish

exactly what status, if any, he has.
Neither the subject or his reps have any knowledge or confirmation of his grant of ELR. If the subject has extant ELR then why are we accepting and processing applications for leave as a student?"

13. There followed a sorry story of inaction on the part of the defendant, both in responding to the request for the decision letter that had been requested confirming that the claimant had been granted exceptional leave to remain, and in making a decision on the claimant's application to remain as a student. During that period, which lasted until 10th February 2006, the claimant made telephone calls and wrote letters to the defendant seeking expedition.

14. In September 2004 the claimant completed his Legal Practice Course. On 2nd September 2004 he wrote to the defendant informing her of that fact and of his wish to proceed with his 2-year training contract. On 1st March 2005 he again wrote asking for consideration of his application to be expedited because he had been unable to secure a training contract due to the absence of a student visa or permit. He enclosed letters of rejection from law firms and also a statement from his partner, Ms Kashi Abu, in support of his request. She stated that she had known him since 1999, they attend the same church and they had been together since December 2003.

15. Not having received any replies to his letters, the claimant wrote a letter of complaint to the Immigration & Nationality Directorate's Complaint Unit on 5th May 2005 setting out the history of the matter, explaining the difficulties he was having obtaining a training contract and seeking the Unit's intervention. Apart from an acknowledgement, nothing was heard from the Complaints Unit.

16. Eventually, in August 2005, the claimant managed to secure a training contract with Cranbrook Solicitors in Ilford. On 7th December 2005 he wrote to the defendant informing her of that fact and again requesting a decision on his application, explaining that he had written to the Complaints Unit some six months ago and had received no response. Again, there was no response so, on 16th February 2006, he wrote to the Director of the Immigration & Nationality Directorate setting out the history of the matter and asking him for information about the current position relating to his application submitted over 3 years ago.

17. Some two days later, he received the decision letter dated 10th February 2006 refusing his application. By that time he was six months into his training contract. Following his application for judicial review on 19th April 2006, the defendant issued a further supplementary decision letter on 23rd June 2006. Subsequent to the grant of permission by Pitchford J on 31st October 2006, the claimant successfully completed his training contract on 28th February 2007 and, on 1st March 2007, he was admitted to the Roll of Solicitors. On 26th April 2008 the claimant married his partner, Ms Abu.

Decision letters

18. The first decision letter dated 10th February 2006 referred to the claimant's training contract with Cranbrook Solicitors, making the point that he was required to have an entry visa for that purpose and stating that it would not be appropriate to allow him to enter outside the Immigration Rules and that once abroad he could apply for entry

clearance if he wished. It was stated that the claimant's length of stay in the United Kingdom of 9 years and 11 months would not meet the residence requirements of the Immigration Rules. Dealing with the Article 8 implications, it was stated that his circumstances had not changed significantly since the Tribunal's determination of 19th November 2002. It was said that his training as a solicitor was not a sufficiently compelling reason to grant leave to enter exceptionally outside the Rules, again referring to his ability to apply for entry clearance from abroad to return as a student or trainee solicitor.

19. The next paragraph stated:

> "It is also noted in one of your letters that you claim to have been granted exceptional leave to remain in the United Kingdom. You have never been granted leave to enter and so had never been granted exceptional leave to remain."

20. After stating that there were no issues giving rise to discretionary leave, the decision letter summarised paragraph 353 of the Immigration Rules relating to a fresh claim, stating that some points were dealt with in the Tribunal's appeal determination of 19th November 2002 and that the remaining points, taken together with the material previously considered, would not have created a reasonable prospect of success, concluding that the claimant's submissions do not amount to a fresh claim and that there was therefore no right of appeal.

21. Finally, the decision letter stated that the defendant was not prepared to reverse the decision to refuse leave to enter on human rights grounds which had been upheld by the adjudicator on 20th March 2002 and by the Immigration Appeal Tribunal on 19th November 2002.

22. The supplementary decision letter of 23rd June 2006 stated that the claimant's submissions relating to Article 8 of the ECHR did not amount to a fresh claim. It stated that the claimant had not been granted leave to enter or remain during the 10 years he had been here. It concluded that there were insufficient compassionate circumstances to justify a concession on any of the grounds raised.

23. The letter then set out the considerations taken into account in considering whether the interference which removal may cause to the claimant's family or private life was disproportionate. Firstly, reference was made to the statement of Ms Abu, stating that there was no evidence that they were in a relationship akin to marriage and that their relationship was entered into in the knowledge of his precarious immigration status. She could accompany him to Nigeria for him to apply for entry clearance there or she could remain in the United Kingdom and support an application by him from abroad to return as the unmarried partner of a person settled here. Finally on that aspect, reliance was placed on paragraphs 57 and 58 of the adjudicator's determination of 20th March 2002 together with the Tribunal's determination of 19th November 2002. It was concluded that the claimant's removal would not amount to an unlawful interference with his family life.

24. The decision letter then turned to consideration of the claimant's Article 8 right to a private life. It accepted that he may have established a private life in the United Kingdom, but it was concluded that any interference with it was necessary and proportionate to the wider interest of the maintenance of an effective immigration policy because his private life had been established whilst he was in the country unlawfully.

25. It was noted that the claimant had worked in the United Kingdom and owned property here in the knowledge that he had no rights to remain here. Reference was made to his entry to the United Kingdom using a false passport in 1996 and to the adverse credibility findings by the adjudicators in 1998 and 2002. In the light of those matters, it was noted that he had not provided details of how he had purchased a property and obtained a mortgage when he was here unlawfully and did not have a valid passport as proof of identity.

26. The letter then referred to the claimant's employment as a trainee solicitor stating that if, despite the lack of evidence, he were to lose his training contract by having to return to Nigeria to apply for entry clearance from there, it would not amount to a breach of his private life. It was not considered that Article 8 was engaged by his wish to pursue his training contract, but, if it was, any interference was proportionate.

27. Overall, it was not accepted that the existence of any family or private life that the claimant may have established constituted a sufficiently compelling reason to make an exception to the normal practice of removing those who remain in the United Kingdom illegally. It was therefore concluded that his removal would not breach Article 8 and it was determined that his submissions did not amount to a fresh claim so that he had no further right of appeal.

Tribunal determinations in 2002

28. As both decision letters referred to the determinations of the adjudicator on 20th March 2002 and of the Immigration Appeal Tribunal on 19th November 2002, I should next refer to the relevant conclusions in those determinations.

29. In his determination of 20th March 2002, the adjudicator stated at paragraphs 57 to 59 as follows:

> "57) I do not see how the removal of the Appellant will be in any way disproportionate. The Appellant has only been in the United Kingdom since May 1996. He still has a child in Nigeria who lives with a maternal uncle with whom he is in regular contact. His other child is living with his ex-wife in Ghana.
>
> 58) The information before me does not suggest the Appellant has any close relatives living in the United Kingdom. Although he appears to be in a relationship with a British woman who he has known for two and a half years, I was not told about any definite marriage plans and his girlfriend did not attend Court to give evidence.
> 59) I accept that the Appellant is employed and has made commendable

efforts to improve his education. However, none of these factors outweigh the need to maintain effective immigration control. His removal from the United Kingdom will clearly be in respect of a legitimate aim of the Respondent to maintain an efficient and orderly control of immigration and it is clearly lawful."

30. In its determination of 19th November 2002, the Immigration Appeal Tribunal stated at paragraphs 28 and 30 as follows:

> "28. We turn to the Article 8 claim. In this regard we should say at the outset that the appellant has clearly used his time appropriately and well while in the United Kingdom. The relevant date in this regard March 2001 (sic). That is the date of the refusal of the application for exceptional leave to remain on human rights grounds. The appellant has been paying tax without recourse to public funds since early 1997. He works in a Housing Association and has purchased his own home. At date of decision he was well on the way to achieving the upper second class degree in law that he obtained in January 2002. Subsequent to that he has engaged upon further studies. He has no criminal record and is a member of a church. He is also in a relationship with his current girlfriend and has been for the past two and a half years. We have statements from both him and her concerning the relationship. Miss Richards is a British citizen whose family is originally from Jamaica. She says that they plan to get married some time next year. She has never visited Nigeria.
>
> ...
>
> 30. Having considered these matters in the round as we must, we consider that it would not be disproportionate to remove the appellant. In particular we consider that there are not insurmountable obstacles to him and Miss Richards living together in Nigeria. The fact that she has not been there in no sense militates against her joining him there. Alternatively it is perfectly open to him to marry her and he would no doubt have the opportunity to do so prior to departure, and apply to return as her husband or alternatively if they were not married to apply to come as her fiancé. No doubt he has established a life here, and no doubt that life has been established at a time when he has perfectly legitimately been pursuing his appeal rights in this country. However it is our view that in this case balancing the claims of family and/or private life against the need to impose immigration controls that are both effective and fair, it is not disproportionate to his family and/or private life for him to be removed."

Rule 353 of the Immigration Rules

31. Although the decisions impugned in the present case relate to an application to enter or remain as a student, they also involve consideration of whether the claimant's human rights submissions amount to a fresh claim under Rule 353 of the Immigration Rules 1999. Rule 353, so far as material, provides:

> "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. ..."

Authorities

32. At the hearing, the claimant referred me to two authorities relating to Rule 353 fresh claim cases, both of which were decided subsequently to the decisions in the present case. Firstly, the case of WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495, where the Court of Appeal set out the test for fresh claim cases under Rule 353, namely whether the new material, taken together with the material previously considered, creates a realistic prospect of success before an immigration judge applying the rule of anxious scrutiny. That test was described by Buxton LJ as a somewhat modest test. As was made clear in his judgment, a determination by the Secretary of State of a fresh claim under Rule 353 is only capable of being impugned by judicial review on Wednesbury grounds. Although the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny.

33. Secondly, in the subsequent case of AK (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 535, Toulson LJ put the test for the decision-maker in the following way:

"23. Precisely because there is no appeal from an adverse decision under rule 353, the decision maker has to decide whether an independent tribunal might realistically come down in favour of the applicant's asylum or human rights claim, on considering the new material together with the material previously considered. Only if the Home Secretary is able to exclude that as a realistic possibility can it safely be said that there is no mischief which will result from the denial of the opportunity of an independent tribunal to consider the material."

34. There are two other cases not referred to at the hearing to which I ought to refer. Shortly before I was about to give judgment in this case, the House of Lords' decisions in the cases of Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 and EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41 were published. I therefore gave the parties an opportunity to make written representations on the relevance, if any, of those cases to the present case. The parties have made further representations about those cases which I have taken into account.

35. In Chikwamba, the House of Lords considered when it may be appropriate and proportionate to dispose of a human rights appeal on the basis that the appellant ought properly to leave the country to apply for entry clearance from abroad. Giving the lead opinion, Lord Brown referred to the Home Office policy that, if there is a procedural requirement for a person to leave the United Kingdom and make an application for entry clearance from outside the United Kingdom, such a person should return home to make an entry clearance application from there. Lord Brown suggested that the real rationale for the policy was to deter people from coming to this country in the first place without having obtained entry clearance by subjecting those who do come to the very substantial disruption to their lives involved in returning them abroad. He continued at paragraph 42 as follows:

> "42. Now I would certainly not say that such an objective is in itself necessarily objectionable. Sometimes, I accept, it will be reasonable and proportionate to take that course. Indeed, *Ekinci* still seems to me just such a case. The appellant's immigration history was appalling and he was being required to travel no further than to Germany and to wait for no longer than a month for a decision on his application. Other obviously relevant considerations will be whether, for example, the applicant has arrived in this country illegally (say, concealed in the back of a lorry) for good reason or ill. To advance a genuine asylum claim would, of course, be a good reason. To enrol as a student would not. Also relevant would be for how long the Secretary of State has delayed in dealing with the case — see in this regard *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41. In an article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant. And there may be good reason to apply the policy if the ECO abroad is better placed than the immigration authorities here to investigate the claim, perhaps as to the genuineness of a marriage or a relationship claimed between family members, less good reason if the policy may ultimately result in a second section 65 appeal here with the appellant abroad and unable therefore to give live evidence."

36. At paragraph 44 Lord Brown stated:

> "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."

37. In that case it was held that the removal of the appellant to Zimbabwe would violate her and her family's Article 8 rights. The facts of that case were very different from the present case.

38. The case of EB (Kosovo) is the most recent decision on the effect of delay in Article 8 cases. In dealing with the issue of delay at the hearing of the present case, the parties relied on the Court of Appeal decision in HB and others v Secretary of State for the Home Department [2006] EWCA Civ 1713, where Buxton LJ set out in paragraph 24 of his judgment nine propositions derived from the authorities relating to the effect of delay. That case involved four individual cases listed to be heard as test cases by the Court of Appeal. One of those four cases was the case of EB (Kosovo) which was the only one which subsequently went on appeal to the House of Lords.

39. Lord Bingham, giving the lead opinion, dealt first with some general matters relating to appeals on Article 8 grounds. In doing so, he stated at paragraph 12:

> "It [the appellate immigration authority] 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."

40. Turning to the issue of delay, Lord Bingham stated at paragraphs 14 to 16 as follows:

> "14. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.
>
> 15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. ... A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine

but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.

16. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. ..."

41. I should also mention that Lord Bingham stated that, although he agreed with some of Buxton LJ's propositions in the HB case, he did not comment on them because consideration of an appeal under Article 8 calls for a broad and informed judgment which is not to be constrained by a series of prescriptive rules.

42. Again, the relevant facts of EB (Kosovo) were very different from the present case, and the delay in that case was one of over 4½ years.

Submissions

43. I now turn to the submissions made by the parties which include matters raised in the written submissions relating to the two latest House of Lords' decisions.

44. Firstly, the claimant placed reliance on the fact that he was told by Mr Baker on 17th April 2004 that he had been granted exceptional leave to remain and that, despite his request for the decision letter, the matter was not addressed by the defendant until these proceedings when the file records were produced. In the meantime, he continued with his studies whilst waiting for his passport which he had requested in his letter of 5th August 2003, but which had never been provided to him, whilst waiting for the decision letter relating to the grant of exceptional leave to remain. The claimant did not rely on the doctrine of legitimate expectation in respect of the representation that he had been granted exceptional leave to remain.

45. Miss Chan, who appeared on behalf of the defendant, submitted that in the absence of any reliance on legitimate expectation, what Mr Baker had told the claimant was irrelevant to the Article 8 issue. She relied on the content of Mr Baker's file record as showing that there was not an unequivocal or unambiguous statement by him that the claimant had exceptional leave to remain and she emphasised that the defendant had never confirmed such a grant in any written document. The file record was wrong and it was not possible to say how that had arisen.

46. Secondly, the claimant relied on the delay in dealing with his application for leave to remain as a student and with his request for the decision letter relating to the grant of exceptional leave to remain. He submitted that the period of delay in relation to his student application was one of 3 years commencing from the date of his application made on 21st February 2003 for leave to remain as a student to pursue his Master's degree. The period of delay in dealing with his request for the decision letter relating to exceptional leave to remain was from the date of his letter of 19th April 2004. He submitted that the defendant had not taken into account the delay in dealing with those matters in her decision letter, nor had she provided any explanation for it. He relied on the case of EB (Kosovo), particularly in relation to the formation of his relationship with Ms Abu during the period of delay. Finally in this context, the claimant told me

that he would not be able to practise as a solicitor in Nigeria without first qualifying there as a solicitor which would take a further 3 years.

47. Miss Chan accepted that delay might be a relevant factor to make it disproportionate to require the claimant to go back to Nigeria to make a student application from there, but she submitted that the basis of the whole application had fallen away because he is no longer a student, having finished his training. The issue of delay was now academic as he no longer required leave to remain as a student and he should now go back to Nigeria and apply from there, either under the Highly Skilled Migrant Scheme or on the basis of his marriage to a British citizen.

48. In dealing with the case of EB (Kosovo), Miss Chan suggested that the delay of 3 years from February 2003 to February 2006 for which the defendant was responsible should be considered in relation to the period of 12 years the claimant has spent here, and that during much of that period the claimant could not be removed because he was pursuing legal proceedings. The claimant had started studying in September 1998 without permission, well before his student application in February 2003. It was submitted that he had now achieved his objective of qualifying as a solicitor without having had permission to do so and he had thereby benefited from the delay rather than having been prejudiced by it. Miss Chan submitted that the claimant's relationship with his wife was a recent one and that the 3-year period of delay was not "the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes", as described by Lord Bingham in the case of EB (Kosovo).

49. Thirdly, the claimant contended that the defendant's requirement that the claimant should leave the country to obtain entry clearance from abroad had been shown by the House of Lords in Chikwamba to be unlawful. It was contended that the use of a false passport, a common practice of asylum seekers, 12 years ago could not render the claimant's case on a par with the appalling immigration history in the case of Ekinci which had been mentioned by Lord Brown.

50. Miss Chan, on the other hand, submitted that the claimant's immigration history was appalling. Having used a false passport in 1996, he spent the next 7 years pursuing a protracted series of appeals against the refusal of various asylum and human rights claims, eventually exhausting his appeal rights in 2003. In the meantime, he had started studying in September 1998 and had bought a property in 1999. He did not apply for student leave until 4½ years after he had started studying and he has never had any kind of leave in the United Kingdom, whether as a student or otherwise. It was submitted that his immigration history was therefore such that greater weight should be accorded to the importance of immigration control.

51. Fourthly, the claimant relied on his relationship with his wife, Ms Abu, who, in a very recent statement dated 30th April 2008, explained that she is a British citizen settled in the United Kingdom and that she married the claimant on 26th April 2008. She had known the claimant since 1999 and they had been together since December 2003. It was submitted that the claimant now has a strong case for a marriage application under the Rules and that the defendant's insistence on entry clearance had been shown by the House of Lords in the Chikwamba case to be unjustified.

52. Miss Chan, on the other hand, pointed out that the claimant's marriage to Ms Abu was very recent and that their relationship was established in the knowledge that the claimant was not entitled to be in the United Kingdom and was liable to removal at any time. It was contended that the claimant could return to Nigeria to make an application for entry clearance on the basis of marriage or to work under the Highly Skilled Migrants Scheme. It had not been suggested that his wife could not travel to Nigeria and there were no children involved. She could either accompany him or remain in the United Kingdom for the time that it takes to process the entry clearance application. In those circumstances, it was submitted that such a requirement would be proportionate and not inconsistent with what Lord Brown had said in the Chikwamba case.

53. Fifthly, the claimant relied on his length of residence in the United Kingdom which amounted to 10 years at the time of the decision letters, whereas it was only 6 years at the time of the Tribunal's determination on 19th November 2002.

54. Finally, the claimant raised a rather separate matter arising from paragraph 26 of the decision letter of 23rd June 2006 in which, he submitted, there was a plain implication that, because he had used a false passport in 1996 and because of adverse credibility findings by the adjudicators in 1998 and 2002 relating to his asylum claim, he may have purchased his property and obtained a mortgage by deception. The claimant said that the defendant had not previously raised that matter with him. He had owned the property since 1999, he had paid his taxes, he has no criminal record and he had kept the defendant informed about the progress of his legal studies.

Consideration of submissions

55. I begin my consideration of those submissions by reminding myself that, on an application for judicial review of a decision relating to a fresh claim, I am concerned with the rationality of the decision on Wednesbury grounds, including the application of anxious scrutiny. The decisions in this case were made before the case of WM (DRC), but Miss Chan accepted that the correct test for a fresh claim is whether the new material, taken together with the material previously considered, creates a realistic prospect of success before an immigration judge applying the rules of anxious scrutiny.

56. Whilst a number of points were raised by the parties, they all arise from the claimant's application for leave to remain as a student. That application is now academic because the claimant is no longer a student. There is no other outstanding application under the Rules for the defendant to deal with. The claimant has not made a marriage application, nor has he made an application under the Highly Skilled Migrant Scheme. If such an application were made other than from abroad, it would have to be considered in the light of the House of Lords' decision in Chikwamba. All that remains is the Article 8 claim which was parasitic on the student application which is now academic.

57. In my view, it is at least arguable that the defendant's requirement for the claimant to obtain entry clearance from abroad for leave to enter as a student was disproportionate in the light of Lord Brown's observations in Chikwamba and in the light of the delay of the defendant in dealing with his student application. At the time of the decision, he had a bit less than a year of his training to complete. However, that is now academic as

he has finished his studies and there is now no relevant in-country student application or any other application under the Rules for the defendant to consider.

58. With those observations in mind, I turn to consider the points that were raised.

59. I deal firstly with the claimant's point that Mr Baker told him on 17th April 2004 that he had been granted exceptional leave to remain. In my view, the claimant was right not to rely on legitimate expectation in respect of that representation because the file record, which I set out earlier, shows that the position was not unequivocal. Not only does the record not show any date for the expiry of the alleged leave, but the system shows that there was an outstanding human rights application and two outstanding applications for leave to remain which would not have been outstanding if the claimant had exceptional leave to remain. As the file states, the defendant would not have been accepting and processing applications for leave to enter or remain as a student if the claimant had already been granted exceptional leave to remain. It seems to me that it was plainly an error and that no document granting exceptional leave to remain has been issued by the defendant or received by the claimant. Although the claimant must, in my view, have doubted whether he had really been granted exceptional leave to remain, I can see that his hopes would nevertheless have been raised and, for that reason, it was regrettable that the error on the file was relayed to him, and it was even more regrettable that the claimant had to wait so long to be told the true position. It cannot be said that this matter was not taken into account by the defendant because the decision letter of 10th February 2006 refers in terms to one of the claimant's letters claiming to have been granted exceptional leave to remain and it states categorically that he had never been granted leave to enter and so had never been granted exceptional leave to remain. This seems to me to have been an unfortunate episode which understandably has given rise to a sense of grievance by the claimant, but I am not satisfied that it affects the rationality of the decision or that it impinges in any significant way on the claimant's Article 8 rights.

60. For the sake of completeness, I should mention that I am not impressed by the claimant's reliance on the defendant's failure to provide him with his passport pursuant to his alleged request in his letter of 5th August 2003 which I set out earlier in this judgment. That letter shows the claimant's willingness at that time to leave the United Kingdom when he had finished his Master's degree in order to apply from abroad to undertake the Legal Practice Course, but the claimant was not requesting his passport in that letter — he was inquiring about the progress of his application because he would need his passport eventually. I do not consider that the failure to provide the claimant with his passport is a matter on which the claimant can properly rely in his Article 8 claim.

61. I next deal with the issue of delay. Although the defendant's decision letter of 10th February 2006 is plainly directed to the claimant's application of 8th March 2004 for leave to remain as a student to pursue the Legal Practice Course, I would accept that the period of delay should be taken as commencing from his application for leave to remain as a student to pursue his Master's degree dated 21st February 2003. The period of delay in dealing with the claimant's student application was therefore a period of 3 years.

62. It is necessary to consider the issue of delay in the light of the observations of Lord Bingham in the case of EB (Kosovo). Firstly, the development of closer personal and social ties and the establishment of deeper roots in the community — in other words, an increase in the establishment of the claimant's private life.

63. Although, as a matter of common sense, the claimant's private life must have become more established during the 3-year period of delay whilst he was pursuing his studies, this was not a matter at the forefront of the claimant's case and there is very little evidence relating to it. The claimant's right to a private life under Article 8 was, however, expressly considered by the defendant in the decision letter of 23rd June 2006, concluding that any interference with it could be justified in the circumstances of his case.

64. Secondly, so far as delay is concerned, the fading of the sense of impermanence with the expectation that the defendant would have taken steps to remove the claimant if she had intended to do so. Once again, there is very little evidence expressly dealing with that aspect, save for the anticipation raised by Mr Baker's representation that he had been granted exceptional leave to remain, which is a matter which I have already dealt with.

65. Thirdly, so far as delay is concerned, whether the delay was the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. Whilst the delay of 3 years can properly be criticised, as can the delay in dealing with the erroneous file record relating to the grant of exceptional leave to remain, I do not consider that they could be said to be the result of a dysfunctional system in the sense mentioned by Lord Bingham as yielding unpredictable, inconsistent or unfair outcomes. In fact, the claimant has benefited from the defendant's delay in that he was able to pursue his studies during the period of delay with the result that he has since qualified as a solicitor. In that sense, the claimant has not been prejudiced by the delay — he has positively benefited from it, without ever having obtained leave to enter. I do not accept the suggested prejudice of not being be able to practise as a solicitor in Nigeria for 3 years. The claimant should have known that to be the position from the outset.

66. It is correct to say that the defendant did not deal with the issue of delay in either of the decision letters. She did, however, deal with the matters that had arisen during the period of delay, such as the length of residence being a period of 10 years, the claimant's relationship with Ms Abu and the claimant's progression to a solicitor's training contract. The defendant did not apologise or give an explanation for the delay or for the failure to reply to the claimant's letters. In my view, that was a regrettable discourtesy — she should have done so — but what is relevant to this case is the effect of the delay which, as I have said, is that the claimant has ultimately been able to qualify as a solicitor without having obtained leave to enter.

67. The next point raised, which was the requirement to obtain entry clearance from abroad for leave to enter as a student, is a matter which I have already dealt with in my preliminary observations.

68. I turn next to the claimant's reliance on his relationship with Ms Abu. At the time of the Tribunal's determination on 19th November 2002, the claimant was relying on his relationship with a Miss Richards. Such evidence as there was before the defendant in this case relating to his relationship with Ms Abu was contained in her statement dated 1st March 2005 which was sent in support of the claimant's request for expedition of a decision on his student application to enable him to secure a training contract. She sent details of her job and immigration status and she stated that she had known the claimant since 1999, they attended the same church and they had been together since December 2003. She was not, of course, married to the claimant at that time; they were not married until 26th April 2008. Such evidence as there was before the defendant was that they had been in a relationship for about 2½ years at the time of the decision letter of 23rd June 2006. In paragraph 20 of that decision letter, the defendant stated that no evidence had been provided that they were in a relationship akin to marriage, their relationship had been commenced in the knowledge that the claimant might be required to leave the United Kingdom and it was open to her to accompany him to Nigeria whilst he applied for entry clearance or she could remain in the United Kingdom to support any application he may make from abroad.

69. In my view, the evidence before the defendant about the claimant's relationship with Ms Abu was scant and the defendant was entitled to comment on the lack of evidence. Furthermore, there was no suggestion, nor has there been any suggestion, that she could not accompany the claimant to Nigeria if she wished to do so. There were, and are, no children from the relationship. Divorced from the student application which is now academic, the Article 8 claim before the defendant based on family life was a weak one. In my judgment, there was no realistic prospect of it succeeding before an immigration judge.

70. The penultimate point raised related to the claimant's further 4 years of residence in the United Kingdom since the Tribunal's determination. That was a matter taken into account by the defendant in the decision letter of 23rd June 2006. Indeed, the claimant had made a long residency application under paragraph 276B of the Rules which was refused in that letter but which is not a matter pursued by the claimant in this court. The increased length of residence would no doubt result in increased integration with society but, as I stated when dealing with this aspect under the heading of delay, there was very little evidence relating to it, save that he had worked, studied and owned a property. The evidential basis of the private life aspect of the Article 8 claim was lacking and there was, in my view, no realistic prospect of it succeeding before an immigration judge.

71. The final point raised related to the claimant's complaint about the implication in paragraph 26 of the decision letter of 23rd June 2006 that he may have purchased his property and obtained a mortgage by deception. In my view, that complaint is justified because it had never been raised by the defendant previously and such evidence as there was was insufficient to support such an implication. It was, in my view, regrettable that the defendant saw fit to raise it. It does not, however, affect the overall rationality of the defendant's Article 8 decision.

Conclusions

72. I am impressed by the way in which the claimant has successfully pursued his legal studies and finally qualified as a solicitor, and he is to be commended for the professional way in which he has conducted his case. I feel sure that if he is eventually allowed to enter or remain to practise as a solicitor in this country, he would be a valuable member of that profession. However, his student application is no longer relevant as it has become academic.

73. Having considered all the relevant aspects of the remaining Article 8 claim relating to his private and family life, both individually and cumulatively, I am not persuaded, for the reasons that I have given, that there was a realistic prospect of the claim succeeding before an immigration judge. Although that was not the test applied by the defendant because her decision letters preceded the case of WM (DRC), the result of applying that test is consistent with the final decision of the defendant. Whilst I am doubtful whether the first decision letter of 10th February 2006 would have satisfied the test of anxious scrutiny, the second decision letter of 23rd June 2006, when taken together with the decision of 10th February 2006, does, in my view, satisfy that test.

74. In the final result, I am not persuaded that the defendant's decision was, in the circumstances, irrational.

75. Any application that the claimant may now see fit to make based either on his marriage or under the Highly Skilled Migrant Scheme would have to be considered based on his present circumstances and in the light of the House of Lords' decisions of Chikwamba and EB (Kosovo). However, for the reasons I have given, I have concluded that this application for judicial review of the decisions made in February and June 2006 must be dismissed.

76. Yes, Miss Naftalin.

77. MS NAFTALIN: I am instructed by the Secretary of State to apply for costs in the usual way.

78. SIR MICHAEL HARRISON: Sorry?

79. MS NAFTALIN: Sorry, my Lord, to apply for costs in the usual way following the event, and also a form of order, my Lord.

80. SIR MICHAEL HARRISON: Thank you, what do you have to say about that, Mr Omoruyi?

81. MR OMORUYI: My Lord, thank you for the judgment. I oppose the application for costs on a number of grounds. Firstly, prior to the hearing of this application I specifically wrote to the defendant to withdraw this application for judicial review and make a voluntary departure with my wife, then my partner, we would be leaving for 5 years and the defendant refused.

82. SIR MICHAEL HARRISON: Sorry, can you repeat that. You requested what?

83. MR OMORUYI: I specifically wrote to the defendant --

84. SIR MICHAEL HARRISON: Yes.

85. MR OMORUYI: -- to withdraw this application for judicial review --

86. SIR MICHAEL HARRISON: Yes.

87. MR OMORUYI: -- and make a voluntary departure to Nigeria with my wife to make an application for entry clearance as a spouse, that was in April, and the defendant refused this by letter dated 13th March. In this letter --

88. SIR MICHAEL HARRISON: Sorry, could you first of all refer me to where I find the letter that you say you wrote to the defendant asking to withdraw the....

89. MR OMORUYI: I have got --

90. SIR MICHAEL HARRISON: Sorry.

91. MR OMORUYI: I have got a copy here for you.

92. SIR MICHAEL HARRISON: You have a copy. That is the best way, rather than me trying to find that. Thank you very much. (Handed)

93. Thank you. Would you just give me a moment while I read the letter. (Long pause)

94. Yes, and then the reply is within the same bundle, is it?

95. MR OMORUYI: The reply is the next --

96. SIR MICHAEL HARRISON: 13th March?

97. MR OMORUYI: 13th March.

98. SIR MICHAEL HARRISON: Thank you very much. Wait a moment, that cannot be the reply. The letter you have just shown to me is 29th April.

99. MR OMORUYI: No, the letter of 13th March is the one — is this one here. It is right at the back.

100. SIR MICHAEL HARRISON: Right at the back.

101. MR OMORUYI: So it is 13th March.

102. SIR MICHAEL HARRISON: Yes, I have that letter.

103. MR OMORUYI: From me to the Treasury Solicitor.

104. SIR MICHAEL HARRISON: I see. I was reading the letter of 29th April. I should start from the back. Just give me a moment again, will you. (Pause)

105. Then there was a reply on the same day.

106. MR OMORUYI: On the same day.

107. SIR MICHAEL HARRISON: Again I will read that. (Pause)

108. Yes, thank you, I have read that.

109. MR OMORUYI: My Lord, the letter of the 13th from the Treasury Solicitors states that I failed to report, that is not correct because I am correctly reporting every month, just to put that on the record. The last paragraph, the last two lines of paragraph 3 of the letter it says:

> "I am instructed that you did not report when required."

But that is not accurate:

> "In light of these considerations, my client does not agree to withdrawal of this judicial review on the basis that you will make a voluntary departure."

110. I had my ticket, which I explained to Megan Addis, and a copy of the ticket is also here for you, which I forwarded to her client as well, and this is a copy of the ticket. (Handed)

111. This was in order to bring this claim to an end after my qualification as a solicitor. But the Secretary of State refused because in my opinion Megan Addis took a personal interest in the matter.

112. SIR MICHAEL HARRISON: Just a moment. Let me look at the.... Where do I get the date of this? (Pause) Thank you.

113. MR OMORUYI: My Lord, just to point out, that is a flexible ticket. What I have been doing, I have been changing the date as and when necessary. So the first time the ticket was issued was way back in March and I have been changing and every time — I've got a new one, so this will.... But the point I make in relation to this, this case has come this far. I appreciate that the taxpayers' money has been spent, of which I have been a taxpayer myself for over 12 years now, which I explained to Megan Addis that I withdraw this application for judicial review and make a voluntarily departure, she refused. I had no choice. As you read from my letter of 29th April, paragraph 7, I have clearly said:

> "In view of your client's position" --

114. SIR MICHAEL HARRISON: Sorry, paragraph 7 of what?

115. MR OMORUYI: Of the letter of 29th April.

116. SIR MICHAEL HARRISON: Yes, I have it.

117. MR OMORUYI: Paragraph 7, I have clearly said:

"In view of your client's position that she will not agree to the withdrawal of this application for judicial review, I have no alternative but to continue with the matter."

118. This is not an application that was — it was an application that the Secretary of State would not agree to. She wanted to come to court and we came to court, my Lord. So I oppose the application for costs. I appreciate that taxpayers' money has been spent on this case, but I have been a taxpayer myself and I clearly made it clear in my letter of 29th April, well before the judicial review, I said in paragraph 2, I said:

"During our without prejudice telephone conversations of 13th March" --

119. SIR MICHAEL HARRISON: I am so sorry, you are going rather quickly. You are reading from what now?

120. MR OMORUYI: The same letter of the 29th, paragraph 2.

121. SIR MICHAEL HARRISON: Paragraph 2, thank you. Yes.

122. MR OMORUYI: I said clearly there, this was letter was addressed to the Treasury Solicitor for the attention of Megan Addis:

"During our without prejudice telephone conversations of 13th March 2008 I proposed to withdraw this application for judicial review in order to save time and costs to taxpayers (of which I have been a taxpayer for over 10 years)."

And I then explained what I wanted to do, and she refused that I couldn't withdraw this application for judicial review.

123. So, my Lord, I oppose this application for costs. It is clear that this matter would not have ended up in a hearing, but because the Secretary of State clearly refused to my withdrawal of this application for judicial review many, many months ago.

124. SIR MICHAEL HARRISON: Thank you very much.

125. Now Miss Naftalin, what do you say about that?

126. MS NAFTALIN: My Lord, I have not understood the reason the claimant has given as to why costs should not follow the event as is usual in these matters. It is true to say, obviously, that the claimant did make this offer in March 2008, but your Lordship will see from the letter from the Secretary of State to the claimant dated 13th March 2008 that your Lordship just read that this offer was in essence not considered to be a genuine offer, that the claimant would remove himself voluntarily to Nigeria. Your Lordship is well aware of the history of this case, and the Treasury Solicitor and her client, the Secretary of State, felt that the offer simply was not genuine and that is why the offer was refused — the offer to settle was refused. Further, the claimant had drafted a consent order, the terms of which are briefly set out in the Treasury Solicitor's letter of 13th March in the first paragraph. He had offered to withdraw his judicial

review claim on the basis that he would return to Nigeria in order to apply for entry clearance, but it specified that the Secretary of State would agree that he had an Article 8 claim in the United Kingdom. That is made clear, my Lord, in the last sentence of the first paragraph of the Secretary of State's letter of 13th March.

127. My Lord, clearly --

128. SIR MICHAEL HARRISON: He may have an Article 8 claim. Whether it will succeed or not....

129. MS NAFTALIN: Indeed. My Lord, the simple matter is the Secretary of State is not in a position to bind the hands of an Entry Clearance Officer in Lagos, should the claimant have voluntarily departed and made that application in Nigeria. It is not the Secretary of State's decision, it would be the Entry Clearance Officer's decision, it is not a matter for the Home Office. My Lord, that is why the draft consent order that the claimant proposed was not accepted and the offer to withdraw was not accepted.

130. SIR MICHAEL HARRISON: If one looks at the draft form of consent, it says:

> "... the Secretary of State is satisfied that the Claimant may have established family life with his partner, Miss Kashi J.R Abu, and the Claimant has agreed to seek entry clearance in this regard ..."

It is attempting, is it not, to in effect say he is going to go back to make his Article 8 claim from abroad. He has to specify what the Article 8 claim is about, the reason why he is going abroad.

131. MS NAFTALIN: Certainly, my Lord. First of all, as I said, it was not considered to be a genuine offer, firstly. Pursuant to that, the claimant has actually not purchased any aeroplane tickets. He purchased those on 3rd June 2008.

132. SIR MICHAEL HARRISON: Wait a moment. There is some — I was looking at the date of.... Where are you suggesting that occurs?

133. MS NAFTALIN: My Lord, there is.... My Lord, I doubt you have it in the court's bundle, but the claimant certainly sent the Treasury Solicitor an e-ticket, my Lord, booked on the Internet, which was dated 11th — apologies, 3rd June 2008. My Lord, I can pass it up if you would like to look at it.

134. SIR MICHAEL HARRISON: No, I have been handed an e-ticket. It seems to say outward bound on Friday July 11th.

135. MS NAFTALIN: My Lord, yes, but it was purchased, the ticket was purchased after the offer was made by the claimant to withdraw the judicial review.

136. SIR MICHAEL HARRISON: There does not seem to be any date on mine of when the ticket was purchased.

137. MS NAFTALIN: My Lord, I have a printout of an email from British Airways dated 3rd June 2008. I do not know if that is what your Lordship is looking at.

138. SIR MICHAEL HARRISON: Could I just see what you have?

139. MS NAFTALIN: Certainly.

140. SIR MICHAEL HARRISON: Yes, down the bottom right-hand corner it says 3rd June; is that right?

141. MS NAFTALIN: In this — I will just tear it out.

142. SIR MICHAEL HARRISON: If it is difficult, just hand up the whole file and I will hand it back to you after I have looked at the document. (Handed)

143. That I think is probably consistent. What I have is a different document from yours, but it does have down the bottom right-hand corner of it 3rd June, which is the same date as this document you have just produced. I think I had better hand this file back to you. (Handed)

144. MS NAFTALIN: I am grateful.

145. SIR MICHAEL HARRISON: Thank you very much.

146. MS NAFTALIN: My Lord, the point is the offer was not thought to be a genuine offer, that is why the offer to settle was not accepted by the Secretary of State, and in that event it is my submission that costs should follow the event as in the usual manner, because the Secretary of State has — as you can see from the file, my Lord, there has been a great deal of correspondence, a lot of time has been taken up with this case and costs --

147. SIR MICHAEL HARRISON: Some of it due to the delay of the defendant.

148. MS NAFTALIN: My Lord, the delay is not an exceptional delay and, my Lord, the situation is such that the claimant has brought the judicial review and it has not been granted, and in my submission costs should follow the event in the usual way.

149. SIR MICHAEL HARRISON: Right, thank you very much.

150. Yes?

151. MR OMORUYI: My Lord, firstly, the defendant submitted that my offer was not genuine. My Lord, you will recall that for 4½ years I was the one chasing the defendant to deal with my immigration matter. I was not underground. The defendant just didn't do anything about my immigration matter. I was writing and telephoning the defendant to deal with my immigration matter. If that is the case, as you rightly accepted in your judgment, then it is not appropriate for the defendant to say that my offer was not genuine. There was no reason for that assumption at all because I clearly said to her, to make (inaudible), that I was going to buy my ticket, I was going to go

away because the whole matter was stressful. She said, okay, she was going to take instructions from her client and revert back to me, and she did.

152. My Lord, in relation to the consent order I said at the bottom, "Kindly let me have your comments as soon as possible on the numbers below." I gave my numbers on which she contacted me.

153. SIR MICHAEL HARRISON: Sorry, you are reading from where?

154. MR OMORUYI: I reading my letter of March 13th to the....

155. SIR MICHAEL HARRISON: March 13th, "Kindly let me have your comments as soon as possible", yes.

156. MR OMORUYI: So we could discuss the consent order and if she wanted any amendment made we could have made that straightaway and resolved the matter. But instead she sent me a letter at about 7.00pm, the letter which followed, where she said they do not agree to withdrawing this claim at all. She phoned me by telephone, she telephoned me first to say this, and then she sent this letter to me by email as well on the same day. So I had no choice. I said clearly to her --

157. SIR MICHAEL HARRISON: You are going very fast. Can you speak a little more slowly.

158. MR OMORUYI: I then had no choice but to carry on with this claim. I appreciated from the outset that this was taxpayers' money being used, which I explained to her of which I have been a taxpayer myself, having been granted permission to work in 1997. For over 11 years, I have been a taxpayer. I appreciated and I said clearly to her, "Let me withdraw this claim and go away" and she said "no", and the defendant would not agree to that.

159. Another point I submit to you, my Lord, is this. The ticket that you have with you dated the 3rd is a flexible ticket. What happens every time I had to update the airline to say, "I am not leaving on that day and I will get a new ticket." So every time I update the airline they send me a different --

160. SIR MICHAEL HARRISON: When did you first get it?

161. MR OMORUYI: The first one I got was in March. It was the same day that I spoke — that was a booking, I had not paid for that. After she telephoned me — the first booking I made was in March, the same day I spoke with her. When she telephoned me and said that her client was not willing to agree to the withdrawal, I have to cancel that because I could lose £1,200 if I wasn't going to fly. I then change it to a flexible ticket, of which you have a copy there, and I also have two other different flexible tickets here.

162. So the point I make, my Lord, there was no basis for the defendant to say that my offer was not genuine, if for 4½ years she was not chasing me, I was chasing her to deal with my immigration matter, and I said I was departing voluntarily. She has never given me that opportunity to depart. So it was genuine that I wanted to leave, my ticket is

evidence of that, my letter to her was evidence of that, and she did not give me that benefit of doubt at all and there was no reason, there was no basis for her to conclude that I would not have left the United Kingdom at all. My passport is with the defendant.

163. SIR MICHAEL HARRISON: Yes, thank you very much.

164. The defendant has applied for costs on the basis that the normal rule should apply and that costs should follow the event. Mr Omoruyi disputes that that should be so because he says he offered to withdraw the judicial review application and to make an Article 8 application from abroad, that offer having been made on 13th March 2008 and refused by the defendant on that day.

165. Stripped of the verbiage, I am told by Miss Naftalin on behalf of the defendant, that the claimant's offer was refused because it was not considered that it was a genuine offer and that the claimant would not voluntarily depart. I am told by the claimant that he had actually booked a ticket at that time in March, but he subsequently cancelled it so that he did not incur penalty charges, and that he subsequently obtained a flexible ticket on 3rd June 2008, the details of which he has handed to me.

166. It seems to me that I have to look in the round at the reasonableness of the Secretary of State's refusal of the claimant's offer to withdraw his claim and to depart to Nigeria. In one sense it seems a bit rich to me to have delayed for some 3 years in dealing with the claimant's student application, during which time, namely those 3 years, the claimant had kept the defendant informed about the progression of his studies, now to say that his offer to go home and make an application from there was not genuine.

167. Although I appreciate there is a very considerable immigration history to this matter, as I have set out in my judgment, looking at the matter as things existed in March 2008 and the history of the period since 2003, I do not consider that there were reasonable grounds to conclude that his offer was not genuine. In those circumstances, and also bearing in mind the defendant's delay in this matter and indeed that, had the student application still been in existence, it was a case that the claimant might have succeeded in in the light of the case of Chikwamba, and also bearing in mind that he is a litigant in person — taking into account all those matters — it seems to me that the fair and reasonable order to make in the circumstances of this case is that there be no order as to costs.

168. MR OMORUYI: Thank you, my Lord.

169. SIR MICHAEL HARRISON: You have copies of this document?

170. MR OMORUYI: I've got copies.

171. Thank you, my Lord, I appreciate that. My Lord, firstly, I would like to make an application myself for permission to appeal in relation to the Article 8 point.

172. SIR MICHAEL HARRISON: In relation to what point?

173. MR OMORUYI: Article 8.

174. SIR MICHAEL HARRISON: Article 8.

175. MR OMORUYI: I would like to make an application for permission to appeal.

176. SIR MICHAEL HARRISON: Why do you say it would be appropriate to grant permission to appeal?

177. MR OMORUYI: My Lord, the point in relation to the Article 8 point, my Article 8 point I think has not been addressed appropriately in this judgment. My 12 years in the United Kingdom has been solely — it is one that could be split into two. The first 6 years was as a result of my application for asylum and on human rights grounds. The latter 6 years was solely to the defendant's handling of my immigration matter in the United Kingdom. My Lord, you accepted that the information given to me by Mr IO Baker was information that the defendant did not dispute, but the reasons that you have given in rejecting that as relevant to my Article 8 claim is one that I do not agree with. The evidence before you was that I have been chasing the Secretary of State for a decision on this matter and for requesting this ELR evidence. That is clearly relevant to the time I have spent in the United Kingdom. Part of my 6 years after November 2006 was purely due to the defendant's (inaudible) of my immigration matter and the determination, the proportionality determined in 2002 by the Tribunal did not include the evidence that you have before you today. The facts of my Article 8 claim are clearly different from the facts that was before the Tribunal in 2002, upon which that proportionality assessment was made.

178. The evidence today is that during the last 6 years the defendant informed me that I have been granted ELR. There was a delay in dealing with my student application. In the period of the delay in confirming my status, having informed me of ELR, I entered into a relationship with my wife and we've been together for 5 years. That was evidence that was not before the 2002 Tribunal. Paragraph 353 is relevant to this period of 6 years, from November 2002 to date, and this case is a forward-looking assessment of what the Tribunal would do when my case comes before the Immigration Tribunal. And as I clearly point out in my submissions of 12th July, I said — I submitted that the question at this stage is not whether the defendant is still entitled to maintain her own view on the merits that I should be refused leave, on the correct question and the correct question which the defendant ought to direct herself at this point is whether there is a realistic prospect that an immigration judge could disagree with the defendant's view on the merits, and I submitted that the House of Lords' judgments render my case compelling. They emphasised that the immigration judge is the primary decision-maker at an appeal stage, because the immigration judge is going to hear evidence which you have not heard today. He's going to hear detailed evidence of my Article 8 claim, detailed evidence from my wife and detailed evidence as to the circumstances surrounding the ELR that the defendant communicated to me in 2004. That evidence is not before you today and, my Lord, you will recall at the hearing you specifically asked the defendant to produce a copy of ELR and they were unable to do so. Clearly, that is a factor that is relevant to this matter and that — my position on this is that the immigration judge is better placed to hear all the evidence and then make an

informed decision. The evidence before you was solely to challenge the decision of 10th February and 23rd June 2006, and on the face of it, and on the evidence that you have before you today, it is my submission that the disposal of my Article 8 claim is not in accordance with the law. And I also submitted to you that the House of Lords' decision emphasised that claims depend upon the detailed factual findings made by the immigration judge after hearing evidence, taking into account the position of both the appellant and his family. They establish that the Secretary of State's policy of requiring claimants who would have good claim under the Immigration Rules to leave the United Kingdom to apply for entry clearance other than in exceptional circumstances is not lawful and should not be applied. But this case does not give me the opportunity to provide evidence, detailed evidence, that you would require in coming to this decision in relation to my Article 8 claim.

179. The further submission before you was that the House of Lords' decision established that it is open to an immigration judge to have regard to the findings he makes as to the mistakes and mishandling of the claim by the Secretary of State, and whether the Secretary of State has provided good explanation for the ELR communicated to me and/or for the delay. It is clear, and it is apparent from the evidence before you, that the Secretary of State has not provided any evidence at all for the delay and/or for why Immigration Officer Baker informed me 4 years ago that I had been granted ELR, and this was confirmed by the Croydon office. There is no evidence before you today to investigate this matter further and the effect of this on my length of stay is apparent because that means I have been in the United Kingdom a further 6 years after proportionality was first assessed in November 2002.

180. My Lord, I submit to you that permission should be granted to appeal to the Court of Appeal in this case only in relation to the Article 8 point, of which I have outlined before you.

181. SIR MICHAEL HARRISON: Right, thank you very much.

182. Do you have anything to say in reply to that?

183. MS NAFTALIN: My Lord, no.

184. SIR MICHAEL HARRISON: I have listened to what you have to say, Mr Omoruyi, but I am afraid I am not persuaded this is an appropriate case to grant permission to appeal. So that application is refused.

185. MR OMORUYI: My Lord, one further application. I would like a copy of the judgment, my Lord.

186. SIR MICHAEL HARRISON: Yes. By that you mean at public expense?

187. MR OMORUYI: Yes, my Lord.

188. SIR MICHAEL HARRISON: Well --

189. MR OMORUYI: I retract that, my Lord, but I would like a copy of the judgment and I am happy to pay for it.

190. SIR MICHAEL HARRISON: You are entitled to have a copy of the judgment, it simply a matter of when the transcript has been corrected and approved by me, then it is available and you can get a copy of it.

191. MR OMORUYI: Okay. My Lord, would that affect the time limit for my application to the Court of Appeal?

192. SIR MICHAEL HARRISON: I do not know how long it would take. What is the period for application to the Court of Appeal for leave to appeal.

193. MS NAFTALIN: My Lord, it is 21 days.

194. MR OMORUYI: 21 days. (The Judge conferred with the shorthand writer as the availability of the transcript of the judgment)

195. SIR MICHAEL HARRISON: The trouble is that although I am sitting here at the moment I am not quite sure of my own whereabouts during the intervening period and I would not want you to be prejudiced as a result of any delay arising from that. So what I am minded to say, Miss Naftalin, unless you have any comments to the contrary, is that the period to make any application to the Court of Appeal for permission to appeal should not start to run until — I will make it Monday of the week after, because the transcript has to get to me to be corrected. Would that seem to you to be reasonable, Mr Omoruyi? Has somebody got a calendar?

196. MS NAFTALIN: My Lord, may I just say that obviously the claimant does not need a copy of the transcript in order to go to the Court of Appeal, to apply for leave to appeal to the Court of Appeal. He can provide that after his appeal papers have gone in.

197. SIR MICHAEL HARRISON: Yes.

198. MR OMORUYI: My Lord, given the complex facts involved in this case, I would require the judgment in order to set out my grounds properly before the Court of Appeal. The judgment is important. If I were to instruct counsel in this matter, as I am currently unrepresented in this hearing, counsel will require the judgment in order to help me draft grounds of appeal.

199. SIR MICHAEL HARRISON: What I am going to do is to say that time for making any application for permission to appeal to the Court of Appeal should not start to run until 26th August.

200. MR OMORUYI: Thank you, my Lord.

201. SIR MICHAEL HARRISON: If there is, Mr Omoruyi, any delay in the transcript being obtained, you must still make your application within that period running from that date. Let that be understood.

202. MR OMORUYI: Thank you. I am grateful.
