OUTER HOUSE, COURT OF SESSION

[2009] CSOH 123

OPINION OF LADY CLARK OF CALTON

in the Petition of

AK (AP)

Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department dated 16th January 2009

Petitioner: Winters, solicitor-advocate; McGill & Co
Respondent: Campbell; C Mullin

4 September 2009

Summary

[1] The history of the case is summarised in Article 4 of the petition. Some of the issues which were advanced at earlier procedural stages were not issues in the judicial review. The judicial review was directed to the decision contained in the decision letter dated 16 January 2009 (6/2 of process). The decision was made by an official on behalf of the respondent.

The Legal Framework

[2] It was agreed on behalf of both parties that Rule 353 of the Immigration Rules provides the legal framework within which a decision must be made by the respondent. Rule 353 provides:

> "When a human rights or asylum claim has been refused and any appeal in relation 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) has not already been considered; and
> >
> > (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection...".

The grounds of challenge

[3] The solicitor advocate for the petitioner advised that he was not relying on paragraph 14 of the petition. On behalf of the petitioner, he made submissions in relation to the issues set out in paragraphs 6-13 and 15-18 of the petition. It was submitted on behalf of the respondent that many of the submissions made on behalf of the petitioner are inter-related. I now summarise the submissions which were made.

[4] Paragraph 6 of the Petition states:

> "That the respondent has acted unreasonably *et separatim* acted irrationally. Reference is made to the facsimile from the respondent dated 17th April 2009 which is herein incorporated *brevitatis causa* confirming that they are reviewing the petitioner's case. It is unclear why the respondent continues to

> oppose the petitioner's case when it appears that the respondent is again reviewing the case. The petitioner's solicitors have contacted the respondent to enquire as to whether the petitioner and his family are to be granted indefinite leave to remain. The respondent has not been able to confirm whether the petitioner and his family are to be granted indefinite leave to remain. The respondent appears to be acting unreasonably et separatism irrationally by continuing to oppose the Petition when they also appear to be reconsidering the petitioner's case".

[5] Counsel for the respondent produced two affidavits explaining how the petitioner's case had been dealt with by officials. The affidavits explain that the case has been reviewed, the results of that review are contained in the decision letter and that there is no active ongoing review.

[6] In relation to paragraph 6 of the petition, I am satisfied on the basis of the affidavits that there is no reconsideration of the petitioner's case which is outstanding. I accept that the wording of the letter dated 17 April 2009 is not clearly expressed but the affidavits make plain that the petitioner's case is not under active review.

[7] Paragraph 7 of the petition states:

> "That the respondent has acted unreasonably *et separatim* acted irrationally by referring to a refusal letter dated 1st August 2008 on page one of the refusal letter dated 16th January 2009. The respondent agreed that this refusal letter dated 1st August 2008 was flawed and was withdrawn. By referring to the letter dated 1st August 2008 which was withdrawn and agreed was flawed it is unclear whether the respondent has been influenced or other subsequent findings tainted by having reference to the previous refusal letter which was withdrawn. In so doing the respondent has acted unreasonably *et separatim*

acted irrationally. Any subsequent references to the refusal letter/refusal decision refer to the letter dated 16th January 2009".

[8] Submissions on behalf of the parties added nothing of significance to the pleadings on this point. I consider that the issue raised in paragraph 7 is without merit. In my opinion, it is plain that the respondent is merely giving a historical narrative in referring to the earlier refusal letter dated 1 August 2008. I do not consider that the decision is flawed merely because reference to this historical narrative is included in the decision letter.

[9] Paragraph 8 of the petition states:

> "That the respondent has accepted that the petitioner and his family have established private and family life in considering the representations made under the case resolution program and Article 8, ECHR at the fourth paragraph on page four of the refusal letter. That the respondent has erred in law because her decision to refuse to accept that further submissions amounted to a fresh claim is irrational by appearing to usurp the function of the court. The respondent has made what would appear to be a decision on the merits of the petitioner's case. In so doing the respondent has erred by treating her own view on the validity of the further submissions and its effect as more than a 'starting point' (see pages four and five of the refusal letter). Although the respondent refers to whether there would be a realistic prospect of success before an Immigration Judge the respondent does not appear to have kept clearly in mind the proper test to be applied. In so doing the respondent has acted unreasonably and in a way that no reasonable decision maker would in the circumstances have acted".

[10] In developing the submission on behalf of the petitioner, the solicitor advocate for the petitioner relied on *WM (DRC)* v *SSHD* [2006] EWCA Civ 1495 per Lord Justice Buxton at paragraph 6, 7 and 11. Reference was also made to *Hassan* v *SSHD* 2004 SLT 34.

[11] The short response by counsel for the respondent was to the effect that the respondent had not erred. The respondent had asked the right question and adopted the correct approach.

[12] Before considering the submissions in relation to paragraph 8, I wish to make some general comments which bear upon the proper approach by the Court to this case. In considering *WM (DRC)* v *SSHD*, I have borne in mind that this case helpfully sets out the task of the Court in paragraphs 8 to 11 as well as considering the task of the respondent in paragraphs 6 and 7. Lord Justice Buxton analysed the role of the Court and concluded

> "the determination of the Secretary of State is only capable of being impugned on *Wednesbury* grounds....Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly a Court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters. ....First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return....The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting point for that inquiry; but it is only a starting point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluations 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".

There is no dispute between the parties that these passages summarise the proper approach to be adopted by the respondent and by the Court in reviewing the decision.

The solicitor advocate for the petitioner accepted that the review powers of the Court are limited and that this is not an appeal on the merits.

[13] Although the decision letter 6/2 of process was subjected to detailed scrutiny, I consider that it must be read as a whole, fairly and in context. It is not to be subjected to scrutiny as if it were a contract document. I bear in mind that the determination of the respondent is only capable of being impugned on "*Wednesbury* grounds". I consider that on any fair reading of the decision letter it is plain that the respondent had in mind the proper test and applied it. The logic of the submission on behalf of the petitioner appears to be that the respondent is disbarred from forming any judgement about the matters in issue. I consider that the submission is ill founded. The respondent, according to Lord Justice Buxton in paragraph 6 "has to consider whether (the material) taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgment will involve not only judging the reliability of the new material but also judging the outcome of tribunal proceedings based on that material....". I am of the opinion that, in addressing the test, which is not in dispute in this case, as to whether the new material creates a realistic prospect of success in an application before an adjudicator, the respondent is entitled and must be in a position to form a view of the merits to inform a judgement about whether there is created a realistic prospect of success before an adjudicator. The respondent has not, in my opinion, decided the case without considering and applying the proper test.

[14] Paragraph 9 of the petition states:

> "That the respondent has acted unreasonably *et separatim* acted irrationally in assessing whether the interference would be in a manner sufficiently serious to engage Article 8, ECHR at page four at the fifth paragraph. The respondent

has misdirected herself by failing to consider that there is a low standard applicable to engage Article 8, ECHR. The respondent appears to be employing a higher standard than is appropriate and in so doing has acted unreasonably *et separatim* acted irrationally".

[15] Counsel for the petitioner prayed-in-aid *Huang* v *SSHD* [2007] UKHL page 11 in particular paragraphs 19 and 20. He referred also to *AG* (*Eritrea)* v *SSHD* [2007] EWCA Civ. page 801 at paragraphs 24 and 26-28. It was submitted that the respondent did not appear to understand the correct test as expressed in those cases.

[16] Counsel for the respondent submitted that the approach taken is a reasonable one bearing in mind the circumstances of the family. The present case is not one where the family will be split up. The whole family can enjoy family life in Israel together. The respondent was entitled to reach the conclusion that the consequences were not so grave as to engage Article 8. Even if the respondent was not entitled to reach that conclusion, the respondent was plainly entitled to reach the further conclusion taking into account proportionality and applying the test in *Huang*.

[17] In *Huang* the Judicial Committee considered Article 8 ECHR jurisprudence in paragraph 18 and referred to the acknowledgement that the Convention confers no right to choose where an individual or family lives. The Judicial Committee recognised that there must be "sufficient seriousness" to engage the operation of Article 8 at all. There is, however, no need, having applied the correct test and considered proportionality, to ask if the case meets a "test of exceptionality". The issue is put in this way by Lord Justice Sedley in *AG (Eritrea)* "....that while an interference with private or family life must be real if it is to engage Art.8(1) the threshold of engagement (the 'minimum level') is not a specially high one. Once the article is engaged the focus moves....to the process of justification...." (paragraph 28).

I consider that it is plain that Article 8, ECHR does not provide an absolute right to respect for private and family life. On the facts of this case where the petitioner and his family have a relatively tenuous connection with the UK and are to be moved together, the respondent in my opinion is entitled to conclude that Article 8 is not engaged at all. But in any event the respondent also considers Article 8(2). Article 8(2) provides:

> "there shall be no interference by public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Lord Justice Sedley considers the development of the law in *AG (Eritrea)* v *SSHD*. I find this a useful overview of the recent case law. In my opinion, the solicitor advocate for the petitioners has not demonstrated any foundation in the facts of this case to justify his submission that the respondent was not entitled to reach the conclusions applying the proper approach. The submission appears to be mere assertion.

[18] Paragraph 10 of the petition states:

> "That the respondent has acted unreasonable *et separatim* acted irrationally in assessing proportionality. The respondent has relied on the petitioner's and his family's precarious immigration status. However, the respondent has erred by failing to consider that under the legacy/case resolution program the petitioner's and his family's claim ought to have been being considered. Although there was a delay in making the application this is irrelevant to the

> responsibility of the respondent to have been actively considering the petitioner's and family's claim under the legacy program".

[19] The solicitor advocate for the petitioner prayed-in-aid *ED (Kosovo)* v *Secretary of State for the Home Department* (2008) UKHL 41, paragraphs 14-16. He particularly relied on paragraph 14 to the effect that during the period of delay the petitioner may develop closer personal and social relationships and become more established in the community. The solicitor advocate for the petitioner submitted that the respondent had caused some delay in this case resulting in the petitioner spending a longer time developing ties in the community with his family.

[20] Counsel for the respondent referred to the last paragraph, page 4 of the decision letter in which the respondent applies the appropriate test and thereafter sets out the various factors which bear upon proportionality.

[21] There was no dispute and I accept, as is obvious, that during a period of delay a petitioner may develop closer personal and social relationships and become more established in the community. That will depend upon the facts and circumstances of the case. Even if it is accepted that the petitioner had such an opportunity because of delay, any delay and the consequences thereof are to be considered by the respondent. I have considered pages 4 and 5 of the decision letter where delay is considered. I am satisfied for the reasons given in the decision letter that the respondent applied the proper test, considered proportionality and reached a conclusion which the respondent was entitled to reach.

[22] Paragraph 11 of the petition states:

> "The Respondent has acted unreasonably *et separatim* acted irrationally at page five, second paragraph in that she considered the weight to be placed on

immigration control. Weight, at best is peripheral to the question whether a fresh claim is being made.....".

[23] The solicitor advocate prayed-in-aid *Harbachou* U SSHD [2007] CSOH page 18 at paragraphs 23 and 37-38. It was submitted that the respondent in weighing the factors did not keep the correct test in mind and that the respondent appears to be making her own decision about the weight to be attributed to the factors.

[24] In response, it was submitted on behalf of the respondent that it was plain from the case law that the maintenance of immigration control is a relevant factor and that factor is entitled to be given weight by the respondent. In these circumstances it is not unreasonable or irrational to give weight to immigration control in the decision letter.

[25] I do not consider that *Harbachou* gives support to the submission by the solicitor advocate for the petitioner. In the submissions in that case, reference was made to "weight being peripheral to the question whether a fresh claim was to be made" (paragraph 23). But it is plain from the decision that the problems which were identified and led to reduction were because the Secretary of State had fallen into error because the absence of reasons indicated that he had not correctly addressed the correct question (paragraph 38). For the reasons given in paragraph 13, I consider that the respondent, contrary to the submission made on behalf of the petitioner, is entitled to "weigh" or assess the evidence and form a view, which will assist but not be determinative of the issue to be decided, looking to whether there is a realistic prospect of success of an adjudicator applying anxious scrutiny deciding in favour of the applicant. I also consider that it is well settled that maintenance of immigration control is a relevant factor to which the respondent is entitled to have regard in considering Article 8(2) ECHR. (*Huang*, paragraph 19).

[26] Paragraph 12 of the petition states:

> "The respondent has failed to take into account or failed to take into account properly factors which are relevant in such an exercise. They include whether the petitioner could reasonably carry on private life outwith the UK. Such issues and matters arising out of them are matters of fact. They fall to be assessed in terms of an evaluative exercise rather than a limited approach to one or two factors, taking into account all material factors affecting both the petitioner and other relatives".

[27] The solicitor advocate submitted that the respondent had placed immigration control on a higher plateau that the personal matters involving the petitioner and his family. He submitted that the proper approach was illustrated in *Huang*, paragraph 18 and *Beoku-Betts* v *SSHD* [2008] UKHL 39.

[28] On behalf of the respondent, it was submitted that the solicitor advocate had conceded in relation to paragraph 14 of the petition that he could not rely on discrimination in relation to the petitioner and his family as a factor preventing a return to Israel. The submission on behalf of the petitioner was plainly wrong insofar as it appeared to rely on a submission that evaluation in some way tainted the reasons given by the respondent. The respondent is not precluded from evaluation and is entitled to consider the issues and evaluate them in considering the proper test. The respondent was plainly entitled to conclude that there is no impediment to the petitioner and his family carrying out a private life outside the UK and there is no irrationality in the reasons or approach.

[29] I refer to my views expressed in paragraphs 13 and 25 in relation to evaluation. I further note that *Huang* highlights core values which Article 8 exists to protect and illustrates this by reference to "matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence

on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant". The solicitor advocate for the petitioner was not able to found upon any particular facts which should have been considered by the respondent and were not. The respondent had new material and, according to the decision letter, considered that. I therefor consider that the submission on behalf of the petitioner is ill-founded.

[30] Paragraph 13 of the petition states:

> "The respondent has erred in failing to apply anxious scrutiny particularly by relying on the petitioner's and his family's precarious status. The petitioner and his family have developed closer social ties and established deeper roots than the petitioner or his family could have shown earlier. The respondent appears to have erred by failing to recognise the petitioner's claim is strengthened. The respondent appears to have failed to apply a structured approach to assessing proportionality. The respondent has failed to have proper and visible regard to relevant principles in making a structured decision and there has been a failure of reasoning by the respondent".

[31] The solicitor advocate prayed in aid *EB (Kosovo)* v *SSHD* (2008) UKHL 41, paragraph 14 in which there is discussion of the effect of delay in the decision-making process. He also referred to *AG (Eritrea)* v *SSHD*, paragraph 37.

[32] Counsel for the respondent submitted that this was merely another aspect of proportionality. The petitioner and his family have never had any entitlement to be in the UK. It cannot be irrational to have regard to that. The decision-maker sets out the factors considered in the balancing exercise and refers to the correct test. The respondent has considered the up-to-date material submitted. Reference was made to *EB (Kosovo)*, paragraphs 14-16.

[33] It is not disputed that length of residence may be relevant to the development of family life. I consider however that the weight to be given to that in a particular case is a matter for the decision maker (*EB (Kosovo)*, paragraph 16). The claim of the petitioner in this case dates from August 2005 and the period in which the petitioner and his family have had family life in the UK has been taken into account. I consider that the reasoning of the respondent is obvious and clear.

[34] Paragraph 15 of the petition states:

> "The respondent has not taken into account a consideration which is relevant. The UK is a signatory to the UN Convention on the Rights of the Child. Reference is made to the UN Convention on the Rights of the Child which is incorporated herein *brevitatis causa*. This provides *inter alia* that in all actions by public authorities, the best interests of the child shall be a primary consideration. Prior to 22nd September 2008, the UK had reserved its position *quoad* this provision in respect of immigration matters. On that date, it intimated that it was withdrawing this reservation. As a result, all decision makers in the UK in any field, including immigration matters, are now obliged to take the best interests of the child into account. The respondent when reaching her decision has failed to take the best interests of either of the petitioner's children into account. It was her duty to recognise that the best interests of the children were now an important consideration. She failed to do so. No reasonable decision maker properly considering the UK obligation under the treaty referred to would have failed to consider this matter".

[35] The solicitor advocate for the petitioner referred to Article 3 of the UN Convention on the Rights of the Child (hereinafter referred to as the UN Convention). Article 3 provides:

> "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

The solicitor advocate made reference to 6/22 of process which referred to the withdrawal of certain reservations in particular "the immigration reservation" which the UK Government had made in relation to the UN Convention. The withdrawal was effected on 18 November 2008. In summary, the solicitor advocate submitted that the respondent in applying Rule 353 should have had specific regard to the principle of the best interests of the children as a primary consideration in the decision making (hereinafter referred to as "the principle"). As the respondent did not do this, the decision of the respondent is irrational and wrong. The high point of the petitioner's case was submitted to be the Opinion of the Court of Human Rights in *T* v *UK*, Application 24724/94 and the concurring opinion of Lord Reed. In the course of consideration of this case, reference was also made to *R* v *Secretary of State for the Home Department ex parte V* 1988 A.C. (H.L. CE) 407 at p.499-500. The solicitor advocate submitted it was not enough for the respondent to concede that the best interests of the child falls within the proportionality assessment under Article 8 ECHR. That does not give sufficient importance to the provisions of Article 3 of the UN Convention. He submitted that the mere balancing exercise envisaged in Article 8 ECHR does not meet or apply "the principle" that the best interests of the child is a primary consideration.

[36] Turning to the decision letter, he submitted that in any event even if the proportionality assessment under Article 8 was sufficient to comply with "the principle" set out in the UN Convention, it is plain from the terms of the letter that the respondent did not in the present case apply "the principle" taking into account the best interests of the child as a primary consideration. The solicitor advocate accepted

that in the decision letter, the respondent appears to have regard to the welfare of the children. He submitted that it is not clear from the terms of the decision letter that the respondent addressed the best interests of the children as a primary consideration. That is "the principle" which requires to be applied. I was referred to page 4 of the decision letter which makes brief mention of the children attending nursery and school and the further references to the children at page 5. The solicitor advocate conceded that if the respondent in the decision letter had expressly referred to "the principle" there would be no problem in the present case. He submitted that the problem arises because "the principle" was not expressly referred to and the terms of the decision are unclear about what the respondent had in mind.

[37] In response, counsel for the respondent conceded as a matter of law that the respondent accepted "the principle" that the best interests of the child is a primary consideration which required to be applied in the decision making process. As I understood the submission, that concession did not include a concession in law that the UN Convention provisions in particular Article 3 were justiciable. The concession flowed from the respondent's view of the operation and effect of Article 8(2) ECHR in the context of cases such as the present case. The concession in law was that "the principle" to be applied was the same and indistinguishable from "the principle" which the solicitor advocate submitted flowed from Article 3 of the UN Convention and ought to be applied. Counsel for the respondent submitted firstly, that the best interests of the child was the primary consideration and is not the determining factor. Secondly, "the principle" is not a separate or stand alone consideration but forms part of the balancing exercise under Article 8(2) ECHR. Thirdly "the principle" may be outweighed by other important competing considerations. That is because "the principle" is not the determining or paramount factor.

[38] Counsel submitted that his approach was supported by the approach adopted by the European Court of Human Rights. He referred to *Üner* v *Netherlands* (2006) 45 EHRR 14, paragraphs 54, 57, 58. He submitted that in paragraph 8 the Court makes explicit that Article 8 ECHR includes criteria referring to the best interests and well being of the child. He submitted that paragraph 58 demonstrated that the best interests of the child are an important factor which falls within the scope of Article 8(2) ECHR. Turning to domestic law, in an immigration context, counsel referred to *VW & MO (Uganda)* (2008) UKAIT 00021. That case considered a number of issues, some not relevant to the issues in the present case were reversed on appeal. It was submitted that *Űner* is helpful because in approaching the question of the best interests of the child, it is clear that the Immigration Judge and Tribunal were doing so in the context of Article 8(2) ECHR. Paragraph 48 is also of assistance because it explains that the best interests of the child is a consideration but not the overriding consideration. Counsel then referred to *PS (India)* (2009) EWCA Civ 544. He set out the facts referred to in paragraph 18. Paragraphs 19-22 are a summary of the submissions presented. One of the issues in the case was whether the Tribunal had placed insufficient weight and/or had failed adequately to consider the impact of the removal of the appellant on a child who was accepted and treated as a child of the marriage. It was also contended that the Tribunal had failed to make findings concerning the best interests of the child. These issues are considered in paragraphs 29-31 and specifically in paragraphs 32-36. The Court accepted that the Tribunal had considered and reflected on the best interests of the child. They also accepted that the Tribunal had made an evaluation of the many factors in the case. In paragraph 35, it was accepted that conflicting public interests have to be balanced. Counsel also referred to the case of *Huang* referred to in *EB (Kosovo)* v *SSHD* (2008)

UKHL 41. Lord Bingham, quoted with approval in paragraph 10, the acknowledgement of the Committee in *Huang* to the effect that,

> "the authorities will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under Article 8(2), there will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if the system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; ...."

Counsel submitted that it is plain that the Courts consider that immigration control is an important competing consideration.

[39] Counsel then turned to the decision letter 6/2 of process. He submitted that the decision letter contains reference to the factual situation of the children and their circumstances. The respondent made the decision in the context of the updated information submitted and taking into account the present and prospective situation of the children. It is not necessary for the respondent to specifically include the "magic phrase" referring to the best interests of the children as a primary consideration.

[40] I now deal with the issues raised in paragraph 15. It is not disputed that the reservation to the UN Convention in respect of immigration had been withdrawn and was not in force at the date of the decision letter 6/2 of process. The case proceeded on the basis of a legal concession on behalf of the respondent that the best interests of the child is a primary consideration which required to be applied in the decision making process by the respondent in this case. In my opinion it is significant that "the principle" does not include the words "the paramount consideration" or "the primary consideration". Both these formulations would give greater importance and affect the application of "the principle" in a way not demanded by "the principle" which is phrased in terms as "a primary consideration". I conclude from the wording that "the

principle" carries with it the implication that depending on the facts and circumstances of the particular case, there may be other relevant considerations which also may be regarded as primary in importance and which may properly be taken into account. I also consider that when one or more such considerations are taken into account, it follows that in a particular case, one or more of these considerations may outweigh the best interests of the child. I agree with the first and third points made by counsel for the respondents which I have summarised in paragraph 35. I consider that "the principle" is not determinative and can be outweighed. This flows from the meaning which I attach to "the principle"

[41] An issue for consideration, in my opinion, is whether "the principle" automatically applies as part of the consideration of Article 8(2) ECHR where there is a child of an applicant. In broad terms, the real dispute between the parties is that counsel for the petitioner submits that Article 3 of the UN convention has not been given effect as it is not implicit in Article 8 ECHR assessment. Counsel for the respondent submits that it is implicit in the assessment of Article 8 ECHR.

[42] I consider firstly the case law prayed in aid on behalf of the petitioner. In *T* v *UK* the European Court of Human Rights considered whether various articles of the Convention of Human Rights had been breached. Lord Reed in a concurring opinion made some observations in relation to Articles 3 and 6 ECHR. At page 36, he reflected as to whether the tariff in the sentence was compatible with Article 3 and he considered it appropriate to have regard to Article 3 of the UN Convention. He appears to do that in the context of forming a view about whether there was a breach of Article 3 ECHR. This in my opinion illustrates the way the jurisprudence of the European Court of Human Rights may be informed and influenced by other international conventions. A process which is not unfamiliar also in the domestic

courts. In the conjoined appeal with *R* v *Secretary of State for the Home Department ex parte V*, Lord Browne Wilkinson considered Article 3 of the UN Convention and noted that the Convention had not been incorporated into English law. He stated "but it is legitimate in considering the nature of detention....to assume that Parliament has not maintained on the statute book a power capable of being exercised in the manner inconsistent with the Treaty obligations of this country. Article 3.1 requires that in the exercise of administrative as well as court powers the best interests of the child are a 'primary consideration'". He concluded that "the Secretary of State in exercising his discretion as to the duration of the detention of the child must at all times be free to take into account as one of the relevant factors the welfare of the child and the desirability of reintegrating the child into society....The child's welfare is not paramount: but it is one of the factors which must be taken into account".

[43] Although the solicitor advocate for the petitioner submitted that this case law supported his position, I consider that the dicta may be interpreted as supportive of the respondent's position. Lord Browne Wilkinson (at 499F) did not in my opinion express any novel concept in relation to interpretation in domestic law. Interestingly for present purposes, he appears to interpret the UN Convention Article 3 to the effect that "the child's welfare is not paramount: but it is one of the factors which must be taken into account". This appears to be his understanding of the words "a primary consideration". The obiter comments, in my opinion, give some support to the petitioner's submission. I note of course that Lord Browne Wilkinson is not expressing his opinion in the context of a consideration of Article 8 ECHR. Article 8 ECHR has at its core the concept of proportionality and balancing but I do not consider that inconsistent or impossible to reconcile with "the principle". In Article 8 ECHR no consideration is the paramount or the primary consideration. There may be

considerations other than "best interests of the child" which in a particular case may also be primary and individually or in combination may outweigh the best interests of the child. In my opinion "the principle" is entirely consistent with the Article 8 ECHR approach.

[44] It appears also to be implicit in the submission on behalf of the petitioner that Article 3 of the UN Convention lays down some higher standard protecting the interests of the child so that even a mandatory consideration of the best interests of the child as part of the consideration of Article 8 could not meet that standard and therefore give effect to the principle. I do not accept that. Article 3 of the UN Convention does not elevate the principle to a higher status which would be implied by the words "the paramount consideration" or "the primary consideration". It is also in my opinion not intended to be a reference to the best interests of the child in the very general sense which might be appropriate in care proceedings. What is in issue, in the immigration context, is whether or not the decision affects the Article 8 rights of the child. A failure to give consideration to the best interests of the child would not in my opinion satisfy "the principle". The mere fact that a balancing exercise of circumstances and factors is necessarily involved in Article 8 consideration, does not mean that "the principle" is not given effect. In my opinion a recognition that the best interests of the child must be considered in the balancing exercise is sufficient to give effect to the principle that it is a primary consideration. Other factors or circumstances may be omitted or discounted because they have not been given that status. But a failure to address the best interests of the child in a case where a child is involved, and the decision maker is required to consider Article 8 ECHR would in my opinion amount to a failure to give effect to "the principle".

[45] When I consider the case law prayed in aid on behalf of the respondent and summarised in paragraph 38, I accept that the case law does indicate that when a tribunal or court comes to consider Article 8 ECHR, that consideration properly encompasses consideration of the best interests of any child affected.

[46] I turn now to the decision letter 6/2 of process. That was decided in the context of the information submitted to the respondent including the further information appended to the letter of 14 June 2007 which includes specific information about the children. The decision letter bears to consider the private and family life of the petitioner and his family at pages 4-5. It is not limited to a consideration of family life in respect of the children. The children were born in Israel. *E* was born 26 August 2001 and *A* was born 23 November 2004. The petitioner and his family arrived in the United Kingdom in August 2005. At page 5, consideration is given specifically to the circumstances of the children including the future circumstances in relation to the private life of the children. I note that the decision letter does not expressly refer to "the best interests of the children". I consider that it is plain from the decision letter that in considering both family and private life, as it relates to the children, the respondent is addressing the best interests of the children current and future in the light of the information given. I consider that the letter must be interpreted fairly in its context. These are children who will remain in family. In view of their ages and limited opportunities to form a separate private life at the date of the decision letter, it is not clear what further information should have been referred to and considered by the respondent as bearing upon the best interests of the children. None was put forward on behalf of the petitioner. I do not consider that it is essential that the respondent make specific reference to the phrase "the best interests of the children as a primary consideration". I am satisfied from the terms of the letter that the

respondent did have in mind "the principle" in her consideration and effectively applied "the principle".

[47] Paragraph 16 of the petition states:

> "The respondent has taken into account considerations which are not relevant. At page 6 the respondent considers matters which the Immigration Rules (paragraph 395C) set out when considering factors relevant to dealing with a claim by a person who is to be deported who avers that his/her Article 8 rights have been infringed. The petitioner is not facing deportation nor is there any prospect that he will. Accordingly reference to such factor is wholly irrelevant. No reasonable decision maker properly considering matters would have referred to them".

[48] Counsel for the respondent drew attention to the specific wording of paragraph 395C. He submitted that the decision letter is essentially identifying other factors which fall to be considered in terms of the rules. The reference to a claim by a person who is to be deported is merely a standard response reflecting the terms of the Rules.

[49] I am satisfied the submission by the solicitor advocate is without merit. There is no suggestion in this case that the respondent was in any way confused about the status of the petitioner.

[50] Paragraph 17 of the petition states:

> "That the respondent has acted unreasonably *et separatim* acted irrationally by failing to bear in mind that there is only a modest test to be persuaded that the further submissions should be treated as a fresh claim. The content of the further submissions taken together with previously considered material create a realistic prospect of success where (a) the content of the further submission

is apparently credible, there being nothing on its face to show that the content is incredible; if investigation is required to determine credibility then the material is apparently credible. The respondent appears to have accepted the new documents as credible and the respondent has accepted that private and family life have been established. The respondent ought to have treated the further submissions as a fresh claim if as appears to be the case further investigation is required to determine whether the removal of the petitioner and his family is proportionate. Secondly (b) the content of the further submission is capable of having an important influence on the result of the case, although it need not be decisive. The consideration of whether submissions amounted to a fresh claim is a decision of a different nature to that of an appeal against refusal of asylum, it requires a different mindset. Only if the respondent can exclude as a realistic possibility that an independent tribunal (in the person of an immigration judge) might realistically come down in favour of the petitioner's asylum or human rights claim, can the petitioner be denied the opportunity of consideration of the material. No such Secretary of State so directing herself would have found that the content of the further submissions could not have an important influence although they need not be decisive".

[51] Paragraph 18 of the petition states:

"The respondent has erred by arriving at unreasonable findings in light of the guidance given on assessing proportionality and it cannot be said that there would be no realistic prospect of success before an Immigration Judge. That a reasonable Secretary of State for the Home Department having regard to the relatively low test applicable and applying anxious scrutiny, would not have

> failed to decide that the fresh evidence was material, apparently credible and when taken together with the previously considered material was reasonably capable of producing a different outcome before an Immigration Judge. The respondent ought to have found the further submissions were significantly different, namely not having been considered previously and having a realistic prospect of success".

[52] As I understood the solicitor advocate's submission, paragraphs 17 and 18 of the petition were meant to be an attempt to pull together and generalise the grounds made in the petition. These paragraphs were not further developed in relation to the case. I was asked to consider the issues which were raised in the petition cumulatively.

[53] Counsel for the respondent submitted that paragraphs 17 and 18 of the petition were merely a restatement of the petitioner's position. It is mere assertion and does not add anything to the submissions which have been made covering the same grounds.

[54] As I understood the submissions, the general issues raised in paragraphs 17 and 18 are not founded upon any new grounds but on the grounds already dealt with by the solicitor advocate. I have dealt with these grounds in the preceding paragraphs. I considered that the approach in this case attempting to break down and isolate some of the issues from their context was not helpful. Apart from the issues raised in paragraph 15, the main issue in the case relates to the respondent's approach to Article 8. These are the matters which are broken down and dealt with on a rather fractured basis in paragraphs 8 to 13 of the petition.

[55] For the reasons given I am not persuaded by the solicitor advocate for the petitioner that there is any basis to intervene. I conclude that the petition should be refused. For the avoidance of doubt, I do not consider that the submissions viewed cumulatively lead to any other conclusion than the refusal of the petition.