Case No: CO/65/2010

Neutral Citation Number: [2010] EWHC 776 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2010

Before :

THE HONOURABLE MR JUSTICE BEATSON

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Between :

R (WJ) (CHINA)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

MR ABID MAHMOOD (instructed by **Harvey Son & Filby**) for the **Claimant**
MR CHARLES BANNER (on 17/3/10) and **MR DAVID BLUNDELL** (on 23/3/10) (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 17/3/10 and 23/3/10 at Birmingham Civil Justice Centre

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Judgment

Mr Justice Beatson:

A. Introduction

1. The claimant, a citizen of China, seeks to challenge the decisions of the Secretary of State on 25 November 2009 to refuse to regard new representations as a fresh claim and on 17 December 2009 to issue directions for her removal from the United Kingdom on 5 January 2010. On 17 March I heard her application for permission to apply for judicial review on a "rolled up" basis pursuant to the order of HHJ Kirkham on 21 January. At the conclusion of the hearing I granted permission and allowed the application only on the basis of a ground (the *"BA (Nigeria)"* ground) first advanced on behalf of the claimant by Mr Mahmood in his oral submissions. The sole ground in the claimant's N461 form is that her removal would be a breach of Article 8 of the European Convention of Human Rights. In his skeleton argument Mr Mahmood also submitted that the defendant applied the wrong test in determining whether the claim was a "fresh claim" within paragraph 353 of the Immigration Rules. I refused permission on both those grounds.

2. On the day after the hearing I formed the view that my conclusion on the *BA (Nigeria)* ground was manifestly wrong. As the Order had not been drawn up, on Friday 19 March I invited written submissions from Mr Mahmoud and from Mr Banner, who had appeared on behalf of the Secretary of State, as to whether it was open to me to revisit the decision and, if it was, whether to do so. I received submissions on behalf of the claimant from Mr Mahmood, and, on behalf of the Secretary of State, from Mr Blundell, who had appeared on behalf of the Secretary of State in a similar case heard by the Divisional Court on 16 March. After a further hearing on Tuesday 23 March, I set aside my earlier decision. I confirmed my decision to grant permission to apply for judicial review on the *BA (Nigeria)* ground, but dismissed the claim, and granted the claimant permission to appeal. Mr Mahmoud also sought permission to appeal on the Article 8 point, but since I concluded that the point was not arguable and did not give permission to move for judicial review, he will have to apply to the Court of Appeal. I now give the reasons for my decision on the grounds advanced by Mr Mahmood at both hearings, and for my decision to set aside my previous decision.

3. On 31 March the Divisional Court dismissed the claimant's case in *R (SM and ZA) v Secretary of State for the Home Department* [2010] EWHC 718 (Admin). If, as Mr Blundell informed me, the issues in that case are similar to those in this case and if there is to be an appeal from that decision to the Court of Appeal, there would be some advantage in any appeal from my decision being heard together with it or sequentially.

B. The factual and procedural background before the hearing on 16 March

4. The claimant first arrived in the United Kingdom in 2001. She claimed asylum in September 2001 but on 4 February 2002 her application was refused on third country grounds because she had previously claimed asylum in France. On 12 February 2002 she was removed to France. She subsequently re-entered the United Kingdom illegally. She claimed to have done so in July 2008 concealed in a container. She did not come to the notice of the authorities until 29 July 2009 when she was arrested for shop lifting. She was detained, served with IS151A papers as an illegal entrant, and then released. She subsequently claimed asylum again. She did not, at that time, claim that removal would breach her Article 8 rights. In her asylum interview she claimed she had broken up with her boyfriend a couple of weeks before the interview. When detained she gave a false name, but fingerprint evidence revealed her true identity and her previous asylum claim. Her second asylum claim was refused on 28 August 2009. She did not appeal against that decision.

5. The Secretary of State's decision letter did not accept the claimant's account and (paragraph 24) concluded that she lacked credibility. The letter refers (paragraphs 5, 11 and 21) to her assertions that she and all her family are Catholic and that she attended prayer meetings twice daily, but that she only had very limited knowledge of the Catholic religion. It also stated (paragraph 22) that her account and her stated fear of persecution by government officials is inconsistent with the objective evidence about the treatment of Catholics in China.

6. The claimant has been detained since 18 August 2009, when she reported. It was not until 6 November 2009 that the Secretary of State through the UK Border Agency set removal directions for 12 November. On 11 November, the day before she was to be removed, two months after she was detained, and five days after the removal directions were set, her solicitors made an application under the Family FLO Policy based on a relationship she claimed she had been in for approximately a year with Songan Lei, a naturalised UK citizen originally from China. The application stated they had been living together since the beginning of 2009. The solicitors also applied on her behalf for permission to apply for judicial review and for urgent interim relief to restrain her removal. The application for interim relief (case CO/13502/2009) came before HHJ McKenna that day. He granted the interim relief sought. As a result the removal directions were cancelled.

7. On 20 November further submissions were made on behalf of the claimant. Her solicitors asked for them to be considered as a fresh application for asylum and on human rights grounds which were based in part on her relationship with Mr Lei. The application under the Family FLO Policy and the fresh claim for asylum were both refused on 25 November. The defendant treated the application for leave to remain as

Mr Lei's unmarried partner as a "fresh representations" application. This was because, since the claimant had no status in the country when she made the application, she was not eligible under the Family FLO Policy.

8. The material parts of the letter dated 25 November are:

> "20. You claimed asylum on the 29/7/2009 and your application for asylum was refused on the 27/8/2009. You did not appeal against this decision but have now applied for Judicial Review.
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> …
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> 24. … It is noted that in the asylum interview you claimed that you were previously in a relationship with Su'an Lai and that you had broken up with your boyfriend a couple of weeks ago when he had moved out after a row. You now claim that you are presently in a relationship with Mr Songan Lei a British Citizen. Due to the inconsistencies in your account regarding the name of your partner and the status of your relationship it is not considered that you have established a family life in the UK.
>
> Furthermore it is noted that whilst you have provided the passport of your partner Mr Songan Lei you have provided no other evidence of this relationship. In fact in making this application you stated that 'the lack of documentation was for three reasons (i) my instructing solicitors have only recently been instructed in this matter, (ii) the urgency of the removal directions aspect was given priority rather than seeking to deal with the details of the document relating to the couple and (iii) the couple have made a FLR (O) application in which they seek for the Claimant to remain in the UK which tends to show some of the details in any event. This application is dated 11th November 2009'. However, since you were refused asylum on the 27/8/2009 it is considered that you have had adequate opportunity to acquire any information pertinent to your claim. The only evidence that you have submitted for your FLR (O) application consists of copies of your alleged partner's bank account. This does not demonstrate that you are in a relationship.
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> …
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> 29. You have also raised the case of **Chikwamba v SSHD [2008]** and stated that the Home Office has not shown that it would be proportionate for the Claimant to have to apply for leave to enter the UK from China. As stated previously the issue of proportionality was not considered above due to the fact that it was not considered that you have established a family life in the UK with Mr Songan Lei. However despite the lack of family life **Chikwamba** has been considered. Your case is significantly different from **Chikwamba**.
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> …
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> 30. It is noted that Mr Songan Lei although a British Citizen was born in China and no reasons have been provided to suggest that he is unable to return to China with yourself. This is fundamentally distinguished from

> **Chikwamba** where the spouse was a refugee and was unable to return to Zimbabwe.
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> 31. Your asylum claim has been reconsidered on all the evidence available, including the further submissions, but it has been decided that the decision of 27/8/2009 should not be reversed. It has been decided that the fresh submissions regarding your relationship are not significantly different from your previous application and furthermore that your relationship was considered in the Reasons for Refusal Letter.
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> …
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> 33. As it has been decided not to reverse the decision on the earlier claim and it has been determined that your submissions do not amount to a fresh claim, you have no further right of appeal."

9. The application for permission in case CO/13502/2009 came before me on the papers on 11 December 2009. The evidence in support of the application consisted of statements by the claimant and Mr Lei dated 10 December, ie about a month after the judicial review proceedings were launched, and three days after the defendant's Acknowledgment of Service was received. I refused permission, stated that I considered the claim to be totally without merit, and observed**:**

> "Any family or private life you have established in the 18 months since your clandestine and illegal arrival in the UK has been established in the knowledge you have no basis for remaining here. You are an immigration offender, have assumed a false identity and have no children in the UK. You have furnished very little evidence of your relationship or any obstacles to your partner's ability to join you in China. In these circumstances it is not arguable that the defendant erred in his consideration of your claims, whether it is proportionate to remove you, and how *Beoku-Betts, EB (Kosovo)* and *Chikwamba* apply to your case."

10. The claimant did not renew that application at an oral hearing, apparently because her solicitors decided that they should obtain more evidence. The injunction granted by HHJ McKenna was discharged. She remained detained at Yarl's Wood Detention Centre and on 17 December new removal directions were set for her to be removed to France on 5 January. Between 11 December and 5 January no further steps were taken. Only on 5 January, almost three weeks after the removal directions had been set and the day on which the claimant was to be removed, was the present application, CO/65/2010, lodged. The detailed statement of grounds completed by the claimant's solicitors refers to "grounds of appeal" rather than grounds for judicial review. The grounds state that evidence is adduced "in response to" the "reason for refusal of the previous judicial review application". The evidence submitted on behalf of the claimant to support her claim that she and Mr Lei had

formed a family life pursuant to Article 8 of the European Convention on Human Rights consists of a statement dated 21 December by Mr Lei, and witness statements by Ping Xi, Gui Fan You, Lily Yang and Dong Cheng, all dated 22 December.

11. This application came before HHJ Oliver Jones QC on the same day. He granted interim relief, restraining the defendant from removing the claimant from the United Kingdom until the determination of the application for permission to apply for judicial review was granted. He observed that**:**

> "Having regard to the evidence filed in support of the new application the interim relief is necessary to preserve the status quo, there being arguable merit in the application."

The removal directions were then cancelled.

12. On 15 January, shortly before the matter came before HHJ Kirkham, the claimant's solicitors applied on her behalf for a certificate of approval in order to enable her to marry Mr Lei. They wrote a further letter about this application on the same date and another one on 12 March. Further statements by Mr Lei and the claimant dated 19 January and consolidated statements by each of them dated 5 February were filed. Still further statements were filed on 16 March, the day before the hearing. These were by two acquaintances of the claimants who had been removed from the United Kingdom to China, and a further statement by Mr Lei to which I shall return. On 16 March 2010 the Secretary of State issued a further decision letter. It stated the claimant's case had been reconsidered since the institution of these proceedings but, after summarising the contents of all the witness statements, maintained the decision in the letter dated 25 November 2009.

13. The material parts of this letter are:

> "32. It is not accepted that any interference is sufficiently serious to amount to a breach of the fundamental right protected by Article 8. Even if it was accepted that there is a subsisting relationship it is considered that your client can enjoy her relationship with her partner in China.
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> …

> 35. …It is considered that your client's partner was aware of your client's precarious immigration status at the time they met and began co-habiting. Your client's partner, in his witness statement dated 5 February 2010, commented on this point. No exceptional circumstances have been put forward by your client and therefore in accordance with the European Court's caselaw, her removal will not constitute a violation of Article 8.
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> 36. Consideration has also been given to any potential interference with your client's partner, Sogan Lei's right to a family life in accordance with the decision in **Beoku-Betts v SSHD [2008] UKHL 39**. However, if it was accepted that the relationship was genuine and that any interference would be of such gravity as to engage Article 8, it is considered that any such interference would be proportionate. Mr Lei was fully aware of your client's precarious immigration status from the outset. In the light of her poor immigration history and the Secretary of State's interest in maintaining effective immigration control it is considered that any such interference would be proportionate to the legitimate goal of immigration control.
>
> 37. It is not accepted that your client's partner has an arguable case against him not being able to relocate back to China, his homeland, with your client. It is noted that Songan Lei has only been naturalized in the UK since October 2009. It is therefore considered that if he wished to marry your client and build a family life with her, then it is reasonable to expect him to return to China with your client in order to do so. Article 8 does not preclude the removal of a person from a country simply because he/she has a partner settled and employed in that country.
>
> 38. In summary, even if it was accepted that your client has established a family life with Mr Lei in the United Kingdom, she would have done so in the full knowledge that she had no lawful basis to stay here and in the light of her poor immigration history, her removal would be a proportionate interference with any family life she may have established in the United Kingdom."

The letter also reviewed the evidence about the claimant's private life in the United Kingdom and concluded that removal would not be a disproportionate interference with that. It also concluded that the claimant did not qualify for humanitarian protection.

14. This case has taken a curious and unsatisfactory procedural track. It has a number of the features of a claim that is *prima facie* abusive. The claimant's second asylum claim made in July or August 2009 did not assert that her removal would breach her Article 8 rights. But in November 2009 in her human rights claim she asserted she had been in a relationship with Mr Lei for over a year and they had lived together since the beginning of 2009. Secondly, although the claimant had been detained for some

months before the removal directions were set on 6 November no application was made or challenge launched during that time. The application in case CO/13502/2009 was made only on 11 November, the day before she was to be removed. The application in this case (case CO/65/2010) was made on the very day she was to be removed, almost three weeks after the removal directions were set.

15. Thirdly, the only evidence in support of the application in case CO/13502/2009 was contained in her solicitor's statement of the grounds on which relief was sought. While in some cases the speed at which the defendant proposes to act may justify proceedings being launched with insufficient material, on these facts this is not one of those cases. Only after the defendant's Acknowledgment of Service was received did the claimant's solicitors file any evidence in support of that application. The two statements dated 10 December, however, furnished very little evidence of the relationship or any obstacles to Mr Lei's ability to join the claimant in China. The position is that the evidence in both the earlier judicial review and in this case has trickled in as responses to points made either in the defendant's Acknowledgements of Service, or by the court when it refused permission in case CO/13502/2009. It is (see PD54 paragraph 5.10) the responsibility of claimants and particularly of their legal representatives to put before the court the material which it is necessary for the court to have if it is to be in a position to scrutinise a challenge to a decision by the Secretary of State properly.

16. These were not the only unsatisfactory aspects of the case. After HHJ Kirkham ordered a rolled-up hearing and the hearing on 16 March was listed, the claimant's solicitors did not provide a trial bundle until, shortly before the hearing, the court requested that a bundle be provided. The bundle provided was, moreover, manifestly incomplete. For example, it did not contain the defendant's Acknowledgement of Service in these proceedings (case CO/65/2010), only that in case CO/13502/2009. Moreover, the trickle of evidence continued: evidence was received as late as the day of the hearing. All of the evidence, except possibly the evidence of those who had been removed to China and whose statements have been recently obtained, could have been obtained and provided earlier. No explanation has been given for the failure to do so. As far as the incomplete bundle is concerned, it is said that the claimant's solicitors moved office over Christmas. But the Acknowledgement of Service was lodged on 15 January and the trial bundle was only provided shortly before the hearing, so it could not have been mislaid in the move.

17. The consequence of the way the claimant's case has been handled by the Claimant's solicitors has been significantly to increase the cost to whoever is funding the proceedings. I do not know whether they are funded privately or publicly. What has happened has also increased the burden on the Court, the court office and the Defendant, who have been faced with a rolling series of propositions. Claimants in

cases such as this and their solicitors justifiably expect the court to give their cases the anxious scrutiny which claims to infringements of human rights require. But, leaving aside any increase in costs, the way these proceedings have been pursued impedes the ability of the court to scrutinise the decisions properly.

18. One reason for some of the difficulties in this case may be that where a rolled-up hearing is ordered the timetable moves faster than some might expect and the rules do not clearly provide for the filing of evidence and skeleton arguments before the hearing. This is not surprising because rolled-up hearings are (at least in their present numbers) a relatively recent development. They may be justified where there is an issue of delay which, if permission is granted, cannot be raised at the substantive hearing. They may also be justified where there is an issue that has to be determined urgently, its arguability is not clear on the material before the court, but the relevant evidence has either been adduced by the time the papers are considered by the court or it can be adduced within a shortened timescale. But the rules concerning evidence and skeleton arguments for hearings are framed on the basis that permission has been granted. So, the provision in CPR 54.14(1) for evidence provides a timetable of up to 35 days starting from "the service of the order giving permission" and that in the Practice Direction for filing skeleton arguments (54A PD 15.1) requires them to be filed 21 days before "the date of the hearing of the judicial review (or the warned date)". The explicit reference in CPR 54.14(1) to the order giving permission stongly suggests it does not apply to a rolled-up hearing but, if interpreted generously, the provision in the Practice Direction might apply to a rolled-up hearing because it will in substance deal with the judicial review as well as the application for permission. There is, however, no clear basis in the rules for requiring these steps to be taken in such a case. Accordingly, when an order is made for a rolled-up hearing it is desirable that directions be given to ensure there is an appropriate pre-hearing timetable. This should make provision for the service of evidence by the Defendant, additional evidence by the Claimant, a trial bundle, skeleton arguments, and a bundle of authorities.

C. The Claimant's case at the hearing on 16 March

19. There were three limbs to Mr Mahmood's submissions. The first is that the claimant is entitled to an in-country appeal and that the Secretary of State in seeking to remove her before such an appeal has acted unlawfully. Mr Mahmood relied on the decision in *Secretary of State for the Home Department v BA (Nigeria) and Ors* [2009] UKSC 7. That case concerned an asylum or human rights claim made which fell within section 92(4)(a) of the Nationality Immigration and Asylum Act 2002 (the "2002 Act"). Accordingly, it appeared from the natural reading of Section 92(1) of the 2002 Act that the claimant in that case was entitled to an in-country appeal because the claim had not been certified by the Secretary of State.

20. The Supreme Court rejected the Secretary of State's submission that Section 92(1) only applied to the first claim and not to subsequent asylum or human rights claims. Lord Hope stated at [29] that the system contains powers enabling the Secretary of State to deal with the problem of repeat claims. Those are the provisions in section 94(2) empowering the Secretary of State to certify that a claim is clearly unfounded and thus to remove the right of the person whose claim has been certified from remaining in the United Kingdom pending his or her appeal. Lord Hope stated (at [32]) that there is a balance to be struck between, on the one hand, not burdening the immigration appeals system with worthless repeat claims, and on the other hand, having procedures in place to address the problem of repeat claims which respect the United Kingdom's international obligations under the Refugee and Human Rights Convention. Lord Hope concluded that**:**

> "That is what the 2002 Act did in its provisions concerning certification."

Lord Scott and Lord Rodger agreed with Lord Hope's judgment. Lord Brown also agreed but gave a substantive judgment. Mr Mahmood submitted that this claimant's claim was not certified, that, in the light of the decision in *BA (Nigeria)*, it is irrelevant that this is not her first claim, and that accordingly she is entitled to an in-country appeal.

21. The second limb of Mr Mahmood's submissions is that the defendant applied the wrong test in determining whether the claim was a "fresh claim". He submitted that the reference in the decision letter dated 25 November to "a realistic prospect of success" reflects the test for fresh claims set out in Buxton LJ's judgment in *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, but not the approach in the recent decision of the Court of Appeal in *R (YH) v Secretary of State for the Home Department* [2010] EWCA Civ 116. In *YH's* case Carnwath LJ, with whom Moore-Bick and Etherton LJJ agreed, considered the effect of decisions since *WM(DRC)*'s case, in particular the decisions of the House of Lords in *ZT (Kosovo) v SSHD* [2009] 1 WLR 348 and of the Supreme Court in *BA (Nigeria)*'s case. In the light of that he reformulated the test as one in which the question is not whether there is a "realistic prospect of success" but whether the claim is "clearly unfounded".

22. Mr Mahmood also relied on Carnwath LJ's statement (see [18] – [21]) as to the approach of the court in judicial review proceedings; that is as to the effective scope of judicial review. Carnwath LJ approved Sedley LJ's observation in *QY (China)* [2009] EWCA Civ 680. This is that, in the light of *ZT (Kosovo)*, in a case in which there are no issues of primary fact, because of the essentially forensic character of the

judgment that has to be made, the court is generally as well placed as the Home Secretary and can ordinarily gauge the rationality of a certification decision by deciding whether it was right or wrong.

23. Mr Mahmood submitted that the reference to "realistic prospect of success" in the decision letter in this case showed that the defendant applied the wrong test, and that the court could use the wider scope of review and determine the rationality of the decision to certify the claim by deciding whether the decision was right or wrong. He submitted that in this case, in the light of the material before the Secretary of State and the court about the claimant's relationship with Mr Lei, the tribunal, with its fact-finding power, should be given the opportunity to determine the issue after a full hearing. He also relied on Carnwath LJ's statement in *YH's* case (at [15] – [16]) that, although it is the Secretary of State who has to make the decision, the concept of a "hypothetical judge" in the tribunal is useful because it makes it clear that the Secretary of State "is acting simply as the gatekeeper in a process leading to a possible appeal", and emphasises the objectivity which that requires.

24. The third limb of Mr Mahmood's submissions concerns the Secretary of State's approach to Article 8. He submitted that in relation to whether removal is arguably disproportionate, I should follow the decisions in *Beoku-Betts* [2008] UKHL 39, *Chikwamba* [2008] UKHL 40 and *EB (Kosovo)* [2008] UKHL 41 rather than the decisions of the Strasbourg Court in *Abdulaziz v UK* (1985) 7 EHRR 471 and *Omoregie v Norway,* Application No 265/07, 31 October 2008 on which Mr Banner had relied.

D. Discussion: The *BA (Nigeria)* ground:

25. I have referred to the fact that the "*BA (Nigeria)*" ground did not feature in the grounds or in Mr Mahmood's skeleton argument. Mr Mahmood frankly stated he developed it very shortly before the hearing on 17 March and gave notice to Mr Banner on the morning of the hearing. Notwithstanding (or perhaps because of) this, at the conclusion of the hearing I decided that the claimant's challenge succeeded on this ground.

26. At the hearing on 16 March, I accepted Mr Banner's submission that pursuant to *BA (Nigeria)* it is a pre-requisite for the application of section 92 of the 2002 Act that

there be an immigration decision within Section 82 of that Act.[1] Accordingly, it was crucial to determine whether there was such an immigration decision in the present case. The two decisions under challenge are that contained in the letter dated 25 November and the removal directions set on 17 December. It was submitted by Mr Mahmood that they fell within section 82(2)(d) and (g) of the 2002 Act and they were both immigration decisions. He also submitted (at both hearings) that, although the claimant did not appeal against the Secretary of State's dismissal of her application for asylum on 28 August 2009, that remained an "immigration decision" against which an appeal (albeit out of time) lies. As to the last submission, the claimant had an in-country right of appeal against the dismissal of her application for asylum and thus the requirements in *BA (Nigeria)* were satisfied. She did not exercise that right within the specified time limit and has not applied for permission to appeal out of time. In those circumstances the decision made on 28 August is no longer juridically alive. I reject the submission that it is arguable on the basis of *BA (Nigeria)* that the dismissal of an application for asylum retains currency as an "immigration decision" generating a further right to an in-country appeal in such circumstances.

27. What of sections 82(2)(d) and (g) of the 2002 Act? Section 82(2) states that an "immigration decision" means *inter alia***:**

> "(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain",

> "(g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), or (c) of the Immigration and Asylum Act 1999 (removal of a person unlawfully in United Kingdom)"

28. At the first hearing I concluded that the decision contained in the letter dated 25 November is not an immigration decision within Section 82. Therefore section 92, in particular section 92(4), on which Mr Mahmood's submissions depended, was not engaged by that decision. The only provision that Mr Mahmood suggested applied to that decision was section 82(2)(d). That provision does not, however, apply because the claimant had no status whatsoever in this country when the decision was made on 25 November. The claimant's application had been treated as a fresh application for asylum and human rights, ie as further representation on human rights grounds, and the Secretary of State's decision on this did not fall within section 82(2)(d) because it did not change the claimant's status. She had no leave before the further representations and the rejection of them as a fresh claim did not change her status: see for example *ZT (Kosovo)* [2009] UKHL 6 at [59] and [70]. It was not therefore

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1 On 31 March in *R (SM and ZA) v Secretary of State for the Home Department* [2010] EWHC 718 (Admin) the Divisional Court held this to be so.

the "result of the refusal" that she had no leave to remain in this country. Accordingly the letter did not contain a new immigration decision.

29. What, however, about the removal directions set on 17 December? The directions were cancelled when HHJ Oliver-Jones granted interim relief on 5 January. Mr Banner's submissions were focussed on the fact that once the removal directions were cancelled, there was no live immigration decision (although he did not accept that before their cancellation they were an immigration decision). At the first hearing I accepted Mr Mahmood's submission that it cannot be right that where removal directions are cancelled following the grant of interim relief, the rights to an appeal that the claimant had by virtue of the decision to set removal directions disappear. He submitted that otherwise there would be a continuing cycle of decisions justifying interim relief but not leading to any substantive outcome one way or the other.

30. Had the setting of removal directions been an immigration direction, Mr Mahmood's submission would have been compelling. But section 82(2)(g) applies only to decisions to remove a person by way of directions under section 10(1) of the Immigration and Asylum Act 1999, namely the removal of an overstayer, a person who has breached a condition attached to his leave to enter or remain, a person who has obtained leave to remain by deception, or a person whose indefinite leave as a refugee has been revoked on the specified grounds. The decision under challenge in the present case is not such a decision and in any event the removal directions are to be distinguished from the (normally) prior decision to remove a person from the United Kingdom. It was for this reason that I considered that my decision on 17 March was manifestly wrong, and invited submissions as to this and as to my power to vacate it.

31. It is only the substantive decision to remove on one of the grounds in section 10(1)(a), (b), or (c) of the 1999 Act which gives rise to a right of appeal under section 82(2)(g). Removal directions will be set to give effect to that decision. Removal directions direct the carrier of the aircraft to remove a person on a particular flight and inform him that he is going to be removed. The issue of whether removal directions constitute an "immigration decision" was resolved by the Court of Appeal in *GH v Secretary of State for the Home Department* [2005] EWCA Civ 1182. It was held (at [45]) that the setting of such directions does not of itself give rise to any right of appeal because that is not an "immigration decision" under section 82(2).

32. Having considered the submissions made on behalf of both parties before and at the hearing on 23 March, I concluded that the decision of 25 November 2009, refusing to accept the claimant's further representations as a fresh claim, which was maintained

in the letter of 16 March 2010 was not an "immigration decision" within the meaning of section 82(2) of the 2002 Act. The only immigration decision that has been made in respect of the claimant was the decision to remove her as an illegal entrant on 27 August 2009 following the refusal of her asylum claim: see section 82(2)(h) of the 2002 Act. She did not exercise her right of appeal against that decision. The removal directions set which were cancelled following her first judicial review claim and those later set but cancelled following the commencement of the present claim are also not "immigration decisions". Accordingly, while the *BA (Nigeria)* ground of challenge was arguable, it fails.

E. Jurisdiction to revisit the decision reached on 17 March

33. It is clear that the pre-CPR power of a court to recall a judgment before the Order has been perfected has survived the CPR: see *Stewart v Engel* [2000] 1 WLR 2268 and *Venetia Robinson v Ronald Fernsby* [2003] EWCA Civ 1820. The court may do so of its own motion: *Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717; *Pittalis v Sherefettin* [1986] QB 868.

34. May LJ in *Venetia Robinson's* case stated that a judge should hesitate long and hard before recalling a judgment. The authorities suggest that this should only be done in an exceptional case or where there are strong reasons for so doing and there is a "plain" or "palpable" mistake in order to save the party which was prejudiced the expense of an appeal.: *Stewart v Engel* [2000] 1 WLR at 2274 (Sir Christopher Slade); *Venetia Robinson's* case [2003] EWCA Civ 1820 at [94] (May LJ). The Court of Appeal in *Pittalis's* case regarded the case of a judge who shortly after delivering an oral judgment decided that it was wrong as exceptional. In the present case the point was one first raised in general terms on behalf of the claimant in oral submissions, and the precise ground upon which it was submitted that there was an immigration decision in this case was only advanced in Mr Mahmood's reply. Those factors led me to conclude on 23 March that the circumstances in this case qualify, and to recall the earlier judgment.

F. Did the defendant arguably apply the wrong test in determining whether the claim was a "fresh claim"?

35. In the light of *R (YH) v Secretary of State for the Home Department* [2010] EWCA Civ 116 and *AK (Sri Lanka)* [2009] EWCA Civ 447 the reference to the words of the *WM (DRC)* test in the decision letter in this case does not raise an arguable ground of review. In *YH's* case at [10] Carnwath LJ, agreeing with Laws LJ in *AK's* case, stated that, whatever the theoretical difference between the two legal tests, it is so narrow that "its practical significance is invisible". Carnwath LJ stated he took that to mean that the difference can for practical purposes be ignored and proceeded on that basis.

36. As far as the scope of review point is concerned, I have referred to the unsatisfactory manner in which the evidence came forward in this case. In *YH's* case Carnwath LJ stated (at [21]) that, while the court can ordinarily gauge the rationality of the Secretary of State's decision to certify by deciding whether it was right or wrong, the process is one of judicial review not a *de novo* hearing, and the issue must be judged on the material available to the Secretary of State. The Secretary of State, however, did not object to the admissibility of the later evidence and Mr Banner's submissions were made on the basis of the facts contained in all the witness statements in support of the claimant's case. I am therefore also prepared to consider the case on this basis.

37. I have concluded that it is not arguable that the Secretary of State erred in concluding that the representations made on 20 November 2009 did not amount to a fresh asylum claim. The claimant's second asylum claim had been refused on 28 August 2009. Her account was (see [5]) considered not to be credible. She did not appeal against that decision and the position in relation to that claim has not changed since then.

38. For the reasons given in section G of this judgment I have also concluded that the Secretary of State did not arguably err in concluding that the human rights claim based on Article 8 did not satisfy the requirements of a fresh claim.

G. The Article 8 ground

39. The evidence asserting that the claimant and Mr Lei are in a relationship is not free from difficulties. I have referred to the the way and the time that it was adduced. The defendant was entitled to conclude in his letter dated 25 November 2009 on the basis of the inconsistencies in the claimant's account (see [4], [6], [8], and [14]) that she had not established a family life in the United Kingdom. However, for present purposes I assume that the Tribunal would accept that she and Mr Lei were in a relationship. On that assumption, the evidence that is of principal significance to the Article 8 issue is that given by Mr Lei. He is now a United Kingdom citizen. If the claimant is removed, he would have to make a decision about joining her in China, conducting their relationship by a series of visits, conducting it by correspondence and telephone, or letting it wither. There is nothing of relevance to these matters in his statement dated 10 December 2009. That was why the previous application for judicial review was (see [9]) said to be totally without merit.

40. The evidence in Mr Lei's statement dated 5 February is that**:**

> "Unfortunately I would not be able to return to China with Xue Juan because I have an established business here in the UK. Further, I have put down my roots in this country that I love and adore. I have many friends here. The UK is my home and I would lose all of this if I was to return to China with Xue Juan." (paragraph 11)

In his most recent statement dated 16 March he states he has been in this country since June 2002, first as a business visitor and then as the holder of a work permit, and that he was naturalised on 5 October 2009 and is no longer a citizen of the People's Republic of China, which does not recognise dual nationality. He has thus lived in the United Kingdom for nearly eight years. He is now self-employed, trading as Lucky Rainbow at Fox and Goose Shopping Centre in Birmingham. This business (a take-away food business) has been running for over a year since its inception in 2009 and has one employee.

41. Mr Lei says that he will be subject to Chinese immigration control as a non-citizen, that**:**

> "[i]t would be unreasonable to expect me to relocate to China because I have already made the UK my main home and established a private and family life in this country." (paragraph 9)
>
> [and]
>
> "I have invested almost all my savings in my business and it has yet to make money for me. It would be a disaster if I had to close down my business now and restart a new life in China." (paragraph 10)

There are a number of problems in relying on this evidence to set aside the defendant's decision dated 25 November 2009. The first is that, as I have explained when summarising the facts, all this evidence was adduced long after the Secretary of State made his decision. This court tries to be flexible, particularly in cases of urgency, but (see [36] above) the issue must be judged on the material available to the Secretary of State.

42. That would suffice to dispose of the Article 8 claim. However, as I have stated, in the light of the position taken by Mr Banner I also consider the impact of the recent evidence. I recognise that, as Wall LJ stated in *Senthuran v Secretary of State for the Home Department* [2004] EWCA Civ 950 at [15], each case is fact-sensitive. But I have concluded that the effect of the decisions of the Strasbourg Court in *Abdulaziz v United Kingdom* (1985) 7 EHRR 471 and *Omoregie* v *Norway,* Application No 265/07, 31 October 2008, and that of the House of Lords in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, is that it is not arguable that in the circumstances of this case the decision to remove the claimant would be a disproportionate interference with her Article 8 rights and those of Mr Lei. The decisions of the Strasbourg Court concerned persons with rights to be in respectively this country and in Norway married to a spouse with no such rights and who would find it difficult to go to the country to which their spouse was to be removed. That is they concerned persons in the position of Mr Lei.

43. In *Abdulaziz's* case the first two applicants were lawfully and permanently settled in the United Kingdom whose husbands were refused permission to remain with or to join them. The first applicant, Mrs Abdulaziz, who was granted indefinite leave to remain in the United Kingdom in 1979, married a Portuguese citizen. (Portugal was not then a member of the EU) Mrs Abdulaziz was in poor health and had no family in

Portugal and did not speak Portuguese. The second applicant, Mrs Cabales, had arrived in the United Kingdom in 1967 and established a lawful career as a nurse. Her husband, whose application for a visa had been refused, was a citizen of the Philippines. Mrs Cabales maintained she was too old to return to the Philippines, that her qualifications would not be recognised in the Philippines, and that she would not be able to support her parents. Nevertheless the court held that the refusal to allow the two spouses to remain or to enter was not a breach of the applicants' Article 8 rights. It referred (see [67] – [69]) to the wide margin of appreciation enjoyed by Convention states, the right of a State to control the entry of non-nationals, the fact that it was only after becoming settled in the United Kingdom as single persons that the applicants entered into the relationships under consideration, and to the fact that the Article 8 duties on a State did not extend to a duty to accept for settlement the non-national spouses of those in the country.

44. *Omoregie's* case shows that in 2008 the Strasbourg court took the same approach as it had in 1985 in *Abdulaziz's* case. In *Omoregie's* case, the first applicant, a Nigerian working unlawfully in Norway following an unsuccessful asylum application in 2001, started cohabiting with a Norwegian national who was at the time a student in 2002, and married her in 2003. They had a child in 2006. In 2007, when the child was a year old, and the couple were in their fourth year of marriage, the first applicant was expelled from Norway. The wife and child were unable to relocate to Nigeria. The Strasbourg court rejected the submission that the consequent splitting of the family amounted to a disproportionate interference with their rights under Article 8.

45. The court stated, with reference to the balance that has to be struck between the competing interests of the individual and the community as a whole and the needs of immigration control, that the factors to be taken into account are the extent to which family life is effectively ruptured, the extent of the ties in the contracting state, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, and whether there are factors of immigration control, for example a history of breaches of immigration law. The court also said that it was an important consideration that family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the family life within the host state would be precarious. In such a case, only exceptionally would the removal of a non-national family member be incompatible with Article 8.

46. Mr Mahmood submitted that I should be wary of *Omoregie's* case because the jurisprudence in this country has moved since the 1985 decision in *Abdulaziz's* case. In particular he submitted that *Huang* [2007] UKHL 11 has eschewed reliance on the phrase 'exceptional' and Sedley LJ has said in *VW (Uganda)* [2009] EWCA Civ 5 that the phrase 'insurmountable obstacles' which Lord Phillips MR used in

Mahmood v SSHD [2001] 1 WLR 840 had to be seen in the light of subsequent decisions which explained the contextual significance of the phrase. Sedley LJ stated that**:**

> "While it is of course possible that the facts of any one case may disclose an insurmountable obstacle to removal, the inquiry into proportionality is not a search for such an obstacle and does not end with its elimination. It is a balanced judgment of what can reasonably be expected in the light of all the material facts."

While Mr Mahmood has a point about the change of language and what Sedley LJ said, it would not be appropriate for this court to disregard the approach in the Strasbourg cases. In *EB (Kosovo)*, Lord Bingham ([2008] UKHL 41 at [12]) stated that the appellate immigration authority will "take note of factors which have, or have not, weighed with the Strasbourg court". He did so in the particular context of considering delay. But what he said reflects the general approach of our courts to the decisions of the Strasbourg court as to the scope of the Convention rights. Our courts have taken what has been termed a "no less but no more" or a "no more but certainly no less" approach: see *R(Ullah) v Special Adjudicator* [2004] UKHL 26, 2 AC 323 at [20] (Lord Bingham), *Al Skeini v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 at [106] (Lord Brown of Eaton-under-Heywood), although cf Lord Scott and Baroness Hale in *R(Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

47. The Secretary of State was entitled to take account of the claimant's appalling immigration history and the fact that effectively what the claimant and Mr Lei are doing is (adapting what was said in *Omoregie*'s case) to confront the Secretary of State with the claimant's presence in the country as a *fait accompli* and asserting that removing her was disproportionate. In paragraph 64 of the judgment in *Omoregie*'s case, the Strasbourg court stated that an applicant is not entitled to expect that any right of residence would be conferred upon him in such circumstances. *Abdulaziz v United Kingdom* and *Omoregie* v *Norway,* and indeed the decision in *EB (Kosovo)* and other English decisions take account of the fact that the relationship has been formed when the parties know that one of them is here without permission and illegally and that the persistence of family and private life in the United Kingdom was precarious.

48. As far as relying on the reference in *VW (Uganda)* as to whether it would be "unreasonable" to expect the family of a removed person to relocate with that person, that case does not establish that mere inconvenience, expense or linguistic, social or cultural difficulty suffices to show "unreasonableness" and thus disproportionality. It is important to note that in *VW's* case there was a young child of the relationship, born in this country, and a British citizen. It was not considered proportionate for the

mother to leave that young child here (see [2009] EWCA Civ 5 at [33], [40] and [47]). The fact that the only alternative was for her to take this young British citizen away from the United Kingdom was an important factor. That is a very different scenario to the facts of this case. The decisions of the Strasbourg court in the cases of *Abdulaziz, Cabales* and *Omoregi* show that on probably more compelling facts than in the case of the claimant, removal pursuant to the aims of immigration control was not disproportionate. I describe the facts of those cases as more compelling in the light of this claimant's immigration history and the circumstances in which she made her claim and because, unlike *Omoregi's* case where there was a bad immigration history, there is no child of the relationship.

49. Similarly *Chikwamba* [2008] UKHL 40 is a case very far from this. In that case the spouse with leave to be in this country could not return to Zimbabwe because he was a refugee in this country and the couple had a very young child born in the United Kingdom. It was clear that the issue was really only an issue of timing because if the claimant in *Chikwamba's* case was returned to Zimbabwe, she would in due course be given entry clearance. For these reasons I consider that in the circumstances of this case the submissions on Article 8 do not raise an arguable ground of challenge. The Secretary of State was entitled to conclude that it is not unreasonable to expect Mr Lei to relocate with the claimant and, whether the test is formulated as requiring a fresh claim to have a "realistic prospect of success" or not to be "clearly unfounded", that the Article 8 submissions did not raise a fresh claim.

H. Conclusion

50. For the reasons given, I grant permission on the *BA (Nigeria)* ground only but dismiss the application for judicial review, and refuse permission on the other grounds.