Case No: CO/8016/2008

Neutral Citation Number: [2010] EWHC 3301 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16th December 2010

Before :

His Honour Judge Bidder QC
(Sitting as a Deputy High Court Judge)

- -

Between :

THE QUEEN (on the application of MARK WRAY)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr. David Jones (instructed by **Dexter Montague LLP, Solicitors**) for the **Claimant**
Mr. Vikram Sachdeva (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing date: 28th October 2010
- -

Judgment

His Honour Judge Bidder QC :

1. This is an application for judicial review against the decision of the Defendant to refuse to treat a series of submissions by the Claimant that he should not be removed from the UK because such removal would infringe his Article 8 ECHR rights as a fresh claim under paragraph 353 Immigration Rules HC395.

2. Although the claim form refers to a decision of the Defendant of 18 August 2008 the formal decision that the submissions of the Claimant did not amount to a fresh claim is contained in a letter of 23 September 2008 (CB 57-62). Further representations have been considered by the Defendant who has maintained her refusal to treat the submissions as a fresh claim. Her refusal letters of 16 February 2009, 30 April 2010, 2 July 2010 and 1 October 2010 need also to be considered and the parties have concentrated on the last decision letter in time.

CHRONOLOGY

3. There is a number of chronologies in the bundles and skeleton arguments. I give now a brief history based on those chronologies.

4. The Claimant was born in Jamaica on 2 July 1977. On 24 April 2002 he arrived in the UK using a passport in the false name of Marvin Mark Miller. The Claimant contends and has contended in previous judicial review applications that he came to the UK as a result of a campaign of persecution by a member of the Jamaican police, a man called McArthur Sutherland. In the Claimant's statement at page 79 he says that in the first month or his arrival in the UK he consulted his then legal representative Hilary Brown who, he says, contacted the Home Office on his behalf and requested a screening interview so that he could claim asylum. That interview was scheduled for 19 June 2002. However, Sutherland came to the UK and as a result of his contact with the UK police the Claimant was arrested on 9 June 2002 by the Bristol police. He claimed asylum at the police station. He was not charged with any offence but was subjected to immigration detention.

5. On 25 June 2002 his asylum and human rights claims were refused. He appealed against the decision and on 25 November 2002, the adjudicator, Immigration Judge French refused his appeal. The determination of the Immigration Judge is at pages 148-160. Surprisingly, the Defendant was not represented at that hearing. The Claimant gave and adduced evidence but was not cross examined.

6. In his judgment, at paragraph 32, the adjudicator found as follows:

> "To the lower standard, and expressly on the basis that the appellant was not cross examined and I heard no evidence from the respondent, I accept that this appellant had been harassed by the police in Jamaica and allegations which could not be substantiated were made against him. However he was acquitted following trials and his complaints against the police were investigated, albeit not with the result that he desired. He could bring further complaints that he wished. The motive for the police activities against him was not one to bring the appellant within the protection of the Refugee Convention.

> Having considered the matter in some detail I find that if this appellant were returned he would not face a real risk of treatment contrary to Articles 2 or 3 of the Human Rights Convention and I do not accept that Article 5 is engaged."

7. On 9 November 2002, the Claimant made an application for leave to appeal to the tribunal which leave was refused on 26 February 2003. The Claimant's first application for judicial review was made on 11 February 2003, permission being refused on an oral application on 26 February 2003. The next day permission to appeal to the Court of Appeal was sought and it was refused on 3 July 2003.

8. In August 2003 the Claimant was detained with a view to removal and in response to that his second claim for judicial review was commenced in respect of the removal directions. He produced further evidence to establish that he was still at risk on return to Jamaica and articles 2 and 3 were relied on. Kay J (as he then was) refused permission indicating that the submissions were effectively a fresh claim for protection and that if they fell to be refused further proceedings would be appropriate. Unsurprisingly the Claimant then submitted fresh representations together with more evidence supporting the risk he faced in Jamaica.

9. By this time, the Claimant had formed a relationship with Davina Salmon and on 17 May 2004 the Claimant's eldest daughter Kashyga was born. Kashyga is a British citizen.

10. Before the fresh representations could be considered the Claimant was again detained and removal action again was commenced. Again, unsurprisingly, judicial review proceedings, the third, were begun in respect of the removal directions on 6 December 2006. That judicial review, on its commencement, relied on the previously submitted evidence of persecution and contended that the Claimant's fresh representations had not been dealt with.

11. On 8 March 2007, the Claimant's second child, Omarion, was born. The Claimant had separated from Davina Salmon and had formed a relationship with Shakara Gray, which relationship still subsists. Shakara Gray arrived in the United Kingdom on 9 August 1998 with her two siblings. They were all given six months leave to enter as visitors. Ms Gray made two applications for leave to remain, both of which were refused. She became appeal rights exhausted on 21 July 2004. By a letter from the Defendant, dated 25 October 2010, and which was, very unfortunately, received by the Claimant's legal representatives on the day before the hearing before me (Mr Jones, counsel for the Claimant, received it only on the morning of the hearing), the Defendant refused Ms Gray's application for reconsideration of her application to remain based on an article 8 rights and paragraph 395C of the Immigration Rules. As it has been for some time, her position in the UK is precarious.

12. On 21 June 2007, the Claimant first made an article 8 claim in a document entitled "Holding Grounds/Note". That stated:

> "Since the Claimant's fresh application in 2003 ... the appellant has accrued significant time in the UK and it is understood that he is now in a relationship and has a son [*that should have read daughter*] born to a British woman. There has plainly been

> significant delay in the Secretary of State dealing with the Claimant fresh application and this has been the case in spite of constant numerous reminders from the Claimant's legal representatives. Such factors taken together and/or separately give rise to a claim under article 8 family and/or private life. These issues are also being advanced in terms of the fresh claim and further and better particulars will be submitted in due course."

13. A statement from the Claimant dated 12 July 2007 alleged that he had shared responsibility for his daughter two days per week, despite the breakdown of that relationship. The Claimant also stated that he had a son, Omarion, with his new partner Shakara Gray. He expressed the fear that he would not be able to continue contact with his daughter should he be removed to Jamaica.

14. On 30 July 2007, further representations were presented to the Defendant detailing for the first time the Claimant's family and private life in the UK, referring to the two children, his contact with them and his assumption of responsibility for Ms Rhodes, a lady suffering from multiple sclerosis with whom he was then living and providing, he alleged, constant care and support. It was submitted that his removal from the UK would be unlawful having regard to his article 8 rights to a family and private life.

15. On 3 December 2007 the Defendant refused to treat the further submissions in relation to the protection claim and the article 8 claim as a fresh claim. It is right to say that the evidence of a family life that had been submitted by the Claimant was limited. It established the birth of children and contact but said little of the quality of the family life or of the contact with the children. In relation to the article 8 claim the Defendant contended that the Claimant could seek entry clearance for the purpose of contact with his children.

16. On 11 June 2008 permission for the third judicial review was refused on an oral application. The Claimant contends that the judge who determined the oral application did not rule on the article 8 issues. That appears to have been as a result of a mistaken apprehension by the Claimant's representatives that a concession had been recorded by the Defendant's counsel on instructions from the Treasury Solicitor. The concession was thought to be that the article 8 issues had not been properly dealt with and should and would attract a right of appeal. On the other hand the Defendant refers to a note made by the Treasury Solicitor which recorded the permission judge, James Goudie QC, as having said:

> "the article 8 claim is also hopeless. The Claimant has not adduced any cogent reasons for the assertion that any interference with his article 8 rights would be disproportionate."

17. It is correct to say that the decisions of the House of Lords in *Chikwamba* [2008] UKHL 40 and *Beoku-Betts* [2008] UK HL 39 were not raised before the court. The Claimant was detained on 14 August 2008 and removal directions were set on 18 August 2008.

18. There was no challenge to the decision of James Goudie QC; nor was any appeal out of time attempted against the decision of 30 March 2007.

19. The fourth set of judicial review proceedings were commenced in respect of the removal directions on 22 August 2008. Subsequently there was additional evidence served on the Defendant in relation to the Claimant's family and private life.

20. Further representations have been made on behalf of the Claimant in letters dated 28 August 2008, 4 September 2008 and the 5 September 2008. The Defendant responded on 30 August 2008 and 6 September 2008.

21. The Defendant notified the Claimant that he would be removed unless he applied for an injunction against removal. As a result there was an application for an injunction and there was an appeal to the Court of Appeal, permission for which was refused. The Claimant made representations to his Member of Parliament and, as a result, removal directions were cancelled.

22. On 25 September 2008 His Honour Judge Inglis adjourned the consideration of permission to an oral hearing and granted an injunction against removal. On 7 November 2008 permission was granted by David Holgate QC for three reasons:

    i) that it was arguable that the Defendant had acted unreasonably in rejecting the claim under rule 353 because the Defendant had both accepted and rejected the presence of family life within the same letter of 23 September 2008;

    ii) that there had been no consideration given to the issue in *EB (Kosovo)* that the Defendant's delay was relevant to the assessment of proportionality;

    iii) that there was no consideration given as to how long the Claimant might be required to be in Jamaica while he made his application for entry clearance and, as such, the proportionality assessment was flawed.

23. The Defendant now contends that all three of these points have been considered in further letters from the Defendant.

24. On 16 February 2009 a further refusal letter was issued by the Defendant together with detailed grounds of defence. On 12 March 2009 the Claimant lodged his skeleton argument and on 20 March 2009 the Defendant responded to a witness statement of DC Thompson by way of a further letter. That witness statement, to which I shall come in due course had been disclosed to the Claimant at a bail hearing on 10 October 2008.

25. On 7 October 2009 the Claimant's second son, Jaidon, was born to Shakara Gray.

26. By a letter of 30 April 2010 the Defendant indicated that she would consider her obligation under section 55 of the Borders, Citizenship and Immigration Act 2009.

27. The substantive hearing listed for 24 March 2009 was adjourned by consent for at least eight weeks and on Thursday, 29 April 2010 the Claimant lodged his skeleton argument and further evidence on which he intended to rely. On 30 April 2010 a further decision letter was promulgated.

28. On 4 May 2010 the full hearing of judicial review was adjourned for the Defendant to deal with the section 55 issues and following that on 2 July 2010 was a further decision letter addressing the safeguarding duty under section 55.

29. On 21 July 2010 the full hearing of judicial review was adjourned as the Claimant appeared unrepresented and on 21 September 2010 the Claimant made further representations attaching to them the report of an independent social worker.

30. On 1 October 2010 a further decision letter was promulgated and it is that letter upon which the parties have concentrated their arguments.

31. The chronology in this case is of significance as is the significant delay which has occurred between various requests for reconsideration and actual decisions.

THE LEGAL FRAMEWORK

32. Paragraph 353 of the Immigration Rules states:

> "When a human rights or asylum claim has been refused at any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

33. The task of the Secretary of State considering the paragraph 353 test was considered in *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495. In *ZT (Kosovo) v SSHD* [2009] UKHL 6 the House of Lords were considering a situation where it was necessary to consider whether there was a distinction between the test under paragraph 353 and the determination of whether a claim was clearly unfounded under section 94 of the Nationality Immigration and Asylum Act 2002. As I read the judgments in *ZT* their Lordships did not cast doubt on the correctness of the decision and guidance in *WM* and I do not have to consider the distinction between those tests in this case.

34. In *WM* Buxton LJ stated:

> "[6] There was broad agreement as to the Secretary of State's task under r. 353. He has to consider the new material together with the old and make two judgements. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under r 353(i) according to whether the content of the

> material has already been considered. If the material is not "significantly different" the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the Applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the Applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.
>
> [7] The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the Applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the Applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in *Bugdaycay v SSHD* [1987] AC 514 at p 531F, [1987] 1 All ER 940, [1987] 2 WLR 606."

35. This Court's function remains that of reviewing the Secretary of State's decision on a rationality assessment. As Buxton LJ said at paragraph 10:

> "Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.
>
> [11] 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: see para 7 above. The Secretary of State of course can,

> and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

36. Article 8 of the ECHR states:

> "8 (1) Everyone has the right to respect for his private and family life, his home and his correspondence;
>
> 8(2) There shall be no interference by a public authority with the exercise of this right except such as is 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."

37. In *Razgar v SSHD* [2004] UKHL 27 the House of Lords considered what needed to be established to determine if there was a breach of the article 8 obligation. In his judgment, Lord Bingham considered there should be a 5 stage test:

> "[17] In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on art 8, these questions are likely to be:
>
> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of art 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of

disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

[18] If the reviewing court is satisfied in any case, on consideration of all the materials which are before it and would be before an adjudicator, that the answer to question (1) clearly would or should be negative, there can be no ground at all for challenging the certificate of the Secretary of State. Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112. If the reviewing court is satisfied that the answer to this question clearly would or should be negative, there can again be no ground for challenging the certificate. If question (3) is reached, it is likely to permit of an affirmative answer only.

[19] Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognised in the Strasbourg jurisprudence (see *Ullah and Do*, para 6) and implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively.

[20] The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. In *Secretary of State for the Home Department v Kacaj* [2002] Imm AR 213, para 25, the Immigration Appeal Tribunal (Collins J, Mr C M G Ockelton and Mr J Freeman) observed that:

"Although the [Convention] rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate."

> In the present case, the Court of Appeal had no doubt (para 26 of its judgment) that this overstated the position. I respectfully consider the element of overstatement to be small. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case-by-case basis."

38. Lord Bingham's reference to "exceptional cases" led to a series of cases in which it was considered that a test of "exceptionality" had to be applied to a claim that an article 8 right was not outweighed in the proportionality test by the public interest in maintaining a robust and fair immigration policy. In *Huang v SSHD* [2007] UKHL, the House of Lords, in the judgment of the Committee, of which Lord Bingham was a member, explained the true meaning of what Lord Bingham has said in *Razgar*:

> "[20] In an art 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the Applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by art 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* above, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of Claimants not covered by the Rules and supplementary directions but entitled to succeed under art 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test."

39. Nevertheless, although *Razgar* established that article 8 could be mobilised to resist an expulsion decision, and while *Huang* made it clear that it was not necessary for a claimant seeking to rely on article 8 to meet a test of exceptionality, the House of Lords in both cases made it clear that it would be likely that only a small number of applicants would be able successfully to rely on article 8 to avoid otherwise lawful removal. For example, in *Razgar*, Lord Bingham said, at paragraph 9 of his judgment:

> "The threshold of successful reliance is high, but if the facts are strong enough art 8 may in principle be invoked."

Again, in *Huang*, the Committee expanded on the factors which told against the refusal of leave to remain, at paragraph 16:

> "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 to be workable, predictable, consistent and fair as between one Applicant and another; the damage to good administration and effective control if a system is perceived by Applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on. In some cases much more particular reasons will be relied on to justify refusal, as in *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139, [2002] INLR 55 where attention was paid to the Secretary of State's judgment that deportation was a valuable deterrent to actual or prospective drug traffickers, or *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606, [2002] QB 1391, [2002] 4 All ER 289, an art 10 case, in which note was taken of the Home Secretary's judgment that the Applicant posed a threat to community relations between Muslims and Jews and a potential threat to public order for that reason."

40. These and other similar factors must be weighed in the balance by the decision maker with the factors establishing and defining the quality and extent of the family life or private life relied on. The decision has to be on a case by case basis and it is not possible to be overly prescriptive as to the outcome in any particular case. Thus in *EB (Kosovo) v SSHD* [2008] UKHL 41, Lord Bingham stated:

> "[12] Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

41. As this particular claim raises as a central issue the impact of delay, it is also worth citing Lord Bingham's analysis of the relevance of delay in the consideration of an article 8 balancing exercise:

> "It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may,

depending on the facts, be relevant in any one of three ways. First, the Applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the Applicant's claim under art 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the Respondent accepts it.

[15] Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an Applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the Applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in *R (Ajoh) v Secretary of State for the Home Department* [2007] EWCA Civ 655, para 11, it was noted that "It was reasonable to expect that both [the Applicant] and her husband would be aware of her precarious immigration status". This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time when he or she entered into a family relationship" see *Boultif v Switzerland* (2001) 33 EHRR 1179, para 48; *Mokrani v France* (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the Applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.

[16] Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. In the present case the Appellant's cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it took the Respondent to correct its erroneous decision to refuse the Appellant's application on grounds of non-compliance. In the case of *JL (Sierra Leone)*, heard by the Court of Appeal at the same time as the present case, there was

> a somewhat similar pattern of facts. *JL* escaped from Sierra Leone with her half brother in 1999, and claimed asylum. In 2000 her claim was refused on grounds of non-compliance. As in the Appellant's case this decision was erroneous, as the Respondent recognised eighteen months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be "predictable, consistent and fair as between one Applicant and another" or as yielding "consistency of treatment between one aspiring immigrant and another". To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an Applicant to apply from out of country. As Carnwath LJ observed in *Akaeke v Secretary of State for the Home Department* [2005] EWCA Civ 947, [2005] INLR 575, para 25 "Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal".

42. Additionally the decision of the House of Lords in *Beoku-Betts v SSHD* [2008] UKHL 39 in which the House decided that the effect on other family members with a right to respect for their family life with the appellant must also be taken into account, is of considerable relevance in this case, having regard, in particular, to the evidence of the relationship between Kashyga and Omarion.

43. In considering the weight to be accorded to the interest of the community in a fair and robust immigration control system, the Claimant puts substantial weight on the decision of the House of Lords in *Chikwamba v SSHD* [2008] UKHL 40. While the Defendant contends it is a decision that should be confined to its own facts, the Claimant contends it has particular relevance to this case having regard to the impact of the Immigration Rules governing leave to enter the UK for the purpose of access to a child.

44. The appellant in *Chikwamba* was a Zimbabwean national who arrived in the UK with a younger brother and sister and sought asylum on the basis of her and her mother's involvement with the MDC. Her asylum claim was refused but because of the deteriorating situation in Zimbabwe, the Secretary of State suspended removals of failed asylum-seekers to that country. During that period of suspension, the appellant married another Zimbabwean national who had been granted asylum in the UK. Upon the lifting of the suspension of removals, the Secretary of State refused the appellant's claim that to remove her to Zimbabwe would breach her article 8 right to respect for her family life. Just over a year later a daughter was born to the appellant and her husband. An adjudicator dismissed the appellant's appeal on the ground that although conditions in Zimbabwe were "harsh and unpalatable" the appellant could not establish a case under article 8. Although it was common ground that the adjudicator had erred on his approach to article 8, the IAT dismissed the appeal essentially on the basis that the appellant could and should return to Zimbabwe to apply there for entry clearance to return to the UK. They believed that her separation from her husband (who they accepted faced "an insurmountable obstacle to his own return to Zimbabwe") would be for "a relatively short period".

45. The Court of Appeal dismissed the appellant's appeal.

46. The case involved a consideration of the then extant section 65 of the Immigration and Asylum Act 1999 (now sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002) which, coupled with section 72 (2) of the 1999 Act, gave a right of appeal against an adjudicator's decision on a human rights issue but, in a case where the Secretary of State certified that the allegation of a breach of human rights was "manifestly unfounded" , gave only an out of country right of appeal.

47. The House of Lords rejected the "wider argument" that in all human rights cases a section 65 appeal could never be dismissed on the basis that the appellant ought properly to leave the country to apply for entry clearance abroad save where long term removal was permissible. Lord Brown, giving the main judgment, agreed with the respondent's argument that the structure of the sections was not to deny the appellant his or her right to an in-country appeal but rather to dispose of it in a manner intended to promote immigration control.

48. However, the House did agree with the appellant on the narrower ground that even if in some cases it may be permissible to dismiss a s 65 appeal on the basis that the Appellant should be required to apply for entry clearance abroad, the appellant's case was not such a case: the interference with family life occasioned by the requirement in her case (even if only on a short-term basis) would be disproportionate to any legitimate objective of immigration control.

49. Lord Brown analysed what the rationale for the policy requiring a person seeking to remain in the UK on the basis of marriage to a person settled in the UK to return home to seek entry clearance to come to the UK as a spouse under the relevant immigration rule. It was suggested that it was unfair to steal a march on those in the entry queue by gaining entry by other means and then taking the opportunity to marry someone settled her and remain on that basis. Lord Brown was unpersuaded by that justification. Then he considered what he thought was the real reason:

> "Is not the real rationale for the policy perhaps the rather different one of deterring people from coming to this country in the first place without having obtained entry clearance and to do so by subjecting those who do come to the very substantial disruption of their lives involved in returning them abroad?
>
> [42] Now I would certainly not say that such an objective is in itself necessarily objectionable. Sometimes, I accept, it will be reasonable and proportionate to take that course. Indeed, *Ekinci* still seems to me just such a case. The Appellant's immigration history was appalling and he was being required to travel no further than to Germany and to wait for no longer than a month for a decision on his application. Other obviously relevant considerations will be whether, for example, the Applicant has arrived in this country illegally (say, concealed in the back of a lorry) for good reason or ill. To advance a genuine asylum claim would, of course, be a good reason. To enrol as a student would not. Also relevant would be for how long the Secretary of State has delayed in dealing with the case - see in this regard

EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41. In an art 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant. And there may be good reason to apply the policy if the ECO abroad is better placed than the immigration authorities here to investigate the claim, perhaps as to the genuineness of a marriage or a relationship claimed between family members, less good reason if the policy may ultimately result in a second s 65 appeal here with the Appellant abroad and unable therefore to give live evidence.

[43] As matters presently stand the published policy appears to apply routinely to all art 8 family life cases irrespective of whether or not the rules apply "A person who claims that he will not qualify for entry clearance under the rules is not in any better position than a person who does qualify under the rules - he is still expected to apply for entry clearance . . .". And for the reasons given in para 36 above it is, indeed, entirely understandable why someone outside the rules should not be better off. Oddly, however, when asked to explain why in those circumstances the Appellant in *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, seeking to remain here to enjoy family life with his emotionally dependent mother, was not first required to apply for entry clearance abroad, the Secretary of State (in a post-hearing note) said:

"Mr Betts did not . . . on the face of it fall within the scope of any relevant immigration rule designed to enable him to enjoy family life in the United Kingdom. In those circumstances it was not argued that Mr Betts should return to Sierra Leone to apply for entry clearance to join his family in the United Kingdom."

I cannot reconcile that explanation with the stated policy. Nor has any explanation been offered as to why the policy was not applied also to the Appellant Mr Kashmiri in Huang, who did not qualify under a rule requiring entry clearance but who was asserting a family life claim to remain here under art 8.

[44] I am far from suggesting that the Secretary of State should routinely apply this policy in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an art 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad. Besides the considerations already mentioned, it should be borne in mind that the 1999 Act introduced one-stop appeals. The art 8 policy instruction is not easily reconcilable with the new streamlined approach. Where a single appeal combines (as often it does) claims both for asylum and for leave to remain

> under art 3 or art 8, the appellate authorities would necessarily have to dispose substantively of the asylum and art 3 claims. Suppose that these fail. Should the art 8 claim then be dismissed so that it can be advanced abroad, with the prospect of a later, second s 65 appeal if the claim fails before the ECO (with the disadvantage of the Appellant then being out of the country)? Better surely that in most cases the art 8 claim be decided once and for all at the initial stage. If it is well-founded, leave should be granted. If not, it should be refused."

50. In the Claimant's case, it is contended that, under the rules, but for having entry clearance, he would qualify for limited leave to remain as the parent of Kashyga, for the purposes of exercising access to her. The relevant rules are 246 and 247:

> "Requirements for leave to enter the United Kingdom as a person exercising rights of access to a child resident in the United Kingdom
>
> 246. The requirements to be met by a person seeking leave to enter the United Kingdom to exercise access rights to a child resident in the United Kingdom are that:
>
> (i) the applicant is the parent of a child who is resident in the United Kingdom; and
>
> (ii) the parent or carer with whom the child permanently resides is resident in the United Kingdom; and
>
> (iii) the applicant produces evidence that he has access rights to the child in the form of:
>
> (a) a Residence Order or a Contact Order granted by a Court in the United Kingdom; or
>
> (b) a certificate issued by a district judge confirming the applicant's intention to maintain contact with the child; and
>
> (iv) the applicant intends to take an active role in the child's upbringing; and
>
> (v) the child is under the age of 18; and
>
> (vi) there will be adequate accommodation for the applicant and any dependants without recourse to public funds in accommodation which the applicant owns or occupies exclusively; and
>
> (vii) the applicant will be able to maintain himself and any dependants adequately without recourse to public funds; and
>
> (viii) the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

> Leave to enter the United Kingdom as a person exercising rights of access to a child resident in the United Kingdom.
>
> 247. Leave to enter as a person exercising access rights to a child resident in the United Kingdom may be granted for 12 months in the first instance, provided that a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival."

51. He contends that he would be able to obtain the relevant certificate from a district judge and, thus, the only obstacle to his obtaining limited leave to remain is the absence of entry clearance. Following *Chikwamba*, he contends it is disproportionate to require him to leave the UK so as first to obtain entry clearance.

52. If he obtained leave to enter, further leave to remain could be sought under paragraph 248A of the Rules (see tab 17 of the authorities bundle).

53. It appeared to be the case that the claim proceeded on the basis that leave to enter could be refused under paragraph 320 (7B) on the basis that he had used deception in an application for entry clearance but it is clear that under 320 (7C) paragraph 320 (7B) shall not apply where the applicant is a person exercising rights of access under paragraph 246. The Secretary of State's position at this hearing was that there would be no mandatory period of exclusion (as there would have been had (7B) applied and that, provided that the Claimant could establish that he was genuinely seeking access, he would obtain entry clearance.

54. It is to be noted that the Defendant's own guidance has altered following *Chikwamba*:

> "Applicants making article 8 claims still need to demonstrate on the balance of probabilities that they enjoyed private and/or family life in the UK and that there would be an interference with private and/or family life if they were not allowed to remain in the UK. The UKBA, is minded to reject the claim, then has to show that the interference is proportionate, having regard to all the facts of the case.
>
> Returning an applicant to his/her home country in order to make an entry clearance application may still be proportionate in a small number of cases. All cases must therefore be considered on their own merits and a decision made about whether it is appropriate to expect the individual to go abroad and apply for entry clearance.
>
> For the process of assessing whether it is appropriate, the House of Lords considered that the prospective link and degree of family disruption involved would always be highly relevant, but accepted that it could well be proportionate to enforce removal in the case, for example, where there was an appalling immigration history or an abusive asylum claim, providing the practicalities of going abroad to obtain entry clearance did not entail a serious disruption to family life.

> The Lords considered it would also be relevant to take into account any delay in considering the claim for which the applicant was not responsible….they also accepted that there would be some cases where the Entry Clearance Officer would be better placed to investigate the claim in the UK authorities, although this would have to be balanced against the disadvantage to the applicant in being unable to give evidence at the appeal hearing of a refusal to grant entry clearance."

The Evidence Submitted and the Decisions

55. At the core of the Claimant's case is his contention that the Defendant has misapprehended the strength of ties enjoyed by the Claimant with his daughter Kashyga.

56. The Claimant has submitted evidence from an independent social worker, Mrs J Lyons, whose report is at pages 136 to 147 of the Claimants bundle. At paragraph 21 Mrs Lyons indicates:

> "As is clear from my notes ... this little girl clearly has a significant and important attachment to her father. … The way she plays with him and also ignores him, when he asked her to do something is a clear indication of a child who firstly is accustomed to being with her father and secondly is comfortable in this household."

At paragraph 23, she says:

> "Without doubt, if Mr Wray were to return to Jamaica, this would have an adverse effect on Kashyga's welfare given her age and current emotional needs."

She also notes at paragraph 25:

> "Kashyga and Omarion are clearly great friends and playmates ..."

Finally, at paragraph 26 she says:

> "Mr Wray clearly takes an important part in the care of his daughter Kashyga and has done so since her birth. Whilst he may have acquired another family, his relationship with his daughter is significant and essential to her healthy emotional development. The geographical proximity between the two households does mean that there can be contact regularly and this includes staying contact. The school have been able to confirm that he was known to have them when Kashyga was in reception class two years ago."

57. There is also substantial support for the existence of a significant relationship between the Claimant and Kashyga and between Kashyga and Omarion in a series of statements including that of the Claimant at 81 to 82, Shakara Gray (89-90), Davina

Salmon (94, 95), Beverley Salmon (97-8), Sharnia Roberts (102), Kayann Miller (105), Madge Griffiths, (105), and a series of handwritten letters of support from 186-189.

58. The Defendant considered some evidence of a relationship between the Claimant and Kashyga in the decision letter of 23 September 2008. It is recognised there that he was contending that he had regular contact with his children. However, in that letter there is a limited appreciation of the level of contact - see paragraph 20.

59. Only limited additional evidence in relation to the contact with Kashyga was considered in the letter of 16 February 2009. The Defendant noted (page 51) that the Claimant no longer had a significant relationship with Kashyga's mother but recognised that Kashyga did have article 8 rights in relation to the Claimant and also towards Omarion and those rights had been considered as part of the balancing process within article 8 (2). It is pointed out that the Claimant was aware of his precarious immigration status when he entered both his previous and present relationships. However, in that letter the Secretary of State indicates:

> "It is noted that your client does have limited contact with Kashyga, and that should your client wished to continue his relationship with Kashyga, this can be maintained by regular visits by your client, having obtained the correct entry clearance from Jamaica with the support of Ms Salmon to return to visit his child. I refer you to the UKBA website which indicates that an application for entry clearance from Jamaica to visit family in the United Kingdom takes approximately between three days at its minimum and 60 at its maximum to complete. Alternatively your client's child's mother may wish to have his child visit him there in Jamaica."

60. Thus, it seems to me, that, while the Defendant, at this stage, did not have the fullest information about the relationship between Kashyga and the Claimant available, it is clear from the above paragraph and the next two paragraphs in the letter (which follow the stages of consideration of article 8 rights as set out by Lord Bingham in *Razgar*) that the Secretary of State was considering the factors which were said to be important in *Chikwamba*. The application of paragraph 246 of the Rules was considered (at page 53).

61. In the letter of 20 March 2009, the Defendant refers to a witness statement of DS Ian Thompson of the Avon and Somerset police. That indicates that in May 2007 an investigation was undertaken of the Claimant who was suspected of being concerned in the importation and distribution of large quantities of class a drugs, money-laundering and firearms offences. It should be recognised, and is recognised by the Secretary of State, that the Claimant has never been convicted of any offence. In October 2007 police operations established that he was living at an address in Fishponds, Bristol. He was regularly visiting Shakara Gray and Omarion at the address and at another address in Bristol.

62. It is right to say that the police operation did not run 24 hours a day but the monitoring of his movements by telephonic cellsite analysis was running 24 hours a day between July 2007 March 2008 and later between June 2008 and August 2008.

Monitoring of his telephone calls did show a large number of calls to Shakara Gray. However, during the period of observations he was not seem to visit Davina Salmon at her address at St Paul's, Bristol nor was he seen with a young female child.

63. The Claimant has had no access to the raw material forming the basis of DS Thompson's report.

64. In the letter of 20 March 2009 the Defendant says that:

> "This information cast serious doubts on your client's claim that he enjoys family life with his daughter and therefore whether article 8 (1) is even engaged in his case. In any event any interference would not be disproportionate."

The Defendant also indicates that the evidence of DS Thompson casts serious doubt on the credibility of the claim.

65. The letter of 30 April 2010 adds little more to the case. Further witness statements from the Claimant, Ms Salmon and Shakara Gray were submitted to the Defendant and there was a reconsideration in the letter of 2 July 2010 from the Defendant of the Claimant's family life in relation to Kashyga, Omarion and Jaidon. The Bristol City Council's Children and Young Peoples Services Department were contacted and reported to the Defendant that none of the children was known to them in an adverse way and that none was on the risk register. The Defendant's position in relation to Kashyga remained the same and the Secretary of State took the view that the removal of the Claimant would have no adverse effect on her welfare as he had little contact with her and she was not dependent on him. It was indicated that the office of the Children's Champion had been consulted and would be consulted about splitting the Claimant and Kashyga before removal was affected. Thus the Defendant contends that she had met and would meet her duty under the Borders Citizenship and Immigration Act 2009 section 55.

66. Finally, further statements dealing with the Claimant's relationship with his children and, in particular, the report of Mrs Lyons, were submitted to the Defendant with further representations of 21 September 2010. The Defendant considered the correct test in *WM*. At paragraph 24 the Defendant considers the report of Mrs Lyons and says:

> "The report confirms the view held by the SSHD that the mother of Kashyga has the sole responsibility of caring for her with her father having limited contact with her occasionally. For example whilst your client was seen when she was in reception class, the year one teacher did not remember seeing him when she was in year one. Indeed, your client confirmed in paragraph 8 of the report that he saw Kashyga "some weekends". The Children and Young Peoples Services Department of Bristol City Council have confirmed that they have no concerns regarding Kashyga and her mother. This confirms that her mother is capable of taking adequate care of her and providing her with the parental care that she needs. Mrs Lyons concluded that your client has significant contact

> with Kashyga, that he has a close relationship with her and that separation from him will affect their emotional health. However, it is noted that this is very similar to the situation that prevailed at the time of your client's previous judicial review claims, all of which have failed. Therefore, nothing has changed. Your client had regular, albeit limited, contact with Kashyga before and he still has limited contact with her now."

The Arguments

67. Mr Jones, on behalf of the Claimant, contends that, while the Claimant entered the UK under a false passport, the Immigration Judge accepted (albeit that the Defendant was unrepresented at the hearing and did not cross examine the Claimant) that he had been the subject of persecution by the police in Jamaica. Moreover, having entered the UK he asserted a protection claim very quickly and it would not be right to characterise the Claimant as having a poor immigration history. There had been justification for his earlier judicial reviews and the Defendant had not really engaged with the Article 8 arguments until after March 2007. Until the series of decision letters under consideration in this review, it would be fair to characterise the evidence adduced by the Claimant to support his article 8 rights in relation to Kashyga and hers and Omarion's in relation to each other, as superficial, as was the response of the Defendant.

68. However, it is correct to say that, although subsequent evidence has considerably bolstered the article 8 issues in relation to Kashyga, the Claimant did rely on his contact and relationship with Kashyga in supplementary submissions and in his statement of the 12th July 2007 in which he alleged he had shared responsibility for his daughter on 2 days per week despite the breakdown of his relationship with her mother. The Defendant refused to treat the further representations, including the article 8 submissions, as a fresh claim and, whatever may have been the confusion in the minds of the Claimant's solicitors in the subsequent judicial review proceedings, the article 8 claim was a basis for those proceedings, permission being refused at an oral renewal, which decision was not appealed. Thus, although the quality of the evidence has deepened, the Defendant contends that, particularly having regard to the evidence of DS Thompson, it was not irrational of the Defendant to conclude that the effect of the new evidence did not significantly alter the basis of the article 8 claim already considered, namely, that there was a significant but limited relationship existing between the Claimant and Kashyga, but that her main carer was her mother.

69. Mr. Jones makes the point that because of the delay, which cannot be said to be the fault of the Claimant, matters have moved on and it is clear from the evidence of Mrs Lyons that the relationship between him and Kashyga and between Kashyga and Omarion has deepened. Of course, even if the Claimant is returned to Jamaica, there is no reason why the respective mothers cannot continue to foster the relationship between the children, although Shakara Gray's position in the UK looks to be a very precarious one. If Shakara, Omarion and Jaidon accompany the Claimant to Jamaica, as the Defendant contends that they can do, having no right to stay in the UK, then there will be significant disruption to the relationship between Omarion and Kashyga.

70. That said, both those children are very young and it is difficult to contend that their relationship, based at best on occasional visits, could arguably outweigh the

countervailing policy considerations in favour of maintaining a consistent and robust immigration policy. The rights of Kashyga in relation to Omarion and vice versa have been considered by the Defendant (see her letter of the 16th February 2009) and although not mentioned again in the more recent decision letters, it cannot be said that the Defendant has been unmindful of their position.

71. It is further argued that the Defendant's approach to Mrs Lyons' evidence is unsatisfactory. Her report has been dealt with fairly briefly, it is correct to say, but it goes too far to say, as does Mr. Jones in his (unnecessarily) long skeleton, that the Defendant has repudiated that evidence. As can be seen from the most recent decision letter the Secretary of State has clearly considered the report carefully, though stressing certain aspects of the report which are less favourable to the claim than others. However, having regard to the evidence from DC Thompson, it is not arguably irrational for the Defendant to have drawn the conclusions she has about the regularity, extent and depth of contact between Kashyga and the Claimant.

72. I accept that in *WM* the Court of Appeal indicated that sound expert opinion commenting on issues of substance would likely found a fresh claim where it could not be dismissed as simply implausible, but here the expert evidence, in truth, merely expands on the evidence of an important but occasional relationship which had already been considered by the Defendant before the previous review. It is not only open to the Secretary of State to take an overview of all the evidence, including that unfavourable to the Claimant's case, but essential that the Defendant does do so and it has been confirmed by the higher courts that a review of the Secretary of State's decision as to whether to treat further submissions as a fresh claim remains a rationality review and that the Court may not substitute its view for that of the Secretary of State, though it is entitled to begin by considering its own view of the evidence.

73. As to the evidence of the Avon and Somerset police, Mr. Jones stresses that analysis of it cannot be complete without consideration of the base of surveillance logs and cellsite analysis which underlies it and that, at the very least, if there is a clash between it and the evidence presented by the Claimant the Secretary of State ought to recognise that that type of factual issue cannot be resolved on paper and should persuade her that she should recognise these submissions as a fresh claim. I am not persuaded that it is inappropriate in a case such as this for the Secretary of State to make a judgment on the papers before her, always assuming, as was the case here, that she applies the correct test.

74. On the issue of proportionality, the Claimant argues that the Defendant's flawed assessment of the evidence of the strength of the ties with Kashyga undermines her consideration of proportionality.

75. Mr. Jones also stresses that, since the last unsuccessful review, the law has developed and stresses in particular the House of Lords approach quoted above in *EB (Kosovo)*. Here, he contends, there is clear evidence of a "genuine and subsisting relationship between parent and child". However, if the contentions of the Claimant in relation to the likelihood of the Claimant obtaining leave to enter to exercise access to Kashyga is correct, and the Defendant has not argued to the contrary, what here is being considered is not the severing of the relationship on any permanent basis but a reduction in the amount of contact while the Claimant is in Jamaica, with the

probability, should he so wish, of resuming the currently enjoyed access when he obtains entry clearance. In other words, this case does not in fact raise the "stark choice" referred to by Lord Bingham in *EB (Kosovo).*

76. Since the last review the decision in *Chikwamba* has been given and the Defendant's revised policy statement has been promulgated. As I have indicated, it is clear that the Defendant has considered the issues raised in Chikwamba. Criticism is made, however, of the factual basis upon which the Defendant approached the Chikwamba assessment. In the decision letter of 23rd September 2008 the Defendant said "Your client entered the United Kingdom as a visitor and later claimed asylum. Your client's immigration history indicates a deceitful pattern of behaviour." In the sense that, as well as entering as a visitor and later claiming asylum, the Claimant entered under a false name and with a false passport, a pattern might have been established. However, later in that letter the Defendant wrongly refers to the Claimant as having acquired a criminal record. In addition, the Secretary of State in that letter indicated that the Claimant had not demonstrated the extent of his relationship with his children.

77. The error in relation to a criminal record was corrected in a later decision letter and, responding to the material later submitted by the Claimant, the Defendant has now also given fuller consideration to the extent of the relationship between Kashyga and the Claimant.

78. In the most recent decision letter, at paragraph 25, the Defendant indicates that *Beoku-Betts* and the article 8 rights of the Claimant's family members has been considered and that *Chikwamba* was considered in the September 2008 letter. It does not specify what further consideration has been given to the *Chikwamba* issues having regard to the new material but it is not necessary for a decision maker to go into the most extensive detail in relation to each and every issue. What is clear is that the strength of the relationship and the article 8 rights both of the Claimant and his family have, on the face of the letter, been given anxious scrutiny and the indication is given, properly, and in accordance with section 55, that the office of the Children's Champion will be consulted again with regards to the welfare of Kashyga and her half brothers before the Claimant and his family, who were stated, correctly, to be in the UK unlawfully, were removed.

79. It cannot be said that entry clearance has been relied on by the Defendant as the sole basis for exclusion of the Claimant, although it has been considered as an important factor. It is not unreasonable for the Defendant also to rely on the deceptions used by the Claimant to enter the UK and she has corrected her error in relation to his convictions. It is not contended that the Claimant's immigration history is bad as the applicant in *Ekinci*, given as an example by Lord Brown in *Chikwamba* as someone in whose case it would be justified to require him to leave the UK to seek entry clearance but, although Chikwamba is not, in my judgment, a case confined to its own very particular facts, nothing in Chikwamba prevents the Secretary of State making the step by step consideration outlined in *Razgar*.

80. This is, it must be recognised, a very different factual situation from that in *Chikwamba* where requiring the applicant to return to "very harsh" conditions in Zimbabwe meant a separation both from her infant daughter for whose care she was responsible and from her spouse.

81. It is less obvious that the delay in this case, while not being delay for which the Claimant can obviously be criticised, has been such as to give rise to the perception that there is here "a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes." As the chronology indicates, there have been periods of inactivity on behalf of the Defendant. On the other hand, much of the delay has been caused by 3 previous judicial reviews and the court process inherent in those reviews.

82. The Defendant has, in my judgment, recognised that delay may have deepened the relationships between the Claimant and his children but it is still true that he and the 2 mothers of those children have always been aware that the Claimant's position here has remained precarious. Indeed the fact that 3 reviews have taken place must have meant that he and they must have been frequently reminded of that fact.

83. It is also the case that the Claimant relies on the establishment of a private life during his time in the UK but it can only faintly be argued that that either as a separate factor or added to the family life issues, could make any significant difference to the correctness or otherwise of the Defendant's decision. There is no new material in relation to the persecution risk which has been rejected as a reason for not ordering the Claimant's exclusion from the UK

84. The Defendant argues that the later decision letters have dealt appropriately with the 3 reasons for which permission was granted on 7th November 2008 by Mr. Holgate QC, which reasons I have already set out in paragraph 22 above.

85. It is quite clear, I agree, that each of those issues has now been dealt with by the Defendant. A family life is now accepted, both with Omarion and Jaidon and their mother, and with Kashyga. It is not strongly argued that the Defendant's approach in relation to Shakara Grey and her children is flawed. Although there remains some uncertainty about her position, it cannot be argued with any force that she and her young children could accompany the Claimant back to Jamaica and make a new life there. As to Kashyga, her article 8 rights in relation to the Claimant and to Omarion have been properly recognised and assessed as has the Claimant's relationship with her. Much time was spent by Mr. Jones underlining the weight of evidence of the depth of the Kashyga/Claimant relationship and criticising the language with which it has been described in the decision letters but the thrust of DC Thompson's statement is a matter which the Defendant is perfectly entitled to take into account and it seems to me that the Claimant's criticisms are, in truth, however attractively presented, no more than a disagreement with the Defendant's assessment of the relative merits of the evidence.

86. Delay has undoubtedly now been considered by the Defendant although, as I have indicated, I do not consider that the impact of delay here is of the nature as to suggest a dysfunctional system. It is not specifically mentioned in the most recent decision letter but there is no doubt that the Secretary of State has been aware of the delay and showed that awareness in decision letters before the current sequence (see for example, Claimant's bundle page 67k).

87. Additionally, the delay in gaining entry clearance has been considered, in the way I have outlined above.

88. I accept Mr Sachdeva's contention that the relationship between Kashyga and her father, on which the main thrust of the Claimant's argument in this claim is founded, was indeed considered, though briefly summarised, in June 2008. At that stage, the Secretary of State did not assume a more distant relationship but merely recognised that it was limited by the amount of time father and daughter spent together. Even taking the Claimant's evidence at its height and ignoring the police evidence, the relationship remains one that is based on occasional contact and not everyday contact or residence. The relationship has deepened since then, but remains one of access or contact occasionally exercised, with the main carer being Ms Salmon. That is not to say that there is not a substantial body of evidence which is now available to the Secretary of State about its intensity but there can be no doubt from the most recent decision letter that that material has properly and anxiously been scrutinised.

89. Mr. Sachdeva stresses that even with the House of Lords' revisiting of *Razgar* in *Huang* it remains the case that if the correct approach set out there towards the proportionality assessment of article 8 claims and the requirements for a robust and consistent immigration policy, there will be but a small number of cases in which family life issues will "trump" the immigration policy issues and most removals will be found to be proportionate. He contends, and I accept, that there is no principle (and no authority for any principle) that there should be parity of family life after removal with that before it unless a breach of article 8 is to be avoided, an argument floated by Mr. Jones. To quote again Lord Bingham's words in *Razgar*: "The threshold of successful reliance [on article 8 rights] is high".

90. Thus, he contends, that when considering the Secretary of State's determination that the content of the new submissions is not such that taken together with the previously considered material creates a realistic prospect of success (albeit that this imposes a somewhat modest test), I should have firmly in mind that what is proposed is not the separation of a caring resident parent from a young child or spouse from spouse, but separation of half siblings and temporary separation of a father exercising valuable, meaningful but occasional contact to his very young daughter who is living with and being cared for by her mother, as she has been since birth.

91. While it seems to me that to describe the new evidence submitted by the Claimant (as Mr. Sachdeva does in his skeleton) as merely "repeating in greater detail" the claim already made is to devalue somewhat that material, particularly the expert's report, I do consider that there is force in his submission that at its core, the type of relationships relied on remains substantially the same.

92. Moreover, while this is patently not an *Ekinci* case, there is a plain distinction to be drawn between an applicant who has entered the country lawfully and built up relationships here but who has failed in a claim for asylum and who is then asked to leave the country to seek entry clearance, which entry clearance is likely to be granted for exercising access to a child and someone, like the Claimant, who enters under a false name and eventually is in a similar position. There is much to be said in favour of discouraging deception on entry, even if there may have been persecution in the country from which the immigrant comes. Deterring such entry and insisting on exclusion and re-seeking of entry clearance seems to me a proper policy reason for the Secretary of State to weigh in the proportionality balance.

93. Mr. Sachdeva contends, with some justification, that it is a fairly frequent situation that people enter the UK, form relationships with UK residents and have children to whom they have access. It cannot be the case that that situation most will be able to argue that their article 8 rights should weigh more heavily than proper immigration control. I also accept that the reasoning in *Chikwamba* does not undercut the view expressed by the House of Lords in *Huang* or *EB (Kosovo)*. Each case must, however, be decided on its own particular facts.

94. I agree with Mr. Sachdeva that there is, here, no arguable breach of section 55 of the 2009 Act. The best interests and welfare of all three children have been taken into account and will be taken into account prior to removal.

95. I have formed the view, in conclusion, looking at the whole sequence of decision letters leading to that of the 1st October 2010, that the Secretary of State has established that she has applied anxious scrutiny to this case and has properly considered all the material submitted on behalf of the Claimant, including the expert's report and has expressed her reasons for her conclusion in a sufficiently clear and accessible way. While the content of the material might be regarded as not having been considered before, it is not fundamentally different from that which supported a previous unsuccessful attempt to rely on article 8 grounds and I find myself unable to say that the Secretary of State was irrational in concluding, applying the correct test, that it did not create a realistic prospect of success. I find no other ground for designating the decision of the Secretary of State as unlawful and therefore I dismiss this application.