OUTER HOUSE, COURT OF SESSION

[2018] CSOH 21

P634/17

OPINION OF LADY WISE

In the petition of

RK (AP)

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Caskie; Drummond Miller LLP
Respondent: C Smith; Office of the Advocate General

9 March 2018

Introduction

[1] The petitioner is a citizen of the Democratic Republic of Congo ("DRC"). He arrived in the UK in December 2004 and sought asylum. His claim was refused and he has been present in this country ever since. In 2008 he was convicted of possession of six false identity documents and sentenced to one year's imprisonment on each charge concurrently. The respondent decided to deport him and an appeal against that decision was refused. He subsequently made further submissions including a proposed Article 8 claim based on his family life with a partner and their child. (The Petitioner's partner is referred to as his wife in some of the paperwork. Although not by the respondent. It is not clear whether their

marriage would be recognised under domestic law but I shall refer to them as if they are either married or at least holding themselves out as married). These further submissions were not accepted and an appeal against that refusal in 2012 was unsuccessful. The petitioner became appeal rights exhausted on 10 June 2013. This petition concerns further submissions made by him in June 2014, with further supporting information added in both 2015 and 2016. The respondent declined to accept those submissions as a fresh claim. The relevant decision of the respondent was taken on 8 May 2017 and the petitioner seeks reduction of that decision.

The applicable law

[2] The petitioner's further submissions, which he contended amounted to a fresh claim, required to be considered in terms of paragraph 353 of the Immigration Rules HC 395C, which provides:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
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> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
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> This paragraph does not apply to claims made overseas."

[3] In consequence of the petitioner's criminal conviction, the terms of section 117C of the Nationality, Immigration and Asylum Act 2002 are applicable. These provisions are in the following terms:

"**117C Article 8: Additional considerations in cases involving foreign criminals**

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of 4 years or more, the public interest requires C's deportation unless exception 1 or exception 2 applies.

(4) Exception 1 applies here –

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least 4 years, the public interest requires deportation, unless there are very compelling circumstances over and above those described in exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

The petitioner's challenge to the decision of 8 May 2017

[4] Mr Caskie identified four challenges to the respondent's decision. The first related to the correct approach to a rule 353 application. In essence, the respondent's decision letter, number 6/1 of process, states twice that the respondent did not accept that the petitioner's material "would result in a decision to grant you asylum" and that "… nothing leads me to

believe an immigration judge would take a different view …" The correct approach was well established and a realistic prospect of success means only that the petitioner must establish that he could succeed before a fresh immigration judge, not that he would succeed – *WM (DRC)* v *SSHD* [2006] EWCA Civ 1495 at paragraph 11.

[5] It was acknowledged that the respondent in this case would submit that, notwithstanding the use of the word "would", if the decision letter is read as a whole it is clear that the respondent was aware of and applied the correct approach. It was anticipated that the respondent would refer to a decision of Lord Ericht in *MA* v *SSHD* [2017] CSOH 109 in which the same point about expression in the respondent's letter had been taken and rejected. Lord Ericht had expressed the view (at paragraph 16-19), that while such wording was deficient, the sentence could not be read in isolation and that the letter had to be read as a whole. Mr Caskie pointed out that in the case of *MA* v *SSHD* what the court was dealing with was very different from the present case in that MA had three criminal convictions relating to the supply of drugs and in each case had been sentenced to a period of imprisonment of 4 years or more. The different provision of section 117C(6) had accordingly applied to him in that he would have to show very compelling circumstances before the public interest would not militate in favour of deportation. Accordingly the hurdle of showing whether there was a realistic prospect of success had been far higher for that petitioner. His submissions had been found to be "… so lacking in substantive merit" that there was no realistic prospect of a judge taking a different view.

[6] Turning to the decision letter in this case, it was accepted that at paragraph 68 thereof the correct test is set out. The application of that test to the facts of the case begins at paragraph 77. That paragraph is in the following terms:

> "Since this determination approximately four years has passed, M has been born and the two nieces have joined the family. Based on the information submitted nothing leads me to believe an immigration judge would take a different view if asked to consider the changes in your circumstances during the time which has passed since the original determination. What must also be considered is that you had been served a deportation order on 27 January 2009 and therefore all of your family life has been built with the knowledge that your time in the UK was precarious"

[7] At paragraph 80 of the decision letter having concluded that the submissions do not amount to a fresh claim, the respondent explains:

> "This is because the new submissions taken together with the previously considered material do not create a realistic prospect of success. This means that it is not accepted that, should this material be considered by an immigration judge, your submissions would result in a decision to grant you asylum, humanitarian protection, limited leave to remain on the basis of your family or private life or any other form of leave for the reasons set out above"

[8] The petitioner's argument had been that there had been material changes since his previous application in 2012. He and his partner now had a child under the age of four and two nieces of his partner who had been victims of sexual abuse in their own country had come to the UK and been accepted by the petitioner as part of his family. Mr Caskie did not seek to argue that the approach taken by Lord Ericht was wrong insofar as his decision had reiterated that the court requires to look at the decision letter as a whole. The concern was that in the present decision letter, at paragraph 80 in particular, the respondent appeared to be specifically interpreting the test of creating a realistic prospect of success by reference to what the outcome would be before an immigration judge rather than whether the circumstances of the case could lead to such a judge reaching a different decision. Counsel accepted that the expression used by the respondent in explaining what was meant by a realistic prospect of success could mean different things depending on the context and to that end he sought only to argue that the court must be careful to look at the context of the decision being made to see whether the operative part of the decision was properly made.

[9] The second challenge to the decision related to an alleged failure to analyse the inevitable fracturing of the petitioner's family that would result from the petitioner requiring to return to the DRC. At paragraph 33 of the decision letter it is noted that the petitioner's wife and the two nieces who have joined her in this country are said to be victims of sexual abuse and indicates that "this would possibly be an issue in terms of the family returning to the DRC". However, the letter continues to reject the proposition that it would be unduly harsh for the children to remain in the UK even though the petitioner is to be deported as they would continue to benefit from the health and education system here and because the nieces have been in the petitioner's care only for approximately four years and that now, aged 17, they were of an age to be able to understand the reasons for the separation. In relation to those nieces and also the petitioner's son M, the respondent concluded (at paragraph 35) that the petitioner would be able to keep contact with all the children through modern means of communication. Under reference to the decision of the upper tribunal in *Omotunde* v *SSHD* [2011] 1 NLR 684, paragraph 29, Mr Caskie submitted that there was judicial support for the view that internet and telephone calls do not substitute for the daily care and interaction between someone such as the petitioner and his child or children in the sense required for family life. Counsel submitted that as the decision letter made no comment on whether the respondent regarded such modern means of communication as a substitution for family life it is unclear what view was taken on this. Does the respondent think it ameliorates the harm of fracturing the family or not? The youngest child, M, was aged two and a half at the time of the decision and it was questionable whether the reference to keeping contact with him through modern means of communication was appropriate. If the decision is reduced the respondent would have to

look at the matter again and consider the availability of modern communication in the context of the separation between him and these children and form a view.

[10] The third challenge made to the respondent's decision was the extent to which reliance had been placed on elderly findings in relation to the children in question. Mr Caskie submitted that this was illustrated by paragraphs 34, 35 and 52 of the letter. In paragraph 34 the respondent rejected the contention that it would be unduly harsh for the children to remain in the UK even if the petitioner was to be deported. A passage from the immigration judge's decision of 22 November 2012 is quoted at the end of that paragraph relating to the older child of the petitioner and his wife ("MKAK") who was the only child in the family at that time. Although paragraph 35 narrates that since that determination in 2012 the petitioner and his wife have had another child (M) and that the petitioner's wife's two nieces had joined them in the UK there is no analysis of the up to date circumstances of the children which was a material factor in the petitioner's proposed fresh claim. It was significant, contended Mr Caskie, that the petitioner's wife has settlement in the UK and that the youngest of the children in the family, M, is a British citizen. The respondent had relied further on the immigration judge's decision of 22 November 2012 at paragraph 52 of the letter. That paragraph related exclusively to the older child, MKAK. It was hard to see how the circumstances for that child's primary care in 2012 were relevant to the question of the childcare being provided by the petitioner now in light of the three additions to the family.

[11] The fourth challenge related to the issue of delay and the petitioner's particular circumstances of continuing to be in this country almost a decade after the decision to deport was first considered, during which time he had fathered two children and accepted two near relatives of his wife to be admitted into the family. Counsel referred to the decision of the UK Supreme Court in *R (Agyarko)* v *SSHD* [2017] 1 WLR 823. At

paragraph 52 of the judgment in that case Lord Reed addressed the importance of proportionality in decisions of this sort. His Lordship had emphasised that the cogency of the public interest in the removal of a person living in the UK unlawfully was liable to diminish if there is a protracted delay in the enforcement of immigration control, stating that from the other perspective that meant that more weight would be given to family life, even precarious family life, after a considerable passage of time. Further, in *EB (Kosovo)* v *SSHD* [2009] 1 AC 1159 Lord Bingham of Cornhill had addressed the issue of delay in the decision making process in an immigration context. In particular, one of the ways in which delay may be relevant was that if months and then years pass without a decision to remove being made it is likely that the sense of impermanence will fade and the expectation on the part of someone like the petitioner will grow that if the authorities had intended to remove him they would have taken steps to do so. This was an issue that may affect the proportionality of any removal. A further way in which delay might be relevant is discussed at paragraph 16 of the decision in *EB (Kosovo)*. That is that it may reduce 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, while the respondent could not dispute the years of delay, the focus in the answers to the petition (at paragraph 18) is on the various applications for reconsideration or review presented by the petitioner over the years. In doing so the respondent had failed to have regard to a material matter, namely the very significant period of years that has passed, regardless of reasons, to see how that might feed into the decision on realistic prospect of success. The decision to deport the petitioner had been made in January 2009. Litigation had taken place in one form or another between 2009 and 2014. Some of that litigation was on any view well founded. In any event, between

2014 and 2017, indisputably the respondent had done nothing either to progress the removal of the petitioner or deal with his further representations. That passage of time was important because as the UK Supreme Court had stated in the case of the *Christian Institute and Others* v *The Lord Advocate* [2016] UKSC 51, at paragraph 89, the more tenuous the link between the objective pursued by state intervention and the achievement of one of the legitimate aims the more difficult it is to justify significant interference with an individual's private and family life. Mr Caskie also relied on the decision of the Grand Chamber of the European Court of Human Rights in *Maslov* v *Austria* (2008) 47 EHHR 20. At paragraph 57 of that judgment the court had referred to a number of criteria established in previous cases that it would use in order to assess whether the expulsion of a foreign national from the relevant state was necessary in a democratic society and proportionate to the legitimate aim pursued. These included the nature and seriousness of the offence committed by the applicant, the length of time he had been in the relevant country, the time that had elapsed since the offence was committed, his family situation including whether there are children of any marriage and if so their age and other relevant matters. The court emphasised, at paragraph 70 of the judgment, that those criteria were ultimately "… designed to help evaluate the extent to which the applicant can be expected to cause disorder or engage in criminal activities."

[12] On the basis of these authorities, Mr Caskie submitted that it was not enough in the circumstances of the present case for the respondent to rely simply on the criminal conviction in 2008. She required to give consideration to the considerable lapse of time without any further offending and to make clear that this had been taken into account. Indisputably an immigration judge would apply the criteria in *Maslov* v *Austria* and could find in favour of the petitioner, thus giving him a realistic prospect of success. The

respondent had failed to apply anxious scrutiny to the petitioner's case. For each and all of the four bases of challenge Mr Caskie submitted that the decision should be reduced and the prayer of the petition granted.

The respondent's submissions in defence of the decision

[13] Ms Smith for the respondent addressed the four challenges made by Mr Caskie. She characterised the first question as being whether the respondent had applied the correct test in considering the submissions that were said to amount to a fresh claim. She pointed out that the correct test had been set out at paragraph 68 but conceded that thereafter the decision letter was unhappily worded on this point. She clarified that the explanation for realistic prospect of success being worded as "this means that it is not accepted that, should this material be considered by an immigration judge, your submissions would result in a decision …" had become a standard passage in such letters and that while the wording was on any view unhelpful, each decision letter must be considered on its own terms. Some latitude required to be given to the respondent. Counsel very fairly acknowledged that the difficulty for the respondent in this case is that the word "would" appears twice in significant passages of the decision letter, unlike the case of *MA* where it only appeared once. As against that, however, the correct exposition of the test also appeared twice in the current decision letter at paragraphs 78 and 80. Ms Smith submitted that the approach should be to step back and look at the meaning of the letter as a whole and decide whether the correct test had been applied. In relation to the reference in *MA* v *SSHD* to that petitioner's further submissions being "so lacking in substantive merit that there was no reasonable prospect of a judge taking a different view" counsel pointed out that it was the Lord Ordinary who had expressed the matters that way and not the respondent in the

decision letter. She submitted that a comparison of the merits of the case of *MA* and the present petitioner was unhelpful. All applicants are entitled to a lawful decision and the first point about the respondent's approach should be decided solely on the basis of whether, the correct test having been enunciated, the use of the unfortunate term "would" appearing twice was sufficient to conclude that the respondent had not applied the correct test.

[14] On the second issue of whether the respondent took full account of the way in which the family would be fractured on the petitioner's departure, counsel commented that there appeared to be two aspects to the petitioner's argument, namely first that the respondent did not consider this issue properly and secondly that even if it had been considered properly inadequate reasons had been given for the conclusion. Ms Smith submitted that this was not a fair characterisation of the way in which the respondent had dealt with the matter. The petitioner's complaints amounted to little more than that he disagreed with the decision made. The decision letter sets out accurately the situation of the various children in the petitioner's life in some detail. Arguments can always be made about the weight to be attached to certain factors and disagreement could be expressed with the conclusion but it was wrong to say that the respondent had not considered the point raised. In relation to reasons, these were sufficient. The background was that the respondent was weighing the importance of the petitioner's family life against the public interest in deportation and in that context concluded that ongoing electronic contact between the petitioner and his children would be satisfactory. There is always a balancing exercise to be carried out. It was accepted by the respondent that the petitioner had constituted family life that would be diminished if he is removed from the country. However, the decision maker had to balance all of that against the other factors including that the petitioner had developed family life

knowing that he was subject to a deportation order. In essence no crisp error of law had been identified in this second challenge.

[15] Turning to the third issue of the respondent having relied too heavily on old findings from the Immigration Judge's decision in 2012, counsel submitted that it was both relevant and necessary for previous circumstances relating to the petitioner to be taken into account. It could not be said that his current situation was not also taken into account and so any reliance in the decision letter on the old findings of the Immigration Judge were balanced by that consideration. In any event, the context in which there was detailed reference to the previous circumstances at paragraph 52 of the decision letter related primarily to credibility and reliability. For the reasons given the Immigration Judge had not accepted the petitioner's claim that he was the primary carer of the child in question at all. A previous adverse credibility finding was always relevant. Further, in relation to the proposed new claim, the petitioner now maintains he continues to be the primary carer of the child under discussion in 2012 and now also the carer of additional children. It was entirely appropriate for the respondent to have considered that fresh information in the context of previous findings. It was all part of the balancing exercise that the respondent required to carry out.

[16] On the issue of delay and its significance to this case, Ms Smith agreed that the relevant guidance should be taken from the decisions given in *EB (Kosovo)* v *SSHD* [2009] 1 AC 1159 at paragraphs 14-16 already referred to by Mr Caskie. The respondent's position was that only the second of the two factors mentioned by Lord Bingham was relevant in the present case, namely the passage of time without a decision to remove being made. However as counsel for the petitioner had also relied on the third possible relevance of delay, namely that of delay shown to be the result of a dysfunctional system, that would also be addressed. Ms Smith submitted that the years prior to 2014 when the petitioner was

engaged in ongoing litigation could not help him so far as any delay argument was concerned. She accepted that the period 2014-2017 was relevant in principle but any delay on the part of the respondent was restricted to that three year period and not the eight years mentioned by Mr Caskie. In any event, the petitioner was clearly someone who had understood that challenges could be made to decisions of the respondent that may or may not be successful. Accordingly the whole period took place against a background of a certain understanding on his part that the deportation order was there and that he could not rely on any period of inaction and silence while waiting for the latest decision. He has been legally represented and can be assumed to have been given advice about the precariousness of his situation. While he has continued to contest deportation by providing new information in 2014 and 2015, this itself distinguished him from someone who had "fallen under the radar". While a period of three years between the lodging of proposed fresh submissions and a decision by the respondent was a long period it was not unheard of. It was submitted that this case was not in the territory of delay caused by a dysfunctional system. There had been no unpredictable, inconsistent or unfair outcomes. In any event the dysfunctionality point had not been raised in the petition.

[17] It was submitted further that there is a distinction between the type of immigration control referred to in *EB (Kosovo)* and the deportation of criminals with which this case is concerned. The circumstances in *EB (Kosovo)* were very different. It might also be said that in this case delay had helped the petitioner as his position was stronger in that he had established more of a family life. It was inappropriate to allow him to take advantage of a delay insofar as it strengthened his claim while at the same time arguing that the system was dysfunctional, as the latter argument could only help the disadvantaged.

[18] Counsel for the respondent made certain submissions on legitimate aim. She emphasised that the deportation of foreign criminals in an immigration context is the legitimate aim behind the decision of the respondent. The only real complaint made was one of balance and there was no dispute that the criminal conviction and sentence had to be balanced against the petitioner's creation of a family life. The matter came down to one of anxious scrutiny. Unless the petitioner could show that the balancing exercise had not been properly carried out the petition could not succeed on this point. There was no need for the respondent to list the criteria recorded in the *Maslov* v *Austria* case. However paragraphs 50-65 of the decision letter were sufficient to cover the various aspects of the balancing exercise. Having carried out that detailed balancing exercise the respondent had concluded that the public interest in deporting the petitioner was greater than the acknowledged need to consider his family life in this country.

[19] Finally, Ms Smith submitted that the respondent's decision letter was a detailed one exhibiting that anxious scrutiny had been undertaken. The accepted and significant change in the petitioner's family life is set out correctly and comprehensively and the petitioner had been given the full benefit of that added weight. The respondent had been entitled to reach the conclusion that she had and the petition should be dismissed.

Discussion

[20] This case involves the use by the respondent of what is apparently a standard expression when considering submissions under paragraph 353 of the Immigration Rules to see if they amount to a fresh claim. It was not in dispute before me that the reference, on two occasions, in the decision letter to realistic prospect of success amounting to a requirement that the petitioner's submissions "would" result in a favourable decision by an

immigration judge was inappropriate and deficient. The question is whether, even where stated twice, this error in expression in the circumstances of this particular case was illustrative of failure by the respondent to apply the correct test. The proper approach to considering whether or not further submissions amount to a fresh claim is set out in the often cited passage from the judgment of Buckstone LJ in *WM (DRC)* v *SSHD* [2006] EWCA Civ 1495 as follows:

> "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 §7 above. The Secretary of State of course can, and no doubt logically should, treat his own view on 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 for 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?"

[21] It is clear from the acknowledged correct approach to such submissions that it is wrong to describe the test of realistic prospect of success in the way that appears twice in the decision letter in this case. It is important that the hurdle to be overcome by the petitioner in a paragraph 353 claim is a modest one. It has been described as having to show that there is more than a fanciful prospect of success – *AK (Sri Lanka)* v *SSHD* [2009] EWCA Civ 447. As counsel for the petitioner in this case did not go so far as to submit that the use of the expression "would" result in success before an immigration judge as opposed to "could" result in such success vitiates the decision, the question then becomes whether, reading the decision letter as a whole, the respondent has applied the correct test and has shown that she has done so. That was the approach taken by Lord Ericht in the case of *MA* v *SSHD* [2017] CS0H 109, where analysis of the decision letter illustrated that there was no substantive merit in the further submissions submitted, and so in that case there was no realistic

prospect of a judge taking a different view. I agree with the approach taken in that case. I would add, however, that in the circumstances of the case before me, where the respondent has twice used the incorrect expression under reference to the applicable test, a particularly careful analysis of the letter is required to see whether the respondent has exhibited not just a statement of the correct test but also its application, including satisfying the requirement of anxious scrutiny. While what matters is whether the correct test was applied rather than what language was used, the respondent's unfortunate use of language on two occasions in the present case is sufficient to alert the reader to the possibility of error in its application. As Mr Caskie put it, what mattered was whether the operative part of the decision was properly made. That involves consideration of the particular ways in which it is said to be deficient.

[22] Turning to the first of the substantive challenges to the terms of the decision letter, the petitioner claims that the respondent failed to analyse properly the anticipated fracturing of the petitioner's family that would result from him requiring to return to the DRC. The respondent required to consider whether it would be unduly harsh for the children of the family to remain in the UK following deportation of the petitioner. The respondent's conclusion on that point is that the petitioner would be able to keep contact with all four children through modern means of communication. The issue is whether something more was required in terms of balancing the quality of that contact against the impact on the children of being separated from (in the case of MKAK and M) their father and in the case of the nieces, a father figure. In *Omotunde* v *SSHD* [2011] INLR 684 Blake J, sitting as president of the Upper Tribunal (Immigration and Asylum Chamber ("UTIAC") rejected a submission that family life hitherto enjoyed between an active parent and a small child

could be appropriately maintained by telephone calls or other "modern methods of communication" from, in that case Nigeria. He stated:

> "If it is justified to interfere with the right of respect for family life because of a contrary compelling public interest, so be it and the fact of electronic communication may provide some means of continued contact, but the internet and telephone calls do not substitute for the daily care, engagement and attendance on a young child that is the essence of family life in this context." (para. 29).

The context of that case was also deportation of a foreign criminal. Of course there will be cases where the unsatisfactory nature of maintaining a parent-child relationship through internet and telephone calls is outweighed by the legitimate aim of deporting a foreign national with a record of offending from the country. What is required in such a proportionality assessment is an indication of why in any particular case the ability to keep contact with children through electronic means is sufficient. The nature of the criminal conduct in question whether it was an isolated conviction or not and the time that has elapsed since its commission, may all be factors, as will the ages and abilities (if known) of the children I conclude that the respondent's decision letter on this particular issue is deficient insofar as it does not directly address that balance. It states only that the petitioner "will be able to keep contact with your children through modern means of communication along with more traditional methods" without specifying whether it is the respondent's view that in the circumstances of this particular case, having regard to the relevant competing factors, that would be sufficient. In other words the availability of such modern means of communication is relied on, but not whether in the circumstances of the present case such means are sufficient to justify the acknowledged interference with family life.

[23] The petitioner contends also that the respondent has placed too much reliance on elderly findings in relation to the issue of family life as it stood when an immigration judge looked at the matter in 2012. At that time there was only one child of the petitioner and his

partner and the immigration judge did not accept at that time that the petitioner was the main carer or at least heavily involved in providing childcare to that child. On this issue I accept the contention of counsel for the respondent that it is perfectly acceptable to quote from a previous decision of an immigration judge in relation to issues of credibility. Further, it cannot be said that the respondent did not address directly the additional information provided about the petitioner's nieces and the new child of the relationship. In particular, at paragraph 53, it is noted that the petitioner's partner still only works part time, that the two nieces are of an age where they could take some responsibility in the household and concludes that it is not accepted that the petitioner is the primary carer for the children. That is a specific finding that the respondent was entitled to make on the basis of the available information. Accordingly, while references to the situation in 2012 in relation to the issue of childcare were relevant only in relation to credibility or as a starting point for the discussion, it seems to me that that is the context in which they are set out. It cannot be said that the respondent has not dealt with the claim that the petitioner is the primary carer of additional children. This particular matter is adequately dealt with by the respondent in the decision letter, in contrast to the issue of the separation of the petitioner from the children on deportation dealt with above. The respondent does not dispute that the petitioner is actively engaged in family life in this country. The specific issue being addressed in paragraphs 52 and 53 was that of childcare. The additional reference to the 2012 determination at paragraph 34 is in the context of the continuing support that would be provided to both natural children of the relationship if the petitioner was removed. That was a matter that the immigration judge had found relevant in 2012 in relation to the older child of the relationship and the respondent concludes that it would also be a relevant factor for the younger child. Again, in the context of the point being addressed at that stage in the

decision letter, I do not consider that the respondent has attached too much weight to the 2012 decision. That does not mean that sufficient weight has been attached to the petitioner's current family circumstances, simply that using the previous findings as a starting point is not illustrative of error.

[24] The final challenge in this case, in relation to the issue of delay, highlights the unusual circumstances of the petitioner's situation. Having been convicted in February 2008, a full decade has now passed since the decision to deport him was first considered, the liability to deport letter having been served on 17 March 2008. There is no doubt that the weight of the public interest supporting deportation of foreign criminals is generally very considerable, a point made by Lord Reed in *R (Agyarko)* v *SSHD* [2017] 1 WLR 823 at paragraph 51. However in that case, Lord Reed went on to state the following:

> "It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish – or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase – if there is a protracted delay in the enforcement of immigration control."

[25] In *EB (Kosovo)* v *SSHD* [2009] 1 AC 1159 Lord Bingham of Cornhill identified three ways in which delay in the decision-making process in an immigration matter might be relevant. The first and most obvious way is that the longer the period of delay the more an applicant may develop close personal and social ties relevant to an Article 8 claim. The respondent accepted in that case that an applicant's claim will necessarily be strengthened in that respect by delay. It is the two possible further ways in which delay may be relevant that arose for discussion in this case. The issue was expressed by Lord Bingham in the following way:

> "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] Imm AR 817, 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* 33 EHRR 1179, para 48; *Mokrani* v *France* 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.
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> 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."

[26] Counsel disagreed as to what the relevant period was in terms of delay in this case. Mr Caskie's position for the petitioner was that as the petitioner has been in the United Kingdom since 2004 and a decision to deport him taken in 2008 the respondent has tolerated his presence for about a decade. While it was accepted that periods of litigation up until 2014 at least put the petitioner on notice that the respondent continued to oppose any attempt to resist deportation, since then there had on any view been a three-year period during which the petitioner had received no response to his submissions in support of a fresh claim. Throughout that time there was no information to suggest that the petitioner had reoffended and it was contended that the respondent failed to have regard to that lapse of time in reaching a conclusion that a continued reason for pursuing the petitioner's removal was one of public safety. The respondent disputes that any period prior to 2014 could be relevant and does not accept that there has been any significant delay in the

petitioner's case, the three years to consider his current application being unfortunate but not unique. More importantly the respondent's position is that the petitioner has benefited from delay in the way *EB (Kosovo)* anticipated he is entitled to benefit in that the strength of his Article 8 claim has improved.

[27] The way in which delay may have affected the petitioner and his claim is that identified as the second relevant factor in *EB (Kosovo)*. Although the petitioner's relationship with his partner was entered into at a time when his status was extremely precarious, years have passed during which the couple have not only given birth to a second child, but the petitioner's partner has had two nieces placed with her in this country following the grant of refugee status for them. The youngest child M has been given British citizenship. It is in these respects that on the face of it, during the last three years or so it might be expected that the petitioner's sense of impermanence will have faded, as he has been free to develop his expanded family unit without challenge or adverse inquiry. A deportation order based on someone being a danger to public safety through having committed a crime is by definition an order that the state has an interest in enforcing promptly. I accept that prior to 2014 the respondent was unable to enforce the deportation order due to a number of appeal and review proceedings at the instance of the petitioner, albeit that one or two of those achieved a modicum of success. What cannot be ignored, however, is that by the time the three-year period of delay between 2014 and 2017 arose the petitioner had already established a family life. It is the impact on the balance between respecting that family life and the need to remove him on public safety grounds that is affected by the three-year period of delay. Accordingly what was required was a careful proportionality assessment balancing the nature and seriousness of the original criminal conviction against the period of delay and consequent further development of family life. It was not disputed by counsel for the

respondent that the criteria listed in *Maslov* v *Austria* [2008] 47 EHRR 20 were applicable, simply that they did not need to be set out in terms in any decision letter. While that is undoubtedly correct, I have concluded that in the particular circumstances of this case, the absence of any reference to the very significant period of time that has elapsed since the commission of the relevant offence and the petitioner's family situation leaves the reader in doubt as to whether the respondent has truly evaluated whether the petitioner is someone who is likely now to engage in any criminal activities if not deported. Such an evaluation is essential; otherwise the respondent would effectively be able to refuse any application under paragraph 353 of the rules from a foreign criminal sentenced to a period of imprisonment of less than four years without taking account of the passage of time since the commission of the offence in the context of the extent and strength of their family relationships.

[28] On the undisputed facts of this case, the petitioner is someone who has lived openly in this country for many years since the decision to deport him was taken. He has created and enlarged a family and there is no indication that he has reoffended. On the basis of those undisputed facts it was incumbent upon the respondent to explain clearly why the criminal conviction of 2008 outweighed the relevant and more recent information in relation to the additions to the petitioner's family. Having taken three years to assess the proposed fresh claim the respondent has not shown how these competing factors have been balanced. I do not consider, however, that the third way in which delay may be relevant arises in this particular case. While the delay of three years in dealing with the petitioner's application is excessive and hopefully unusual, there was nothing to support that it resulted from a dysfunctional system yielding the outcomes referred to by Lord Bingham in *EB (Kosovo).*

[29] For the reasons given above, I am not satisfied that the respondent has considered correctly whether the petitioner has a realistic prospect of success before a fresh adjudicator,

applying the rule of anxious scrutiny. The important developments of the birth of the petitioner's son M and the reception of his partner's two nieces into the family were sufficiently important matters that an explanation was required as to why it was considered satisfactory for M in particular who was under the age of three, to keep contact with his father using modern means of communication such that physical separation was justified. Further, the absence of reference to the very lengthy passage of time in this case and the impact of that on the prominence or otherwise to be given to the criminal conviction as compared with the significant family life established is illustrative of a lack of anxious scrutiny in this particular case. These are material errors justifying reduction of the decision.

Decision

[30] For reasons given above I will sustain the plea in law for the petitioner and reduce the decision of 8 May 2017. I will reserve meantime all questions of expenses.