IN THE UPPER TRIBUNAL

EXTEMPORE JUDGMENT GIVEN FOLLOWING HEARING

R (on the application of Robinson) v Secretary of State for the Home Department (paragraph 353 – Waqar applied) IJR [2016] UKUT 00133(IAC)

Field House
London

16 February 2016

THE QUEEN
(ON THE APPLICATION OF)
JAMAR CHRISTOFF ROBINSON

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

First Respondent

and

THE FIRST-TIER TRIBUNAL

Second Respondent

BEFORE

UPPER TRIBUNAL JUDGE SOUTHERN

- - - - - - - -

Ms C Robinson, instructed by Lawrence Lupin Solicitors appeared on behalf of the Applicant.

Mr T Fisher, instructed by the Government Legal Department appeared on behalf of the first Respondent. There was no representative on behalf of the second Respondent.

1. *Notwithstanding the amendments brought about by the Immigration Act 2014 to the types of decisions appealable under s82 of the Nationality, Immigration and Asylum Act 2002, para 353 of HC395 continues to perform a gateway function in respect of access to a right of appeal. Arguments to the contrary, founded upon dicta in BA (Nigeria) v SSHD*

[2009] UKSC 7, are misconceived because, as explained in ZA (Nigeria) v SSHD [2010] EWCA Civ 926, in BA (Nigeria) immigration decisions (of a type that no longer give rise to a right of appeal) had been made so that there was, on that account, a right of appeal.

2. *The argument now advanced, which was not considered by the Upper Tribunal in R (Waqar) v SSHD (statutory appeals/paragraph 353) IJR [2015] 00169 (IAC), founded upon the amendment to the definition of "a human rights claim" found at s113 of the 2002 Act, provided for by the Immigration, Asylum and Nationality Act 2006 but not yet implemented, is no basis for doubting that Waqar is correctly decided.*

3. *Where the respondent rejects further submissions and goes on to conclude that they do not amount to a fresh claim for the purposes of para 353 of HC 395, it is not implicit that the respondent has made a decision to refuse a human rights claim. Properly understood, the respondent has done precisely the opposite and has declined to make a decision at all. To the extent that the respondent has embarked upon an examination of the merits of the further submissions, she is not making a decision but doing no more than equipping herself to follow the para 353 process.*

- - - - - - - - - - - - -

ON AN APPLICATION FOR JUDICIAL REVIEW
APPROVED JUDGMENT

- - - - - - - - - - - - -

UPPER TRIBUNAL JUDGE SOUTHERN:

1. The applicant has been granted permission to bring a judicial review against decisions of the first respondent made on 23 June 2015 and 31 July 2015 to refuse to treat further submissions made by the applicant's solicitors on 13 May 2015 and by the applicant himself on 28 July 2015 as amounting to fresh claims such as to give rise to a fresh right of appeal and also against the decision of the second respondent made on 7 August 2015 to refuse to accept that the applicant had a right of appeal against a fresh refusal of his human rights claim.

2. The applicant, who is a citizen of Jamaica born on 14 May 1991, arrived in the United Kingdom in October 1998, then aged just 7 years old. He was admitted as a visitor and having overstayed that leave has remained unlawfully in the United Kingdom ever since. He is now 24 years old. Unfortunately, he has committed a number of serious criminal offences in respect of which, as the respondent has pointed out, he has been sentenced to custodial sentences of a combined total of about seven years.

3. In April 2011 he was sentenced to a term of eighteen months for two counts of robbery and, in August 2011, 56 months for theft from the person and two further counts of robbery. On that occasion he was also made subject to an antisocial behaviour order for a period of five years. While serving that sentence he received a

consecutive term of twelve months' custody for violent disorder, an offence committed whilst detained.

4. The applicant's appeal against the deportation order that was signed in July 2013 was dismissed following a hearing on 17 October 2014 by a decision of the First-tier Tribunal promulgated on 19 November 2015. In that appeal the applicant relied upon a human rights claim founded upon his right to respect for private life due to his length of residence in the United Kingdom, it being accepted at that time that there was no protected family life in play.

5. The decision letter of 23 June 2015 is a response to a letter dated 13 May 2015 sent by the applicant's solicitors. In that letter they ask the respondent to grant the applicant temporary admission so that he could support his partner who was imminently due to give birth. This was a short letter making no other request but the respondent took it to be implicit from what was said that the applicant was now advancing a claim that he had established family life with his partner, Ms Tyrena Godson-Charles who is said to be pregnant with his child. The response from the Secretary of State dated 23 June 2015 was a detailed one from which it can be seen that the respondent recognised that the applicant was in fact asserting that he now had a claim to advance on that basis. However, for the reasons set out in that letter, the respondent saw no basis to revisit the deportation decision but did go on to carry out a full assessment of whether what had been said amounted to a fresh claim for the purposes of paragraph 353 of HC 395 but concluded it did not, saying at paragraph 55 of that letter "as your client's submissions do not create a realistic prospect of success before an Immigration Judge they do not amount to a fresh claim".

6. Shortly afterwards the applicant himself submitted further submissions on 28 July 2015, this time informing the respondent that his son had now been born. Once again the first respondent refused to accept that to amount to a fresh claim. We do not have a copy of that letter but it can be seen from the response it generated from the respondent that the same documents as accompanied the letter previously sent by his solicitors evidencing the arrival of the child were included and so discussed.

7. Although these two decisions were drawn up as refusals to accept that the further submissions amounted to a fresh claim for the purposes of paragraph 353, the applicant categorises these decisions also as decisions to refuse to revoke the deportation order that had been made in respect of him. In both decisions the respondent said that she saw no grounds on which to revoke the deportation order. I shall say something more about that a little later but it might be observed that, in the context of the revised framework of Section 82 of the 2002 Act, whether or not there had been a decision to refuse to revoke a deportation order did not have the same significance that it previously did have.

8. These proceedings were first brought in challenge to the two decisions of the first respondent but the applicant was subsequently granted leave to expand the scope of his claim to include a challenge to the refusal of the second respondent to accept his appeal. It is, however, today common ground and agreed between the parties that it

is not necessary to address the claim that relates to both the first and second respondent separately because the outcome will be the same for both whether the claim succeeds or falls.

9. There are in effect two grounds upon which the applicant now relies. The first of those has been neatly summarised by Mr Fisher in his skeleton argument and I do not see that Ms Robinson expresses any disagreement with how he puts it. In the statutory scheme, as amended by the Immigration Act 2014, does paragraph 353 of the Immigration Rules continue to perform a gateway function to accessing the appeal rights now provided by Section 82 of the Nationality, Immigration and Asylum Act 2002. Put another way, do further human rights submissions have to meet the threshold set out in paragraph 353 in order to amount to a human rights claim for the purpose of Section 82 or will any further human rights submissions be sufficient to amount to a human rights claim for the purpose of Section 82 and therefore generate a right of appeal.

10. The second ground is that on the basis of the information before the first respondent the refusal to accept that the further submissions made amounted to a fresh claim was irrational and so unlawful. I shall deal with those grounds in turn.

11. Before addressing the first ground it might be observed that it can succeed only if Ms Robinson persuades me to do that which the Court of Appeal was not prepared to do, that being to find that the reported decision of the Upper Tribunal in R (Waqar) v Secretary of State for the Home Department (statutory appeals/paragraph 353) IJR [2015] UKUT 00169 (IAC) was wrongly decided. That may be thought not to be a promising position from which to bring an application for judicial review before the Upper Tribunal but I shall examine the arguments advanced by the parties to see where they lead. I should add that Ms Robinson offers one line of argument that was not considered in the litigation concerning Waqar. That concerning the revised but unimplemented version of Section 113 of the 2002 Act brought about by Section 12 of the Immigration, Asylum and Nationality Act 2006. I move on to consider the legal framework with which we are concerned in this claim.

12. Section 82 of the 2002 Act as originally enacted provided for a right of appeal against any of the immigration decisions described in Section 82(2). One of those described in Section 82(2)(k) was refusal to revoke a deportation order.

13. Section 94 of the 2002 Act provides that an appeal under Section 82 where the appellant has made an asylum or human rights claim cannot be brought from within the United Kingdom if the Secretary of State certifies that the claim is clearly unfounded.

14. Section 96 of the 2002 Act provides that an appeal cannot be brought at all if the claim could have been raised at an earlier appeal or in response to an earlier Section 120 notice and there is no satisfactory reason for it not having been raised.

15. There is a definition of what is a human rights claim found at section 113 of the 2002 Act.

"human rights claim" means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights".

As I have mentioned, the 2006 Act provided for an amendment to that definition but there has been no commencement order to bring that amendment into force. The amended version so far as is relevant for present purposes adds a subparagraph (b) saying that the definition of a human rights claim does not include a claim which, having regard to a former claims, falls to be disregarded for the purposes of this part in accordance with the Immigration Rules. The amended version is as follows, so far as is relevant:

"human rights claim"

(a) Means a claim made by a person that to remove him from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c.42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights, but

(b) Does not include a claim which, having regard to a former claim, falls to be disregarded for the purposes of this Part in accordance with immigration rules,"

16. Section 82 of the 2002 Act has been amended by the 2014 Act so that the familiar concept of the somewhat lengthy list of immigration decisions has gone and has been replaced by a new Section 82(2) providing for just three types of decision that can give rise to a right of appeal. In its amended form Section 82 provides so far as is relevant for present purposes as follows:

"**Right of appeal to the Tribunal**:

(1) a person ("P") may appeal to the Tribunal where –

(b) the Secretary of State has decided to refuse a human rights claim made by P."

The vocabulary of Sections 92, 94 and 96 of the 2002 Act has been amended to reflect the refreshed access to the right of appeal provided by Section 82.

17. Para 353 of the Immigration Rules provides:

"Fresh Claims

353. 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

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas."

And, finally, it is helpful to reproduce here paras 398-399A of the Immigration Rules which deal with deportation and claims under article 8 of the ECHR:

"Deportation and Article 8

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who

shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

18. The applicant contends that refusal of a human rights claim and indeed refusal of a protection claim regardless of whether it is a fresh claim or not must give rise to an in-country right of appeal unless certified. That is because there is no requirement to be found within Section 82 that the human rights or protection claim be a fresh claim. The applicant places reliance upon BA (Nigeria) v Secretary of State for the Home Department [2009] UKSC 7 pointing in particular to what was said at paragraphs 29 and 32 by Lord Hope discussing the new scheme of certification powers introduced by the 2002 Act. He said this:

> "The new system contains a range of powers that enable the Secretary of State or as the case may be an Immigration Officer to deal with the problem of repeat claims. The Secretary of State's power in Section 94(2) of the 2002 Act to certify that a claim is clearly unfounded, if exercised has the effect that the person may not bring his appeal in-country in reliance on Section 92(4). The power in Section 96 enables the Secretary of State or an Immigration Officer to certify that a person who is subject to a new immigration decision has raised an issue which has been dealt with or ought to have been dealt with in an earlier appeal against a previous immigration decision which has the effect that the person will have no right of appeal against the new decision. It is common ground that the present cases are not certifiable under either of these two sections. Why then should they be subjected to a further requirement which is not mentioned anywhere in the 2002 Act. It can only be read into the Act by, as Lord Justice Sedley in the Court of Appeal put it, glossing the meaning of the words 'a claim' so as to exclude a further claim which has not been held under Rule 353 to be a fresh claim. The court had to do this in ex parte Onibiyo but there is no need to do it now"

and a little later

> "The Immigration Appeals system must not be burdened with worthless repeat claims. On the other hand procedures that are put in place to address this problem must respect the United Kingdom's international obligations. That is what the legislative scheme does, when Section 95 is read together with Section 94(9). It preserves the right to maintain an out-of-country appeal that the decision in question has breached international obligations. I would hold that claims which are not certified under Section 94 or excluded under Section 96, if rejected, should be allowed to proceed to appeal in-country under Sections 82 and 92, whether or not they are accepted by the Secretary of State as fresh claims.

19. The difficulty facing the applicant in this case is that the submission founded upon those comments is an argument that has been advanced before the Upper Tribunal previously but has been rejected. In Waqar the guidance given was summarised in the head note as follows:

"1. The current statutory appeal regime requires a decision to be made on a human rights claim. Without a claim and without a decision there is no appeal.

2. Where a claim has already been determined, submissions made subsequent to that require a decision as to whether they amount to a claim. Paragraph 353 of the Immigration Rules provides the mechanism to determine whether they amount to a claim the refusal of which enables a right of appeal."

20. It is plain that the conclusions reached in Waqar have survived challenges similar to those being advanced in this claim when considered by the Court of Appeal. In refusing permission to appeal on the papers Lord Justice Underhill said this:

"I consider that this appeal has no realistic prospect of success for the reasons set out in the respondent's skeleton argument below and adopted by the UT. In short –

1. ZA (Nigeria) confirmed that under the pre-2014 regime Rule 353 permitted the Secretary of State to decide that a purported human rights claim was not in fact such a claim but was no more than an attempt to revive a previous unsuccessful claim (see para 27) and that if she did so there was no immigration decision within the meaning of Section 82 (see paragraph 21). It also decided, though I am not sure this is directly material to the particular argument now raised, that in such a case there would be no human rights claim for the purpose of Section 94 with the result that there was no overlap between the operation of the two provisions (see para 30). ZA (Nigeria) adopted a narrow reading of the ratio in BA (Nigeria) on which the applicant relies and that reading is binding on this court.

2. Nothing in the changes introduced by the 2014 Act undermines that reasoning. If the rejection of a claim under rule 353 did not constitute an immigration decision for the purposes of the old section 82 there is no reason why it should constitute a decision for the purposes of the new rule. In fact the relevant word is 'decided' not 'decision' but the use of the verb rather than the noun is obviously immaterial. It is suggested that it makes a difference that the old section 82 used the label 'immigration decision' which was then defined to cover a number of specific kinds of refusal etc., whereas the new section refers simply to a decision to refuse; that that is just a matter of drafting technique and connotes no difference of substance."

21. That reasoning was specifically approved by Lord Justice Beatson after he had heard argument at an oral renewal of the application for permission to appeal. See: HW v Secretary of State for the Home Department [2015] EWCA Civ 1351. Lord Justice Beatson examined the submission that BA (Nigeria) was authority for the proposition

that there was a right of appeal even where the respondent decided that further submissions did not amount to a fresh claim for the purposes of paragraph 353 and explained why that was misconceived. BA (Nigeria) is distinguishable because in that case there was an immigration decision or, more accurately, there were immigration decisions, under the former version of section 82, that being refusal to revoke a deportation order. Thus a right of appeal had arisen and the question was whether the appeal could be brought from within the United Kingdom.

22. Referring to ZA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 926 he continued at paragraph 18:

> "The importance of ZA (Nigeria**)** was that it was held that BA (Nigeria) only applied where there was an appealable decision so that one was within the statutory framework. It was clearly held in ZA (Nigeria) that the Secretary of State is not required to make a further appealable decision whenever further submissions are made."

In rejecting the arguments advanced to the contrary, he observed:

> "It is not legitimate to take isolated statements from BA (Nigeria) out of context. In that case the context was a situation which, by Section 82(2)(k) a decision not to revoke a deportation order generated a right to an in-country appeal unless it was certified under Section 94. Accordingly, it was in issue that there was an appealable decision, only the locus of the appeal. The right to that appeal existed whether or not it was repetitious. BA (Nigeria) was not concerned with whether a right of appeal should arise at all, that was what ZA (Nigeria) was concerned with. This court, in a judgment given by the Master of the Rolls Lord Neuberger, held that BA (Nigeria) did not require the Secretary of State to issue an appealable decision whenever further submissions were made. He gave BA (Nigeria) a narrow reading: (see Lord Neuberger at [21]);
>
> > 'The Secretary of State can decide that it is not a fresh claim and then decide to make a decision on whether or not to refuse leave to enter etc. In that event there would be no decision which could give rise to a right of appeal under Section 82'."

and after that he gave a number of further reasons that reinforced his analysis as to that outcome.

23. At this point I must address Ms Robinson's submissions concerning the amendment to Section 113 of the 2002 Act. In short she argues that it is implicit in the fact that the new unimplemented version of the definition of what is a human rights claim specifically excludes from that definition a claim that fails to meet the fresh claims test of paragraph 353 that the original version did not do so, otherwise there would have been no reason to provide for the exclusion in the new version.

24. Mr Fisher contends that that is not correct. In his submission the new version of the definition does no more than to clarify the position that pertained before. For

reasons that will be clear from this judgment, I do not accept the analysis urged upon me by Ms Robinson. I have no doubt at all that I should follow the approach to Waqar taken by Lord Justices Underhill and Beatson. I cannot say that Waqar is wrongly decided and in fact I am confident that it is correctly decided and so will follow it in determining this application. In any event, as Mr Fisher has submitted, I am bound by the decision of the Court of Appeal in ZA (Nigeria) and so must accept the narrow reading of the ratio in BA (Nigeria).

25. In this case the Secretary of State has looked at the further submissions but has concluded that they did not amount to a fresh claim and so declined to treat them as a claim at all. That meant that there was no decision taken and so it cannot be said in the language of the amended Section 82 that the Secretary of State has decided to refuse the applicant's human rights claim. What has occurred is precisely the opposite of that. The Secretary of State has refused to make a decision because, applying the paragraph 353 test, she has concluded that the further submissions did not amount to a fresh claim so that no decision on the human rights claim was required. To the extent that the Secretary of State embarked upon an examination of the merits of the submissions and explained why the earlier decision was maintained, that was not a decision on a human rights claim but the operation of the process engaged by paragraph 353 of the Immigration Rules. Similarly where the respondent said in both decisions that having fully considered all that had been said there were no grounds on which to revoke the deportation order. That was not, as has been submitted on behalf of the applicant a decision not to revoke the deportation order but an explanation that there was no need to make such a decision.

26. In discussions this morning, Ms Robinson accepted that if her submission were correct, where the respondent did not accept further submissions and so did not grant a period of leave, any assessment carried out as to whether or not submissions constituted a fresh claim must necessarily involve reaching a decision to refuse a human rights claim. That of course would mean that paragraph 353 of the Rules would be otiose and the best that could be achieved to deal with repeat or abusive claims would be to certify them. However, unless such a claim could be certified under Section 96 which plainly not all repeat claims devoid of merit could be, there would always be an out-of-country appeal even for the most hopeless claims that simply repeated what had been said in a recently rejected claim. That cannot be correct given that paragraph 353 has survived not just the arrival of the certification process with the 2002 Act but the frequent and continual amendments to the legislative framework that we see in this jurisdiction (including more than 100 amendments to HC395 since the arrival of powers of certification) but which have left paragraph 353 intact plainly indicating that it continues to have a role to play. That in my judgment is sufficient to dispose of the ground that relates to the right of appeal.

27. I next address the second ground being pursued which is that on the fact advanced in the further submissions, as a matter of rationality, the Secretary of State should have accepted that a fresh claim had been made out such as to require a fresh decision on the applicant's human rights claim. In short, the applicant says that it

was properly considered a fresh claim because the previous refusal of his claim under Article 8 of the ECHR was based only on private life whereas the further submissions were concerned with family life, first with his pregnant partner, Ms Godson-Charles and then with both her and their newly born son. That means, in Ms Robinson's submission, that the human rights claim being advanced was of a different nature than previously relied upon and so it was legally incorrect for the respondent to refuse to consider it and to refuse to produce a decision. In support of that submission she took me to ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 in support of the proposition that the best interests of the child were to be treated as a primary consideration, to ZB (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 834 to illustrate the positive duty to show respect for family life and to Paradeep Singh v Entry Clearance Officer (New Delhi) [2004] EWCA Civ 1075 as authority for the need to recognise that family life between father and son necessarily arises at birth something we enforced in EM (Lebanon) v Secretary of State for the Home Department [2008] UKHL 64.

28. The legal tests in play are, I think, uncontroversial. If, as was the case here, the Secretary of State does not accept the further representations and so declines for that reason to grant a period of leave she must consider whether they constitute a fresh claim. I have already set out what is said about that by paragraph 353 of the Immigration Rules. The Court of Appeal in WN (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495 made clear that the Secretary of State must treat further submissions as a fresh claim if there is a realistic prospect of success in an application before an Immigration Judge but no more than that referring to this as a somewhat modest test. The Tribunal's function is one of review of the decision of the Secretary of State but the Tribunal will intervene if the Secretary of State has not demonstrated the anxious scrutiny demanded of her in reaching her decision or has committed some other public law error such as failing to take into account relevant considerations.

29. I am unable to accept the submission that the two fresh claim decisions are unlawful because the respondent asked herself the wrong questions, predicating her conclusions impermissibly on her own assessment rather than her assessment of how the claim would be assessed by a hypothetical Immigration Judge. That is because, as Mr Fisher has pointed out, the two letters are carefully structured so that the respondent first reached her own view and then directed herself in terms at paragraph 353 and specifically addressed the quite separate question, and the correct question, of whether there was a realistic prospect of success before an Immigration Judge. In that respect the approach of the respondent cannot be faulted.

30. That takes us to the second limb of the challenge pursued against the fresh claim decisions that it was not rationally open to the respondent to refuse to accept that a fresh claim had been made out. Ms Robinson puts it thus, in her skeleton argument which she adopts today:

> "The applicant is entitled to succeed in his Article 8 claim if he establishes any one of the following. First, that he meets the family life child requirements of

paragraph 239A of the Immigration Rules; second, that he meets the family life partner requirements of paragraph 399B of the Rules, or, third, that notwithstanding that he cannot do so there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

31. This means, in Ms Robinson's submission, that in order to defeat the applicant's challenge the respondent must show not only that she has rationally and lawfully rejected the applicant's claim on each of these bases set out above but also that she has rationally and lawfully concluded that there was no realistic prospect that a First-tier Tribunal Judge would reach a different conclusion from her on any of the three bases on which the applicant could succeed. The gist of the respondent's reasoning in this regard is encapsulated in the extract from the second refusal letter reproduced by Ms Robinson in her skeleton argument:

> "As outlined in the paragraphs above you have not provided any details or documentary evidence either to this department or during the appeal process to support your claim that you were in a relationship with Miss Tyrena Godson-Charles or that she was pregnant with your child. You have not produced a birth certificate of the child showing parentage or any other documentary evidence which confirms that you are the father of the child. In addition, prior to your detention on 1 July 2015, and the child's birth on 26 July 2015 you and Tyrena Godson-Charles were not living at the same address. Although the birth of your son is a change of circumstances, they do not amount to a fresh claim because they are not significantly different from material which has been previously considered."

32. Ms Robinson draws together the factors that in her submission should have driven the respondent to the conclusion that a fresh claim had been established:

    (1) The applicant now has a British partner;

    (2) the applicant now has a British son;

    (3) there needed to be a proper assessment pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009 of the son's best interests;

    (4) similarly, an assessment was required under the UN Convention on the Rights of the Child, and

    (5) attention is required to the positive obligation to give respect to family life and the potential development of it.

    It might also be observed, although this was not a matter discussed this morning, that the assessment of the applicant's Article 8 claim by an Immigration Judge would of course be informed by application of Section 117 of the 2002 Act.

33. For the respondent Mr Fisher points out that there was nothing before the decision-maker to indicate that the child and his mother were British citizens or settled

although it is now clear that both are indeed British citizens. However, being a foreign criminal liable to deportation especially in view of the nature and extent of his offending, the applicant faced a formidable obstacle in terms of proportionality. The judge who dismissed the appeal had said this:

> "The appellant is a recidivist who is of medium risk of reoffending and of medium risk to the public as highlighted in the NOMS Report and who is of particular risk to young vulnerable people and young vulnerable women who he has robbed in the past. The social worker points out that the risk is heightened when the applicant is in financial need. I note that the applicant has never worked in the United Kingdom despite the fact he left school at the age of 16 and he is now 23. The main difficulty facing the applicant in making out this aspect of his challenge is that the only information before the respondent when considering whether the further submissions taken together with everything previously considered created a realistic prospect of success before an Immigration Judge was the fact that a child had been born of which the applicant had confirmed he was the father."

34. As Mr Fisher has pointed out, in the context of a foreign criminal facing deportation that would not in itself be a sufficient basis to meet the requirements of paragraph 399A of the Immigration Rules and so it could not possibly be enough in itself to demand as a matter of rationality an acceptance that there was a realistic prospect of success before a judge, but there was no more than that to be considered. Therefore, in my judgment, it is impossible to see what more could reasonably be expected of the respondent in discharging her duty under Section 55 of the 2009 Act in respect of the welfare or the best interests of this child about whom so little was known. Although making no concession to this effect Ms Robinson realistically recognised that there was no realistic prospect of the claim succeeding on the basis of the applicant's relationship with his partner either.

35. Given the paucity of information before the decision-maker about the family life now being asserted, in my judgment the outcome was inevitably that which resulted. The asserted relationship with Ms Godson-Charles had been entered into relatively recently at a time when, on any view the applicant's immigration status was precarious. That much appears to have been recognised by Ms Godson-Charles herself as she has said in a brief statement that they have decided not to marry while this was uncertain. There was no evidence of prior cohabitation, there was no prospect at all of the Article 8 claim succeeding on the basis of the relationship. The conclusion that the applicant did not meet the requirements of 399A or 399B was plainly a rational one and even now there is nothing to identify the very compelling circumstances over and above those required to succeed under those provisions such as to outweigh the public interest in the deportation of a foreign criminal convicted with a history of offending as is in play in this application, especially as the probation report of June 2014 spoke of the applicant representing a medium risk of re-offending. The decisions under challenge were plainly rational and lawful ones. It is impossible to see on the evidence now available that the outcome before a judge of

the First-tier Tribunal could be any different and for these reasons the application for judicial review is refused. ~~~~*0*~~~~