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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Olalekan's (Kwolawole Sharafadeen) Application [2016] NIQB 57

IN THE MATTER OF AN APPLICATION BY KWOLAWOLE SHARAFADEEN OLALEKAN (OTHERWISE KNOWN AS DAVID OLALEKAN) FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

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MAGUIRE J

Introduction

[1] The applicant in this case is Kwolawole Sharafadeen Olalekan ("the applicant"). The applicant is a Nigerian national. His date of birth is 16 June 1979. He is now aged 36. The respondent is the Secretary of State for the Home Department ("the respondent").

[2] The applicant's relevant history for the purposes of these proceedings is found within the papers in the trial bundle and is not in dispute. The highlights of it are:

11/01/05	Arrived in United Kingdom. Refused leave to enter UK. He later appealed this decision.
19/05/05	His appeal was dismissed. Applicant remained in the country illegally as an absconder.
08/07/10	Applicant arrested as a result of a dispute with a partner. Served with papers as an over-stayer.
28/01/11	Applicant circulated as an absconder.

19/03/11	Arrested on suspicion of aggravated burglary; possession of an offensive weapon and assault causing grievous bodily harm.
17/08/11	Arrested for assault on a partner and threats to kill.
23/01/13	Failed to appear at court for sentencing.
23/02/13	Received a suspended prison sentence of six months.
06/07/13	Alleged beginning of relationship with Ms C.
22/07/13	Daughter born (E); mother Ms W.
10/10/14	Remanded to Maghaberry Prison in respect of further criminal charges.
05/12/14	Sentenced to eight months imprisonment in respect of domestic abuse incidents.
30/01/15	Released on home leave (stayed with Ms C to 4/02/15).
05/02/15	Decision by immigration authorities refusing Article 8 human rights claim based on his relationship with E. Claim certified as "clearly unfounded".
06/02/15	End of criminal sentence.
06/02/15	Placed under immigration detention.
09/03/15	Leave to judicially review immigration decision of 05/02/15 granted.
20/08/15	Family Court decides that applicant is only to have indirect contact with E.
08/09/15	Judicial review proceedings dismissed.
11/02/16	Found not guilty of further criminal charges preferred against him.
01/03/16	Transferred to Brooke House, an immigration detention centre, as a prelude to removal which was to take place on 22 March 2016.

03/03/16 Offer by Home Office to receive further submissions as to why he should not be removed.

10/03/16 Submissions made on behalf of applicant to immigration authority. They centre on his relationship with Ms C as an aspect of Article 8.

16/03/16 Decision by Home Office holding that new submissions do not amount to a fresh claim.

21/03/16 Present judicial review proceedings begun.

22/03/16 Leave granted by Colton J.

[3] On the hearing of this judicial review on 17 May 2016 an issue arose about the correct focus of the judicial review application. Prior to the hearing, hitherto the focus had been on what was described as a decision of the respondent to certify that the applicant's claims were under section 94 of the Nationality, Immigration and Asylum Act 2002 "clearly unfounded" – a decision originally made on 10 February 2015 but upheld on review by the Home Office in its decision of 16 March 2016. However, in light of submissions made in his skeleton argument on behalf of the respondent by Mr Egan BL, Mr Ward BL, for the applicant, accepted that the true focus of the judicial review should not be that decision but should be the decision of 16 March 2016 which held that the submissions received by the respondent dated 10 March 2016, when considered by the respondent, did not amount, in accordance with Immigration Rule 353, to a fresh claim. In the light of this, Mr Ward sought and obtained the court's leave to file an amended Order 53 statement which made the position clear. In these circumstances it was agreed between counsel that there was no obstacle to the court proceeding to hear the case as a rolled up hearing as the relevant factual substratum in respect of the judicial review was already before the court. The court agreed to continue with the hearing on this basis.

[4] In accordance with the amended Order 53 statement the target of the judicial review remained the respondent's decision of 16 March 2016. The ground for judicial review was that the impugned decision (that is the decision whereby it was determined that the applicant's further submissions did not amount to a fresh claim pursuant to paragraph 353 of the Immigration Rules) was irrational as Wednesbury unreasonable in that the respondent had failed to have any or any sufficient regard to the following issues:

(i) His "parental responsibility for [E], a British citizen".

(ii) The applicant's strenuous efforts over the past two years to ensure that he can play a useful part in his daughter's life.

(iii) The applicant's alleged genuine and subsisting relationship with Ms C, a British citizen, for almost three years.

(iv) The fact that the applicant and Ms C were said to be engaged to be married and had made enquiries in respect of organising a wedding ceremony.

(v) The fact that Ms C had visited the applicant on more than 66 occasions while he was detained in prison over a period of some 14 months.

The key immigration decisions

[5] There are two key immigration decisions in this case. The first is that of 10 February 2015 and the second is the impugned decision dated 16 March 2016.

Decision of 10 February 2015

[6] The above decision was made as a result of the Home Office decision to detain the applicant for immigration purposes at the end of a criminal sentence the applicant had been serving. The detention was to be a prelude to him being removed from the United Kingdom. This information was notified to the applicant on 18 December 2014 and in response the applicant made representations that he should not be removed on Article 8 grounds due to his relationship with his daughter, E. It was this which elicited the response of the respondent dated 10 February 2015.

[7] The respondent in this decision did not accept the applicant's claim to have a subsisting family life in the United Kingdom but went on to indicate that, if he had, his removal would be proportionate under Article 8(2). In these regards, it was noted that:

(i) E was 18 months old.

(ii) She had had no contact with the applicant since July 2014.

(iii) The applicant had not been a significant or consistent person in E's life.

(iv) The applicant's past contact with E had been reduced owing to the applicant's aggression and abusive behaviour towards Ms W, E's mother.

[8] In the light of the above, it was considered by the Home Office that the applicant's removal from the United Kingdom would not breach Article 8 of the ECHR and a decision was made that the applicant's claim to the contrary was clearly unfounded.

[9] The first decision was then made subject to judicial review but following the decision of the Family Court on 20 August 2015 declining to allow the applicant any direct contact with E and confining contact to indirect contact by card or letter twice per year, the judicial review was abandoned and dismissed. Thus the decisions made in the decision letter of 5 February 2015 stood.

[10] The court has had sight of the main documents in the 2015 judicial review and it seems clear that:

(a) The focus of the judicial review was the applicant's Article 8 rights as generated by his alleged relationship with E.

(b) There was no suggestion in the documents that at the time it was being advanced the applicant entered or had entered into a relationship with Ms W or that such a relationship was relevant to the Article 8 equation. This was so notwithstanding that now, in the 2016 judicial review, it is being suggested that the two had been in a relationship since July 2013.

(c) There is evidence in the papers which indicates that the applicant had failed to co-operate with Social Services in respect of his relationship with E and her mother. In particular when he was provided with the opportunity to attend a "Caring Dads" course run by the NSPCC he had only attended 6 out of 17 sessions.

(d) The applicant, moreover, also breached an NSPCC "no abuse contract" by sending his ex-partner (Ms W) abusive texts.

(e) The view of the Trust which was involved with the applicant was that it was opposed to contact between the applicant and E because of the applicant's propensity for violence directed at the child's mother. The prospects of improvement in the applicant's behaviour were described by the Trust as "low". The applicant was described by the Trust as presenting "a risk to E and women generally".

(f) Against that background, and in particular, the applicant's propensity towards domestic violence the Family Court's decision to disallow all but indirect contact with E was unsurprising.

[11] The 2015 judicial review had been aimed at overturning both the substance of the Home Office's decision and the certification decision that the decision *viz* that the applicant's claims were "clearly unfounded". After the decision of the Family Court was made the 2015 judicial review was abandoned. This tends to support the view that it was felt by the applicant himself and his advisors that judicial review had no realistic prospect of success given that the Family Court had held that the welfare of the applicant's young daughter was served by him having no direct contact with her and only minimal indirect contact.

The decision of 16 March 2016

[12] This decision arose because of the service by the applicant on the Home Office on 10 March 2014 of further representations about his case. The representations had to be considered. The representations consisted of:

(i) A statement from the applicant.

(ii) A statement from Ms C.

(iii) A statement from two of Ms C's adult daughters.

(iv) A range of photographs and correspondence.

[13] The applicant's statement referred to the applicant beginning a relationship with Ms C on 6 July 2016 (16 days before his daughter to Ms W was born). The birth of his daughter was described as having "caused difficulties in [his] relationship with [Ms C] and our relationship ended". The applicant says that after his daughter was born he "resumed his relationship with Ms W". This relationship, however, continued to be volatile and unstable. The applicant then referred to him acting in a manner towards his child's mother that he now deeply regretted.

[14] The applicant went on indicate that he resumed his relationship with Ms C. No date for this is given but his statement says that "we" have been together now for almost three years. Interestingly there was no reference to the applicant and Ms C co-habiting but there is reference to Ms C becoming pregnant with his child in the spring of 2014. Unfortunately the applicant goes on to note that the pregnancy miscarried. The applicant refers to his imprisonment later. This appears to be a reference to a sentence imposed in October 2014. While in prison the applicant records that his relationship with Ms C deepened and grew. Reference was made to the applicant staying with Ms C during a period of four days home leave at the end of January 2015. He states that during this period he asked Ms C to marry him and that she agreed.

[15] It seems clear that Ms C visited the applicant in prison regularly. When his criminal sentence ended, as the chronology above shows, the applicant went straight to immigration detention. He remained in detention until April 2016 when, after these proceedings had begun, he was granted immigration bail.

[16] In his statement the applicant recalls contact being made with the Governor of the prison in which he was detained to see if he could be married in prison. The couple, however, decided against this option, though it was available in principle.

[17] Other points made by the applicant include that:

(i) He accepted he had issues dealing with former partners due to his anger problems.

(ii) However he had taken a Barnardo's course, he said, to assist him to obtain contact with his daughter.

[18] In Ms C's statement she indicated that she had been in a relationship with the applicant since 6 July 2013. She says she understood that the applicant was dealing with his behaviour in respect of former partners. Ms C recorded the loss caused by the miscarriage of their child and she indicated that the applicant got on well with her three children, two of whom were adults and one, a daughter, who was aged 13. She pointed out that she could not just leave and live with the applicant outside the country because of her responsibilities to her 13 year old daughter who lived with her but had weekend contacts with her father, who is estranged from Ms C. She also referred to the applicant having done a parenting course. At one point, Ms C said that E was part of her life though notably there is no evidence that they have ever met. She indicated that the applicant had not been abusive towards her. She also indicated that she planned to marry the applicant and had enquired about this at the prison. She said she visited the applicant every week and provided evidence of 66 visits within a period of about five months.

[19] There are two handwritten letters one from each of Ms C's adult daughters which state how the applicant is missed by each of them while he was in prison. Neither refers to the applicant and Ms C co-habiting at any stage.

[20] The papers before the court exhibit a range of correspondence between the applicant and Ms C or vice versa. It tends to suggest a close and loving relationship. A substantial number of photographs of the two together were also contained in the submission.

[21] The respondent clearly considered all of these submissions. Ultimately this consideration is reflected in the Home Office's decision letter of 16 March 2016. Their decision letter is 23 pages long. It has helpfully been summarised in the affidavit of an executive officer in the Home Office, Nicola Willis (who was also the Home Office's deponent in the earlier judicial review proceedings). At paragraph 9 she states:

> "… the respondent rejected the applicant's further submissions and concluded that:
>
> (a) The applicant's removal would not breach Article 8 of the ECHR and the applicant was not entitled to remain in the United Kingdom

under the Immigration Rules or any other grounds.

(b) The applicant was not entitled to leave to remain outside the Immigration Rules.

(c) The further submissions did not satisfy the requirements of paragraph 353 of the Immigration Rules i.e. they did not taken together with previously considered material create a realistic prospect for success.

(d) There were no exceptional or compassionate circumstances giving rise to leave to remain.

(e) The decision to certify the applicant's human rights claim as 'clearly unfounded' pursuant to section 94 of the Nationality, Immigration and Asylum Act 2002 … was correct and maintained."

[22] The deponent's analysis for present purposes is best explained at paragraphs 13, 15 and 18 of her affidavit. These paragraphs state:

"13. In the decision letter the respondent analysed the submissions, as distilling down to two broad propositions … namely that removal would be a disproportionate interference with the applicant's relationship, as the:

(a) Partner of Ms C, and

(b) Father of E.

…

15. Taking each of the two propositions in turn the claim was rejected for the reasons set out in the notice and in particular:

(a) Family life as Ms C's partner.

(i) There was no evidence of co-habitation, save for a brief period of days during home leave from prison.

(ii) Neither the applicant nor Ms C or her adult daughters claimed that the couple had co-habited at any time save for a brief period of days during home leave.

(iii) There was no independent evidence of any concrete arrangements for marriage.

(iv) There was no evidence of pooling of resources.

(v) The relationship was formed at a time when the applicant's status in the United Kingdom was highly precarious and neither him, nor Ms C, could have had any expectation that the relationship would give rise to an entitlement to remain in the United Kingdom.

(vi) The relationship with Ms C did not amount to family life.

(vii) That if the relationship with Ms C did amount to family life interference with the applicant and Ms C's Article 8 rights was justified having regard to the provisions of Part 5A of the 2002 Act as amended.

(b) Family life as father of E.

(i) The applicant's only contact with E occurred during a period of some months following her birth on 22 July 2013.

(ii) Belfast Family Court, provided with all of the relevant evidence, determined it was not in E's interest that she had any direct contact with the applicant and limited contact to indirect contact by correspondence twice a year."

Finally at paragraph 18 she noted that:

> "18. … the respondent concluded that the totality of the evidence did not give rise to a realistic prospect that an Immigration Judge would conclude that removing the applicant to Nigeria would breach his Article 8 rights. It was considered that the claim was bound to fail …".

[23] The decision itself has been carefully considered by the court. However it is not proposed to set out here more than a few passages which appear important for this litigation. Much of the decision deals with issues not central to the applicant's current challenge.

[24] It is at paragraph 71 of the decision that the issue of whether or not the applicant's representation/submissions amounted to a fresh claim is discussed. The thrust of Immigration Rule 353 is set out in the decision, as is the relevant case law. At paragraph 77 the discussion begins:

> "77. Some points raised in your submissions were considered when the earlier claim was determined. These are the points relating to your relationship with your biological child and they were dealt with in the letter giving reasons for a refusal dated 05 February 2015.
>
> 78. The remaining points in your submissions – your relationship with Ms C and your desire to petition the Family Court for direct contact with your daughter, taken together with the material previously considered in the refusal letter dated 05 February 2015, would not have created a realistic prospect of success.
>
> 79. That conclusion is based on our assessment of how your case would now fare in an appeal before an Immigration Judge of the First Tier Tribunal (Immigration and Asylum Chamber). In our assessment the hypothetical Immigration Judge would approach your case, and the evidence and assertions which presently underpin it, in the following way.
>
> 80. When determining whether the general creditability of you has been established in your human rights claim the hypothetical Immigration Judge will have regard to the provisions contained in

section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004.

81. In assessing whether removal would breach your rights under Article 8 the hypothetical Immigration Judge would be bound by Part 5A of the Nationality, Immigration and Asylum Act 2002 (as inserted by the Immigration Act 2014) and Parliament's clear view of where, in Article 8 appeals, the public interest lies.

86. Applying the law to the facts we see nothing in the totality of evidence that remotely gives rise to a realistic prospect that an Immigration Judge … would properly conclude that returning you to Nigeria would prejudice your private or family life in a manner sufficiently serious to amount to a breach of Article 8.

87. …. Put another way, taking the material, old and new, as a whole, any appeal based upon it would on any legitimate view be bound to fail."

The legal context relevant to these proceedings

[25] The court has recently considered the relevant legal context in a judicial review of this sort in its decision in Jahany's Application [2016] NIQB. At paragraph [12] the court set out the terms in which Immigration Rule 353 is cast. The rule reads:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn … 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 which 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".

[26] The correct way to address the Rule is also discussed in Jahany at paragraphs [13] and [14]. These paragraphs read:

> "[13] The correct way for the decision maker to address rule 353 has been the subject of considerable judicial guidance. A commonly cited passage is that found at paragraph 6 *et seq* of the court's judgment in WM (Democratic Republic of Congo) v SSHD; AR (Afghanistan) v SSHD [2006] EWCA Civ 1495:
>
> > '6… [The Secretary of State] has to consider the new material together with the old and make two judgments. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed…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 judgment will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. …the Secretary of State in assessing the reliability of the new material, can of course have in mind where that is relevantly probative, any finding as to 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…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 the adjudicator, but not more than that'.

[14] The approach of the court on review of such a decision was described in the same authority as follows:

> 'First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return…The Secretary of State of course can and no doubt logically should treat his own view of the merits as a starting point 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 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'."

[27] The court in Jahany also discussed what was meant by the phrase "realistic prospect of success and what was meant by the notion of "anxious scrutiny". In respect of the former at paragraphs [16] and [17] the court said:

> "[16] The above phrase is referred to in various authorities. In AK (Afghanistan) v SSHD [2007] EWCA Civ 535 Toulson LJ (with whom Ward and Tuckey LJJ agreed) said that 'a case which has no

reasonable prospect of success…is a case with no more than a fanciful prospect of success'. Thus 'reasonable prospect of success' means only more than a fanciful prospect of success.

[17] Another formulation is found in ST v SSHD [2012] EWHC 988 Admin where His Honour Judge Anthony Thornton QC, acting as a High Court Judge, said at paragraph [49]:

> 'In deciding whether the claim has a reasonable prospect of success, the decision maker must consider whether he or she considers that the claim has a reasonable prospect of persuading an immigration judge hearing an appeal to allow the appeal from the decision of the same decision maker who has just rejected the fresh representations or submissions'."

[28] At paragraph [18], in respect of anxious scrutiny, the court stated:

> "[18] The notion of anxious scrutiny has also been the subject of discussion in the case law. For example, in a recent case, R (Kakar) v SSHD [2015] EWHC 1479 Admin, Foskett J at paragraph [32] referred to ML (Nigeria) [2013] EWCA Civ. 844 in this connection. In that case Moses LJ said:
>
> > 'Of all the hackneyed phrases in the law, few are more frequently deployed in the field of immigration and asylum claims than the requirement to use what is described as 'anxious scrutiny'. Indeed, so familiar and of so little illumination has the phrase become that Carnwath LJ in R (YH) v SSHD [2010] EWCA Civ. 116, between paragraphs [22] and [24], was driven to explain that which he had previously explained namely what it really means. He said that it underlines 'the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might

> tell in favour of an applicant has been properly taken into account'. It follows that there can be no confidence that that approach has been taken where a tribunal of fact plainly appears to have taken into account those factors which ought not to have been taken into account'."

The court's assessment

[29] In the court's view, it is possible to distil the real issues in this case down to consideration of two questions. The first is whether the decision-maker's treatment of the applicant's relationship with is daughter, E – viewing it as not giving rise to a fresh claim – is unreasonable. The second is whether the decision-maker's treatment of the applicant's relationship with Ms C – also viewing it as not giving rise to a fresh claim – is unreasonable. The court will consider each in turn.

The relationship with E

[30] The landmarks in respect of the above are not in dispute and the court reminds itself of them. E was born to the applicant's now former partner, Ms W on 22 July 2013. There is no doubt E is the applicant's daughter. However it seems clear from the papers that the relationship between Ms W and the applicant had been a difficult one, marred by volatility and domestic violence aimed at Ms W by the applicant. This domestic violence resulted in the imprisonment of the applicant and it may be inferred it was of a serious nature. It appears that after the couple's relationship fractured E remained with her mother. For a time the applicant had contact with E periodically but the level of contact over time diminished. In these circumstances the applicant made an application for contact before the Family Court and, as has already been discussed, this was denied. From the material available, it appears that the court concluded that direct contract between E and her father were not in E's best interests. Instead indirect contact was facilitated on a twice yearly basis by means of the sending of cards or letters by the applicant to his daughter. In these circumstances an earlier judicial review in respect of an immigration decision of the same nature as the decision which the court is now reviewing was abandoned, presumably because there was no realistic prospect of the Home Office's decision to deny the applicant's human rights claim and the certification that went with it, being overturned. In the court's view, whether this was or was not the motivation in abandoning the earlier judicial review, the Family Court's decision to refuse direct contact, between E and the applicant, a decision not at any stage appealed, was a hammer blow which rendered his then judicial review challenge hopeless. As is obvious, indirect contact can be maintained from outside the United Kingdom. Consequently the removal of the applicant from the United Kingdom, even if it amounted to an Article 8 interference, would be easily justified on public interest grounds given the applicant's lengthy immigration history. In effect, the applicant's

contention that it would be a breach of his Article 8 rights *vis a vis* his daughter were he to be removed from the United Kingdom collapsed. The abandonment of the judicial review occurred in 2015, just eight months before the hearing of this judicial review. The court asked itself whether anything has significantly changed *vis a vis* the applicant's relationship with E or her mother since. The applicant suggested answer is that since then he has completed a Barnardo's course while in prison and that this may clear the way to a new appraisal of his contact with his daughter. The decision-maker was aware of this, but it must be unlikely that much weight could be given to this factor given the decisive outcome in the Family Court in 2015. In this regard the court notes the paucity of material about the course in the papers before it and the reference to it by a social worker, who had been involved in the past with the applicant and Ms W, as being a parenting group not involving assessment. The social worker, who was contacted by the Home Office in March 2016, stated that:

> "The programme would not be sufficient in order to address [the applicant's] violence and aggressive behaviours."

[31] It seems to the court to be most unlikely that the applicant's propensity for domestic violence, which transcends any single past relationship, could be resolved so easily as the applicant appears now to suggest.

[32] In these circumstances and applying anxious scrutiny to the case, the court is unable, looking at the matter in the round, to say that the decision-maker's decision on this aspect of the case was unreasonable or irrational. To say that on this aspect of the matter there would not be any realistic prospect of success before the Immigration Judge seems to the court to be well within the bounds of a reasonable assessment.

The relationship with Ms C

[33] In the period between the abandonment of the applicant's earlier judicial review in September 2015 and the making of submissions to the Home Office on 10 March 2016, the applicant's case in respect of an Article 8 violation were he to be removed to Nigeria appears to have been if not completely, at least substantially, re-cast. This has been so notwithstanding that central to it has been the contention that the applicant and Ms C had been in a relationship since just before the child E was born to Ms W in July 2013.

[34] In the applicant's earlier communications with the Home Office prior to March 2016 there were no references to Ms C and nor was she referred to in any of the documents pertaining to the 2015 judicial review. Nonetheless, the applicant now claims that the relationship had been in existence and had prospered over a period of several years.

[35] Mr Ward BL, for the applicant, did his best to explain the apparent contradictions in the accounts before the court by indicating that there were times when the applicant's relationships ran in parallel with one another or overlapped.

[36] The facts, however, do not appear to support the proposition that at any time the applicant and Ms C had co-habited save for the four days when the applicant resided with her while enjoying a period of home leave. Certainly in none of the statements before the court is there reference to cohabitation apart from as stated above. Of course the course reminds itself that the applicant was in prison or immigration detention in the period October 2014 to a date after these proceedings were begun. The court also acknowledges that there is in respect of this aspect of the matter supporting evidence from the prison chaplain that there had been enquiries about the possibility of a marriage between the two in the prison and to Ms C's regular visits to the applicant while he was in prison. Indeed the Home Officer decision-maker appears to accept that the relationship between the applicant and Ms C is not a sham.

[37] However, notwithstanding that acknowledgment, the Home Office decision-maker was of the view that the information provided in the applicant's submissions about the relationship were not qualitatively sufficient to establish a realistic prospect of success before an Immigration Judge. It is, of course, this decision which is at the core of this judicial review.

[38] It appears to the court that there is considerable support for the decision maker's analysis of the situation set out in the affidavit of Nicola Willis at paragraph 15 under the head "Family life as C's partner": see paragraph [22] above. Points (i), (ii), (iv), (v) and (vii) are all strong points which suggest that at a tribunal the applicant would face an uphill task. This is so even if one factors in the points that can be made reasonably in the applicant's favour, for example, that the relationship with Ms C is not a sham; that the couple have a developed relationship and are to be married; and that a measure of family life may exist in this case. On any view, the applicant's immigration history is a point of significant weight against him. Likewise the fact that the relationship has been born at a time when both parties to it must have known of the applicant's precarious immigration status is a powerful countervailing factor. If it is assumed in the applicant's favour that any interference has to be justified for the purpose of Article 8 (2), it seems to the court that this task would not be difficult in this case, given the importance attributed to firm immigration control and Parliament's intervention in this area in the form of Part 5A of the Nationality, Immigration and Asylum Act 2002 where at section 117B, *inter alia*, it is noted that little weight should be given to a relationship formed with a British citizen that is established by a person at a time when the person is in the United Kingdom unlawfully.

[39] The totality of factors – both for and against the applicant's claim – lead the court to the opinion, applying anxious scrutiny, that it is unable to say that the decision maker's decision on this aspect of the case is either irrational or

unreasonable. In truth any appeal to a tribunal by the applicant would, in the court's view, be extremely difficult and would not bear a realistic prospect of success. At most, in the court's opinion, the applicant's prospect of success is fanciful. It follows that it is the court's view that the decision maker on this aspect of the matter has not come close to exceeding the area of discretionary judgment open to him/her.

Conclusion

[40] For the avoidance of doubt the court indicates that in reaching its conclusions above it has kept in mind the Article 8 rights of E and those of Ms C and, to the extend they may be engaged, the rights of Ms C's children It has reminded itself of the judgment of the House of Lords in the well-known case of Betts v Secretary of State for the Home Department [2009] 1 AC 115 as it touches on the correct Article 8 analysis. Having taken into account these factors the court is of the opinion that they do not alter the court's conclusion.

[41] Likewise the court wishes to make it clear that while it has referred to the applicant's relationship with E and, separately, to his relationship with Ms C, it has also considered these two aspects of Article 8 cumulatively. This exercise again has not altered the court's conclusion.

[42] The court is also satisfied that in the context of the applicant's relationship with E the decision maker had regard to section 55 of the Borders, Citizenship and Immigration Act 2009 and gave primary consideration to the best interests of E.

[43] For the reasons given above, the court dismisses the applicant's judicial review application. Having taken into account the history of the matter (see paragraphs [3] and [4] above), the court considers that the hearing before it was in the nature of a full hearing and was prepared by the parties on this basis. In these particular circumstances the court will grant leave to apply for judicial review, notwithstanding that it has ultimately decided to dismiss the applicant's application.