OUTER HOUSE, COURT OF SESSION

[2017] CSOH 109

P1096/16

OPINION OF LORD ERICHT

In the Petition of

MA

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Petitioner: C Jones; Drummond Miller LLP
Respondents: C Smith; Office of the Advocate General

22 August 2017

Introduction

[1] The petitioner is a citizen of Pakistan who has three convictions for being concerned in the supply of a controlled drug for which in each case he was sentenced to imprisonment for periods of 4 years of more. The petitioner seeks reduction of a decision of the respondent dated 16 August 2016 that submissions made on behalf of the petitioner on 16 May 2016 do not meet the requirements of paragraph 353 of the Immigration Rules and do not amount to a fresh claim.

Factual Background

[2] The petitioner was born on 12 December 1967. At some time in 1978 he was granted a Visa to join his father in this country and was granted indefinite leave to remain in line with his father's status. He has maintained his Pakistani Passport, having renewed it on at least two occasions. He holds a valid Pakistan identity card which states his permanent address as being in Islamabad, Pakistan. On 22 June 1988 the petitioner was convicted at Chiltern Magistrates Court of handling stolen goods and fined £25. On 6 August 1990 he was convicted at Rochdale Magistrates Court of aid & abet/obtaining property by deception and fined £75. On 16 July 1997 he was convicted at Edinburgh Sheriff Court on two counts of possession of a controlled drug and fined £100 for the first offence and £20 for the second offence. On 22 August 2000 he was convicted at Edinburgh Sheriff Court of assault and breach of the peace and fined £150. On 16 January 2002 he was convicted at Preston Magistrates Court of possessing an offensive weapon in a public place and fined £50.

[3] On 22 April 2002 the petitioner was convicted at Edinburgh High Court of being concerned in the supplying of controlled drugs and sentenced to 4 years imprisonment. This was followed on 12 April 2005 when he was convicted at Edinburgh Sheriff Court of being in charge of a motor vehicle whilst unfit, fined £400 and disqualified from driving for 4 years.

[4] On 12 December 2005 the petitioner was convicted at Edinburgh High Court of being concerned in the supplying of a controlled drug and sentenced to 4 years imprisonment. On 2 November 2010 he was convicted at Edinburgh Sheriff Court of being concerned in the supplying of a controlled drug and sentenced to 32 months imprisonment. On 23 April 2013 he was convicted at Jedburgh Sheriff Court of being concerned in the supply of drugs and sentenced to four years four months imprisonment.

[5] On 11 June 2013, the respondent served a deportation order, dated 7 June 2013, on the petitioner. The petitioner appealed and the appeal was dismissed by the First-tier Tribunal on 3 February 2014. Permission to appeal was refused both by the First-tier Tribunal and the Upper Tribunal.

[6] On 18 February 2016, the respondent undertook a review of the petitioner's deportation due to the passage of time since 2013. The respondent found there to be no reason why the deportation order should not be enforced once his custodial sentence had been completed.

[7] The petitioner's release date was 20 May 2016. On 27 April 2016 the respondent advised the petitioner that it was her intention to remove him to Pakistan on 21 May 2016. On 16 May 2016 the petitioner's agents made further representations.

[8] In a decision letter dated 16 May 2016 the Secretary of State decided that the submissions did not amount to a fresh claim. The petitioner brought Judicial Review proceedings challenging the decision of 16 May, and that decision was subsequently withdrawn by the respondent. The respondent issued a new decision letter dated 16 August 2016 which is a decision letter being challenged in the current proceedings. The decisions of 16 May and 16 August 2016 were both made by the same official.

Statute and Immigration Rules

[9] Section 117C of the Nationality, Immigration and Asylum Act 2002 provides as follows:

> "**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 four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(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 four 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."

Paragraph 353 of the Immigration Rules, HC 395C provides as follows:

"When a human rights or protection 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."

Grounds for Reduction

[10] The petitioner sought reduction of the letter of 16 August on the grounds that the

respondent had applied the wrong test, and *esto* she had applied the correct test her decision was irrational and failed to demonstrate anxious scrutiny.

Application of the Wrong Test

[11] At the outset of the decision letter, the respondent set out the test as follows:

> **"Paragraph 353 of the Immigration Rules, HC 395C**
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> 5. Consideration of further submissions is dealt with in Paragraph 353 of the Immigration Rules, HC 395C in the following terms:
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> '*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.*'
>
> 6. The correct approach to considering whether or not further submissions amount to a fresh claim has been considered by the courts on many occasions. In WM (DRC) v SSHD [2006] EWCA Civ 1495 of the Court of Appeal described the task at paragraph 11 as
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> *'The question is not whether the Secretary of State himself thinks that the new claim is a good one of 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?'*
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> 7. In addition, the Court of Appeal in YH (R on the application of) v SSHD [2010] EWCA Civ 116 at paragraph 15 and 16 as

'15. WM (Congo) has been treated as authority that, in deciding whether to treat a submission as a fresh claim, the Secretary of State should in effect put himself in the shoes of an adjudicator or immigration Judge. The Judge quoted the following passage from the judgment of Buxton LJ:

> *"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 [allowing the appeal]. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting point for that enquiry; but that is only a starting point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind." (para 24)*

It was no doubt in deference to such guidance, that the decision-letter of 17th April (see below) spoke of the view to be expected from "the hypothetical judge".

16. The concept of a "hypothetical Judge" deciding an appeal can be a helpful discipline, in so far as it makes clear that the Secretary of State is acting simply as the gate-keeper to a process leading to a possible appeal, and it emphasises the objectivity which that requires. However, it is no more than a guide, not a legal formula. In law, whether under the rules or the statute, the Secretary of State is standing in his or her own shoes in deciding this threshold question.'

8. It is also clear from the authorities on paragraph 353 that the test to surpass is a modest one. On occasion it has been described as a case where there is more than a fanciful prospect of success – seek AK (Sri Lanka)(R on the application of) v SSHD [2009] EWCA Civ 447.

9. It is against this background that your client's further submissions have been considered."

[12] Counsel for the petitioner took no exception to what was said in these paragraphs 5 to 9. He accepted, correctly, that this was a correct statement of the test. His argument was that in her substantive treatment of the issues in paragraphs 40 and 41, the respondent had deviated from that test and applied a more stringent one.

[13] Paragraphs 40 and 41 were as follows:

"**Paragraph 353 conclusion.**

40. As such it is concluded that your submissions do not meet the requirements of paragraph 353 of the Immigration Rules as stated above and therefore do not amount to a fresh claim. This is because the new submissions, that he is a

> reformed character who has overcome his habit of substance abuse and has rekindled a relationship with his son and mother, 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 client's submissions would result in a decision to grant your client Asylum, Humanitarian Protection, limited leave to remain on the basis of his family or private life or any other form of leave for the reasons set out above. While you have submitted new facts concerning the relationship your client has with his son and to a lesser extent with the rest of his family, these bring nothing substantially new to the argument. Your client is being deported from the United Kingdom under the provisions of section 32(5) of the UK Borders Act 2007, a provision for automatic deportation. The Secretary of State has a responsibility to deport foreign national offenders. Your client's rehabilitation so far is admirable as is his claim to an improved relationship with his family, especially his son, but this does not change the test applied. It is accepted that his family life may have increased but not to a level where his removal would be a disproportionate breach of Article 8.
>
> 41. Notwithstanding this, and even if she were to accept your submissions at their highest and she were minded to treat them as a fresh claim, the Secretary of State does not accept that the presence of your client's son or his mother would be sufficient to overrule her responsibility to the public seeing your client deported from the United Kingdom."

[14] In relation to paragraph 40, counsel took no exception to the sentence

> "This is because the new submissions, that he is a reformed character who has overcome his habit of substance abuse and has rekindled a relationship with his son and mother, taken together with the previously considered material do not create a realistic prospect of success."

He accepted that this was a correct application of the test. The difficulty arose with the next sentence which was:

> "This means that it is not accepted that, should this material be considered by an Immigration Judge, your client's submissions would result in a decision to grant your client Asylum, Humanitarian Protection, limited leave to remain on the basis of his family or private life or any other form of leave for the reasons set out above."

He argued that that second sentence was a fundamental error: the test was not whether an immigration judge **would** grant leave, but whether there was a realistic prospect of a judge doing so. The respondent was stating that even if it were a fresh claim, that fresh claim

would not be sufficient to prevent deportation. This was a fundamental error as it did not allow for a realistic prospect that an immigration judge would take a different view. Paragraphs 5 to 8 could not cure the errors in paragraphs 40 and 41 because paragraphs 40 to 41 deserved primacy as they amounted to the respondent's substantive reasoning, and further they had been pasted wholesale into the document from the deficient earlier decision of 16 May which had been withdrawn.

[15] In response, counsel for the respondent submitted in relation to paragraph 40 that reading the letter as a whole the correct test had been applied. She accepted that the sentence beginning "This means that it is not accepted" could have been drafted better, and it would have been better if it had said "submissions could result" rather than "would result". However the use of these words was not fatal. The wording used was a standard form which appeared in many decision letters. The point had been taken in other petitions, but no judge had ruled on it and, so far as she was aware, no other judge had the point at *avizandum*. She further submitted that paragraph 41 did not form part of the 353 consideration.

[16] In my opinion, the letter has to be considered on its own terms, and whether these paragraphs also appeared in the previous decision, written by the same official and then withdrawn, have no bearing on this. What matters is whether in this letter the Secretary of State has applied the correct test.

[17] The wording in paragraph 40 the sentence beginning "this means that it is not accepted that" is deficient. If that sentence were to be read in isolation, it is not a correct interpretation of what the test means. It does not address whether the immigration judge might take a different view from the view of the respondent.

[18] However, that sentence is not to be read in isolation. It has to be read in the context of the letter as a whole. Each case where this standard wording is used will turn on the construction of the particular letter as a whole. There may be circumstances where construction of the phrase "your client's submissions would result" in the context of the letter as a whole may constitute an application of the wrong test, but this is not one of them.

[19] In this letter, the correct test is clearly set out in paragraphs 5 to 9. Moreover, it is clearly set out in the immediately preceding sentence in paragraph 40. Reading the letter as a whole, it is clear that the respondent was well aware of the correct test and applied it: what the respondent is saying is that the further submissions were so lacking in substantive merit that there was no realistic prospect of a judge taking a different view. For the reasons set out below, the respondent was entitled to take such a view on the substantive merits.

[20] With respect to paragraph 41, I accept counsel for the respondent's submission that this does not form part of the 353 consideration. Paragraph 41 proceeds on the hypothesis that the 353 test has been satisfied and that the further submissions are a fresh claim. Therefore it cannot logically form part of the decision as to whether the 353 test has been satisfied.

[21] Accordingly I find that the respondent applied the correct test.

Irrationality/Anxious Scrutiny

The Further Submissions

[22] At this stage it is helpful to set out in more detail the decision of the First-tier Tribunal on 3 February 2014 and the submissions of 27 April 2016 which the petitioner maintains amount to a fresh claim.

[23] The First-tier Tribunal stated:

"53. Although the appellant states that he is not a serial criminal, based on the evidence before us we find that that is exactly what he is. His crimes have not been violent but they have been serious. He has spent over 10 years in prison since he came to the United Kingdom when he was aged 11. He has always been in the United Kingdom legally and was granted ILR in 1978 in line with his father's status.

54. With regard to family life, it is debatable whether there is family life in this case. The appellant refers to [A] as his ex-partner and the mother of his son. She has given a statement but did not appear in court to support the appellant's claim. The appellant is a drug addict and so is she. She states that although she is still in a relationship with the appellant, he is always in prison. She wants the appellant to remain in the United Kingdom so that he can see his son but he has not seen his son for over a year. His ex-partner has not visited him in prison and neither has his son. We believe that if there had been a subsisting relationship [A] would have done her best to appear for the hearing of this claim.

55. The appellant has not seen his son for over a year. His sister's evidence is that he gets on well with his son and they are happy when they are together but they are very rarely together. Her evidence about this can be given little weight as she has only seen the child 3 times since he was born 12 years ago.

56. This case is not in line with the said case of Maslov v Austria. Although the appellant has a child he has little to do with him. He clearly thinks very little of his child as he has continued to offend since his son was born and he was in prison when he was born. Whether he has been in prison for 10 years or 15 years is not important. What is important is the gravity of his offences and the fact that there is no period between the offences. He was still on licence when he was convicted of his most recent offence. It can be said that there is family life between this appellant and his son and perhaps between this appellant and his ex-partner but it is extremely limited family life. Little weight can be given to the relationships. [A's] mother seems to have parental responsibility for the appellant's son but the appellant was unable to give us any details of this. He seems not to be interested in who his son is living with, in what conditions he is living and whether this is a permanent arrangement and he gave us no information about his son's schooling or the like because he does not know anything about this. The deportation letter has little information about this but it seems to have been almost impossible for the respondent to get any information.

57. Proportionality has to be assessed and the case of Razgar [2004] UK HL 27 has to be considered along with the 5 step process therein. This appellant's private life case is stronger than his family life case. His mother is apparently coming back to the United Kingdom. The appellant may go to stay with her if he is released from prison and his sister states that he will be able to help her and his mother but based on his history it is more likely that he will end up

back in prison. The appellant's mother could go to live with her other sons in Islamabad. We have no evidence that she is coming back to the United Kingdom. If she comes back the appellant's sister will look after her. We do not believe that the appellant will be able to help. Although he states he has been drug free for 13 months he has been in prison in a controlled environment. When his history is considered there is nothing which makes us believe he will be able to stop taking drugs or he will stop supplying drugs. He will be returning to the city he lived in before and seeing the same people. Although we do not have a social work report or a risk assessment, there must be a high risk of him re-offending, based on the evidence we have before us.

58. When proportionality is assessed we have noted that the appellant had his primary education in Pakistan. Although his representative states that his formative years have been spent in the United Kingdom he was in Pakistan until he was 11 years old. It depends on what years you consider to be his formative years. He came to the United Kingdom as a youth and has become an adult here but he must remember his life in Pakistan. He speaks Urdu he has 2 brothers and a sister in Pakistan and at present his mother is there. The panel does not accept that this man has no links to Pakistan. He has strong links there. If his mother stays there, he will have even stronger links.

59. With regard to the appellant's ex-partner, we know very little about her. She states in her statement that she wishes the appellant to remain in the United Kingdom but it is clear that when he is in the United Kingdom he has little contact with her or with his child as he is always in prison. When the appellant left school he worked for 6 years in a shop. If he returns to Pakistan he can get a job there. He speaks Urdu and English. We do not find that there is any reason why the appellant cannot return to Pakistan and continue with his private life there. If he does this he will be away from the people who might influence him relating to his drug addiction. We do not find that his human rights will be breached if he is deported and we do not find that his ex-partner's or his son's human rights will be breached if he is deported as it would be in the public interest and for the public good for this man, who continually breaks the law and supplies drugs to others, to return to Pakistan. We have no real evidence of his private life in the UK. He is rarely out of prison long enough for him to have developed a private life.

60. We have given weight to the appellant's sister's evidence and we have considered her human rights. They are adult siblings and there is nothing more than normal emotional ties between them.

61. We have assessed whether an expulsion measure is necessary and is proportionate to the legitimate aim pursued. The Immigration Rules state that it will be only be in exceptional circumstances that a person's right to family and/ or private life would outweigh the public interest in seeing a person deported, where they have been sentenced to a period of imprisonment of at

> least 4 years. There are no exceptional circumstances. The appellant's offences are mainly relating to the supply of a controlled drug but he has had convictions for assault, theft, handling stolen goods and possession of an offensive weapon. He has shown a consistent disregard for the laws of the United Kingdom. His criminality has been escalating and there is a clear propensity for him to re-offend. There is no evidence of any difficulty the appellant might encounter in Pakistan.
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> 62. With regard to the delay by the Home Office, the nature of his offences means that these delays are not exceptional.
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> 63. This is a 2 stage decision and under Article 8 of ECHR we find it would be conducive to the public good for this appellant to be deported. In assessing proportionality, what the appellant has in his favour is the fact that he has been in the UK for a long time. Against this, much of this time has been spent in prison and there is no evidence to suggest that this will change apart from the appellant stating that he is now drug free. This may have been the situation before and he may then have lapsed. We have been given no evidence about this. What we have are the facts and the appellant's many convictions. We find that he has ties to Pakistan. He has siblings there and his mother is there just now. He has a Pakistani passport and an up to date ID card with a Pakistani address thereon. There is a family house and the appellant speaks Urdu. There is a presumption in favour of deportation and public interest will be served by deporting this appellant because of his criminality. Because he has spent so much time in prison he has little or no family life and a very limited private life. The balancing exercise must fall in favour of the respondent."

In paragraph 63 the First Tier Tribunal conducted a balancing exercise on proportionality. In his further submissions of 16 May 2016 the petitioner is now seeking to have that balancing exercise repeated with a different result because of two changes in circumstance since 2014. The first change is that the petitioner is a reformed character due to his Muslim religion: this would go to the finding in paragraphs 57 and 63 that there was no evidence that his criminal lifestyle would change. The second change is that the petitioner now has a closer relationship with his son: this would go to the findings in paragraphs 54 to 56 and 61 that he had little or no family life.

[24] The detail of these further submissions are set out in a letter from the petitioner's solicitors dated 16 May 2016 enclosing a number of supporting documents, including an

affidavit from the petitioner. The affidavit narrated that his circumstances relating to drugs had changed and he was now in his fourth year toxic free; he had turned to prayer and led Friday prayers in prison. The accompanying documents also included a letter dated 23 March 2016 from the Muslim chaplain at HMP Addiewell which referred to the petitioner starting attending Islamic classes and then engaging in religious observation, and stating that "I believe he has gone through significant personal development." The documents also included a parole report from Rev Bob Patterson, the faith services team leader at HMP Addiewell which stated

> "In discussions had over this time he has expressed his determination to no longer engage in an un-Islamic life, resolving to exercise due diligence in redressing all of his past lack in accordance with tenets of Islam. Both I and my Imam colleague consider that he has been genuine in these endeavours and has indeed succeeded in embracing this opportunity whilst in custody."

[25] In an email to the petitioner's instructing agents dated 19 February 2016 Mr Patterson stated "throughout his time here he has remained unswervingly engaged with living appropriately and productively as a Muslim" he further stated:

> "In conclusion, knowing so much of [the petitioner's] wrong and extensive engagement in criminal activity, I can say without any sense of misgiving that he has achieved enduring authenticity of a changed life as the foregoing factors evidence, I would say".

[26] With regard to the petitioner's son, the petitioner stated in his affidavit that he has been able to obtain a DNA report to confirm that he is the father, and that his son visits him regularly and he sees him every five weeks and speaks to him once or twice per week.

[27] In the decision letter of 16 August 2016, the respondent dealt with the further submissions as follows:

> "27. In the original decision letter of 11 June 2013 your client's Article 8 rights were considered. It was clear that, because of the length of his custodial sentence which exceeds the period set out in paragraph 398(a) of the Immigration Rules, the public interest in him being deported would only be overridden in very

compelling circumstances over and above those described in the exceptions to deportation set out in paragraphs 399 and 399A of the Rules.

28. The exceptions described in paragraphs 399 and 399A deal mainly with the relationships your client may have had with family members, be they children or partners. They also deal with the time he may have spent in the United Kingdom prior to the decision to deport him was made. It is clear therefore that the very compelling circumstances would have to be over and above any family life he may have had or has enjoyed since being served with the deportation order.

29. However, and for the avoidance of doubt, the Secretary of State has considered whether or not your client's family life amount to a very compelling circumstance referred to above.

30. As stated in our letter of 11 June 2013, there is significant public interest in deporting your client. This is because:
    - He has been convicted of being concerned in the supply of a controlled drug for which he received a sentence of over 4 years imprisonment ;
    - His removal is in accordance with the permissible aim of the prevention of disorder and crime and the protection of the rights and freedom of others;
    - The Secretary of State is required to make a deportation order on foreign criminals where there has been a sentence of imprisonment for a single offence of 12 months or more;

31. In order to outweigh the very significant public interest in deporting your client, he would need to provide evidence of a very strong Article 8 claim over and above the circumstances described in the exceptions to deportation.

Article 8

32. Your client's Article 8 claim is based on his relationship with his son. The child's details are as follows:
    [C].

33. The Home Office's duty to safeguard the welfare of children as set out in section 55 of the Borders, Citizenship and Immigration Act 2009 has been taken into account and the best interests of your client's child has been a primary consideration in making the deportation and human rights decision. However, the best interests of the child are not the only or paramount consideration, and must be balanced against other relevant factors, including the public interest in deporting foreign criminals, to determine whether your client's deportation is proportionate.

34. As stated above, the best interest of your client's child has been considered previously. It is understood that he is living with his grandmother in Edinburgh. Your client has been absent from his son's life for a significant amount of time

following his convictions for drugs offences and subsequent custodial sentences. It is considered, following these convictions at least, that the child's grandmother is the child's primary carer. The claimed rekindling of your client and his son's relationship following his latest conviction is admirable but is only a recent manifestation after years of separation. It is clear from your submissions that your client's involvement in his child's life is limited to weekly calls and occasional visits.

35. The Secretary of State considers that after your client is removed from the United Kingdom, he will be able to maintain contact with his son by modern means of communication such as instant messaging or Skype. Indeed the child himself could travel to Pakistan to visit your client should he wish to do so. The child could apply for a visa to travel to Pakistan (or his Grandmother could apply on his behalf). The Secretary of State is aware that children travel all over the world on an unaccompanied basis if no appropriate adult can be found to travel with them. It is not accepted that this separation from your client, caused by his own actions when he was convicted of serious drugs offences, outweighs the child's Article 8 rights even when taken as a primary consideration. It is submitted that it is entirely up to the child's parents or carers whether contact should be maintained between the child and his father. There is nothing to suggest that the child's upbringing would be adversely affected or be disadvantaged by living in a separate country from his father.

36. By the same token, the child is of an age where relocating to a different country would not be considered too harsh. He is of an age where relocation would not be considered a major impediment in his development as a child. The decision on whether or not he should join your client would of course be solely down to his parents or carers.

37. It is accepted that the best interests of the child are undoubtedly that your client should remain in the United Kingdom however, the Secretary of State has to balance that interest against the interest of society in general, in that he be deported as he is a foreign national who has committed crimes that represent a serious threat to the safety of the public. It is submitted that the presence of your client's child in the United Kingdom does not amount to a very compelling circumstance that would outweigh the public interest in your client's deportation.

38. In addition, your client has claimed that he now wishes to look after his mother as she is getting old. However it is clear from previous communications that his mother has been living in Rochdale with her daughter and does not require her son to look after her. Your client's mother appears to travel between Pakistan and the United Kingdom, living in the family home in Islamabad when she is there. During the appeal hearing in 2012 your client stated that he had brothers and sisters who still lived in Pakistan although they were estranged at that time. Notwithstanding this, the Secretary of State considers that your client's relationship with his mother at best is nothing beyond normal familial ties with

his family and his removal would not engage a breach of Article 8. Even with his mother here in the United Kingdom your client can be returned to Pakistan. He claims to be recovering from his addiction so there is nothing to stop him seeking employment or establishing himself in Pakistan even without the direct support of his mother.

39. Given all of the above, the Secretary of State submits that the relationship your client now claims to have with his son or his own mother is insufficient for her to overturn her previous decision."

Argument for the Petitioner

[28] Counsel for the petitioner argued that *esto* the respondent had applied the correct test, her decision was irrational and failed to demonstrate anxious scrutiny.

[29] The petitioner argued that the respondent had acted irrationally in conducting the balancing exercise between the public interest and the prevention of disorder or crime, and the private interest of the petitioner and his son in their private and family life. The respondent did not engage with the evidence about the petitioner's rehabilitation, nor attempt to evaluate his risk of reoffending in the light of his religious conversion. Due to the abundance of credible evidence of rehabilitation and religious conversion, the only rational conclusion available to the respondent was that a First-tier Tribunal judge could form the view that the risk of reoffending was low, which would significantly reduce the public interest in deportation. Counsel referred to *HA (Iraq)* v *Secretary of State for the Home Department* [2016] 1 WLR 4799 at paragraphs 25, 36, 51 – 53, 62 – 63, 26, 46, 25 and *Maslov* v *Austria* [2009] INLR 47 at 68 – 75. In relation to private interest, the respondent recognised that the best interests of the child were "undoubtedly" to have the petitioner remain in the United Kingdom, but asserted that those interests were outweighed by the public interest. The respondent erred in failing to give adequate reasons in relation to the best interests of the petitioner's son, which was a primary consideration in the case, failing to carefully

examine all the relevant factors relating to the child's best interests, failing to form a clear idea of the child's circumstances before she asked herself whether those interests were outweighed by other considerations and for failing to have regard to the fact that relocation would likely separate the child from his primary carer. The respondent also left out of account that the petitioner's son's mother was a drug addict and unable to care for him. The respondent held that it was undoubtedly in the best interests of the petitioner's son for him to stay (paragraph 37 of the decision letter) and accordingly there required to be strong countervailing factors to overcome his interest. The respondent was bound to conclude that a judge of the First-tier Tribunal could accept the evidence that the petitioner had radically reformed, and having done so that the weight of public interest diminished considerably, and consider that the Article 8 rights of the petitioner and the best interests of the child, prevailed over the public interest. She was accordingly bound to accept that the submissions amounted to a fresh claim. In any event, she failed to demonstrate anxious scrutiny ie that no material factor that could conceivably be regarded as favourable to the petitioner was left out of account in the review of the evidence. He referred to *ZH Tanzania* v *SSHD* [2011] UKSC 4 at 45 – 47, *Beoku-Betts* v *SSHD* [2009] 1 AC 115 at paragraphs 5 and 41 – 43, *Zoumbas* v *Secretary of State* 2014 SC (UKSC) 75.

Argument for the Respondent

[30] In response, counsel for the respondent referred to section 117C of the Nationality, Immigration and Asylum Act 2002 and submitted under reference to *HA Iraq* at paragraph 50 that only a claim which was very strong indeed would succeed, and that this was not such a claim. The evidence about his rehabilitation was only one factor to take into account and other evidence such as his long record of serious offending and the fact that his

drug free period had not been tested by being outside prison were not sufficient to alter the balance to such an extent that it swung in favour of the petitioner

Decision

[31] The question for this court is not whether there is a realistic prospect of success in an appeal before an immigration judge but whether the Secretary of State was *Wednesbury* unreasonable or acted without anxious scrutiny in reaching the view that there was not (*R* v *SSHD* 2011 SLT 970.

[32] Section 117(c) provides that where a foreign criminal has been sentenced to a period of imprisonment for at least 4 years, the public interest requires deportation unless there are very compelling circumstances. In this case, the petitioner has been sentenced to imprisonment of at least 4 years on three occasions.

[33] The Tribunal is required to carry out a balancing exercise to decide if the deportation is proportionate. As is said in *HA (Iraq)* at paragraph 50:

> "50. In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders, as explained in paras 14, 37-38 and 46 above, and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in *MF (Nigeria)* - will succeed."

[34] The original Tribunal decision of 2014 found that there was no such very strong or compelling claim: there was family life between the petitioner and his son but that this was extremely limited, the petitioner was in prison when his son was born in 2002 and had spent

most of his son's life in prison and was not interested in his son's living arrangements, nor did he have any knowledge of the son's schooling or the like. The further submissions were to the effect that this had now changed in that the son visited and spoke to him in prison on a regular basis. In the decision letter, the respondent commends the petitioner for his improved relationship with his family, especially his son, calling it admirable. However, while accepting that his family life may have increased, she takes the view that this has not increased to the level where his removal would be a disproportionate breach of Article 8 and accordingly there is no realistic prospect of success.

[35] In my opinion the respondent was entitled to find that the additional information given in the petitioner's further submissions about his improved relationship with his son does not lift his article 8 claim into the category of being "very compelling circumstances" within section 117. He has been in prison for most of his son's life and has taken no interest in him until some recent point after the 2014 decision, and that recent interest has been of a limited nature due to his imprisonment. In these circumstances in my opinion the respondent did not act unreasonably or without anxious scrutiny in finding that the further submissions in respect of family life have no realistic prospect of success.

[36] I now turn to the further submissions in respect of the risk of re-offending. In paragraph 57 of its decision of 3 February 2014, the First-tier Tribunal took the view, on the evidence it had before it, that there must be a high risk of the petitioner reoffending. It came to this view on the basis that although he had been drug free for 13 months he had been in prison and not in the outside world; there was nothing in his history which made them believe he would be able to stop taking drugs or would stop supplying drugs; he would be returning to the city he lived in before and seeing the same people. The petitioner sought to address this by providing evidence that he was now going into his fourth year free of drugs,

and that as a result of turning to religion he was now a reformed character. That evidence was considered by the Secretary of State in the letter of 16 August 2016. In respect of him being drug free, the Secretary of State stated that "While being toxin free for approximately 3 years is admirable, the Secretary of State is aware that this situation only occurred while your client was in custody" (paragraph 26). In paragraph 40, the Secretary of State stated "Your client's rehabilitation so far is admirable". The respondent recognised the improvement which the petitioner had made to his life, but did not find that these improvements could overcome these findings of the First-tier Tribunal.

[37] In my opinion, the Secretary of State was entitled to come to that conclusion and did not act unreasonably or without anxious scrutiny in doing so. It remained the case, as it had done before the First-tier Tribunal, that the petitioner's ability to remain drug free and not indulge in crime had not been tested outwith the prison environment. While there was nothing to suggest that his new attitude towards religion was a sham, that was not in itself sufficient to overcome the problem identified by the First-tier Tribunal. The Tribunal held in paragraph 57 that there was a high risk of re-offending. The further submissions did not contain any sort of risk assessment as to his re-offending. The chaplains' reports were not an assessment of the risk of offending. A new tribunal judge looking at the further submissions would require to consider the question of the risk of reoffending in the round, taking into account not only the petitioner's new religious and drug-free lifestyle within the prison environment but also other factors such as his extensive criminal record and his previous lifestyle in the community. The Secretary of State gave careful consideration to this and came to a reasoned view on it. She took the view that, when taken together with what was said in the 2014 Tribunal decision, the chaplains' reports would not create a realistic prospect of success before a tribunal judge. In my opinion she was entitled to do so.

[38] In these circumstances in my opinion the respondent was entitled to come to the view which she did, and in so doing did not act irrationally, nor without anxious scrutiny.

[39] For these reasons, the petition is refused. I reserve all questions of expenses in the meantime.