Neutral Citation Number: [2011] EWCA Civ 121

Case No: C4/2010/0858/QBACF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH ADMINISTRATIVE COURT
THE HONOURABLE MR JUSTICE BEATSON
CO 6657/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2011

Before :

LORD JUSTICE WARD
LORD JUSTICE ELIAS
and
LORD JUSTICE TOMLINSON

- -

Between :

THE QUEEN ON THE APPLICATION OF MD (GAMBIA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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- -

Mr Al Mustakim (instructed by **Messrs Hoole & Co**) for the **Appellant**
Mr Matthew Barnes (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates: 19 January 2011

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Judgment

Lord Justice Elias :

1. The appellant, a national of Gambia, challenges by way of judicial review proceedings two decisions of the Secretary of State for the Home Department ("SSHD"). The first is her decision to include Gambia, in respect of men only, in the list of countries in section 94(4) of the Nationality, Immigration and Asylum Act 2002 (a process known as "designation"). The second is the related decision by the SSHD to certify the Appellant's case as clearly unfounded pursuant to section 94(2).

2. The effect of certification is that the appellant is not entitled to an in-country right of appeal to the First Tier Tribunal (Immigration and Asylum) ("the Tribunal"). If the certificate is set aside, he will have an in-country right. In fact in this case that may not be possible. He was sent back to Gambia some fourteen months ago, after he had been refused permission on paper to pursue his judicial review claim. He had sought unsuccessfully to obtain an interim injunction to prevent his deportation pending his appeal against that refusal, and was thereafter returned to Gambia. We were told that he has had some regular contact with his solicitors since returning and they confirm that they have instructions to pursue the appeal. However, we know nothing of his circumstances in Gambia currently.

3. Both grounds of challenge were dismissed by Mr Justice Beatson on 26 February 2010. The appellant now appeals both decisions, permission having been given by Lord Justice Maurice Kay.

The statutory framework.

4. A right of appeal to the Tribunal against "immigration decisions" is conferred by section 82(1) of the 2002 Act. Subsection (2) defines immigration decisions and it includes a decision that someone illegally present in the UK should be removed. By section 92(1) a person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal falls within that section. Section 92(4)(a) includes within the scope of section 92 appeals against immigration decisions where the appellant has made a human rights or asylum claim.

5. However, section 94(2) provides that the Secretary of State may certify that an asylum or human rights claim is "clearly unfounded" and in those circumstances there is no in-country right of appeal. A decision is only "clearly unfounded" if the Secretary of State, after reviewing the available material, is:

> "reasonably and conscientiously satisfied that the allegation must clearly fail":

per Lord Bingham of Cornhill in *R (Yogathas) v SSHD* [2002] UKHL 36; [2003] AC 920, para 13.

6. Section 94(3) modifies the application of that test. In a limited class of case, namely where the state to which an applicant is to be returned is listed under section 94(4), it *requires* the Secretary of State to certify a claim unless he is satisfied that the claim is *not* clearly unfounded:

> "If the Secretary of State is satisfied that an asylum claimant or human rights claimant is entitled to reside in a State listed in subsection (4) he shall certify the claim under subsection (2) unless satisfied that it is not clearly unfounded."

7. As Lord Phillips of Worth Matravers MR (as he then was) noted, giving the judgment of this court (Lord Phillips MR, Waller and Sedley LJJ) in *R (ZL and VL and another) v SSHD* [2003] 1 WLR 1230 paras 57-59 (a case dealing with the identically worded predecessor), in practice this modification is likely to make little difference to the outcome. Either way, the relevant questions which the Secretary of State has to pose to herself are the same. In R (*on the application of Zakir Husan) v Secretary of State for the Home Department* [2005] EWHC 189 (Admin) para 26 Wilson J, as he then was, said that Lord Phillips' judgment demonstrated that the difference in the approach dictated by subsections (2) and (3) was "so Jesuitical as not to have measurable legal effect". At best it means that the background facts may weigh more heavily against concluding that a claimant has a valid asylum claim where the state to which removal is proposed has been designated.

8. The power of the SSHD to designate a State in the section 94(4) list is conferred by section 94(5) of the 2002 Act, which states that:

> "The Secretary of State may by order add a State, or part of a State, to the list in subsection (4) if satisfied that—
>
> (a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and
>
> (b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention."

9. In most cases paragraph (b) is likely to add little, if anything, to paragraph (a), particularly since persecution itself is capable of covering not only threats to life and freedom but, if sufficiently severe, the systemic or sustained interference with other human rights. It is very firmly established that to send someone back who faces a real risk of persecution in the receiving state will typically involve a breach by the UK government not only of the Refugee Convention but also of Articles 2 and/or 3 of the Human Rights Convention: see eg *Chahal v United Kingdom* (1996) 23 EHRR 413. Although there are sometimes circumstances where a removal to another state would constitute a breach by the UK Government of some Convention right other than those protected by Articles 2 and 3, such as where removal would involve a breach of Article 8 because the person has built up a private or family life in the UK, it will be exceptional for the UK itself to be in breach merely because the receiving state does not respect these other human rights.

10. Section 94(5A) allows for a State to be added to the list in section 94(4) in relation to a particular description of person only. Section 94(5C) of the 2002 Act provides that such a description of person may be defined in a number of ways, including by

reference to gender, religion, race and "any other attribute or circumstance which the Secretary of State thinks appropriate." This would permit distinctions to be drawn between adults and children.

11. Gambia was added to the list with effect from 27 July 2007 by the Asylum (Designated States) Order 2007 (SI 2007/2221), but only in respect of men.

12. There is currently no published policy in relation to the designation of States. However, the approach of the SSHD to that issue is set out in the statement of Mr Becker, dated 23 February 2010, which was before Mr Justice Beatson. Mr Becker noted that there will be certain practical considerations to consider, in particular: (a) there must be a significant number of claims from the State in order to make its addition to the list worthwhile; and (b) there must be an ability to enforce returns to the State concerned. The Country Specific Litigation Team advises on the merits of designation, and if necessary undertakes research into the available country information data to provide an informed opinion. The State is not visited, although designation might follow a fact finding mission. The decision to designate a State is then taken on the basis of policy and legal advice. Thereafter, the designation order is subject to Parliamentary approval. It is an important feature of the procedure that countries listed are kept under regular review to ensure that they continue to meet the statutory criteria.

13. It is pertinent to note that very many "safe" states, as listed states are colloquially if somewhat inaccurately termed, are not designated. For example, there are no EU states on the list, no doubt because there are few asylum claims by citizens of those states.

The facts

14. I set out in very summary form the material facts, which I draw from the lengthy and careful decision made on behalf of the Secretary of State. The appellant was found to be a credible witness.

15. The appellant is from Gambia. He joined the United Democratic Party ("UDP") and was an active member of the youth wing. He distributed leaflets on their behalf. He was arrested on two occasions. The first was on 10 June 2000 when he was on his way to a rally connected to the elections then being held. The group he was with were attacked with stones by opposition supporters, they retaliated, and he was arrested by the police and taken to a detention centre. He was questioned about the fight. He was not, however, fingerprinted or photographed, and was released after 8-9 hours without any obligation to report back to the police station.

16. He was arrested a second time, following an incident in September 2001 during the Presidential campaign, when a government vehicle was destroyed. Again it resulted from a fight with opposition party members. This time the appellant was held in the detention centre for three days and was accused of destroying a Government vehicle. Subsequently he was released because he could not give any information. Again he was neither fingerprinted nor photographed but he claimed to have been beaten while detained. He also claimed to have been harassed generally by the police when carrying out his political activities, but not so as to lead to any arrest or detention.

17. In September 2006 he was required to appear in court in connection with the incident when the Government vehicle had been destroyed some five years earlier. He was required to tell the court what happened. He said he was unable to attend because he was sick. He was then required to attend on 24 October 2006, but came to the United Kingdom the week before, using a valid passport and visitor's visa. Thereafter he did not return to Gambia but stole identity details from a friend and remained working illegally in the UK. He said that he was afraid that he would be accused of deeper involvement in the incident if he were to return.

18. The Secretary of State broadly accepted the truth of this account. However, he considered that the beating received in the detention centre would not have been authorised by the Government, but would have been the random act of rogue officers, and therefore was not evidence of persecution. Furthermore, the objective evidence suggested that he would not face persecution by reason of his membership of the UDP. This was reinforced by the fact that he had been allowed to leave the country.

19. The Secretary of State also accepted that the appellant was required to appear in court, but this was as a witness in a potentially criminal matter, namely the destruction of a Government vehicle, and the appellant's fear that he might be prosecuted because of his non-attendance at court merely demonstrated a fear of prosecution and not persecution. There was no reason to doubt that the appellant would receive a fair trial or that any sentence would be proportionate.

20. A curious feature of the application was that it appears that the appellant was not at that time asserting before the Secretary of State that he was facing a charge of sedition, although he had lodged both an affidavit from his brother who alleged that he and others with whom he had been involved had been so charged, and also a bench warrant dated 29 September 2006 which on its face appears to confirm that fact. The Secretary of State did not specifically address the significance of these documents, although they were before her. She concluded that the appellant was summoned to attend court only because of his non-attendance as a witness.

The designation order

21. I first turn to consider whether Gambia was properly listed. The decision whether to designate or not is conferred on the SSHD. She is to be accorded a wide margin of discretion when exercising her power to designate a State. The role of the court on review was explained by Lord Phillips MR, as he then was, giving the judgement of the Court of Appeal in *R (on the application of Javed and others) v SSHD* [2001] EWCA Civ 789. That was a case where a designation of Pakistan was held to be unlawful because there was plain evidence, identified by the House of Lords in *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, that persecution of women who left the marital home, whether voluntarily or by compulsion, was widespread. Accordingly an order applying to both men and women was not justified and had to be struck down. Lord Phillips said this as to the appropriate test (paragraph 57):

> "Whether there was in general a serious risk of persecution was a question which might give rise to a genuine difference of opinion on the part of two rational observers of the same

> evidence. A judicial review of the Secretary of State's conclusion needed to have regard to that considerable margin of appreciation. There was no question here of conducting a rigorous examination that required the Secretary of State to justify his conclusion. If the applicants were to succeed in showing that the designation of Pakistan was illegal, they had to demonstrate that the evidence clearly established that there was a serious risk of persecution in Pakistan and that this was a state of affairs that was a general feature in that country. For a risk to be serious it would have to affect a significant number of the populace."

22. It is not, therefore, enough to demonstrate occasional breaches of human rights standards even where they amount to persecution. The persecution must be sufficiently systematic properly to be described as a "general feature" in that country, and this in turn requires that it should affect a significant number of people.

The scope of the Order

23. A preliminary issue arose as to the scope of the Order. Does it apply to adult males only or all males, including boys? Mr Mustakim, counsel for the appellant, assumed that it meant the latter, and sought to rely on evidence showing that the Gambia was unwilling or unable properly to protect maltreatment amounting to persecution of children, including boys. Mr Barnes, counsel for the Secretary of State, accepted that in certain contexts men could include male children, but he submitted that that was not so here; certainly it was never the intention of the Secretary of State that it should do so. Indeed, he even went so far as to accept that if that were the proper construction of the Order, then it would be unlawful because children were potentially vulnerable. He accepted that following *Javed*, where a designation was quashed because there was a risk of persecution against females albeit that the particular claimants were male, the risk of persecution against children would invalidate the whole order.

24. In my judgment, the more natural reading of this designation is that it will apply only to adult males. If the intention had been to include male but not female children - a possibly justified distinction in countries where female genital mutilation is widely practised - then I would have expected the order to say so. It is not disputed that age is a potentially relevant attribute which the Secretary of State could invoke. It follows that in my view evidence of maltreatment of children does not assist the appellant's case. The focus must be on the treatment of adult males.

The objective evidence of Gambia's human rights compliance.

25. The central issue with respect to this aspect of the appeal is whether the objective evidence is capable of sustaining the Secretary of State's decision, or whether the decision to list Gambia was a conclusion which no Secretary of State on the evidence could properly reach.

26. We were taken to various documents which demonstrate that in various ways Gambia infringes human rights standards. But the issue is not whether Gambia has a good human rights record; rather it is whether its failings in that regard would put the

UK in breach of its obligations if it were to send persons back there. Much of the material relied upon by the appellant does not in my view assist in determining that question. For example, it is of no relevance to the question whether Gambia should be put on the list whether or not there are free and fair elections in Gambia, nor whether corruption is widespread. Furthermore, the fact that the designation is limited to men only means that evidence of mistreatment of women and children is of no materiality.

27. The appellant submits that the evidence before Beatson J ought to have led the judge to the conclusion that there is a risk of persecution affecting a significant number of the populace. In addition he sought to adduce further fresh evidence, which has become available only since the judge's decision, which he submitted put the issue beyond doubt. This is the Home Office Country of Origin Information Report 2010 ("COIR") which in turn summarises a number of other recent reports relied on by the appellant. The respondent does not object to the court considering that material, and given her obligation to keep the designation under review, that is hardly surprising. Her counsel submits that it raises no further material sufficiently serious to warrant the Secretary of State changing her view.

28. In addition to the COIR, the appellant referred to a wide variety of reports including the US Department of State 2008 Human Rights Report for Gambia dated 25 February 2009 ("the US Report") and also two reports to which it expressly refers, namely an Amnesty International report, dated 11 November 2008, entitled *"Gambia: Fear Rules"* ("Amnesty 2008") and the UKBA Country of Origin Information Key Document in relation to the Gambia, dated 4 April 2008.

29. There is no doubt that there are certain passages in these reports which suggest that the degree of human rights' abuse is extensive and affects numerous different social groups. For example, Amnesty 2008 said this:

> "Unlawful arrests and detentions take place routinely in the Gambia. Individuals are rarely informed of the reason for their arrest. They are often kept in detention without charge longer than the 72 hours specified by Gambian law and rarely have access to a lawyer. Once in the custody of the Government, detainees seem to fall beyond the protection of the law and are routinely subjected to further human rights' violations, such as unlawful detention, torture, extra-judicial execution, unfair trials or enforced disappearance. Avoiding arrest has become a constant pre-occupation for the entire population and it affects every aspect of Gambian life, generating fear and mistrust amongst the population.
>
> The arbitrary nature with which unlawful arrest and detention are carried out leave very few Gambians free from the risk of becoming victims of human rights' violations. The deterioration in the human rights' situation after the March 2006 foiled coup plot demonstrated that all Gambians are at risk and may be subject to unlawful arrest and detention. Those at risk include real and perceived political opponents, people who are close allies of the Government before their arrest, as

> well as Government employees, military people, security people, opposition leaders, human rights' defenders, journalists and lawyers."

30. The report goes on to say that in Gambia "fear rules" and family members are reluctant to speak out if someone disappears because of fear of the consequences. It also states that the judiciary has lost its independence and that there are fears of reprisal against them if they do not do the Government's bidding.

31. The Secretary of State has placed more weight on the US Report. Even that report, however, shows widespread abuse of human rights. The report notes that whilst the Constitution and the law provide for the protection of human rights, in practice these laws are regularly ignored. After referring to the Amnesty analysis that "fear rules" the report continues:

> "Although the constitution and law provide for protection of most human rights, there were problems in many areas. Prison conditions remain poor, resulting in death. Arbitrary arrests and detentions, often without warrant, continued. Security forces harassed and mistreated detainees, prisoners, opposition members, journalists with impunity. Prisoners were held incommunicado, faced prolonged pre-trial detention, held without charge, denied access to families and lawyers, and were tortured and denied due process. The Government restricted the freedom of speech and press through intimidation, detention, and restrictive legislation."

32. Mr Barnes does not deny that these observations make bleak reading. He concedes that the situation is, to use the words of Beatson J, "troubling". He submits, however, that given the margin of appreciation that we must afford to the Secretary of State in a decision of this nature, there was sufficient material to sustain her decision. The thrust of his case was that notwithstanding that there are human rights abuses of the kind outlined in those reports, when one looks at the detail of these reported abuses provided in the reports, they do not suggest that they are so widespread as to compel the conclusion that they constitute a general feature of life in Gambia. To that extent he does not accept that the description in Amnesty 2008 that there are *routine* human rights' violations by way of unlawful detention, torture, extra-judicial execution, unfair trials and enforced disappearance, is in fact warranted by the particulars identified in the available reports. He relies in particular on the US 2009 report where chapter and verse is given with respect to the nature and extent of these human rights abuses.

33. I am not going to set out in detail all the evidence bearing on the extent of these abuses. Mr Mustakim focused in particular upon seven aspects of human rights' infringements which, he submitted, taken together demonstrated that the Secretary of State had reached a decision which she could not properly reach on the material before her.

34. First, there was evidence of significant and widespread detention extending beyond the 72 hours permitted in law. The US Report itself referred to "numerous instances" of such detention and noted that detainees were not generally properly informed of the charges against them. This, submits Mr Mustakim, is consistent with the epithet "routine" in Amnesty 2008.

35. Mr Barnes essentially makes two answers in response. The first is that it is not necessarily persecution or a breach of Article 3 for somebody to be detained for longer than 72 hours. Second, the US Report noted that generally the detention did not extend beyond the 72 hours, that there was a functioning bail system, that convicted prisoners were generally permitted to meet privately with their attorneys, and that persons accused of murder or manslaughter were provided with lawyers at public expense.

36. The second aspect is politically motivated arrests. Again, there is clear evidence of that. The COIR refers to a later Amnesty International Report of May 2010 where it is stated that the army and police arbitrarily arrest and detain Government opponents, human rights defenders, journalists and former security personnel.

37. Mr Barnes responds that in fact when one looks at the examples given of such arbitrary politically-motivated arrests, they do not sustain the contention that these are widespread. Whilst there had been such arrests, in particular in the wake of the coup in 2006, the Amnesty Report published in 2008 provided very few examples of other such arrests. Furthermore, it cannot be assumed that they were all unjustified; some of those detained were charged with treason.

38. Third, as we have seen, there is the evidence of torture, with security forces beating and mistreating persons in custody. Again, Mr Barnes' response is that if one looks at the evidence to sustain this, for example in paragraphs 8.14-8.16 of the COIR, it is plain that although there have been certain reports of torture, particularly following the coup in 2006, there was limited evidence of such abuse more recently. Indeed the US Report stated in terms that there were no developments following 2008 of security force torture and abuse. Certain particular cases of torture are identified, and Mr Barnes does not dispute that the practice does take place, but he says that the evidence does not begin to show that this is systemic. Nor, indeed, does it justify the epithet "routine", which is used in Amnesty 2008.

39. Fourth, Mr Mustakim relies on evidence of prison overcrowding. Again, there is no doubt from the Reports that prison conditions are wholly unsatisfactory. The US Report stated that:

> "Prison conditions were poor and cells were overcrowded, damp and poorly ventilated. Inmates complained of poor sanitation and food."

40. There is also particular evidence of conditions at the State Central Prison, Mile 2, which talks of prisoners having to spend 17 hours a day in solitary confinement, struggling to put up with poor ventilation and suffering from psychological depression and mental torture. The food is poor and of low quality, and visits are

very limited. The US Report provides some statistics which were provided by the Director General of Prison Services, who stated that 23 inmates died in 2006 and 40 in 2007, primarily as a result of chronic anaemia, abdominal pain, and food poisoning. Mr Mustakim points out that where conditions are sufficiently severe they will amount to persecution and a breach of Article 3: see *Batayev v SSHD* [2003] EWCA Civ 1489, which concerned detention in a Russian prison.

41. Mr Barnes does not dispute the principle in *Batayev* but he submits that the conditions in *Batayev* were far harsher than those identified here. The conditions in Russia were identified in the case of *Kalashnikov v Russia* [2002] 36 EHRR 587. They involved gross overcrowding causing beds to be shared, in very poorly ventilated cells infested with insects, with wholly unsanitary circumstances where toilet conditions were shared and where sleep was difficult.

42. Mr Barnes submits that the Secretary of State was entitled to conclude that the conditions in Gambia, although falling below civilised standards, were not sufficiently grave as to constitute a breach of Article 3. For example the US Report indicated that the situation was improving, at least to the extent that guards were now willing to intervene in fights between prisoners, whereas they had not been before; and those who were detained prior to conviction were allowed to receive outside sources of food. Mr Barnes also points out that there is a UN report, referred to in the most recent COIR, which notes that efforts are made to treat prisoners in a humane and dignified manner and that training seminars and workshops are routinely conducted for members of the police force and prison service to ensure they recognise their obligations towards prisoners under international Conventions. The UN Report also observes that the Gambian Prison Service has been taking practical steps to promote the reformation and social rehabilitation of prisoners.

43. Mr Barnes submits that when one looks at all these factors this is a long way from Article 3 infringements. The number of deaths is worrying and is no doubt exacerbated by prison conditions, but even if on occasions the conditions infringe Article 3, they do not consistently do so.

44. Fifth, Mr Mustakim contends that there is evidence that the judiciary lacks independence and in 2009 three High Court judges were unconstitutionally removed from office by an Order of the President. Mr Barnes points to the US Report which states in terms that

> "The constitution law provide for a fair and public trial and the judiciary generally enforce this right …."

He accepts, of course, that there is some corruption, particularly of judges at the lower level who may give way to government pressure, but he pointed out that the three judges who had been removed were later reinstated. Accordingly, he submits that this does not begin to constitute evidence of a general break down in the judicial process.

45. Sixth, the appellant focuses on the position of homosexuals. He submits that homosexual conduct is criminalised under Article 144 of Gambia's 1965 Criminal Code and he refers to a number of occasions where the President has demonstrated

extremely strong homophobic tendencies. Indeed, on one occasion he had threatened that all homosexuals would be beheaded and on another he apparently told security services to arrest homosexuals. In fact, it appears that the Government later retracted that statement.

46. Mr Barnes points out that notwithstanding these offensive words there are no reports at all of homosexuals being arrested on a widespread basis. Indeed there is barely any evidence of any legal action taken against them at all, although he accepts that they are likely to face some social hostility.

47. Finally, the appellant relies upon one particular and rather bizarre episode when Gambian police, soldiers and the President's personal guard are alleged to have arbitrarily kidnapped 1,000 citizens and forced them to drink hallucination potions on the grounds that they were practising witchcraft. The drinks that these people were forced to take apparently resulted in six deaths. The evidence from the Amnesty International Report of 2010 noted that the campaign had ceased after it was publicly exposed, although none of those involved in the abuses were brought to justice.

48. Mr Barnes submits that this was a one-off event which has been brought to an end in any event and which does not begin to justify any inference that conduct of this kind is a general feature of life in Gambia.

49. Mr Barnes also makes certain additional points which, he submits, support the Secretary of State's decision. Opposition views do regularly appear in the independent press notwithstanding the pressures on those who oppose the Government; there are no Government restrictions on access to the Internet and no reports of monitoring of e-mail or Internet chat rooms or anything of that kind; there are no restrictions on academic freedom or cultural events; and no reports of discrimination based on religious affiliations or beliefs.

50. Having regard to all these matters I remind myself that the question is not whether this court would consider it appropriate to list Gambia, but whether the Secretary of State is entitled to do so. I agree with the observation of Beatson J that the situation is troubling, but I also agree with his conclusion that the Secretary of State was entitled to conclude, as I assume she must have done, that the human rights infringements were not so systemic or general as to compel the conclusion that as a matter of law Gambia could not properly be designated under section 94(4). It follows that the first ground of appeal fails.

Certification.

51. It follows that since the listing of Gambia is not unlawful, the Secretary of State was obliged to certify the claim unless satisfied that it was not clearly unfounded. I would observe, however, that the fact that Gambia has been listed does not mean that the general evidence of human rights' abuses is thereafter immaterial. The background information may still, in the context of the facts of a particular claim, weigh against certifying the claim even where it is not enough to demonstrate the degree of systemic human rights breaches necessary to preclude the country being listed under section 94(4). It was in fact taken into account by the Secretary of State in this case.

52. Although we are reviewing the Secretary of State's decision, in practice the court must determine the claim by asking itself the same question as the Secretary of State. The reason was explained by Lord Phillips of Matravers in *ZT (Kosovo) v SSHD* [2009] UKHL 6:

> "Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational."

Lord Brown of Eaton-Under-Heywood (para 76) agreed with this observation; as did Lord Neuberger of Abbotsbury (para 83), although he was not prepared to say that it was necessarily the right approach in all cases. Lord Phillips' comment was made in the context of a decision taken under section 94(2), but I see no reason why it should not apply equally to a decision under section 94(3). Furthermore, if primary facts are in issue that will make it even harder for the Secretary of State to issue a certificate. As Lord Phillips himself pointed out in the *ZL and VL* case (para 60), it is only if the Secretary of State could be satisfied that nobody could find the applicant credible that it would be appropriate to certify a claim where the primary facts were disputed. Here too, if there is any reasonable doubt, the claim cannot be described as clearly unfounded.

53. Beatson J concluded that the claim in this case was plainly unfounded. He summarised his reasons as follows:

> "In this case the Secretary of State has not challenged the factual basis of the claimant's case….. At its highest it shows harassment by reason of police interrupting meetings and an arrest for fighting which has led to a summons to court which may lead him to prosecution for failure to attend. There is no description of being threatened with violence. As well as the recent reports, the claimant relies on Mr Nyassi's statement, his brother's affidavit, and the warrant for his arrest. Mr Mustakim submitted that there is a real risk that the claimant will be tortured if arrested and it cannot therefore be said that the claim is "wholly lacking in substance". The defendant accepts that a warrant has been issued because the claimant did not respond to the summons to appear in court as a witness but there is no evidence that he is himself to be charged with sedition. Mr Nyassi's statement gives different dates for the claimant's detention to those the claimant has given. Significantly, the objective evidence about membership of the UDP is that

> membership as such of that party would not put a person at risk. The party has taken part in demonstrations which were not disrupted by security forces. The treatment of the claimant when he was arrested and detained on two occasions was also, on his account, such as not to put into question the defendant's certification."

54. Mr Mustakim reminds us that the test for certification is a high one: He submits that it cannot properly be said that this claim is clearly unfounded. He contends that the judge started from a false premise. The appellant was not just at risk of being prosecuted for failing to respond to a witness summons; he was, or at least was arguably, facing a charge of sedition (although the nature of that seems to have been the destruction of government property). Both the affidavit from the appellant's brother and the terms of the bench warrant lent some support to that submission. Mr Mustakim says that given the conditions in the prison, and also the fact that opponents of the government face a real risk of torture in prison, it could not be said that the application was bound to fail.

55. Mr Barnes accepts that the judge was wrong to say that there was no evidence that the appellant was charged with sedition, but he contends that nonetheless the certificate was lawful. He asserts first that the evidence that he was facing a sedition charge, and not merely a charge of failing to appear as a witness, was extremely weak. The appellant himself in interview does not appear to have claimed that he was being prosecuted for sedition, notwithstanding that this is what the warrant appears to say. This cast doubt on the genuineness of the bench warrant and the assertion by the appellant's brother in his affidavit.

56. Second and in any event he submits that even if the appellant were to face a sedition charge based on the events which he had recounted, the objective evidence suggested that there was no real risk that he would suffer persecution or an infringement of his Convention rights, whether as a result of torture or poor prison conditions. The intermittent commission of torture by particular officers was insufficient to raise any real doubt about the outcome of the appeal. Nor was there any reason to doubt that he would have a fair trial.

57. I recognise the force of these submissions which raise telling points against the asylum claim, but I do not think that they justify the conclusion that the claim is bound to fail. In my judgment, the high test for certifying a claim was not satisfied and therefore the certificate should be quashed. I fully accept that it is surprising that the appellant does not appear to have been contending before the Secretary of State that he was facing a sedition charge. But there was some evidence to support this. Further, if that is indeed the situation, then the fact that the case is being pursued at all some five years after the incident is alleged to have taken place raises some concerns. In my judgment, it is at least open to the Tribunal to conclude that the appellant may face a trial of sedition, arising out of his alleged activities as an opposition supporter, and that the treatment he might expect in prison could involve a breach of his Article 3 rights. The fact that he was mistreated in the past lends some support to that

possible conclusion. Even though the objective evidence is enough to warrant the Secretary of State listing Gambia as a "safe" country, it does not follow that a tribunal on appeal could not conclude that the objective evidence, when considered in the context of the particular facts in this case, created a real risk of persecution or Article 3 infringements.

Disposal.

58. It follows that I would uphold this second ground of appeal and quash the certificate, but I would dismiss the first ground.

Tominson LJ

59. I agree.

Ward LJ.

60. I also agree