Case No: CO/5903/2013

Neutral Citation Number: [2014] EWHC 4073 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 December 2014

Before :

ANDREW THOMAS QC
(Sitting as a Deputy High Court Judge)

- -

Between :

REGINA (ON THE APPLICATION OF RA - NIGERIA)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Raza Halim (instructed by **Duncan Lewis**) for the Claimant
Julie Anderson (instructed by **The Treasury Solicitor**) for the Defendant

Hearing date: 21 October 2014
- -

Judgment

Andrew Thomas QC:

1. This is a claim for judicial review relating to the Defendant's decision to certify, or purport to certify, the Claimant's asylum and human rights claims as 'clearly unfounded' thereby preventing him from exercising an in-country right of appeal to the First Tier Tribunal.

2. The Claimant has made repeated threats to kill himself if he is returned to Nigeria. He relies upon medical evidence which states that he has been diagnosed as suffering from severe depression. Both the diagnosis of severe depression and the authenticity of the threats are disputed by the Defendant. The views of the Claimant's own expert were contradicted by two other Consultant Psychiatrists.

3. This is not a challenge to the substantive decision. The issue is whether, notwithstanding her rejection of his claim, the Defendant should have accepted that the Claimant had a prospect of successfully appealing her decision to the First Tier Tribunal.

Background

4. The Claimant is now 38 years of age. He first came to the United Kingdom in 2012 aged 35 on a six months visitor's visa. He arrived on about the 29th of January 2012. One week later he was arrested whilst attempting to take an onward flight to France. He was found to be travelling on a false passport. In April 2012 he was convicted at Chelmsford Crown Court of possession of identity documents with intent and sentenced to 12 months imprisonment.

5. It is common ground that by reason of this conviction the Claimant is a 'foreign criminal' within the meaning of Section 32 of the UK Borders Act 2007. There are two relevant consequences:

   a. pursuant to Section 32(4), there is a presumption that the Claimant's deportation is conducive to the public good; and

   b. pursuant to Section 32(5), the Secretary of State must make a deportation order unless one of the statutory exceptions under Section 33 is made out.

   Section 33 contains six different forms of exception. The Claimant relies upon Exception 1, which applies in cases where deportation would breach a person's Convention rights or the UK's obligations under the Refugee Convention.

6. On 30th April 2012 the Claimant was served with a notice inviting him to show reasons why a deportation order should not be made. On 8th May 2012 he made a claim for asylum.

7. The Claimant gave an account of the events which led to him coming to the UK. The Defendant does not accept the truth of this account, but it has never been the subject of an adverse adjudication.

8. The Claimant states that he was born in Lagos and brought up in Kaduna. His father held a senior University post. He was educated at a boarding school to the age of 18 years and thereafter studied IT at college. He met his wife at college and they married in 2011. He was a practising Christian.

9. His case is that in November 2011 he witnessed an attack at his church in which several Christians were murdered by members of Boko Haram. On 25th December 2011, his own home was attacked. It was destroyed by fire and his wife was shot. A few days after that, another friend was killed. He believes that members of Boko Haram were targeting him and that he would be murdered. He obtained a visitor's visa but he was too scared to tell anyone that the real reason he was coming to the UK was to flee Boko Haram.

10. Having made the asylum claim, the Claimant instructed Solicitors. They made further representations on his behalf in a letter dated 28th May 2012. They added a Convention rights claim to the submissions. Accordingly, both parts of Exception 1 fell for consideration. The Claimant stated that he was suffering from memory loss but no other medical concerns were raised.

11. In a notice of decision dated 30th July 2012, the Defendant rejected the Claimant's asylum claim, his Convention rights claim and any claim for humanitarian protection. In summary, the Defendant concluded that even if the alleged events were true they did not prevent the Claimant from returning to Nigeria. Christians are not identified as a persecuted group in Nigeria as a whole. The Claimant could re-locate to a safe area. Further, there is a sufficiency of protection in Nigeria through its police services. There was no risk of unlawful killing or ill-treatment. Any claim for humanitarian protection was barred by virtue of the conviction. As to any medical issues, it was noted that treatment is available in Nigeria, albeit that their services may have limitations. The Convention rights claim was refused.

12. The Notice concluded with a certificate under Section 94(3) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The Defendant determined that the claim was 'clearly unfounded', thereby barring the Claimant from pursuing any in-country right of appeal.

13. A deportation order accompanied the notice of decision. The Claimant was transferred to Colnbrook IRC in August 2012 following completion of his prison sentence.

Medical Evidence

14. The first suggestion of any threat of suicide was in a letter from the Claimant to the Defendant in September 2012. The Claimant was assessed by Dr Sultan, a visiting Consultant Psychiatrist at the IRC. He found some symptoms of depression and insomnia and initially concluded that the Claimant was unfit to fly. A further note dated 24th September 2012 states that the Claimant may be well enough to travel within two to four weeks.

15. On 7th October 2012, Dr Sultan reviewed the Claimant again. He accepted the evidence of symptoms but concluded that the threats to end his life were manipulative behaviour. He suggested a potential diagnosis of Borderline Personality Disorder. He was now fit to fly.

16. There were a number of further reviews by Dr Sultan between October 2012 and January 2013. He found that the Claimant's anxiety and despair were attributable to his situation. They were a natural reaction to events rather than the consequence of any severe or enduring mental illness. By now, deportation had been stayed as a result of the issuance of a claim for judicial review.

17. In January 2013 the Claimant was transferred to Harmondsworth IRC where he was assessed by another Consultant Psychiatrist, Dr Burrun. He concluded that the Claimant was fit to fly although he noted that the Claimant was maintaining his threat to kill himself if he was deported.

18. At no time did the Claimant seek any form of treatment. He never sought any medication nor did he wish to undertake any sort of counselling. He has never suffered injury through self harm. There has never been any report to Dr Sultan or Dr Burrun of hallucinations or any other potential psychotic symptoms.

19. The Claimant's solicitors instructed an independent consultant psychiatrist, Dr Bell, to carry out a review. He saw the Claimant for the purposes of his report on 23rd January 2013. He subsequently set out his findings in a report dated 18th February 2013. That report is the basis for the present claim.

20. Dr Bell carried out a review of the written notes, but it was a limited one. He refers to seven relevant entries which date between August 2012 and October 2012. On six of those occasions there is reference to the Claimant threatening to kill himself. On two occasions his mood is recorded as 'low' or 'flat'. On one occasion the Claimant stated that he had tried to kill himself when he was in prison. Dr Bell makes no reference to the assessments by the other consultants.

21. Dr Bell obtained a full history and carried out his own assessment. The Claimant disclosed that his brother had committed suicide two years earlier. Dr Bell noted that the Claimant looked objectively depressed. The Claimant said that he was not taking medication 'because I do not believe in it'. He said that his sleep was poor, he was eating poorly and he had suffered panic attacks. He reported suffering both auditory and visual hallucinations. He said that on two occasions in December 2012 he had in fact attempted to kill himself by placing a bag over his head.

22. Dr Bell concluded as follows:

> *"It is clear to me that RA suffers from psychiatric disorder. His condition would satisfy the diagnostic criteria for Severe Depressive Disorder with psychotic features [DSM-IV 296.34]. ... The aetiology of his condition would appear to be complex. Although it is possible that his view of his life is coloured, retrospectively, by his current Severe Depressive Disorder, I think it is more than likely that there has been in reality psychological disturbance for much of his life.*
>
> *...*
>
> *In my view the psychiatric disorder as I have described it is real. I have considered the possibility that it is fabricated and I am clear that it is not the case. I do not think that it would be possible to fabricate this kind of psychiatric disorder or to maintain it over this long period of time.*
>
> *...*
>
> *Currently there is a moderate to high risk of self-harm and suicide. ...*

It is my view that return to Nigeria would cause a further serious deterioration in RA's psychiatric state for a number of reasons which include the following:

- *RA has not even begun to metabolise the traumatic events that have occurred. Being returned to Nigeria that is placing him in the context where these events occurred would in effect re-traumatise him. He would be very likely to be overwhelmed with thoughts, memories and feelings that he would not be able to manage.*

- *RA believes himself to be in danger of being detained if he returned to Nigeria. I am of course not in a position to judge to what extent this fear derives from an objective assessment of his situation and to what extent it is coloured by his psychiatric disorder. I can say that this fear is real and would be a further reason for deterioration in his psychiatric state.*

- *As I have commented above, there is a significant degree of paranoia. Finding himself in a context where he believes himself to be in immediate threat would make it increasingly difficult for him to distinguish between real threat and paranoid ideation, that is the degree of paranoia is likely to deteriorate.*

- *Measures can be taken to prevent RA from acting on his suicidal ideation/intentions of self harm. They include physical restraint and sedation. ... They are merely emergency measures to prevent him from acting upon the risk, but they do not remove the risk."*

Dr Bell made recommendations as to the need for urgent in-patient treatment. He also suggested that, whatever facilities there may be for treatment in Nigeria, the Claimant may not be able access them or to fend for himself.

23. These views were not shared by Dr Burrun, the visiting Consultant at Harmondsworth IRC. He continued to provide reports on the Claimant, the last of which was on 24th April 2013 when he recorded *"His mood has been reported as stable and there was no evidence of any psychotic symptoms"*.

Events giving rise to these proceedings

24. This is the second claim for judicial review in which the Claimant has sought to rely upon the report of Dr Bell. The original claim was issued in November 2012 by way of a challenge to Dr Sultan's assessment that the Claimant was fit to fly. The Claimant amended his grounds to challenge the lawfulness of his detention. Permission was refused on the papers on 23rd March 2013. The Claimant sought to rely upon Dr Bell's report at the hearing of the renewed application on 2nd May 2013. Permission was refused by Mr CMG Ockelton QC. He observed that it was within the discretion of the Secretary of State to prefer the evidence of the visiting Consultants who had regular contact with the Claimant. Permission to appeal that order was refused by the Court of Appeal. I am told that permission to appeal was granted at an oral hearing by Laws LJ and that claim awaits substantive hearing.

25. Parallel to those proceedings, on 11th March 2013 the Claimant's Solicitors wrote to the Secretary of State requesting the revocation of the deportation order, again relying upon Dr Bell's report. The application was made *"under Article 8 and 3 grounds"* although these were not elaborated upon.

26. The application for the revocation of the deportation order was rejected by the Defendant and the reasons set out in a letter dated 10th May 2013. The letter reviewed the history in considerable detail, including the medical evidence summarised above. It acknowledged the findings of Dr Bell. However, it noted that Dr Bell had based his assessment on an uncritical acceptance of the Claimant's self-serving reports without reference to any objective support, including the assessments by the other doctors. The letter states:

> *"We note that Dr Bell's report was written on the basis of just one occasion of actual contact with RA, an interview carried out on 23 January 2013 at Harmondsworth IRC, with medical notes from February to October 2012 … However RA has recently and consistently been found to be fit to be detained and fit to be returned to Nigeria by two different Consultant Psychiatrists, Dr J Sultan and Dr J Burrun, who unlike Dr Bell have been in contact with RA on numerous recent occasions. … The Home Office believes that taken in the round RA does not suffer from any severe and enduring mental illness and that he continues to be fit to be detained and fit to fly back to Nigeria. Mr CMG Ockelton sitting as a Deputy High Court Judge on 2 May 2013 did not find it to be even arguable, as RA had submitted that the Secretary of State was not entitled to prefer the professional opinion of Dr Sultan and Dr Burrun to that of Dr Bell and refused RA's claim for permission for judicial review in its entirety.*
>
> *However, the Home Office believes that even if RA did require medical treatment after his arrival in Nigeria, we are satisfied that treatment for mental health, although limited, is available in Nigeria."*

The letter goes on to review evidence of the availability of medical and mental health services in Nigeria. The Defendant found no arguable Article 8 claim, whether within or outside the Immigration Rules.

27. The letter concludes with the refusal of the further submissions by reference to Paragraph 353 of the Immigration Rules. The first decision letter had already certified the claim under Section 94 of the 2002 Act. This letter considered whether it amounted to a fresh claim which had a realistic prospect of success. It concluded:

> *"Your client's submissions of 16 October 2012 and 17 October 2012 and your own submissions written on your client's behalf of 11 March 2013, along with Dr Bell's report of 18 February 2013, have been carefully considered, however it is clear that they contain no new material that would create a realistic prospect of success against the decision to deport your client to Nigeria. We have therefore concluded that it is appropriate for us to proceed with the deportation of [your Client] to Nigeria".*

28. A supplemental letter was sent by the Defendant to the Claimant's Solicitors on 14th May 2013, responding to further representations. The issue of the certification of the claim was further discussed. The Defendant took the view that her decision was a consideration of further representations rather than the rejection of a request to revoke the deportation order, but in any event she stated that the decision was *"to maintain the [s.94] certificate"*.

29. Removal directions were set for 15th May 2013. The Claimant purported to appeal the decision to the First Tier Tribunal. This was rejected on the grounds that it was invalid. An injunction restraining removal was obtained on 15th May 2013 and the present claim was issued the next day.

30. The acknowledgement of service was filed on 4th June 2013. Appended to it were "Summary Grounds of Defence" which in fact amounted to 11 pages of detailed pleadings. The relevance of this detail is explained below. Permission was refused both on paper and at an oral renewal hearing, but granted by Kitchin LJ in the Court of Appeal on 28th March 2014.

31. At some point in the summer of 2013 the Claimant was released from detention pending the determination of this claim. There is of course a degree of artificiality in reviewing a decision now made 17 months ago but the Claimant maintains his wish to pursue the in-country appeal rights which he says he has been wrongly denied.

Issues

32. The Claimant's challenge is not to the substantive decision. He challenges the purported certification of his claim, which has deprived him of the opportunity of testing the medical evidence in an in-country appeal to the First Tier Tribunal. On the case presented to me at the hearing there were two issues:

    (1) Did the Defendant validly certify the claim following the request to revoke the deportation order?

    (2) Assuming the matter has been validly certified, was the decision taken without proper regard to the evidence of Dr Bell and/or was the conclusion irrational?

Preliminary Issue

33. A preliminary issue arose at the start of the hearing. On behalf of the Claimant, Mr Halim invited me to debar the Defendant from responding to the claim on the grounds of non-compliance with the Civil Procedure Rules. This was an oral application made without notice to the Defendant before the day of the hearing.

34. The point which Mr Halim took was that the Defendant had failed to serve Detailed Grounds of Defence as required by Rule 54.14(1) of the Civil Procedure Rules. The rule states as follows:

> *"A defendant and any other person served with the claim form who wishes to contest the claim or support it on additional grounds must file and serve-*
>
> *(a) detailed grounds for contesting the claim or supporting it on additional grounds; and*

(b) any written evidence

within 35 days after service of the order granting permission".

Mr Halim relied only on (a), the lack of Detailed Grounds. The obligation is plainly mandatory. There is no automatic sanction for non-compliance although there is a general power to strike-out a party's case for non-compliance with the rules under Rule 3.4(2)(c) CPR.

35. Mr Halim referred me to the decision of the Court of Appeal in Mitchell v News Group Newspapers (2013) EWCA Civ 1537. He submitted that this was an occasion when the Court should take a robust approach to enforce compliance with the Civil Procedure Rules. He also referred me to R (on the application of Mohammadi) v SSHD (2014) EWHC 2251 (Admin) in which Professor Forsyth, sitting as a Deputy High Court Judge, rejected a similar application in a case where Detailed Grounds of Defence had been served nine months late. In that case it was held:

> *"Although Mitchell was not in terms restricted to private law I recognise that there is a public interest in securing the lawful exercise of public power that transcends the interests of the litigants immediately involved. This public interest is not consistent with striking out the Detailed Grounds and thus deciding this case on an artificial basis. ... The application of the new "robust approach" of Mitchell to public law litigation will doubtless be considered in other cases; but this is not the case in which to do so."*

36. Mr Halim emphasised that this is a case of an outright failure to serve Detailed Grounds of Defence, rather than mere late service. Mr Halim did not seek an adjournment and when pressed he did not identify any material prejudice to the Claimant. His only complaint was that the Defendant's Skeleton Argument dated 17th October 2014 contained extensive submissions on the law relating to risk of suicide in the context of Article 3 claims. These had not been set out in the Summary Grounds of Defence.

37. On behalf of the Defendant, Miss Anderson apologised for the failure to comply with the Rules. There was nothing to indicate that it was due to anything other than oversight, although pressure on resources may have contributed to that. The Defendant's factual case was set out in the Summary Grounds and the relevant evidence was already before the Court. Had the matter been considered within time the overwhelming likelihood is that the Defendant would have formally confirmed that the Summary Grounds should stand as the Detailed Grounds of Defence, as is often the case.

38. I recognise the importance of ensuring that the rules of court are enforced. I agree with the observations in Mohammadi, that in judicial review claims the public interest will usually be a highly significant consideration. When applying the three-stage test outlined in Denton v TH White Ltd (2014) EWCA Civ 906, it seems to me that the public interest must be a highly significant factor when assessing 'all the circumstances of the case'.

39. The Defendant's response was set out in Summary Grounds of Defence annexed to the Acknowledgement of Service which went into considerable detail over 11 pages. The decisions under review are contained within the two Notices of Decision (30th July 2012 and 10th May 2013) each of which constitutes a lengthy and detailed

response to the substance of the Claimant's case. The submissions of law contained in the Skeleton Argument are not something which necessarily belong in a pleading. They concern the case law which arises for consideration on the Claimant's own case.

40. On the facts of the present case, I regard the non-compliance to be one of form not substance and its effect to be insignificant. The fact that comprehensive grounds of response had already been served appears to have led the Defendant to overlook the service of Detailed Grounds within the meaning of the Rules. In all the circumstances, taking into account the admitted lack of prejudice to the Claimant and the considerations of public interest, I find no merit in the suggestion that the Defendant should be debarred from responding to this claim.

Legislative Framework

41. This case concerns in-country rights of appeal. Section 82 of the 2002 Act contains general provisions concerning appeals against immigration decisions. It provides as follows:

> *"(1) Where an immigration decision is made in respect of a person he may apply to the tribunal.*
>
> *(2) In this part, in this part 'immigration decision' means:*
>
> *...*
>
> *(j) a decision to make a deportation order under Section 5(1) of [the Immigration Act 1971];*
>
> *(k) refusal to revoke a deportation order under section 5(2) of that Act;*
>
> *..."*

42. Section 92(1) then specifies which of those decisions attract the right to pursue such an appeal from within the United Kingdom. This provides as follows:

> *"(1) A person may not appeal under Section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.*
>
> *(2) This section applies to an appeal under an immigration decision of a kind specified in section 82(2)(c), (d), (e), (f), (ha) and (j).*
>
> *...*
>
> *(4) This section also applies to an appeal against an immigration decision if the appellant – (a) has made an asylum claim or a human rights claim while in the United Kingdom."*

43. The Secretary of State can curtail the right to bring an in-country appeal by certifying it as 'clearly unfounded' under Section 94. In the case of asylum and human rights claims brought by nationals of certain specified 'safe' countries there is a presumption that the claim will be so certified. Section 94 provides as follows:

> *"(1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both).*
>
> *...*
>
> *(2) A person may not bring an appeal to which this section applies in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded.*
>
> *(3) 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.*
>
> *(4)* [Lists relevant states including] ...
>
> *(bb) Nigeria (in respect of men)."*

44. In the present case, the Defendant certified in the letter dated 30th July 2012 that the original asylum and human rights claims were 'clearly unfounded' under Section 94.

45. Paragraph 353 of the Immigration Rules provides a further mechanism by which in-country rights of appeal can be barred in unmeritorious cases. It is a potential bar to repeated applications. It states:

> *"353. When a human rights or asylum claim has been refused ... 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."*

There are two parts to the test. First, the new material must be significantly different from that which was previously considered. In the present case, that is conceded because the issue of mental disorder was only raised after the asylum claim had been rejected. Second, the material (taken together with the original material) must create a realistic prospect of success. It is the prospect of success which is in dispute.

Did the Defendant apply the right test?

46. In the decision letter of 10th May 2013, the Defendant discussed the question of certification by reference to Paragraph 353 of the Immigration Rules. However, it is now common ground between the parties that the 'clearly unfounded' test was the one

which applied (see: the judgement of Irwin J in R (on the application of Mehmet) v SSHD (2011) EWHC 741).

47. In Mehmet, it was held that a refusal to revoke a deportation order was a separate immigration decision giving rise to its own right of appeal by virtue of Section 82(2)(k) of the 2002 Act. Whilst the refusal to revoke does not itself attract an in-country right of appeal (see Section 92(2)), when the application is founded upon a human rights or asylum claim the in-country right arises under Section 92(4).

48. In ZT (Kosovo) [2009] 1 WLR 348 the House of Lords considered the extent to which there is any practical difference between the related tests of 'clearly unfounded' and 'no realistic prospect of success'. It was accepted that the Section 94 test can be more onerous and in marginal cases that might make a difference.

49. In AK (Sri Lanka) v SSHD (2009) EWCA Civ 447, Laws LJ said:

> *"I do not consider, with great deference, that the reasoning in ZT (Kosovo) is of great assistance in setting the bar, as it were, for the impact of the "realistic prospect of success" test in Rule 353. For what it is worth I should have thought that there is a difference, but a very narrow one, between the two tests: so narrow that its practical significance is invisible. A case which is clearly unfounded is one with no prospect of success. A case which has no realistic prospect of success is not quite in that category; it is a case with no more than a fanciful prospect of success. "Realistic prospect of success" means only more than a fanciful such prospect."*

50. Applied to the facts of the present case, I am satisfied that it made no difference to the Defendant's conclusion. In the two letters of 10th and 14th May 2013 it was made clear that the new evidence had not altered the decision at all: *"We are satisfied that there is no known basis upon which it is appropriate to alter the decision that your client should be deported to Nigeria*".

51. I am satisfied that, having applied her mind to the relevant considerations, the Defendant made an unequivocal decision as to the substantive merits of the claim. Whichever test had been used the conclusion would inevitably have been the same. As to the form in which that decision was pronounced, I am again satisfied that the Defendant made her position clear. If there was any residual doubt as to the substance of her conclusions from the letter of 10th May 2013, that was remedied by the letter dated 14th May 2013 when the Defendant referred to her decision as being to maintain the existing certificate (a certificate issued under Section 94).

Did the Defendant give insufficient weight to Dr Bell's evidence, or otherwise reach an irrational conclusion?

52. Both parties made submissions before me about Dr Bell's qualifications and experience. I approach the case on the straightforward basis that he is a highly qualified witness with particular expertise in cases of this nature. Nothing in the decision letter indicates that the Defendant failed to have due regard to Dr Bell's expertise. Taking that as a starting point, the Defendant was nonetheless entitled to weigh the contents of the report against all the other evidence available to her, and also to analyse the limitations of the assessment which Dr Bell had been able to perform.

53. Mr Halim submitted that the threshold required to overcome the 'clearly unfounded' test is a modest one. As Lord Phillips said in ZT (Kosovo) (at paragraph 23): *"If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded."* He submitted that the decision maker has to allow for the possibility that the Tribunal might prefer the evidence of Dr Bell to that of Dr Sultan and Dr Burrun, and that until their written evidence has been tested in the Tribunal it cannot rationally be said that the claim is bound to fail.

54. Mr Halim also submitted that the presumption under Section 94(3) of the 2002 Act caters only for cases which are founded upon generalised risk within the relevant country whereas the present case concerns an issue of individualised, subjective risk. It seems to me that the proposition has some force, but that is no more than a restatement of the fact that it is a rebuttable presumption. In all cases the Defendant is required to take into account the applicant's individual circumstances. I consider it unnecessary to place any further gloss on the statutory test in this regard.

55. On behalf of the Defendant, Miss Anderson agreed that the threshold of 'not clearly unfounded' is a modest standard in itself, but what is being assessed is the prospect of the Claimant successfully overcoming a very high burden before the Tribunal. The Claimant has to show that it is possible that a Tribunal, properly directing itself as to the relevant law, would accept the Claimant's case. In order to do that, it is necessary to consider the circumstances in which a breach of Article 3 might be found on account of a risk of suicide.

56. To succeed, the Claimant would have to show that there are substantial grounds for believing in the existence of a real risk of treatment contrary to Article 3 (see Soering v UK (1989) 11 EHRR 439).

57. In Bensaid v UK (2001) (44599/98) the Claimant was an Algerian national suffering from schizophrenia who was said to be liable to relapse if deported, thereby giving rise to suicide risk. The Court accepted that, in principle, the suffering associated with such a relapse could fall within the scope of Article 3, but held that the evidence of the risk was not sufficiently compelling. It said:

> *"The Court accepts the seriousness of the applicant's medical condition Having regard, however, to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3."*

58. In J v SSHD (2005) EWCA Civ 629, Dyson LJ stated that what must be shown was a "real risk" not a fanciful risk, and set out six principles which should be considered in assessing the risk in a suicide case. It is relevant to note the third principle, namely that in a 'foreign case' such as this the threshold is said to be *"particularly high ... and it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental"* (see para 28).

59. A further consideration is whether the receiving state has effective mechanisms to reduce the risk of suicide. It is accepted in the present case that medical treatment, including mental health care, is available in Nigeria albeit not to the same standards as the UK.

60. The fifth principle is whether the fear of ill-treatment on which the suicide is said to be based is objectively well-founded. This should now be read in conjunction with Y (Sri Lanka) v SSHD (2009) EWCA Civ 362, where it was held that this might equally apply if there is a genuine, subjective fear of ill-treatment giving rise to a risk of suicide, even though that fear is no longer objectively justified. However, an important feature in that case was that the illness was not naturally-occurring but the consequence of past ill-treatment by the Sri Lankan security forces. The Court otherwise reiterated the general principle:

> *"Save in exceptionally compelling cases, the humanitarian consequences of returning a person to a country where his or her health is likely to deteriorate terminally do not place the returning state in breach of Article 3."*

61. Balogun v UK (2012) (60286/09) concerned a challenge to the deportation of a Nigerian national on the grounds that there was a real risk of suicide were he to be returned. There was an accepted diagnosis of moderate depression which had necessitated in-patient psychiatric treatment following a suicide attempt. The Court found that the claim was manifestly ill-founded. It said (para 31):

> *"The Court reiterates that, according to its established case-law ... aliens who are subject to expulsion cannot in principle claim any right to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by that State, unless such exceptional circumstances pertain as to render the implementation of a decision to remove an alien incompatible with Article 3 of the Convention. Finally, the Court recalls that in order to violate Article 3, treatment must attain a minimum level of severity. This applies regardless of whether the risk of harm emanates from deliberate acts of State authorities or third parties; from a naturally occurring illness ...; or even from the applicant himself…. The Court recalls that in previous cases involving a risk of suicide, it has found not only that the high threshold for Article 3 applies to the same extent as it does in other types of cases, but that appropriate and adequate steps taken by the relevant authorities to mitigate a risk of suicide will weigh against a conclusion that the high threshold of Article 3 has been reached."*

The Court concluded (para 34):

> *"In the light of the precautions to be taken by the Government and the existence of adequate psychiatric care in Nigeria, should the applicant require it, the Court is unable to find that the applicant's deportation would result in a real and imminent risk of treatment of such a severity as to reach this threshold. It therefore follows that the applicant's complaint under Article 3 is manifestly ill-founded and thus inadmissible.. ."*

62. As to the measures discussed above, Miss Anderson confirmed that this would be the approach taken to the present case. The risk to the Claimant within the UK and during

transit would be carefully assessed and managed, if necessary to the extent that a doctor might accompany the Claimant on the flight back to Nigeria.

Conclusion

63. My task is to consider whether the Defendant was entitled to conclude that the Claimant's case was bound to fail. It is clear that the Defendant gave very careful consideration to Dr Bell's report. There is nothing to suggest that the Defendant failed to have regard to his undoubted expertise. The decision letter contains a careful analysis of the contents of the report. However, in my judgment the Defendant was entitled to take into account all of the other material which was available to her. On any view, Dr Sultan and Dr Burrun had far more information available to them than Dr Bell and had been better placed to assess the Claimant.

64. The task which the Defendant was required to perform in this case was not the determination of hard facts. It was an assessment of risk, requiring a holistic view of all of the information available. The Defendant could not ignore Dr Bell's opinion, but she was entitled to take the limitations of his review into account in deciding what weight to attach to it when viewing the case in the round.

65. In my judgment, the Defendant was entirely justified in reaching the conclusion that there was no prospect of the Claimant successfully demonstrating to a Tribunal that the '*high threshold of Article 3'* had been met in the present case. Even if Dr Bell's diagnosis is accepted, it is a naturally occurring illness not a consequence of ill-treatment. The exceptional features found in Y (Sri Lanka) are not present. I am satisfied that the risk, if any, arising from the Claimant's return to Nigeria is capable of being managed by the measures discussed and treatment is available within Nigeria.

66. The claim for judicial review is dismissed and the injunction against the Claimant's removal therefore ceases to have effect.