OUTER HOUSE, COURT OF SESSION

[2008] CSOH 22

P2086/07

OPINION OF LORD HODGE

in the petition of

MR F.N.G. (AP)

Petitioner;

for

Judicial Review of decisions of the Secretary of State for the Home Department to certify her decision to refuse the Petitioner's application on human rights grounds to remain in the United Kingdom, in terms of Section 94(2) of the Nationality, Immigration and Asylum Act 2002, and to decide to remove the Petitioner from the United Kingdom

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Petitioner: Caskie, Advocate; Drummond Miller, LLP
Respondent: A F Stewart, Advocate; C Mullin

6 February 2008

Background

[1] The petitioner is a citizen of Liberia. He is aged twenty-three. He is deaf. He entered the United Kingdom illegally on 1 January 2007, having travelled through several African states, Spain and France. On 27 February 2007 he sought asylum under the Geneva Convention relating to the Status of Refugees as amended by the 1967 Protocol ("the Refugee Convention"). He also submitted that an order removing

him from the United Kingdom would if implemented be a breach of articles 3, 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR").

[2] By letter dated 24 July 2007 ("the decision letter") an official on behalf of the Secretary of State for the Home Department refused his application for asylum and concluded that his removal would not be contrary to the United Kingdom's obligations under the ECHR. The official also certified under section 94(2) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") that both the asylum claim and the human rights claim were clearly unfounded. This certification has the effect that the petitioner cannot appeal the Secretary of State's decision through the statutory appeal framework while remaining in the United Kingdom.

[3] In this application the petitioner seeks to challenge the certification in relation to his ECHR claim and thereby open his right of appeal to the Asylum and Immigration Tribunal ("AIT"). He accepts the certification that his claim under the Refugee Convention is clearly unfounded. His submission is that the certification that his ECHR case was clearly unfounded was unreasonable in the *Wednesbury* sense.

The Petitioner's submissions

[4] Mr Caskie, on behalf of the petitioner, supported his submission that the Secretary of State's decision was unreasonable by four arguments. First, he submitted that the statutory test for certification was a high one and required that before certifying the claim as clearly unfounded the Secretary of State should put herself into the mind of an immigration judge who might take an unusually generous view of the facts provided that that view was not perverse. Unless the Secretary of State could be satisfied that the unusually generous immigration judge would necessarily find against

the claimant, the claim could not be certified as clearly unfounded. Had the Secretary of State considered the matter in this way, she would not have certified the claim as clearly unfounded.

[5] Secondly he submitted that in the context of returning a person to another country a claim under article 8 of ECHR should have regard to the physical and moral integrity of the claimant and that circumstances which did not amount to a breach of article 3 could nonetheless be a breach of article 8: *R (Bernard)* v *London Borough of Enfield* [2002] EWHC 2282 (Admin).

[6] Thirdly Mr Caskie submitted that the Secretary of State had erred in failing to treat a country guidance case on Liberia by the Immigration Appeal Tribunal ("IAT"), namely *LB (Article 3- Monrovia - Security) Liberia CG* [2004] UKIAT 00299, as the starting point in her consideration of the state of affairs in Liberia. He submitted that the case revealed that conditions in Liberia, and in particular in Monrovia, in the aftermath of the civil war were such that it might amount to a breach of article 3 or article 8 of ECHR if a deaf person were to be returned there. If proper regard were had to the country guidance case, it was possible that a generous Immigration Judge might conclude that there was a breach of one or other of those articles.

[7] Finally he submitted that the decision to certify was vitiated by the absence of a proper basis in fact for the Secretary of State's findings of fact about the activities in Liberia of certain non-governmental organisations ("NGOs") whose activities included the provision of assistance to deaf people.

Discussion

The test

[8] Section 94(2) of the 2002 Act provides:

> "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."

The statutory test for certification is that the Secretary of State must be satisfied that the claim is clearly unfounded. That is a high threshold.

[9] In several cases, judges have commented on the statutory words and have paraphrased them. In *R (L)* v *Secretary of State for the Home Department* [2003] 1 WLR 1230, Lord Phillips of Worth Matravers stated (para 57) that if the claim cannot on any legitimate view succeed it is clearly unfounded. In *R (Razgar)* v *Secretary of State for the Home Department* [2004] 2 AC 368 Lord Carswell stated that the Secretary of State must be reasonably and conscientiously satisfied that the application must fail (para 69). In *R (Yogathas and Thangarasa)* v *Secretary of State for the Home Department* [2003] 1 AC 920, (which concerned the test of "manifestly unfounded" which is substantially the same test) Lord Bingham of Cornhill said that the Secretary of State is entitled to certify "if he is reasonably and conscientiously satisfied that the allegation must clearly fail" (para 14), Lord Hope of Craighead said that the threshold for certification is that the claim "is so clearly without substance that the appeal would be bound to fail" (para 34), Lord Hutton said that an allegation was manifestly unfounded "if it is plain that there is nothing of substance in the allegation" (para 72) and Lord Scott of Foscote posed the question whether the claim was "arguable" (para 117).

[10] The focus of the statutory test is primarily on the quality of the claim rather than the prospects of success on an appeal. That is the also the focus of the judicial paraphrases. The claim must be "clearly" unfounded for the Secretary of State to certify. Thus if the Secretary of State came to the view that a claim fell to be rejected

only on a fine balance of considerations, she would not be in a position to say that it was clearly unfounded.

[11] In deciding whether a claim is "clearly unfounded", the Secretary of State has to allow for possible differences of opinion as she must take account of all legitimate views of the law and the facts: *R (L)* Lord Phillips (para 58). The House of Lords in *Razgar* held, in particular in the judgment of Lord Bingham (paras 16 to 20), that the judicial review court in addressing a challenge to certification should ask itself the questions which the immigration judge would have to answer. Thus in answering, for example, the question whether the removal of an applicant would have consequences of such gravity as potentially to engage the operation of article 8, the reviewing court would ask whether the answer, which an immigration judge had to give, would or should be negative. In answering the relevant questions in a way in which an immigration judge would or might properly answer them, the court allows for possible differences in opinion so long as the opinion is not perverse. Lord Carswell in that case (at para 77) said that in the light of the information before the judicial review court it must ask whether the case is so clearly in favour of upholding the decision to remove the applicant that no reasonable immigration judge could hold otherwise. So indeed must the Secretary of State when considering certification.

[12] Mr Stewart on behalf of the respondent submitted that the issue for the court in a judicial review is whether, on the material before her, the Secretary of State was entitled to be satisfied that the claim was bound to fail: *MK* v *Secretary of State for the Home Department* [2007] CSOH 128, Lord MacFadyen at paragraph 22. I accept that submission subject to a qualification which is not relevant to the present case which I discuss in the next paragraph. Mr Stewart's formulation is consistent with the traditional role of the court in judicial review. But so stating the issue does not

preclude the court in the context of an ECHR challenge from subjecting the impugned decision to careful scrutiny in the course of that review. The court as a public authority has a legal duty to act to avert or rectify a violation of an ECHR right: *Huang* v *Secretary of State for the Home Department* [2007] 2 AC 167 (para 8).

[13] The qualification to which I referred arises out of the judgment of Lord Bingham in *Razgar*, which appears not to have been cited to Lord MacFadyen in *MK*. Lord Bingham stated (in para 18) that the judicial review court should consider all of the materials which would be before an adjudicator (now an immigration judge). In para 20 he stated: "The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal." Lord Steyn concurred and Lord Walker of Gestingthorpe concurred with Lord Bingham's analysis of the scope for judicial review of a certificate. Lord Carswell (at para 77) appears to have been of the same view. This extends the normal role of a judicial review court. It appears that the reviewing court in the context of a case involving certification which raises issues of human rights must, in an appropriate case, have regard to relevant information which may not have been before the decision-maker but which would be placed before the immigration judge if an in-country appeal were to proceed. In this context the reviewing court may have to consider the legality of the decision in the light of material which was not before the decision-maker. That issue however does not arise in this case as there was no suggestion that the materials to which I was referred contained new matter which was not before the Secretary of State.

[14] It follows that the court, in deciding whether the Secretary of State was entitled to be satisfied that a claim was clearly unfounded, must (i) ask the questions which an immigration judge would ask about the claim and (ii) ask itself whether on any legitimate view of the law and the facts any of those questions might be answered in the claimant's favour.

Article 3

[15] Mr Caskie submitted that the petitioner had an arguable case under article 3 of ECHR which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[16] However he concentrated his submission on the article 8 case, recognising the high threshold which article 3 set. Having regard to the country guidance case, referred to in paragraphs 6 and 26, and the objective facts about Liberia recorded in the decision letter and summarised in paragraphs 22 and 27 below, I consider that the Secretary of State was entitled to certify that the article 3 case was clearly unfounded.

Article 8

[17] The petitioner relies principally on article 8 of ECHR which provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for

the protection of health or morals or for the protection of the rights and freedoms of others."

[18] In this case the court is not concerned with family life as the petitioner's family live in Liberia. The claim is based on interference with his private life. The jurisprudence of the Strasbourg court has developed the concept of interference with private life.

[19] The reference in article 8 to respect for private life has been interpreted as a protection against sufficiently adverse effects on a person's physical and moral integrity: *Costello-Roberts* v *United Kingdom* (1993) 19 EHRR 112 (paras 34-36). It has been held that article 8 protects a right to identity and personal development and a right to establish and develop relationships with other human beings in the outside world: *Botta* v *Italy* (1998) 26 EHRR 241 (para 32), *Bensaid* v *United Kingdom* (2001) 33 EHRR 205 (paras 46-47) and *Pretty* v *United Kingdom* (2002) 35 EHRR 1 (para 61). The boundaries of these concepts are not clear. The courts have held that article 8 might be engaged in cases where a claimant suffered from serious mental illness (*Razgar*, *Bensaid*) and were engaged where a boy who was deaf and had a specific language impairment was at risk of being unable to communicate functionally in any spoken language if he was removed from the United Kingdom (*R (Jegatheeswaran)* v *Secretary of State for the Home Department* [2005] EWHC 1131 (Admin)).

[20] The House of Lords in *Razgar* held that the rights protected by article 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom if the facts on which the applicant relies are sufficiently strong (Lord Bingham at para 8). That the applicant's case must be strong is clear as ECHR is "directed to the protection of fundamental rights, not the conferment of individual

advantages or benefits" (ibid. para 5). In *Huang* the House of Lords, while rejecting a legal test of exceptionality, confirmed Lord Bingham's expectation (which he expressed in *Razgar* at para 20) that, having regard to the need to strike a balance between the individual's rights and the interests of the community, the number of claimants who were not covered by the immigration rules and supplementary directions but who were nevertheless entitled to succeed under article 8 would be a very small minority.

[21] Against this background was the Secretary of State entitled in this case to certify that the petitioner's claim was "clearly unfounded"? In my opinion she was. This case does not concern the breaking up of family or other connections which the petitioner has made in the United Kingdom. It relates to the petitioner's circumstances were he to be returned to Liberia. In discussion Mr Caskie accepted that the only fact relating to the petitioner which he had to support an article 8 claim was his deafness. The petitioner's surviving family (his mother, seven brothers and one sister) lived in Monrovia and he communicated with them through the Red Cross. He also had aunts and uncles in Liberia. He was able to communicate in the American sign language which was used in Liberia. He was also able to write in English and use the computer. Notwithstanding his deafness he managed to support himself and travel from Liberia to the United Kingdom over a period of thirty months via the Ivory Coast, Burkina Faso, Algeria, Morocco, Spain and France.

[22] While the objective evidence about conditions in Liberia disclose it to be a very poor country which is only slowly recovering from the effects of its civil war and that there can be difficulty in obtaining appropriate medication in Monrovia, the petitioner is healthy and does not need medication. Mr Caskie acknowledged that security conditions were improving in Liberia and that, as the decision letter stated,

the United Nations since 2006 had been promoting the repatriation of refugees. At most for the petitioner it could be asserted that the government provided no significant support to or facilities for deaf people and that NGOs provided only very limited assistance to the deaf.

[23] In paragraph 17 in *Razgar* Lord Bingham stated that the reviewing court must ask the questions which the immigration judge would have to answer. Those were: (i) will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private life? (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (iii) If so, is such interference in accordance with the law? (iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? (v) If so, is such interference proportionate to the legitimate public end sought to be achieved? While it might be arguable that the answer to question (i) in this case could be positive, I am satisfied that the answer to question (ii) would or should be negative. There is no doubt that the facilities available in the United Kingdom to assist deaf people are generally much better and more accessible than those in Liberia, but the issue is not one of comparative advantage. There is nothing in the material before me which suggests that the petitioner would not be able to establish and develop relationships with other human beings in Liberia or that he would otherwise suffer a denial of his physical and psychological integrity. I see no reasonable basis on which one could hold otherwise. I am satisfied that the Secretary of State was entitled to hold that the claim was clearly unfounded. Accordingly this challenge fails.

The other challenges

[24] The other challenges relate to the alleged failure to have regard to a relevant country guidance case and the allegation that there was no factual basis for the findings in relation to the work of the NGOs. I deal with each in turn.

Country guidance cases

[25] In *R (Iran)* v *Secretary of State for the Home Department* [2005] EWCA Civ 982 the Court of Appeal discussed the practice of the AIT and its statutory predecessor of giving "country guidance" in order to avoid multiple examinations of the political and general circumstances in a country at any particular time and to achieve consistent decision-making. The Court held that, where an appeal related to the country guidance issue in question and depended upon the same or similar evidence, it would be an error of law to fail to apply an extant country guidance decision unless there was a good reason, explicitly stated, for not doing so. The error of law would be that the tribunal would have failed to take a relevant consideration into account. The country guidance cases did not have the status of factual precedents but provided at least a starting point for consideration of the background circumstances in the country to which they related. Thus an unexplained inconsistency with a country guidance case could amount to an error of law.

[26] Mr Caskie submitted that there had been a failure to consider the country guidance case of *LB (Article 3 - Monrovia - Security) Liberia CG* [2004] UKIAT 00299. That case considered the humanitarian and security conditions in Monrovia shortly after the arrival of the United Nations peace-keeping force in the autumn of 2003. It narrated a reduction in violence after the deployment of the peace-keeping troops and concluded that the situation in Monrovia was generally safe. It recognised

that humanitarian conditions in Monrovia were very bad and there was a lack of medical supplies, food and adequate sanitation. NGOs were working in Monrovia but had experienced difficulty in distributing supplies after the port was looted. The IAT recognised that the applicant would suffer difficulties if returned to Monrovia but held that those difficulties would not be of such severity as to reach the threshold for breach of articles 2 or 3 of ECHR.

[27] In the decision letter in this case the Secretary of State summarised the political developments and security situation in Liberia since the end of the civil war in 2003, including the successful presidential elections in 2005. The letter narrated the process of the deployment of the UN troops and the disarming of combatants, the training of a new police force and the work of a truth and reconciliation commission. It recognised that problems remained but recorded that the security situation in Monrovia had improved and that the UNHCR had since February 2006 been promoting voluntary repatriation of Liberian refugees.

[28] Mr Stewart explained that it was not the practice of the Secretary of State to refer expressly to country guidance cases in decision letters and submitted that there was nothing in the decision letter in this case which was inconsistent with the guidance given in *LB*. Absent such inconsistency, there was no error of law.

[29] I am satisfied that there is no inconsistency between the country guidance in *LB* and the findings of fact in the decision letter in relation to the political and social circumstances in Liberia. Like *LB* the decision letter concluded that the humanitarian and security conditions in Monrovia were not such as to give rise to a breach of article 3 of ECHR. In relation to the petitioner's article 8 claim the Secretary of State concluded that he had not shown that there was a real risk of suffering a flagrant denial of his article 8 rights, that he could seek the protection of the Liberian

authorities if he required it and that internal flight was a viable and reasonable option as members of his family lived in Elwa and other counties in Liberia were safe to return to. Those findings are not inconsistent with the guidance in *LB.* Accordingly this ground of challenge fails.

The no factual basis challenge

[30] I turn, finally, to the challenge that there was no factual basis for the findings in the decision letter in relation to the activities of NGOs. The statements in paragraph 37 of the decision letter appear to have been made in the light of research on the internet as the paragraph contained references to website addresses. It stated that the Liberia National Association for the Deaf ("LNAD") was still actively working in the community supporting and assisting deaf people. It recorded that there was evidence that the Deaf Institute of Theology had been requested to help deaf people in Liberia. It also stated that there was a missionary helping deaf people, both young and old, all situated in Monrovia.

[31] The petitioner asserted that all that the website revealed in relation to the LNAD was that it had existed and had an e-mail address and a PO Box address. But on the petitioner's own account of his history to the immigration authorities he and many other deaf people had gone to the LNAD on leaving school in the late 1990s. In addition the respondent produced evidence that the LNAD had remained active in recent years and that it maintained a current registration as a member of the World Federation of the Deaf, an international NGO of national associations of deaf people. The Deaf Institute of Theology is an American institution which offers theological training in the United States and in certain other countries. It does not appear to operate in Liberia but appears to have received a request for assistance from someone

in Liberia. There was also evidence of activities by the Organisation for the Social Integration of Liberian Deaf (OSILD). It and the LNAD have acted as pressure groups along with the United Methodist Church encouraging the government to do more for deaf people. The factual basis of the reference to the work of the missionary was a short video of his work with deaf children in a school in 2006 which was available on the internet. It appeared that funding for his work was limited and it was not clear whether he was still able to serve deaf people at the date of the decision letter.

[32] While there may be questions as to the weight which can be attached to the possible availability of assistance from the institute based in the United States and from the missionary who may no longer be working in Monrovia, there was evidence available to the Secretary of State to allow her to challenge the petitioner's assertion that there was no support for deaf people in Liberia (paragraph 36 of the decision letter) particularly in relation to the continued work of the LNAD. I therefore reject this challenge.

Conclusion

[33] I am satisfied that the Secretary of State's decision to certify under section 94(2) of the 2002 Act was lawful. I therefore sustain the respondent's plea-in-law and dismiss the petition.