OUTER HOUSE, COURT OF SESSION

[2008] CSOH 126

P2627/07

OPINION OF LORD BRACADALE

in the Petition

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Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department

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Petitioner: Winters, Solicitor Advocate; Wilson Terris
Respondent: Ms A Carmichael, Advocate; C Mullin

5 September 2008

[1] The petitioner is a citizen of Nigeria who arrived in the United Kingdom in 2000. Thereafter he lived and worked illegally in the UK. When he was arrested on suspicion of committing an offence in May 2007 he claimed asylum. He claimed that he left Nigeria in 2000 as his father, who was the leader of the O'dua Peoples Congress (OPC), was assassinated by a group of men who wanted to overthrow him

as leader. When his father was killed, the petitioner, who was living at his father's home in Sagamu at the time, escaped by the back door of the house. The petitioner averred that these men would have killed him had they been given the opportunity. The petitioner believes that the men who killed his father will still be looking for him. The petitioner claimed to have a well founded fear of persecution in Nigeria. In addition, the petitioner avers that his father had four wives who took the petitioner's father's property after his death. Before me no point was taken in relation to the claim relating to the wives of the petitioner's father.

[2] By letter dated 15 October 2007 the Secretary of State refused the petitioner's claim for asylum and his human rights claim. The Secretary of State considered the claim on the basis that it was true. Paragraph 15 of the refusal letter is in the following terms:-

> "I therefore consider that your expressed fears are unfounded, since you have revealed a fear of local criminals who do not have a reach in all parts of Nigeria. The nature of your problem is that you have faced a threat from the OPC some 7 years ago and you are a person with no political or ideological profile. You do not have access your father's land and property. There is no

> reason for the OPC to have any interest in you any further. In addition you are a fit male, of working age and in good health. I consider that it would be entirely reasonable to expect you to relocate to safe part of Nigeria which is a vast country, before turning to the international community for surrogate protection; in doing so I further consider that it would not be unduly harsh for you. It is considered therefore that on your return the authorities in Nigeria are able and willing to protect you outside of Lagos and the South West of Nigeria".

The Secretary of State therefore concluded that there was no real threat to the petitioner; that, in any event, he could relocate to another part of Nigeria; and that it would not be unduly harsh for him to do so.

[3] The Secretary of State relied on the Country Guideline case *CO (Sufficiency of Protection - Internal Relocation) Nigeria CG* [2002] UKIAT 04404 ("the Country Guideline case"). The Tribunal in that case considered that even if the appellant's claim were true he could properly have placed reliance on State protection. The Tribunal saw no reason why the appellant in that case could not relocate somewhere else in Nigeria:

"... we bear in mind the fact that Nigeria is a vast country, and the evidence indicates that the OPC are only active in the south west of the country. We can see no reason why a young man in his early 30s would not have been able to relocate elsewhere in Nigeria. Arguments are set out in the appellant's skeleton argument before the Adjudicator concerning the problems attached to internal flight in Nigeria. The fact that tribal warfare exists in Nigeria and that internally displaced people experience problems, does not indicate that it would be unduly harsh for this appellant to locate elsewhere in Nigeria. Therefore even if we are wrong in our support of the Adjudicator's credibility finding, we consider that the appellant would be able to locate successfully elsewhere in Nigeria without that being unduly harsh".

[4] The Secretary of State also relied on the latest Country of Origin Information Report which stated at para.27:03:

"Regarding the possibility of internal flight alternative for persons with problems with these groups Usman was of the opinion that it depends on the nature of the problem and the profile of the person concerned. A person who had a serious problem with the OPC cannot return to Lagos or the South West

in safety because of the inability of the authorities to provide adequate protection against the OPC. However, a person in those circumstances could, depending on the nature of the problem with the OPC, in most case relocate to, and be safe in, for example, Abuja".

[5] The Secretary of State certified both claims under section 94(3) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Section 94 of the 2002 Act, so far as material for present purposes, provides:-

"(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 sub-section (4) he shall certify the claim under sub-section (2) unless satisfied that it is not clearly unfounded".

Nigeria (in respect of men) is included in the list of States in sub-section (4).

[6] Mr Winter, who appeared on behalf of the petitioner, sought reduction of the decision to certify the claim in terms of section 94(3) as being unreasonable and irrational. Reduction of the decision to certify the claim would leave open to the petitioner the possibility of exercising his right of appeal to the tribunal.

[7] I was referred to the case of *R (On the application of L and another)* v *Secretary of State for the Home Department* 2003 1 All.E.R.1062 which involved similar, transitional, provisions, in section 115 of the 2002 Act. Section 115(6) is in similar terms to section 94(3). Dealing with the issue of "clearly unfounded" in the context of these sections, Lord Phillips M.R. (as he then was) giving the judgment of the Court said, at paragraphs 56 to 58:

> "56. Section 115(1) empowers - but does not require - the Home Secretary to certify any claim 'which is clearly unfounded'. The test is an objective one: it depends not on the Home Secretary's view but upon criteria which a Court readily reapply once it has the materials which the Home Secretary had. A claim is either clearly unfounded or it is not.
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> 57. How, if at all, does the test in section 115(6) differ in practice from this? It requires the Home Secretary to certify all claims from the listed states

'unless satisfied that the claim is not clearly unfounded'. It is useful to start with the ordinary process, such as section 115(1) calls for. Here the decision maker will -

(i) consider the factual substance and detail of the claim;

(ii) consider how it stands with the known background data;

(iii) consider whether in the round it is capable of belief;

(iv) if not, consider whether some part of it is capable of belief;

(v) consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention.

If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not.

58. ....if on at least one legitimate view of the facts or the law the claim may succeed, the claim will not be clearly unfounded".

[8] I was also referred to the opinion of Lord Macfadyen in *Pet: M.K.* v *Secretary of State for the Home Department,* unreported, [2007] CSOH128. In paragraphs 19-22 Lord Macfadyen addressed the proper approach to whether a claim is "clearly unfounded":

"[22] I am of the opinion that it is correct that, as was said in *Atkinson* (at paragraph 7), in the context of an application for judicial review, the Court's task is not to make a fresh decision of its own, but to consider whether the decision made by the Secretary of State was one that was properly open to him on the material before him when he made it. The question is whether on that material, properly and carefully considered, the Secretary of State was entitled to conclude that the claims were such as would be bound to fail (*R* (*Yogathas*), paras.14 and 34)..."

I was referred to a number of other cases but it did not seem to me that they added anything that assisted me in an understanding of the proper approach beyond that set out in these cases and the cases referred to in them.

[9] As was pointed out by the Court of Appeal in *R* v *Secretary of State for the Home Department ex parte Robinson* [1997] Imm.A.R.568 at paragraph 17 of the Opinion of the Court, "if the Home State can afford what has variously been described 'a safe haven', 'relocation', 'internal protection', or 'an internal flight alternative' where the claimant would not have a well founded fear of persecution for a Convention reason, then international protection is not necessary". The Secretary of State

concluded that it would be safe for the petitioner to relocate to another part of Nigeria. Mr Winter submitted that in so doing the Secretary of State had failed to take account of material factors in the Country of Origin Information Report because she had failed to refer to passages in chapter 28 headed "The OUR Peoples Congress". He referred in particular to paragraph 28.02 which stated that the OPC's members came from diverse backgrounds and from different parts of the country, according to the HRW Report on the OPC, which stated that the OPC claimed to have more than 5,000,000 members, spread over the whole of Nigeria. However, that sentence must be taken in context. The following sentence states that the greatest concentration of members are in the South Western states, commonly referred to as Yorubaland. In paragraph 28.1 there is a further quotation from the HRW Report in which it is stated that the OPC is an organisation active in the South West of Nigeria which campaigns to protect the interests of the Yoruba ethnic group and seeks autonomy for the Yoruba people.

[10] Miss Carmichael, on behalf of the Secretary of State, submitted that the basis for the decisions in paragraph 14 and 15 of the refusal letter was that the information in the Country of Origin Information Report indicated that it was safe for most people with a problem with the OPC to relocate outwith the South West of Nigeria. Surrogate

protection in another state would not be required if there was a part of the country of origin which was safe.

[11] In my opinion Mr Winter's criticism of the approach of the Secretary of State is misconceived. It seems to me that on a reading as a whole of paragraphs 27 and 28 of the Country of Origin Information Report it is clear that the real threat from the OPC exists in the south western States. The report makes it clear that there would be other parts of the country which would be safe for a person who had serious difficulties with the OPC.

[12] The question then arose as to whether it would be unduly harsh for the petitioner to relocate to a safe part of Nigeria. In paragraph 15 of her letter of refusal, the Secretary of State considered that it would not be unduly harsh for the petitioner to relocate. Mr Winter submitted that she was not entitled to come to that conclusion. It would, he submitted, not be safe, reasonable or practicable for the petitioner to exercise internal relocation. He relied on the general points made earlier, namely, that the Country of Origin Information Report showed that the OPC were spread throughout Nigeria (paragraph 28.02); and that the OPC were highly organised and had efficient systems of communication (paragraph 28.04). In addition, he submitted

that the petitioner, if returned, would be an internally displaced person and it would not be reasonable or practical for him to relocate standing the information in Chapter 36 of the Country of Origin Information Report; and he would be a person without any support network (Chapter 40).

[13] Miss Carmichael submitted that the Country Guideline case had taken into account the kind of considerations identified in Chapter 36 of the Country of Original Information Report. Further, she submitted that the absence of a support network for the petitioner on relocation was not a significant consideration in the case of a man of 39 years of age who had been living out of the country for a number of years.

[14] In *AH (Sudan)* v *The Home Secretary* 2007 3 WLR 832 the House of Lords considered the question of whether a person with a well founded fear of persecution in one part of their home State could reasonably and without undue harshness be returned to and relocated in another part of that State. Lord Bingham at paragraph 5 said:

> "In paragraph 21 of my Opinion in *Januzi* I summarised the correct approach to the problem of internal relocation in terms with which all my noble and learned friends agreed:

> 'the decision maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so. There is....a spectrum of cases. The decision maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls....All must depend on a fair assessment of the relevant facts'.

Although specifically directed to a secondary issue in the case, these observations are plainly of general application. It is not easy to see how the rule could be more simply or clearly expressed. It is, or should be, evident that the inquiry must be directed to the situation of the particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant. There is no warrant for excluding, or giving priority to, consideration of the applicant's way of life in the place of persecution. There is no warrant for excluding or giving priority to, consideration of conditions generally prevailing in the home country. I do not underestimate the difficulty of making decisions in some cases. But the difficulty lies in applying the test, not in

expressing it. The humanitarian object of the Refugee Convention is to secure a reasonable measure of protection for those with a well founded fear of persecution in their home country or some part of it; it is not to procure a general levelling up of living standards around the world, desirable although of course that is".

[15] In *R* v *Secretary of State for the Home Department ex parte Robinson* (*supra*) the Master of the Rolls delivering the judgment of the Court said this:

"18. In determining whether it would not be reasonable to expect the claimant to relocate internally, a decision maker will have to consider all the circumstances of the case, against the backcloth that the issue is whether the claimant is entitled to the status of refugee. Various tests have been suggested. For example, (a) if as a practical matter (whether for financial, logistical or other good reason), the 'safe' part of the country is not reasonably accessible; (b) if the claimant is required to encounter great physical danger in travelling there or staying there; (c) if he or she is required to undergo undue hardship in travelling there or staying there; (d) if the quality of the internal protection fails to meet basic norms of civil, political and socio-economic

human rights. So far as the last of these considerations is concerned, the preamble to the Convention shows that the contracting parties were concerned to uphold the principle that human beings should enjoy fundamental rights and freedoms with discrimination."

[16] Chapter 36 of the Country of Origin Report makes reference to a report prepared by the Internal Displacement Monitoring Centre published in September 2006 which set out the problems and difficulties experienced by displaced persons in Nigeria. The report noted that 14,000 people had been killed and hundreds of thousands displaced since military rule ended in 1999. It is suggested that the difficulties relate to ethnic and religious conflicts and issues of poverty and unequal access to power and resources. Mention is made of violence arising from entrenched divisions throughout the country between people considered to be indigenous to an area and those regarded as settlers.

[17] While the Country Guideline case pre-dated the report to which reference is made in chapter 36 of the Country of Origin Information Report, the difficulties had been developing since 1999. It is clear that the Tribunal in the Country Guideline case

did take into account the kind of considerations identified in Chapter 36 of the Country of Origin Information Report in concluding:

> "The fact that tribal warfare exists in Nigeria and that internally displaced persons experience problems does not indicate that it would be unduly harsh for this appellant to locate elsewhere in Nigeria".

Furthermore, chapter 27 of the Country of Origin Information Report specifically states that difficulties with the OPC can be avoided by relocation.

[18] Nor did it seem to me that the absence of a support network for the petitioner on relocation was a significant consideration in the case of a man of 39 years of age who had been living out of the country for a number of years. In these circumstances in my opinion the criticisms of the conclusion of the Secretary of State that it would not be unduly harsh for the petitioner to relocate, when tested in the light of the considerations identified in the cases to which I have referred above, are not well founded.

[19] It seems to me that the Secretary of State has properly addressed the information which was before her. The Secretary of State considered the claim on the basis that it was true. She had regard to the age and gender of the petitioner; his

personal circumstances; the nature of his concerns about the OPC; the absence of any political activity on the part of the petitioner himself; the absence of any reason for the OPC to have any interest in him; and the period of time during which he had been living away from Nigeria. In addition, she took account of what was said in the Country of Origin Information Report and the Country Guideline case. In addressing the question as to whether on the material before her, properly and carefully considered, the Secretary of State was entitled to conclude that the claims were such as would be bound to fail I conclude that she was so entitled and, accordingly, she was bound to certify the claims under section 94(3) of the 2002 Act.

[20] In these circumstances I shall refuse the petition.