

Neutral Citation Number: [2009] EWHC 3100 (Admin)
IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Sitting at:
Cardiff Civil Justice Centre
2 Park Street
Cardiff
CF10 1ET

Date: Tuesday 8th September 2009

Before:

HIS HONOUR JUDGE BIDDER QC

Between:

The Queen on the Application of DARBOE

Claimant

- and -

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Defendant

(DAR Transcript of
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Official Shorthand Writers to the Court)

Mr Mustkim appeared on behalf of the **Claimant**.

Miss Cumberland appeared on behalf of the **Defendant**.

Judgment

HIS HONOUR JUDGE BIDDER QC:

1. This is a renewed oral application for permission to apply for judicial review of the Secretary of State for the Home Department's decision of 25 February 2008 refusing the claimant's claims for asylum and therefore protection of his human rights, and specifically challenging the decision to include Gambia, of which country the claimant is a citizen, in the list of safe countries or colloquially the 'White List' promulgated pursuant to Section 94(4) of the Nationality Immigration and Asylum Act 2002. It also challenges the decision to certify both of the claimant's Asylum Act human rights claims as clearly unfounded under Section 94(2) of that Act.
2. Permission was refused on the papers by HHJ Vosper QC sitting as a deputy High Court judge on 24 July 2009.
3. The claimant is 27 years old. It is contended on his behalf that in June 2000 he became a member of the opposition United Democratic Party ("the UDP") in Gambia (that party is a successor to the People's Progress Party which achieved independence for Gambia) and that in December 2001 he was arrested for anti-government political activities, in March 2002 he travelled to Senegal and in December 2003 he returned to the Gambia. He also contends that on 29 September 2006 a court warrant was issued against him in Gambia to appear in court arising out of his political activities on 24 October 2006. The defendant does not in fact dispute his earlier arrest, his membership of the UDP or the warrant issued against him. As a result of the warrant being issued, the claimant left the Gambia and in October 2006 arrived in the UK.

He claimed asylum on 29 January 2008. He was granted temporary admission subject to conditions. On 25 February 2008 the Secretary of State refused the claimant's asylum claim. There is an issue as to whether that was served upon him. I do not think that is relevant to the matters that I have to consider today. Removal directions were issued on 18 June 2009. He had been arrested, I think, on 24 June 2009.

4. Following the refusal by HHJ Vosper to grant permission the claimant has in fact been returned to the Gambia. Of course, if permission is granted and judicial review is granted in due course, a mandatory order can be made against the Secretary of State to return the claimant. In addition it seems to me that this matter in any event is of significant importance to a substantial number of people, namely Gambian asylum seekers, so that even if it were not to be held to be a genuine benefit to the claimant to succeed in this application, it may be that the court would ultimately consider that its discretion ought to be exercised to make a ruling in this case because of its importance.

5. The UDP, of which the claimant is a member, is the successor, as I say, of the PPP, members of which organisation after its overthrow in a military coup in 1984 were persecuted; there is no doubt about that. The aim of the organisation is to restore democracy and civilian rule in the Gambia, and it is conceded that high profile members of the UDP have been persecuted for anti-government activities. The claimant alleges that he had been heavily involved in such activities and that he had been told that his name had been given to the authorities.

6. As a result of these matters the defendant has claimed asylum in the UK. Where a person has made a human rights claim or an asylum claim or both **and** the Secretary of State (it is important to note the 'and') certifies the claim is clearly unfounded, the Secretary of State shall then issue a certificate under Section 94(2) if he is satisfied that the claimant is entitled to reside in a state listed in Section 94(4) -- that is, the White List -- unless he is satisfied that the claim is not clearly unfounded. Section 94(5) permits the Secretary of State to add a state to the White List if he is satisfied that a) there is in general in that state no serious risk of persecution to persons entitled to reside in that state and b) removal to that state of persons entitled to reside there will not in general contravene the UK's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms. I should say that clearly in this case there is no real argument that the original decision in July 2007 to add Gambia to the list was an illegal decision but that it is conceded that the Secretary of State has to keep the membership of that list under review.

7. In the case of R (Javed & Ors) v SSHD [2002] QBR 129 the Court of Appeal held that the Secretary of State's decision to include a state in the White List was open to judicial review on the ground of Wednesbury unreasonableness, although the Secretary of State should be allowed a considerable margin of appreciation. In order to succeed in so challenging the Secretary of State's decision to place a country upon the White List the claimant would have to demonstrate that the evidence clearly established that there was a serious risk

of persecution in a particular country, in this case Gambia, and that that was the 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 populus.

8. As I say, as the decision letter makes quite clear, there was when the Secretary of State originally considered the matter ample objective evidence to justify the decision in July 2007 to include Gambia on the White List for men only. The material is listed in the decision letter and is repeated at paragraph 3.6 of the grounds of defence.

9. The recent United States Department of State Report 2008, which is dated 25 February 2009 and was not referred to by the Secretary of State in the decision letter (the report was published after that decision letter was promulgated) gives in the contention of the defendant additional and persuasive support for the continuing inclusion of Gambia on the list, but the applicant himself places reliance on other material in the 2009 State Department report which are extensively cited first of all at paragraph 8 of the claimant's counsel's skeleton argument. The claimant also contends that the assessment by the defendant of the judiciary in Gambia was plainly incorrect, again relying on the February 2009 report. That is summarised at paragraph 30 of the skeleton argument. And there is also reference made to the Foreign and Commonwealth Office report of 25 February 2009 indicating regular harassment of opposition parties and summarised at paragraph 16 of the skeleton. There is extensive quotation at paragraphs 18 to 20 of the skeleton from the report of Amnesty International of 11 November 2008

giving evidence of persecution of members of the opposition, and the quotations that the applicant has made from the report supportive of his case are continued in paragraphs 21 to 33.

10. At paragraph 32, and particularly importantly, it is contended that homosexual men are treated with scant regard for their human rights; although it is right to say that the state nominally does not prohibit homosexual relations between men by statute.

11. The summary of the claimant's position is in paragraphs 35 and 36 of the skeleton, and while no one could criticise counsel for the defendant's summary in her grounds of defence of the report as being a fair summary, it cannot take away from the matters that are properly and accurately summarised at paragraph 35 and 36. There is plainly evidence here of a significant minority of the populace having their human rights ignored by the regime. Different extracts from different parts of the report can therefore throw a different light on the situation in Gambia, depending on one's viewpoint.

12. I entirely accept that Javed makes clear that the Secretary of State is to be allowed a margin of appreciation in his judgment of the material before him and the claimant must establish that the decision by the Secretary of State to remove Gambia from the White List must be Wednesbury irrational before he can succeed. But in my judgment in this stage of the proceedings my task is to consider whether the claimant has an arguable case, which is a relatively low

threshold, particularly in light of the fact that the actual decision letter was published before the 2008 country report by the US State Department, and I am persuaded that it is just arguable that the Secretary of State has acted unreasonably in continuing to include Gambia on the White List.

13. As to the certification of the claimant's claim as clearly unfounded, I would not have been satisfied that there was an arguable case on that, but as both aspects of Section 94 must be established to remove the appeal right, it is perhaps only necessary for me at this stage to indicate that I consider the White List point to be arguable. I do not consider the other point to be arguable.

14. I should perhaps indicate that as I regard the ultimate decision in this application for judicial review to be of significant importance, I do consider that I ought at this stage to order that the hearing of this application is not suitable for hearing by a deputy High Court judge.

15. I think that is all that I ought to do at this stage, and that the application for a mandatory order ought to be reserved to the determination by the court on a full hearing of the judicial review application.

MISS CUMBERLAND: Thank you my Lord. Could I also that the question of costs be reserved to the substantive hearing?

HIS HONOUR JUDGE BIDDER QC: Of course.

MISS CUMBERLAND: I am grateful.

HIS HONOUR JUDGE BIDDER QC: Yes?

MR MUSTKIM: It's a matter of being funded by the Legal Services Commission your Lordship.

HIS HONOUR JUDGE BIDDER QC: I am sorry?

MR MUSTKIM: The matter has been funded by the Legal Services Commission, legally aided ...

HIS HONOUR JUDGE BIDDER QC: Yes. What do you want, a certificate?

MR MUSTKIM: Yes, your Lordship.

HIS HONOUR JUDGE BIDDER QC: Right -- a certificate that your costs be taxed?

MR MUSTKIM: Yes.

HIS HONOUR JUDGE BIDDER QC: Yes.

MISS CUMBERLAND: My Lord, I am sorry. Could I just confirm that permission is only granted then in respect of ...?

HIS HONOUR JUDGE BIDDER QC: Only in relation to the White List point.

MISS CUMBERLAND: I am grateful.

HIS HONOUR JUDGE BIDDER QC: Thank you very much.