OUTER HOUSE, COURT OF SESSION

[2010] CSOH 25

P1670/09

OPINION OF LADY DORRIAN

in the Petition of

A M

Petitioner;

for

Judicial Review of the decisions of the Secretary of State for the Home Department to refuse to grant the petitioner leave to remain in the United Kingdom and to certify her claim in terms of section 94(2) of the Nationality, Immigration & Asylum Act 2002

Defender:

Pursuer: Caskie; Drummond Miller
Defender: Haldane; C Mullin

4 March 2010

Background

[1] The petitioner is a citizen of Nigeria who arrived in the United Kingdom on or about 20 November 2004. She had leave to enter as a visitor but overstayed. She gave birth to a daughter in the United Kingdom on 3 October 2005. She sought asylum in the United Kingdom in 2008 and her application was refused on 30 April 2009. She sought humanitarian protection in accordance with Article 3 of the European

Convention on Human Rights and discretionary leave to remain in accordance with Article 8. In refusing these claims the Secretary of State also decided that her human rights claim should be certified under section 94(2) of the Nationality, Immigration & Asylum Act 2002 as "clearly unfounded". In this petition she seeks reduction of those decisions. A separate decision refusing refugee status is not challenged.

Submissions for petitioner

[2] Counsel started by referring to the case of *ZT (Kosovo)* v *Secretary of State for the Home Department* [2009] UKHL 6 in which the meaning of the phrase "clearly unfounded" was considered and where it was contrasted with the requirement in Rule 353 of the Immigration Rules that a fresh claim required to be one which had "a realistic prospect of success". The majority concluded that the two tests were not precisely the same, but it is clear that they were of the view that the difference was so narrow as to be of little practical application. As it was put by Lord Justice Laws in the subsequent case of *AK (Sri Lanka)* v *Secretary of State for the Home Department* [2009] EWCA Civ 447 "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". Counsel pointed out that the test under Rule 353 had been described as "a somewhat modest hurdle".

[3] Counsel referred to the speech of Lord Hope of Craighead in *ZT (Kosovo)* at paragraph 54 where he observed that the Courts, in section 94 cases, should follow the guidance given in *R (Razgar*) v *Secretary of State for the Home Department* [2004]

2 AC 368. He said "The approach that Lord Hodge described in *FNG, Petitioner* para.14 is attractive because it encapsulates in a simple formula what Lord Bingham said in *Razgar*. The key points in Lord Bingham's opinion in that case are to be found in para.17 where he said that a reviewing Court must consider how an appeal would be likely to fare before an adjudicator as the body responsible for deciding any appeal, and in para.20 where he said that a reviewing Court must assess the judgement which would, or might, be made by an adjudicator on appeal. The question that a reviewing Court must ask itself, which Lord Bingham described in para.17, must be subjected to anxious scrutiny. It may become clear that the quality of the claim is such that the facts of the case admit of only one answer. But the process, as these observations serve to emphasise, is essentially one of review". In the Petition of *FNG, Petitioner* [2008] CSOH 22 Lord Hodge said "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".

[4] The questions which an Immigration Judge would have to answer, as set out in *Razgar*, were: (i) will the proposed removal be an interference by a public authority with the exercise of the appellant'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 rights and freedom of others? (v) if so, is such interference proportionate to the legitimate

public end sought to be achieved? As Lord Hodge pointed out in paragraph 10 of *FNG* "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 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 consideration, she would not be in a position to say that this was clearly unfounded".

[5] Counsel submitted that a judicial review court in addressing a challenge to certification should ask itself the question which the Immigration Judge would have to answer. In doing so the Court allows for possible differences of opinion so long as the opinion is not perverse. If the Court could envisage an Immigration Judge allowing an appeal, the certificate must be overturned. If a matter deserving of further inquiry is raised, which should properly be considered by the AIT, then the certificate should be reduced.

[6] Counsel submitted that there was no argument on the law. If the petitioner has an internal flight option which is safe and not unduly harsh her Article 3 claim will fail. In the present case it was accepted that internal location could be achieved safely but the issue was whether it was unduly harsh.

[7] In relation to Article 3, the Secretary of State concluded that there was an internal flight option available to the petitioner. There was material before him which indicated that for a woman in Nigeria seeking to flee internally, four options might be available. The COI Report for Nigeria dated December 2008 had been quoted extensively in the decision-letter, including paragraph 23.8 which records that "...for adult women seeking to escape domestic violence, FGM, forced marriage and adult

women seeking to protect their daughters against FGM (it is) considered that internal relocation is a realistic option for such women". It went on to say:

> "According to UNIFEM, there are basically four scenarios for women who relocate within Nigeria in order to avoid FGM, forced marriage or domestic violence:
>
> - She can approach the local church/mosque or religious establishment and seek assistance from the leadership.
> - She can approach friends or relatives who are willing to hide her.
> - She can approach NGOs working on women's human rights (however these NGOs may only be known to women in those urban settlements, towns or cities where the organisations are active)
> - She can take to the street. This is a frequent scenario for young women or women who do not have the capacity of a means to do otherwise. Some of these may end up in brothels or vulnerable to being trafficked".

Having recorded that there is full freedom of movement in Nigeria the COI Report goes on to note "however, this first step - even to take a bus - can be difficult as women are dependent on their relatives, family or husbands, and may not have the money to allow them to relocate. As a consequence of this, a woman will need relatives in her new location who are ready to accommodate her".

The report goes on

> "Women who are economically independent, in particular, would stand a must better chance of sustaining themselves than women who are not.....It is difficult to separate the question of physical protection from the social, cultural and/or humanitarian constraints involved in relocating. However, even

> women who have access to economic means could face difficulties in finding accommodation or a job as they are often stigmatised....Young women and/or single women, in particular, who have relocated within Nigeria, are vulnerable to unscrupulous men who may target these women. Some of them might even end up as commercial sex workers".

[8] Counsel then referred to paragraph 23.19 of the Report which indicated that there was a reluctance to attend shelters as the perception amongst Nigerians is that shelters are for battered women and women with many problems who have no relatives to turn to. The Report records that the shelters are relatively few, provide shelter for a limited period of time only, i.e. a few weeks and have a limited number of places, for example, 7, 15 or 20 are quoted.

[9] Counsel suggested that the Secretary of State appears to have considered two of the four possible options - approaching a church for assistance, if that is what is meant by the reference to "organisations that you can turn to for shelter" in paragraph 16 of the decision letter, or relying on her brother for help. In her initial interview the petitioner described herself as a Christian and in a subsequent interview mentioned that at one stage members of her church were praying that she would not lose her sanity. Counsel submitted that this was 5 years ago and there was no evidence that she had maintained any contact with the church during that period. An Immigration Judge might wish to ask whether she was still in such contact, whether she would expect to be taken in by the church, whether they had facilities to do so, whether they would take in her child and what their attitude towards unmarried mothers might be. All of those questions required to be posed and addressed. Had the church been able to shelter her previously, they would have done so which militates against her obtaining support from such a quarter now.

[10] Having dealt with the issue of the church, counsel then turned to address the question of family protection. The Secretary of State concluded that the petitioner would have "a male family member who could support you in your stance against FGM". Counsel submitted that having a relative who might support her stance against FGM was not the same as having one who was willing to hide or accommodate her as envisaged in the COI Report. The answers to interview questions indicated that the petitioner's brother was against FGM but went on to say: "He can't say anything" and "He tells them he doesn't know our whereabouts". She has been in contact with her brother by telephone but does not know where he lives.

[11] Counsel submitted that the test was not whether the decision was one reasonably open to the Secretary of State: the decision here is either right or wrong. In this case to reach a contrary view would not be perverse and it is only on that basis that the decisions could stand. Counsel submitted that there were other issues in any event: does the brother have a spare room; what contact does he have with other members of the family; what about his partner? The information in the hands of the Secretary of State was not enough to say that the claim was bound to fail.

[12] The petitioner had been in this country for 5 years. The effect of the passage of time on the life she had established in this country are matters which an Immigration Judge would take into account. In assessing proportionality, such a Judge would require to take into account the factors referred to in the case of *Üner* v *The Netherlands* [Appn. No.46410/99.] These included the length of stay in the country, the nationality of the person concerned, the family situation of the person, whether there were children and if so their ages. In *Üner* the Court made explicit two criteria which it said already had been implicit, namely that the Court had to take into account "...the best interests and well-being of the children, in particular the seriousness of the

difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of social, cultural and family ties with the host country with the country of destination". Although that case involved family life, the observations were equally pertinent to a case relating to private life.

[13] The critical issue in the present case relating to Article 3 is the one of internal relocation. It was accepted on the petitioner's behalf that safe internal relocation was feasible given the size of Nigeria and its population. However, having fled internally, a question arises, even if safe would it be unduly harsh to require her, and her daughter, to take up life in such a location? That is the nub of the case. The absence of any prospect of assistance from a church, together with the lack of any evidence that there was a prospect of accommodation with the brother, rather than simply moral support were important factors in the question of whether relocation would be unduly harsh. Moreover, as to financial prospects for the petitioner, and life for her in Nigeria generally, it should be noted that when she was in Nigeria previously, and moving from place to place she was a college student without ties. She is now a single mother with a dependent five year old child.

[14] As to the Article 8 claim, assuming that the Secretary of State was correct to state that the daughter was young enough to adapt to life in Nigeria that is not the correct question to ask. A primary consideration and a question which must be asked is what is in the child's best interests? The Secretary of State has not asked that question whereas an Immigration Judge would. An Immigration Judge would have to have regard to the position of the child and what she would face in Nigeria. Counsel then referred to passages in the COI Report of 2009 referring to the condition of children in Nigeria.

Submissions for the respondent

[15] Counsel for the respondent submitted that for the petitioner to succeed the Court requires to be satisfied that the Secretary of State had erred in law. She cautioned against an approach that suggested that the test is a low one and is essentially the same as that in paragraph 353 and maintained that the cases of *ZT* and *AK* were both cases where there were very different circumstances. Counsel submitted that the proper approach to section 94 can be seen in the case of *Yogathas* and *Thangarasa* v *Secretary of State for the Home Department* [2003] 1 AC 920 in the speech of Lord Bingham in paragraph 14 where he said:

> "Before certifying as 'manifestly unsound' an allegation that a person has acted in breach of the human rights of a proposed deportee, the Home Secretary must carefully consider the allegation, the grounds in which it is made and any material relied on to support it. But his consideration does not involve a full-blown merits review. It is a screening process to decide whether the deportee should be sent to another country for a full review to be carried out there or whether there appear to be human rights arguments which merit full consideration in this country before any removal order is implemented. No matter what the volume of material submitted or the sophistication of the argument deployed to support the allegation, the Home Secretary is entitled to certify that if, after reviewing the material, he is reasonably and conscientiously satisfied that the allegation must clearly fail".

[16] Counsel submitted that a petitioner required to satisfy a high threshold to engage either Article 3 or Article 8. The Secretary of State has asked questions 1 and 2 in *Razgar* and concluded; (i) that the proposed removal would not be an interference

with the petitioner's right to respect for her private life and (ii) that in any event such interference would not have consequences of such gravity as potentially to engage the operation of Article 8. Reference was made to the case of *Ullah* [2004] UKHL 26 and the speech of Lord Bingham of Cornhill at paragraph 24 in which he states:

> "While the Strasbourg jurisprudence does not preclude reliance on Articles other than Article 3 as a ground for resisting extradition or expulsion, it makes it clear that successful reliance demands presentation of a very strong case. In relation to Article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or to degrading treatment or punishment....The difficulty will not be less where reliance is placed on Articles such as 8 or 9, which provide for the striking of the balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown".

She submitted that this is the background against which the Secretary of State required to approach the task of certification. Unless material can be placed before the decision-maker which shows that there is a real risk of flagrant breach of Article 3 or Article 8 on return, the Secretary of State is entitled to certify the claim as manifestly unfounded. In this case the applicant had failed to meet the test of establishing a real risk of inhuman or degrading treatment or flagrant denial of an Article 8 right. Although given opportunities to do so the applicant was unable to point to a specific risk from named individuals or groups that she was in any real physical risk or danger. As to who might perpetrate FGM she said "People in my family" but could not name them. No actual attempt had been made at perpetrating FGM on her. She may have

perceived that this would be the case, but it did not materialise. The risk has to be a real one, not a possible one.

[17] Turning to the question of whether internal flight was unduly harsh, counsel submitted that there were factors which indicated that it was not. In the first place the applicant had shown that she was able to relocate in the past, although she did so to escape threats and for her education. She had the potential to be economically independent and such women are reasonable candidates for internal relocation. She is a graduate who worked in Nigeria in the past. She is economically mobile and able to relocate. She is not in the category of someone who would have to live on the streets. She has contact with her family in the form of her brother. She claimed to be a Christian and could approach a church for assistance. This was something which it was reasonable for the Secretary of State to conclude and was indeed what was meant in paragraph 16 of the decision letter which states:

> "...there are organisations that you can turn to for shelter and support and...these organisations exist throughout the country...".

The Secretary of State had also taken into account the effect of being the single mother of a 5 year old child.

[18] Turning to the issue of the interests of the child, she submitted that the Secretary of State had regard to the petitioner and the child as a family unit returning to Nigeria and whether it was reasonable for them to do so. The observations in the 2009 COI Report related substantially to babies born in Nigeria, children under 5 and those who's mothers had AIDS, and hardly applied to the petitioner.

Petitioner's response

[19] In the response to the reference to the case of *Yogathas* counsel for the petitioner pointed out that there had been a statutory presumption in that case because the

applicants were to be removed not to Sri Lanka but to Germany. The presumption was that they would not be sent back from Germany to Sri Lanka in circumstances which would interfere with their human rights. That is the context in which the threshold in relation to Articles 3 and 8 was being discussed. He submitted that it was clear from cases in 2009 that this Court does indeed carry out a full merits review. There was a risk of confusion in relation to the submissions relating to Article 3 and Article 8. So far as Article 3 is concerned, (1) there was no doubt that FGM is a breach of Article 3. (2) What is said is that to avoid that she could internally relocate. (3) The test is not whether she will suffer inhuman treatment, therefore, but whether it is unduly harsh for her to relocate. There is a proper assessment to be carried out by an Immigration Judge as to whether or not it is unduly harsh to expect her to escape Article 3 treatment by relocating elsewhere in Nigeria.

[20] The threshold question was not clearly stated in the answers or the decision letter and counsel was not expecting it to arise therefore he sought leave to refer to the case of *VW* (*Uganda*) v *Secretary of State for the Home Department* 2009 EWCA Civ.5, paragraph 22, when Lord Justice Sedley observed that:

> "As this Court made clear in *AG* (*Eritrea*) the phrase 'consequences of such gravity' in question (2) [of *Razgar*] posits no specially high threshold for Article 8(1). It simply reflects the fact that more than a technical inconsequential interference with one of the protected rights is needed if Article 8(1) is to be engaged".

[21] Counsel submitted that the answer to *Razgar* questions (1) to (4) in this case were obvious. (1) She has private life in the UK; as does her child; together they have a family life. (2) There will be no interference with her family life by removal, but there will be interference with her private life. (3) The removal is in accordance with law.

(4) There is an Article 8(2) motive for removal. The difficult question is the fifth one, whether removal is proportionate. Many factors have to be taken into account and if it is not obvious that removal would be proportionate the certificate falls.

Discussion

[22] I start from the agreed proposition that in a case such as this the court, in deciding whether the Secretary of State was entitled to certify a claim as 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. This is essentially also what the Secretary of State requires to do in making the original decision. In respect of the Article 3 claim, one of the questions which an immigration judge would be bound to ask is whether internal relocation would be unduly harsh. In my opinion, there is no indication in the decision letter that the Secretary of State has properly addressed this issue. The decision in paragraph 13 that she could safely relocate must be correct, standing the size of Nigeria and its population. However, this does not address the question of whether it would be unduly harsh to require her to do so. At paragraph 15 it is repeated that "it is clear from your own experiences that you can internally relocate to Anugu State where you are at no real risk of serious harm from your family members". This again does not address the question of whether it would be unduly harsh to relocate. The criticisms advanced by counsel for the respondent regarding lack of detail about those who might seek to perpetrate FGM on the petitioner must also be put into context. The petitioner said that the original reason she had to move around in Nigeria was to escape members of her mother's family who wished to perpetrate FGM on her and her mother. FGM was eventually perpetrated on

the mother and her mother's sister. In paragraph 16, having referred to the COI Report, the letter concludes that there are organisations that she can turn to for shelter and support which exist throughout the country and that internal location is an option particularly due to the vast size and population of Nigeria. This mainly addresses the question of safety rather than whether internal location would be unduly harsh. I do not read this paragraph as an indication that the Secretary of State was considering the first of the listed options available to a woman who might be able to relocate, namely seeking help from a church or mosque. It is more directed towards the existence of general organisations which are available to offer assistance. In any event, I do not think the contents of paragraph 16 are really the basis on which the case was dealt with. The answers for the Secretary of State state that the decision letter is "predicated upon the second of the UNIFEM scenarios, namely that the petitioner will be able to secure assistance from family members, specifically her brother". Paragraphs 17 to 19 are all concerned with the issue of safety. Paragraph 20 effectively deals with safety also because it relates to the risk of FGM and the fact that she would have her brother supporting her stance against FGM. This paragraph does not in any way relate to the question of whether it would be unduly harsh to relocate. It does not in any way consider the circumstances in which she might be moving. It does not explore or address the question of whether accommodation could be found with her brother, or elsewhere and it does not address the issue of financial support. I consider that paragraph 22 which deals with the probability that family members would not know she had returned to Nigeria deals primarily with the question of safety and not harshness.

[23] The only paragraph which, although not in terms, may be seen to address the question of whether it is unduly harsh is paragraph 21. That states:

> "Furthermore you are a young healthy female with no known serious health problems. You are university educated and have a qualification in marketing from the University of Nigeria. You have also gained employment in the past as a cleaner and kitchen assistant. There is no reason to believe that you would not be able to internally relocate and support yourself and your daughter. It is also considered that this would be reasonable to expect you to do so".

It seems to me that this does not properly address the issues which arise if one asks the question whether it would be unduly harsh for this applicant to relocate internally with her daughter. It is clear from the COI Report quoted that internal relocation is indeed an option for women in a position such as the applicant, but subject to a number of conditions. The most important point arising from the COI report is that for a person in the position of someone such as the petitioner successfully to relocate requires family or others in the area of relocation who are willing to accommodate her. I do not think that real consideration was given to this issue. It seems to me that despite attempts to establish the contrary in argument, the Secretary of State has not truly addressed any of the four scenarios referred to in the COI Report in addressing the question of whether relocation would be unduly harsh. The Secretary of State has not considered the circumstances in which she and the child will require to live and what options, if any might be available to them for accommodation and support. The letter appears to make an unjustified leap from the fact that the applicant's brother is not in favour of FGM to a conclusion that he would be able to offer her the accommodation and protection which the COI report envisages as necessary to enable internal relocation to be possible. Furthermore the assessment that there "is no reason to believe that you would not be able ...to support both yourself and your daughter" is a trite one, based on circumstances from 5 years ago when she was young, single and

without ties. Her family situation was different: her mother was still alive and in particular she did not have a 5 year old child dependent only on her. The difficulties which might face her in establishing economic dependence in such a situation are not considered. It seems to me that it is one thing merely to record the facts that there is a child: quite another to consider properly what consequences that may have for the lifestyle and economic ability of the mother. I consider that the Secretary of State was in error in the way in which the issue of internal relocation was approached by failing to make a proper assessment of the question of whether it would be unduly harsh to expect her to do so. This is an issue which would require to be addressed by an Immigration Judge and there is a legitimate basis on which such a question might be answered favourably for the petitioner. It follows that her claim cannot properly be classified as "clearly unfounded".

[24] So far as discretionary leave is concerned, the conclusion (paragraph 26) is that any alleged interference of her Article 8 rights would be legitimate, proportionate and in complete accordance with the law and therefore, by removing her, the UK would not be in breach of Article 8. The letter states that the facts which have been considered in reaching that conclusion are

- That she is a 32 year old woman with a young daughter
- That she has no close family ties in the UK
- That she has complained of suffering depression in the past
- That she has told the doctor about this but has not been prescribed any medication
- There are facilities in Nigeria to treat people with depression
- That her Article 3 rights would not be breached on medical grounds

[25] I am unable to accept the submission of counsel for the respondent that the effect of these paragraphs is to show that the Secretary of State had regard to the interests of the petitioner's 5 year old child. At paragraph 37 the Secretary of State lists a number of factors which are said to have been taken into consideration. Each factor is listed with the annotation that the factor is "not a sufficiently compelling factor to justify allowing her to remain in the UK". Given the way these matters are being treated, it is a moot question as to whether they have, as paragraph 38 states, been considered "individually and together". In any event beyond reference to the fact that she is a single woman with a 5 year old daughter, there is no indication that any consideration has been given to the interests of that child. An Immigration Judge considering the issue would have regard to that factor and again there is a legitimate basis on which the question might be answered favourably for the petitioner. Again the claim cannot reasonably be described as "clearly unfounded."

Decision

[26] The decision of the Secretary of State is based on a flawed approach to the issues and therefore cannot stand. The decision certifying the petitioner's claim as "clearly founded" will be reduced.