Case No: CO/4740/2010

Neutral Citation Number: [2010] EWHC 3000 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 November 2010

Before:

MR JUSTICE KEITH

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Between:

R (on the application of EO)	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

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- -

Mr Zainul Jafferji (instructed by **Lawrence Lupin**) for the **Claimant**
Mr Gwion Lewis (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 16 November 2010

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Judgment

Mr Justice Keith:

1. The claimant comes from Nigeria. He arrived in this country on 4 or 5 March 2004 using a forged passport. At some stage he disappeared off the radar, but he was arrested on 28 September 2009, and eventually claimed asylum here. He was interviewed in connection with his claim for asylum on 1 February 2010. The basis of his claim was that he had been ill-treated by members of a government taskforce in Nigeria because of his membership, and active participation in the affairs, of the Niger Delta Vigilantes ("the NDV"), and ill-treated subsequently by supporters of the NDV who thought that he had betrayed members of the NDV to the Nigerian authorities.

2. By a letter dated 12 February 2010, the claimant's claim for asylum was refused. The official who considered the claimant's claim on behalf of the Secretary of State thought that the claimant was no longer likely to be of any interest to the authorities since (a) he had been away from Nigeria for 6 years and (b) when he had on his account been arrested by the authorities in Nigeria he had been released without charge. In any event, it was noted that amnesties were being agreed to and the situation was improving. Moreover, it was thought that there was a sufficiency of state protection for the claimant from any reprisals by members of the NDV, and that in any event internal relocation to another part of Nigeria away from his home area was a viable option for him. The Secretary of State proceeded to certify the claimant's claim for asylum as clearly unfounded under section 94(3) of the Nationality, Immigration and Asylum Act 2002.

3. When the claimant was interviewed in connection with his claim for asylum, he had spoken of his partner, a Nigerian woman, who had indefinite leave to remain in this country. The claimant was treated as having claimed that his return to Nigeria would infringe their rights under Art. 8, and the Secretary of State certified that claim as clearly unfounded as well. The Secretary of State did so on the basis that the claimant had not established that he enjoyed family life with his partner, but that in any event his removal to Nigeria would not be a disproportionate response to the need to maintain an effective system of immigration control.

4. In this claim for judicial review, the claimant challenges the certification of his claims. Permission to proceed with his claim was refused on the papers by Owen J. He regarded the claimant's claim to be totally without merit, and said that any renewal of the application for permission to proceed with the claim should not operate as a bar on the claimant's removal to Nigeria. The claimant did renew his application for permission to proceed with his claim, and an oral hearing took place on 16 November. Unfortunately, I had to reserve judgment on the application because it emerged in the course of the hearing that a whole raft of documents which had been sent to the court the day before included further representations together with supporting documents which had been submitted to the Secretary of State following the decision of 12 February 2010, and the Secretary of State had decided to reject those representations. I had not read either the further representations or the documents which accompanied them, or the Secretary of State's decision on those representations. Since it was too late in the day to take time out of court to read them because that would have made it necessary to adjourn other cases in the list, I had little alternative but to reserve judgment.

5. It is said that in certifying the claimant's claim for asylum, the Secretary of State applied the wrong test. Instead of considering whether any appeal would have a realistic prospect of success before an immigration judge, the Secretary of State decided for himself whether the claimant's claim was clearly unfounded. Had the Secretary of State applied the proper test, it is said that, given that the Secretary of State had accepted the claimant's account of events in Nigeria before coming to the UK, he could well have taken the view that there was a realistic prospect of an immigration judge concluding (i) that there was a risk of the claimant's previous involvement with the NDV being discovered by the authorities on his return to his home area, or (ii) that there would not be a sufficiency of protection for the claimant from reprisals by the NDV, or (iii) that internal relocation to another part of Nigeria would not be viable.

6. This argument involves a misreading of the letter of 12 February 2010 and betrays a misunderstanding about what the Secretary of State was doing. First, the Secretary of State did *not* accept the claimant's account of events in Nigeria. The Secretary of State merely stated what the claimant's account was, not that he accepted that the claimant's account was true. Secondly, the Secretary of State was not considering whether, under rule 353 of the Immigration Rules, any fresh representations being made by the claimant amounted to a fresh claim, in which event he would, of course, have had to consider what the claimant's prospects of success in an appeal would have been. The Secretary of State was considering whether the claim was clearly unfounded. Having said that, the current state of the authorities suggests that there is no practicable difference between whether a claim is clearly unfounded and whether a claim has no realistic prospect of success, and the criticism, therefore, of the Secretary of State's approach takes the claimant's case no further.

7. At the hearing on 16 November, Mr Zainul Jafferji for the claimant sought an adjournment of the hearing so that expert evidence on the current political climate in Nigeria could be obtained as it was said that any amnesty for members of the NDV had been withdrawn and negotiations to settle their differences with the authorities had broken down. In my opinion, it would not have been appropriate for the hearing to be adjourned. Since this is a claim for judicial review, what the court is reviewing is the lawfulness and rationality of the Secretary of State's decision of 12 February 2010 to certify the claimant's claim for asylum as clearly unfounded. A report prepared much later which by definition the Secretary of State could not have seen at the time of his decision can hardly be taken into account by the court. Otherwise it would be substituting its own decision on *other* evidence for that of the Secretary of State. If the claimant's solicitors obtain such a report, they can, of course, send it to the Secretary of State, and request the Secretary of State to reconsider the claimant's claim for asylum in the light of it. As Mr Gwion Lewis for the Secretary of State said, the Secretary of State would no doubt give any such report such weight as she thought was appropriate. However, on the material which the Secretary of State had when the decision to refuse the claimant's claim for asylum was made, it is not, in my opinion, arguable that the Secretary of State erred in concluding that the claim was clearly unfounded.

8. I turn to the claimant's claim that his removal to Nigeria would infringe his and his partner's rights under Art. 8. The Secretary of State's decision to certify that this claim was clearly unfounded was originally challenged on the basis that the Secretary

of State had not given the claimant an opportunity to produce evidence to show that he enjoyed family life with his partner in this country. The answer to that is that the Secretary of State went on to consider, as I have said, whether, even if the claimant had established family life with his new partner in this country, his removal would be a proportionate response to the need to maintain an effective system of immigration control. The claimant's response to that was that when it came to the issue of proportionality, the Secretary of State had not taken into account the effect of his removal on his partner or the past persecution which the claimant claimed to have been subjected to in Nigeria. The fact is that the Secretary of State *did* consider the former in para. 46 of the letter of 12 February 2010, and the latter became immaterial once the Secretary of State had concluded that internal relocation within Nigeria was a viable option for the claimant.

9. This is where the further representations submitted on behalf of the claimant come into the picture. On 25 June 2010, the claimant's solicitors wrote to the Secretary of State making further representations on the claimant's claim that his removal to Nigeria would infringe his and his partner's rights under Art. 8. A number of documents were submitted which were said to show that their relationship was a genuine and loving one, and that she had continued to provide support for him while he was in detention. The UKBA responded to that letter on behalf of the Secretary of State on 19 July 2010. The letter confirmed the view previously taken that the claimant had not proved that he had established family life in the UK. In his witness statement dated 24 June 2010 (which was one of the documents sent with his solicitor's letter of 25 June 2010) he had claimed that he had met his partner in March 2006, that his relationship with her had begun in November 2008, and that they had begun to live together in December 2008. That is to be contrasted with what he had said when interviewed on 1 February 2010, namely that he had met her in May or June 2009, and that they had started to live together towards the end of June or in July 2009. If the latter was correct, that would have given the claimant and his partner only a few months at most to cement their relationship. In my opinion, it was reasonably open to the Secretary of State to conclude that their professed affection for each other, in the context of their ties having lasted for so short a time before the claimant was detained, was not a sufficiently strong basis to conclude that family life had been established.

10. In its letter, the UKBA maintained the previous stance on the question of proportionality. To the extent that it was said that the Secretary of State had not taken into account the factors held to be relevant in *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39 and *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, the UKBA took those factors into account then. It may be that there is force in Mr Jafferji's point that previously the Secretary of State had not given adequate consideration to whether it was realistic to expect the claimant's partner to accompany him to Nigeria bearing in mind that she had indefinite leave to remain in this country: although the claimant had said when interviewed that there was nothing to prevent her accompanying him to Nigeria, that is a very different thing from saying that it was realistic to expect her to do that. But the length of their relationship and the claimant's immigration history were significant factors which the UKBA was entitled to take into account on behalf of the Secretary of State when considering the issue of proportionality, and in my opinion it is not arguable that that conclusion is open to challenge, even if there had been an

application to amend the claim form to challenge the decision of 19 July 2010, which there was not.

11. For these reasons, I refuse the claimant's renewed application for permission to proceed with his claim for judicial review. The claimant must pay the Secretary of State's costs of preparing the Acknowledgement of Service which I summarily assess at £540.00, though since the claimant is in receipt of public funding, this order will not be enforced without an inquiry relating to the claimant's means. If the claimant wishes to apply for permission to appeal, his solicitors should notify my clerk of that by 4.00 pm on Thursday 25 November 2010, and I will then consider that question on the basis of any written representations without a hearing. However, any appellant's notice will still have to be filed within 21 days of the handing down of this judgment.