**OUTER HOUSE, COURT OF SESSION**

**[2007] CSOH 121**

OPINION OF LADY PATON

in the petition of

**JB**

for judicial review of a decision by the Secretary of State to certify the petitioner's asylum claim in terms of section 96(1)(a)-(c) of the Nationality, Immigration and Asylum Act 2002 (as amended)

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**Petitioner: Melvin Farr, Advocate; Allan McDougall, Solicitors**
**Respondent: Drummond, Advocate; Advocate General's Office**

10 July 2007

**Asylum-seeker using false identity: certification in terms of section 96 preventing further appeal**

[1] An asylum-seeker faced with a removal notice has a statutory right of appeal. In particular in the circumstances outlined in sections 82 and 92(4) of the Nationality, Immigration and Asylum Act 2002 as amended, the asylum-seeker may appeal to a tribunal. However, there are exceptions and limitations to the right of appeal, including that contained in section 96 of the 2002 Act, as follows:

**"Earlier right of appeal**

(1) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies -

(a) that the person was notified of a right of appeal under that section against another immigration decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined),

(b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision, and

(c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision."

[2] In this judicial review, the petitioner seeks reduction of a certification made in terms of section 96(1), which prevents her from appealing against a removal notice.

[3] The petitioner entered the United Kingdom illegally in January 2003, all as set out in paragraph 15 of the adjudicator's determination, referred to below. She claimed to be a Sudanese national named HL, and to be married to DA, a member of the Sudanese People's Liberation Army (SPLA). She sought asylum. Asylum was refused by letter dated 24 March 2004. The petitioner appealed to an adjudicator. She was

unsuccessful. The adjudicator's determination promulgated on 21 June 2004 contained the following observations:

> "21. It has been noted that the [petitioner] was asked nationality questions in her asylum interview and was unable to answer these. Because of this it is concluded that it is not accepted that she is Sudanese and her claim for asylum is refused on the basis that she is not Sudanese. If at an appeal the adjudicator concludes that she is not Sudanese, the respondent will seek to remove her to a country or territory to which she can be removed pursuant to the appropriate legislation ...
>
> 45. Because of [*inter alia* the languages spoken by the petitioner, namely Lusoga and Swahili, neither being a language of Sudan; and also the petitioner's lack of knowledge of Sudan, as detailed in paragraph 44] I concluded, even taking into account to the relatively low standard of proof, that the [petitioner] was not Sudanese. I came to this conclusion notwithstanding the fact that the [petitioner] was not well educated and also that she claimed to be somewhat confused mentally at the present time. In this connection, I did not find the [petitioner] in any way confused or unable to understand or answer questions at the hearing.
>
> 46. In the light of my finding that the [petitioner] was not Sudanese, she does not have a well-founded fear of persecution in Sudan and her asylum claim fails ..."

[4] The petitioner then sought leave to appeal to the Immigration Appeal Tribunal. On 30 October 2004, leave was refused.

[5] Thereafter by letter dated 13 April 2005 the petitioner was invited to attend the Glasgow Enforcement Unit (a unit responsible for enforcing returns to other countries) for further interview about her circumstances. The petitioner attended on 19 April 2005. In the course of the interview, she advised the immigration officer that she was not in fact HL from Sudan, but was JB from Uganda. She also stated that her ex-partner was DW from Uganda. She then explained why she was reluctant to return to Uganda. She was invited to lodge fresh representations. That invitation was confirmed in writing by letter dated 6 May 2005 from the Secretary of State for the Home Department (the respondent) in reply to the petitioner's solicitors' request for an extension of time to prepare a fresh asylum claim.

[6] By letter dated 22 July 2005, the petitioner's solicitors sent the respondent a statement from the petitioner and a medical report relating to her. The petitioner's statement explained why the petitioner was reluctant to return to Uganda, in particular her fear of female genital mutilation. The statement contained the following final paragraph:

> "I was brought to DW's house who I knew from Uganda through my husband. He promised to help us with the asylum process. He said we should say we are his family from Sudan. After he got his leave to remain in this country he started getting abusive and violent towards us. He used to beat me, kick me, lock me and my daughter outside, throw our food in the bin and frequently threatened to kill us and throw our bodies in the sea. I eventually found a church which helped me to find accommodation for myself and daughter."

[7] The respondent decided to treat the letter, statement, and medical report as a fresh claim in terms of Rule 353 of the Immigration Rules. He considered the merits of the fresh claim. By letter dated 2 September 2005 he intimated to the petitioner's

solicitors (1) that the petitioner's fresh claim was refused; (2) that the petitioner would be removed from the United Kingdom; and (3) that the petitioner was not entitled to appeal because the respondent had made a certification in terms of section 96(1) - and not, it should be noted, in terms of section 94, quoted in paragraph [13] below.

[8] In particular, the letter dated 2 September 2005 stated:

> "Dear Sirs,
>
> **Re: Ms JB ... Uganda**
>
> Your client has applied for leave to remain in the United Kingdom on the basis that her removal from the United Kingdom would place the United Kingdom in breach of her Human Rights. For the reasons stated below this application has been refused.
>
> Your application has not been considered by the Secretary of State personally, but by an official acting on his behalf.
>
> Your client claimed asylum on 11/02/04 in the name of HL, a Sudanese national. Her asylum claim was refused on 30/03/04 and she appealed against this decision. Your client attended the hearing of her appeal before an Adjudicator at Hatton Cross on 10/06/04. The appeal was dismissed by way of the Adjudicator's determination promulgated on 21 June 2004. Your client's subsequent application for permission to appeal to the Immigration Appeal Tribunal was also refused on 9 November 2004.
>
> On 19/04/05 your client attended an interview with an Immigration Officer in Glasgow. During the course of this interview, your client claimed that she is not HL, a Sudanese national, but that she is, in fact, JB, a national of Uganda ...

...Your client has admitted that she has previously lied about her identity and her original claim to asylum. At the hearing of her appeal before an adjudicator on 10 June 2004 she had every opportunity to tell the truth about her claim for asylum, but she continued to give false evidence. In his determination, the adjudicator did not find your client's evidence to be credible, neither did he believe your client's claim to be Sudanese. Your client's original statement and the statement now submitted by your client dated 22 July 2005 are indeed very different ... [The respondent then considered the merits of the fresh claim, and refused it.]

... Careful consideration has been given to whether your client should be given discretionary leave in the United Kingdom, but in view of the findings above, this has been refused.

As previously mentioned, your client was previously given every opportunity to give full and credible evidence regarding her asylum claim but chose not to do so. Your client's application for Leave to Remain on the basis of your representations, in which you claimed that returning your client to Uganda would breach her human rights, is refused and is hereby recorded as being determined on 25 August 2005. A decision has been made to refuse your client's human rights claim and remove her from the United Kingdom.

In accordance with section 96(1) of the Nationality, Immigration and Asylum Act 2002 (as amended) the Secretary of State hereby certifies that -

a) your client was notified of a right of appeal under section 82(1) (or under Part IV of the Immigration and Asylum Act 1999) against another immigration decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined),

b) the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision, and

c) in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision.

The effect of this certificate is that an appeal under section 82(1) against this immigration decision ("the new decision") may not be brought.

I must remind you that your client has no basis of stay in the United Kingdom and should make arrangements to leave without delay ..."

[9] Following that letter dated 2 September 2005, a year passed. Then in October 2006 the petitioner lodged the present petition for judicial review of the certification in terms of section 96 of the 2002 Act.

**Submissions for the petitioner**

[10] Two arguments were presented on the petitioner's behalf.

[11] First, it was contended that the respondent erred in concluding that there was no satisfactory reason for the petitioner's not having put forward the matters contained in the fresh claim. Counsel submitted that there was a satisfactory reason, all as set out in statement 7 of the petition, which was in the following terms:

"On or around the 19th April 2005, the petitioner disclosed to an Immigration Officer in Glasgow that she was not in fact HL as she had previously claimed, but was in fact JB, a national of Uganda. At that meeting, at which the petitioner disclosed her true identity, the petitioner also intimated the

following information: that the person who had helped her claim asylum as a Sudanese national was not in fact Sudanese; that this person's name was DW; that he is also Ugandan; that he was a friend of her husband's; and that she had known him for at least 15 years; that she had trusted his judgment when he had advised her that she would not be accepted as a refugee from Uganda if she told the authorities her real asylum claim; that it was Mr. W who had introduced her to a lawyer and it was Mr. W who asked that the lawyer include the petitioner and her daughter as part of Mr. W's ... false claim. The petitioner advised the Immigration Officer that Mr. W had offered her food and accommodation for herself and her daughter, as well as guidance with her false asylum claim. In addition to the above, the petitioner started a relationship with Mr. W, which after a short period ... descended into acrimony. The petitioner advised the Immigration Officer of the above and later in a statement averred that Mr. W started to physically abuse the petitioner."

[12] Counsel submitted that the issue of satisfactory reason should be viewed using a test no higher than the "realistic prospect of success" standard used in asylum claims. Reference was made to *Rahimi v Secretary of State for the Home Department* [2005] EWHC 2838 (Admin), particularly paragraph [12]. The sort of language used for that standard was that "there was a reasonable chance that the claim might succeed". The same kind of language should be adopted for the "satisfactory reason" test. Otherwise there was no indication what "satisfactory reason" meant. There were no objective criteria by which to assess a reason. Counsel submitted that if the

"realistic prospect of success" approach were to be adopted, the petitioner passed the test.

[13] *Esto* the court rejected that submission, the respondent should have considered certification under section 96 using the same approach as was appropriate for certification under section 94 of the 2002 Act. Section 94 provided *inter alia* as follows:

> "**Appeal from within United Kingdom: unfounded human rights or asylum claim**
>
> (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).
>
> (1A) A person may not bring an appeal against an immigration decision of a kind specified in section 82(2)(c), (d) or (e) in reliance on section 92(2) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) above is or are clearly unfounded ..."

[14] The respondent should have considered the merits of the new claim, and should have granted certification (preventing further appeal) only if the new claim was "clearly unfounded". The respondent had not done so. Reference was made to *Tozlukaya v Secretary of State for the Home Department* [2006] EWCA Civ 379, paragraph [43], where a "clearly unfounded" claim was defined *inter alia* as a claim which was "bound to fail". Reference was also made to *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, paragraphs [56] and [57], and to an Asylum Policy Instruction updated 31 October 2005, relating to the investigations to be made when considering certification under section 94, which included the following advice:

> **"2 Key points ... Consideration of individual merits**

> An asylum or human rights claim made by a claimant from one of the listed States should be considered on its individual merits. It is only if a claim falls to be refused that the question of certification arises. Subject to section 3 below, a claim should be certified as clearly unfounded unless on the facts of the case the decision maker is satisfied that the claim is not clearly unfounded ...
>
> **5 Miscellaneous issues**
>
> **(a) Credibility and false information**
>
> ... It will be a rare case which will be certified [in terms of section 94] on the basis of credibility alone. In the majority of cases, caseworkers will need to be able to certify on the basis that, even accepting the claimant's account as credible and taking that account at its highest, the claim is bound to fail ..."

[15] On the basis of either or both arguments presented, counsel invited the court to sustain the petitioner's two pleas-in-law, and to reduce the certification made by the respondent in terms of section 96, thus allowing the petitioner to proceed with an appeal.

**Submissions for the respondent**

[16] In relation to the petitioner's first argument, counsel for the respondent referred to paragraph 11 of the respondent's Answers, which noted *inter alia*:

> "... The petitioner provides no satisfactory explanation of why she did not raise her claim for leave to remain in the UK on the basis of her fear of female genital mutilation at the time of her appeal against the old decision. Mr. W's violence is not said to be connected to the making of her claim. The petitioner chose to put forward an asylum and human rights claim based upon a false account and in a false name. She was given every opportunity to give full

evidence regarding her asylum and human rights claim but chose not to do so. By letter dated 2 September 2005, the respondent refused the petitioner's new claim for the reasons provided in that letter and thereafter certified that no satisfactory reason had been given by her for not raising the matter at the time of the appeal against the old decision. The respondent's decision was reasonably open to him on the material before him. His decision was lawful and reasonable."

[17] Counsel submitted that the terms of section 96(1) (c) (set out in paragraph [1] above) entitled the respondent to form an opinion whether there was a satisfactory reason for certain matters not having been raised in the petitioner's appeal against the old decision (the decision to refuse asylum dated 24 March 2004). Such an opinion could be challenged only on the ground of unreasonableness in the sense outlined in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. No *Wednesbury* challenge had been articulated. In any event, the respondent had been well entitled to take the view that there had been no satisfactory reason for the petitioner's concealment of the true facts. The only reason placed before the respondent was the final paragraph of the petitioner's statement, sent to the respondent by letter dated 22 July 2005 (quoted in paragraph [6] above). The respondent's decision to treat that explanation as not amounting to a satisfactory reason was well within the range of reasonable decisions open to him.

[18] In relation to the petitioner's second argument, counsel for the respondent referred to paragraphs 8 and 10 of the respondent's Answers, which stated *inter alia*:

"8. ... Explained and averred that the respondent did not certify the petitioner's new claim as clearly unfounded in terms of section 94 of the 2002 Act. The respondent certified the new claim in terms of section 96 of the 2002 Act. He

did so because the new claim relied on a matter that could have been raised at the time of the appeal against the old decision and in the opinion of the respondent there was no satisfactory reason for not having raised the matter in the appeal against the old decision ...

10. ... Explained and averred that the policy document is wholly irrelevant since it offers guidance to certification of claims as clearly unfounded under section 94 of the 2002 Act and not under section 96 of the 2002 Act. The petitioner's claim was not certified as clearly unfounded under section 94 of the 2002 Act. The petitioner's averments that the certification is made under error of law because it did not follow policy guidance relating to certification under section 94 are wholly irrelevant ..."

[19] Counsel submitted that it was not possible to import into section 96 the statutory test applicable in terms of section 94. To do so would be contrary to the rules of statutory construction, and would in effect be an attempt to re-write the legislation. If the petitioner and her advisers considered that section 96 as it stood was incompatible with the European Convention on Human Rights, the correct course was to seek a declarator of incompatibility. Meantime however, standing the terms of section 96, the respondent had not erred.

[20] In conclusion, counsel for the respondent invited the court to repel the petitioner's pleas-in-law, to sustain the respondent's second plea-in-law, and to refuse the petition.

**Discussion**

*No satisfactory reason*

[21] Section 96(1) provides that certification preventing further appeal may be made where three conditions are satisfied. In this judicial review, no challenge is made in respect of the first two conditions, namely:

> "(a) that the person was notified of a right of appeal under [section 82(1)] against another immigration decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined),
>
> (b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision ..."

The petitioner's challenge is directed solely at the third condition, namely:

> "(c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision."

[22] I agree with counsel for the respondent that a challenge to a decision under section 96(1)(c) would require to be framed on grounds of *Wednesbury* unreasonableness. No such challenge was made in the present case. Accordingly the petitioner's first argument is, in my view, without merit. *Obiter*, it is my opinion that if someone enters the United Kingdom, and makes a calculated attempt to mislead immigration authorities about his or her identity and nationality, sustaining that approach despite careful questioning by immigration officers and others (for example, at the hearing before the adjudicator, and in an application to the Immigration Appeal Tribunal for leave to appeal), and if that person only reveals the new matter, namely his or her true identity, nationality, and other matters pertinent to asylum, after all appeal procedures based on the earlier false identity and nationality have failed, then the respondent would be well entitled in the *Wednesbury* sense to take the view that a

reason for the earlier concealment such as that given in the last paragraph of the petitioner's statement (quoted in paragraph [6] above) is not a "satisfactory reason" within section 96(1)(c).

*Proper approach in terms of section 96*

[23] Section 94 of the National, Immigration and Asylum Act 2002, which was prayed in aid by counsel for the petitioner, is quoted in paragraph [13] above. That section provides one of the exceptions or restrictions to a right of appeal from an immigration decision, and focuses upon the merits of the application. By contrast, section 96, quoted in paragraph [1] above, does not focus upon the merits of the application, but simply upon whether a matter which could and should have been raised earlier was not, with no satisfactory reason for not having done so.

[24] Sections 94 and 96 are thus quite distinct statutory provisions, dealing with different issues. Counsel for the respondent was in my view correct in her submission that it was not possible for the petitioner to import any language or test applicable to section 94 into the certification procedure defined in section 96. Accordingly I am not persuaded by the petitioner's second argument.

**Decision**

[25] For the reasons given above, I shall repel the petitioner's first and second pleas-in-law, sustain the respondent's second plea-in-law, and refuse the petition.