Case No: CO/6657/2009

Neutral Citation Number: [2010] EWHC 880 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

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

Date: Friday, 26th February 2010

Before:

HIS HONOURABE MR JUSTICE BEATSON

- -

Between:

THE QUEEN ON THE APPLICATION OF DARBOE **Claimant**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

- -

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Mr Mustakim, instructed by Hoole & Co, appeared on behalf of the **Claimant**

Mr Barnes, instructed by the Treasury Solicitors, appeared on behalf of the **Defendant**.

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Judgment

Mr Justice Beatson:

1. The claimant, now aged 27, is a citizen of The Gambia. He arrived in the United Kingdom on 17 October 2006 on a six months visitor's visa, but remained in this country after his leave expired. He was arrested on 30 August 2007, and on 29 January 2008, claimed asylum. In this application for judicial review, lodged on 29 June 2009, he challenges two decisions of the Secretary of State. The first decision is, with effect from July 2007, to include The Gambia in the list of designated "safe" states under Section 94(4) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The second is the decision of the Secretary of State made over two years ago, on 25 February 2008, but of which the claimant was only notified on 25 June 2009, to certify both his asylum and human rights claims as clearly unfounded under Section 94(2) of the Act. The effect of the decision to certify the claims is to preclude the claimant from appealing against them while he remains in the United Kingdom. I shall refer to the first issue as the "safe state" issue and the second issue as the "certification" issue.

2. The list of "safe states" in Section 94(4) of the 2002 Act consists of states in respect of which the Secretary of State is satisfied that there is, in general, no serious risk of persecution of persons entitled to reside in them, and that removal of such persons will not in general contravene the UK's obligations under the Human Rights Convention.

3. Whereas the Secretary of State is generally only entitled to certify a claim for asylum of human rights claim where he is satisfied that it is clearly unfounded, in the case of an asylum or human rights claim by a person who is entitled to reside in a state designated as safe, section 94(3) requires the Secretary of State to certify the claim unless he is satisfied that the claim is not clearly unfounded But, as Wilson J pointed out in *R(Husan) v SSHD* [2005] EWHC 189 (Admin) at [24] – [28], although inclusion in the list of "safe" states appears to subject the criterion for the defendant's certification to a "terminological reverse, inimical to that citizen's interests provided by section 94(3) of the Act", the Court of Appeal in *R (L and another), v SSHD)* [2003] 1 WLR 1230 has construed the terminological reverse "as so Jesuitical as not to have measurable legal effect". This is because, although in the case of "safe" states the background facts may be expected to weigh against a valid asylum claim, in considering whether to certify a claim, the Secretary of State, will have to undertake a similar process of enquiry whether or not the state to which the person would be returned is a "safe" state.

4. Section 94(5) and (5)(a) empower the Secretary of State by Order to add a state or part of a state to the list if the conditions are satisfied in respect of the state, part of the tate, or "in relation to a description of person", which by Section 95(c) can include gender. The Gambia is one of eleven states added to the list in Section 94(4) of safe states by the Asylum Designated States Order 2007 SI 2007 No 2221 ("the 2007 Order"). It and five other states are designated as safe in respect of men only.

5. I first summarise the procedural history of this matter. I have stated that the Secretary of State did not serve notice of his decision to refuse and certify the

claimant's asylum claim for over twelve months. He did so on 25 June 2009 after removal directions were set on 18 June for the claimant to be removed on 30 June and the claimant was detained on 24 June. After these proceedings were launched the removal directions of 30 June were cancelled.

6. On 24 July 2009 HHJ Vosper QC refused permission on the papers, stating that the claimant's case was totally without merit. He ruled that the renewal of the application to an oral hearing should not be a bar to removal. On 29 July the defendant gave the claimant notice that he had set directions for removal to The Gambia on 2 August. The claimant's application for permission was renewed on the same day (a Wednesday). The Administrative Court informed the claimant's representatives that an oral hearing of the renewed application could be listed on Friday 31 July. That hearing did not take place. It is not entirely clear why this was so. Counsel instructed on behalf of the defendant was apparently not available, but the hearing could have proceeded without the defendant's counsel, or with another counsel.

7. On 31 July the claimant's solicitors sought the defendant's consent for the hearing to be relisted on 3 August and for the removal directions to be deferred, but the defendant did not agree to this. The Treasury Solicitors stated that, in view of HHJ Vosper's order, removal would not be deferred unless an injunction was obtained. The claimant's solicitor's response stated that obtaining a further injunction over the weekend was not a viable option. In fact the matter could have been put before the Queen's Bench judge on duty. Indeed a letter dated 1 August from the United Kingdom Border Agency, which was faxed to the claimant's solicitors, referred to the duty judge and asked that, if any application was made, the letter be put in front of that judge.

8. It is not clear from the papers whether there was an application that failed or whether there was no application. In any event, the claimant was removed on 2 August. The renewed application came before HHJ Bidder QC on 8 September. As a result of that hearing, permission was granted on the safe country issue. The refusal to give leave on the certification issue was the subject of a successful appeal by the claimant. On 17 December 2009 Hallet LJ gave permission to apply for judicial review on that ground too.

9. I have been assisted by the skeleton arguments and oral submissions by Mr Mustakim, on behalf of the claimant, and Mr Barnes, on behalf of the defendant. Mr Mustakim in fact served three skeleton arguments; the second in response to the detailed grounds of defence served by the defendant after permission was granted. His first skeleton argument dealt with both the "safe country" issue and the "certification" issue, but the second states that the sole issue in this application concerns the Secretary of State's decision to designate Gambia as a safe country for men. However, at the beginning of the hearing he submitted a further skeleton argument dealing with the "certification" issue, which is dealt with in Mr Barnes' skeleton argument. I will deal with both points.

10. The ground upon which the claimant applied for refugee status is based on his membership of the United Democratic Party ("The UDP") in Gambia. He was arrested and detained on two occasions, and that in September 2006 he was

required to appear in court in connection with an incident during the presidential campaign in September 2001 when a government vehicle was destroyed which, it was said, had given rise to a charge of sedition. The claimant secured a deferral of the first summons on the ground that he was unwell. He was required to appear on 24 October but did not attend. On 17 October he travelled to the United Kingdom.

11. The defendant's decision letter in paragraph 7 accepts the claimant's basis of claim. As well as the material to which I have referred, paragraph 7 states that the arrest in 2000 occurred while the claimant was on his way to a rally connected with elections when people from the opposition attacked his group with stones and they retaliated. They were arrested, taken to a detention centre, questioned and released after eight or nine hours. They were not fingerprinted and were not required to report back to the police station: paragraph 7(iv). After the incident involving the destruction of a government vehicle, the claimant and others were taken to a detention centre where they were held for three days and accused of destroying the vehicle. The claimant was released after being questioned because he could not give any information. He was not photographed or fingerprinted. He was, he stated, beaten while he was detained. The decision letter appears to accept this: paragraph 7(vi). The remainder of the decision letter states *inter alia*:

    a. The United States State Department Report 2004 ("USSD 2004 Report") states that The Gambia's constitution provides for an independent judiciary but that, in practice, the courts, especially at lower levels, are corrupt and subject to executive branch pressure at times. Nevertheless, the courts demonstrated independence on several occasions including in significant cases (see paragraph 12).
    b. The USSD 2004 Report stated there was a functioning bail system; however, on several occasions the police re-arrested people granted bail on their leaving the court (see paragraph 15).
    c. The objective evidence showed that, if there were any charges outstanding against the claimant, he could expect to receive a fair trial (paragraph 33).
    d. On the basis of the Country of Origin Report for The Gambia published in March 2006, a US State Department Report dated March 2003, and the Extended Bulletin of September 2002, the claimant would not face persecution by the authorities in The Gambia solely on the basis of membership of the UDP (paragraph 16 and 18).
    e. It was accepted that the claimant was arrested and detained in 2000 and 2001 (paragraph 19).
    f. The periods of his detention were consistent with the objective country information and the USSD 2004 Report, which stated that periods of detention generally range from a few hours to 72 hours, the legal limit after which detainees must be charged or released. The report also, however, states that there were cases in 2004 of detention that exceeded the 72 hours limit (paragraph 19).
    g. The fact that the claimant was not fingerprinted or photographed on either occasion when he was detained and was not required to report to the authorities indicated that he was of no continuing

interest to the authorities in The Gambia and was legitimately detained while the investigations into the disturbance were carried out and then released (paragraph 20).

h. The section on "sufficiency of protection" in the decision letter acknowledges that there are problems with police corruption and police acting with impunity does so on the basis of the USSD 2006 Report, but also states that the USSD 2002 Report states that no reports of torture and cruel, inhumane or degrading treatment or punishment by government officials were reported (see paragraph 21).
i. Reference is made to the statement in the USSD 2006 Report that positive steps have been taken since 2001 to improve the police forces conduct with regard to human rights (see paragraph 24).
j. The letter accepts (in paragraph 28) that the claimant was required to appear in court in September 2006 in connection with the 2001 incident but (see paragraph 29) it is clear, it is stated, that he was required to attend as a witness to a criminal matter and that the appearance was delayed when he informed the court that he was unwell.
k. The claimant was issued with a Gambian passport valid from 10 October 2010, very close to the scheduled court appearance. This showed that he was of no interest to the authorities (see paragraph 20).
l. It was accepted that the claimant was afraid he might be accused of being involved in the 2000 incident if he attended court and might face charges if he failed to appear in court. However, the decision letter states that those would be criminal charges and thus do not evidence a fear of persecution, only a fear of prosecution, which he does not qualify for asylum (see paragraphs 30 to 32).
m. Reference is made to the USSD 2004 Report stating that, at Mile 2 and two other prisons, the conditions generally met international standards and the government permitted visits by human rights observers. The report, however, noted that an opposition member, who spent six months at Mile 2, criticised the poor diet (see paragraph 37).
n. Reference is made to a Freedom House report dated 2005, stating: "Torture of prisoners had been reported although conditions in some of the country's prisons have improved" (see paragraph 41).
o. Reference is made to the Home Office's official guidance note for Gambia issued on 29 August 2007. Paragraph 3.9.5 of thisstates that prison conditions in the main national prisons have been judged to meet international standards and the position in local prisons is different. It is said that conditions deteriorate with overcrowding and lack of adequate supervisions being particular problems. The guidance note also states "[i]n general conditions are unlikely to reach the minimum level of severity required to reach the Article 3 threshold" (see paragraph 42).

12. The evidence before me on behalf of the claimant consists of his statement dated 28 January 2008, immediately before he made his application for asylum, and the

statement of facts relied on in section 8 of the claim form signed by Mr Khashy, his solicitor. On behalf of the defendant there is a statement dated 23 February by David Becker a Senior Executive Officer who acts as a Senior Policy Adviser in the Country Specific Policy Team in the UK Border Agency. The material before the Secretary of State when he made his decision included an affidavit by the claimant's brother and a statement by Mr Nyassi about the claimant's membership of the UDP.

13. Mr Becker's statement deals briefly with the designation of countries. Paragraph 3 states:

> "The approach of the SSHD to the designation of a country is as follows:
>
> a. The decision to designate a country is taken on the basis of policy and legal advice to satisfy the legal test set out in legislation.
>
> b. When identifying potential additions to the list of designated countries certain practical considerations are taken into account, in particular: (i) there must be a significant number of claims from the country in order to make its addition to the list worthwhile; (ii) there must be an ability to enforce returnees to the country concerned.
>
> c. Suggestions for designation can be made by many sources, including Ministers, Other Government Departments (OGD's) and UK Border Agency operational units.
>
> d. The Country's Specific Policy Team advices on the merits of designation, seeks appropriate legal advice and if necessary undertakes research into the available country information and data to provide an informed opinion. The country is not visited, although designation might follow fact-finding missions.
>
> e. Thereafter, designation is made by Statutory Instrument with the express approval of Parliament.
>
> f. The position in a designated country is reviewed when the relevant Operational Guidance Notes ('OGN') is updated. If there is no OGN for that country, then the county is reviewed on a regular basis, or as and when a change in the country situation has been answered."

14. As to the reviews mentioned in paragraph 3(f) of Mr Becker's statement, there is no indication given as to how frequent they are and what triggers them. Mr

Barnes took instructions during the course of the hearing and stated that operational guidance notes are meant to be reviewed at intervals of between six months and a year, but that the reality of the situation is that it is more likely to be a yearly review than a six monthly one. He stated that the designation of a state is only reconsidered where there is significant reason to do so. He gave the example of Sri Lanka, which was removed from the list of designated safe states after the deterioration in that county in 2006.

15. Mr Mustakim pointed out that the decision letter dated 25 February 2008 referred to an operational guidance note about the Gambia, dated 29 August 2007. He suggested this showed that there was not enough up-to-date scrutiny, but that is within the six-to-twelve month period Mr Barnes mentioned.

16. Before turning to the substance of the first issue -- the "safe state" issue -- I should observe that it is important for the Secretary of State to keep the status of the countries designated as safe under review. The court is appropriately circumspect when reviewing a designation contained in a statutory instrument. However, in assessing the legality of a decision to designate a state as "safe" or to maintain that designation, or whether the decision to designate or maintain the designation of a state for the purposes of section 94(4) is so unreasonable that no reasonable Secretary of State could have made it, the court is entitled to more particularity than is provided in Mr Becker's statement. The court is entitled to take into account whether the decision was made on the basis of up to date material and whether, notwithstanding the margin of appreciation in relation to this issue (see the discussion below of Lord Phillips MR's judgment in *Javed's* case), it was lawful for the Secretary of State to maintain the designation in the light of developments since the designation.

17. The claimant's case is essentially that reliance has been placed on reports relating to country conditions in the past, that there has been a significant deterioration since 2003: see the first skeleton argument, paragraph 9. Mr Mustakim submitted that the United States State Department report dated February 2009, which deals with conditions in 2008, and other more recent reports, put into question the reports relied on by the Secretary of State when designating The Gambia. His written submissions also questioned the designation of The Gambia as "safe", relying, *inter alia*, on the removal by the Swiss Federal Council of The Gambia from its list of safe countries in February 2007, before the United Kingdom designated it as "safe" in July 2007.

18. Mr Mustakim took me through the objective evidence and dealt with the evidence in relation to a number of categories of persons: men, woman, children, political opponents, journalists, defenders of human rights, homosexuals. He submitted that, on the basis of the material contained in the objective reports and summarised in his skeleton arguments, the high threshold for review set by the Court of Appeal decision in *R (Javed & Ors) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] QB 129 has been met. I will set out the evidence and material before the Secretary of State in summary form. I will not burden this judgment with extensive quotations from the objective evidence and for the most part, confine myself to giving the reference to the relevant part of the document.

19. Mr Mustakim relied on the February 2009 US State Department Report, the November 2008 Amnesty International Report, and the two documents prepared by the Office of the High Commissioner for Human Rights for the UN Human Rights Council, which are dated 2 and 13 November 2009. Mr Barnes invited me not to have regard to these documents because they post-date the decision. The legality of the Secretary of State's decision should not, he argued, be tested by reference to subsequent material. As a matter of principle, he is clearly right. But the Administrative Court is constantly being faced with what I have referred to as "rolling judicial review", where new decisions are taken by the Secretary of State after that under challenge or new information is put before the court by one party or the other. The court generally seeks to deal with these situations pragmatically, and where possible to do so in the light of the position as it is on the day of the hearing. Not to do so, for example in this case excluding any consideration of reports because they postdate the decision the legality of which is challenged, while in principle correct, could have the result of generating a further challenge based on the failure of the Secretary of State to reconsider the decision in the light of the more recent material. As the decision was made at the latest in June 2009 when the decision letter was served on the claimant the position of the November 2008 Amnesty Report and the February 2009 USSD Report differs from that of the two November 2009 documents. For these reasons I have taken into account all these reports while accepting that, as a pure matter of law, Mr Barnes' submission has force in relation to the November 2009 documents.

20. As far as the various items are concerned, Mr Mustakim has referred me to the Foreign and Commonwealth Office Report dated 29 February 2009 -- only four days after the date of the decision letter but some four months before it was served. The report referred to media and opposition being "regularly harassed for alleged stirring anti-government feeling"; to an Amnesty International report dated 11 November 2008 stating that "opposition politicians and their supporters when perceived to gain too much power and threaten the status quo can be at risk of being victims of enforced disappearance"; and to the BBC's country profile, a report published after the service of this decision in 2008, stating that *Reporters Sans Frontières* ("RSF") state there is "absolute intolerance of any form of criticism" in Gambia and that Gambia has seen "political opponents and journalists imprisoned without charge." Mr Mustakim also relied on the report by the Gambian Press Council and Coalition for Human Rights that violence against journalists and media workers has been on the increase since 2004. Paragraph 31 states that at least twenty-nine journalists have left the country since 1994, half in the two years preceding the report.

21. The summary prepared by the Office of the High Commissioner for Human Rights for the United Nations' Human Rights Council is a document that does not contain opinions, view or suggestions. It simply reports the information received from others, identifying who they are. In relation to political opponents, referring to the Amnesty International Report, it states special units, the President's personal protection officers, and members of the army and police allegedly tortured or ill-treated detainees. It also states that torture or ill treatment was used to obtain information as punishment and to extract confessions. The summary states that Amnesty International provided examples of ten military personnel and

five civilians tortured while in detention after the 2006 allege coup attempt and (at paragraph 14) refers to cases of unlawful arrest and detention of perceived and real opponents since the coup attempt, stating that most of the arrests took place between March and April 2006.

22. The second of the summaries for the United Nations' Human Rights Council (13 November 2009) states that the Human Rights Committee was concerned about information that numerous members of political opposition, independent journalists and human rights defenders had been subject to arbitrary arrest and detention on varying length without charges.

23. As far as torture is concerned, the USSD 2009 Report refers to the fact that there have been reports of torture and mistreatment of persons in custody by the security forces, although the constitution prohibits such practices, and to the statement by Amnesty International that torture and other ill treatment are used to obtain information.

24. The first of the documents prepared by the UN High Commissioner for Human Rights (2 November 2009) refers (paragraph 13) to 15 people being tortured while in detention further to the coup attempt in 2006. Paragraph 14 states that there have been 63 unlawful arrests since then, mostly in March and April 2006. The second document (dated 13 November 2009) refers to "a journalist and several persons" being detained in connection with the March 2006 coup attempt and to "at least eight other persons" being detained without charge, some of them held incommunicado.

25. As far as prison conditions are concerned, the more recent material does indicate deterioration. Amnesty International reports harsh conditions of detention at Mile 2 which amount to cruel, inhumane or degrading treatment, and its awarenes that at least 20 people have died in Mile 2 since 2005. Amnesty states that there have been no investigations by the authorities to determine the cause of death. The USSD 2009 Report states that although prison conditions remain poor, resulting in deaths, they generally meet international standards. It also states that the Government permitted some visits by independent human rights observers but they were not allowed to visit detainees and prisoners connected to matters that are politically sensitive.

26. As to the position of women, the first of the summaries for the United Nations' Human Rights Council records (paragraph 18) reports of widespread female genital mutilation. It states (paragraph 19) that domestic violence against women is tolerated by society and government, is regarded as private, that there is no legislation to protect victims, and that the police regard rape in the home as outside their jurisdiction. Paragraph 26 of the second of the summaries records that UNICEF noted that harmful practices such as female genital mutilation, early or forced marriage and domestic violence were still "widely practiced". Paragraph 16 refers to systematic discrimination against women.

27. In relation to children, Mr Mustakim relied on paragraph 8 of the first of the summaries and paragraph 18 of the second. The latter refers to the inadequate

implementation of non-discrimination principles against vulnerable children especially girls, children born out of wedlock, and disabled children.

28. Mr Mustakim also relied on the position of homosexuals, and in particular on the announcement by the President on 15 May 2008 ordering all homosexuals to leave the country within 24 hours and instructions to the Security Service to arrest them and close down motels and hotels hosting them. This announcement is referred to in the 2008 Amnesty International report. He also relied on the report of the International Gay and Lesbian Human Rights Commission that, in The Gambia, homosexual conduct is criminalized and those found guilty could be imprisoned for up to 14 years. I, however, observe that the recent US State Department report does not consider that homosexual conduct has been criminalized but refers to it as being the subject of "societal discrimination".

29. Mr Mustakim also submitted that the defendant's evaluation of the judiciary in the decision letter was erroneous (skeleton, paragraph 12) and, on the basis of the documents prepared by the Office of the United Nations High Commissioner for Human Rights, that there is no judicial independence and there is corruption in the judiciary. He submitted that there has been a failure to implement internal human rights obligations as referred to in the summaries of the Human Rights Committee or to provide machinery for safeguarding individuals against abuses. These, he submitted (see *Horvath v Secretary of State* [2001] 1 AC 489), are an important part of affording an adequate and effective system to protect the human rights of those in the country and the failure to do so supports the conclusion that it is not safe.

30. Mr Mustakim relied on the fact that so many groups were affected that it could not reasonably or rationally be said that The Gambia is a country where in general there is no risk of persecution: see his first skeleton argument, paragraph 36. He submitted that, in considering the safety of a country, the Secretary of State must consider the overall human rights position in it. He sought to rely on the material concerning woman and children because of their numbers. 44% of the population of 1.5 million are children and it is said that 31% of the population are woman. Some of the women presumably are female children. In his written submissions he maintained that the distinction made in the designation between men and woman was not based on empirical evidence, but he did not refer to this at the hearing. However, he submitted that attitudes to homosexuals are an important consideration in showing the position of men and their adverse human rights position, just as, in the case of women, this is shown by the position in relation to female genital mutilation.

31. Mr Barnes relied on the positive elements in the USSD 2009 Report (paragraphs 285-288), which in fact refers to the Amnesty International report, and on the overall picture in The Gambia. He submitted that since designation is only undertaken in respect of states which have had a significant number of claims to refugee status or on human rights grounds, the states being considered for designation will have what he described as an "questionable" human rights record.

32. Mr Barnes submitted that the overall effect of the objective evidence is such as not to enable this court on the appropriate test, to which I shall come, to rule that the

designation of The Gambia is unlawful. He relied on the material in the recent USSD 2009 Report stating that Gambia is a multi-party democratic republic, the statement that there were no reports that the government or its agents committed arbitrary or unlawful killings in 2008, and that there were no reports of politically motivated disappearances or arbitrary arrests of political opponents during 2008. This was said although the report acknowledges that the whereabouts of some detainees, including one journalist who disappeared in 2006, were unknown. The report also acknowledges that, despite the prohibition of torture and cruelty, inhumane and degrading treatment or punishment in the constitution, there are reports that security forces engaged in such conduct in respect of people in custody. But Mr Barnes submitted that the report showed this was not systemic or at a level which would put the Secretary of State's decision into question.

33. Mr Barnes accepted that prison conditions had deteriorated since the reports referred to in the decision letter and that the US State Department report said that prisons generally did not meet international standards, although detention conditions did. He accepted that there were numerous instances of the police and security forces arbitrarily arresting and detaining citizens. He placed particular emphasis on the statement that the courts have demonstrated independence on several occasions, even though in practice, particularly at lower levels, the courts were corrupt and at times subject to executive pressure. He also placed particular reliance on the statement in the same report on the next page that the judiciary generally enforced the constitutional right to a fair and public trial.

34. The third matter Mr Barnes relied on in the context of the justice system was that, while there were reports of civilians being held because of their political views or associations, unlike in 2007 in 2008 there were no reports that the government had arrested and detained members who publicly expressed disagreement. He also relied on: (a) opposition views regularly appeared in the independent press, (b) there are seven independent newspapers including one published by the opposition, (c) there are no reports of societal abuse or discrimination based on religious affiliation, belief or practice, (d) the 2006 Presidential election and 2007 National Assembly election were pronounced to be partially free and fair though with shortcomings, and (e) the 2008 local government elections were pronounced by international and local observers to be free and fair but with concern expressed about low voter turnout. The USSD 2009 Report acknowledged that corruption was a serious problem but stated that there were government attempts to curb it in 2008. It also stated that domestic and international human rights groups generally operated without government restriction on investigating and publishing their findings.

35. As to the position of homosexuals, Mr Barnes noted that the report does not say that homosexual acts are criminal, that the Gambian government retracted the President's statement ordering homosexuals to leave the country and instructions to the Security Services to arrest them, and there have been no reports of widespread arraests of homosexuals.

36. His conclusion, see paragraph 12 of his skeleton argument, is that:

> "…[A]lthough the objective evidence indicates that there are shortcomings in respect of human rights protection in Gambia, the SSHD is plainly entitled to take the view that in general the evidence does not indicate that there is a serious risk of persecution to men in Gambia, and that the removal of men would not in general contravene the UK's obligations under the ECHR."

On the approach to designation, Mr Barnes relied on the approach of the UK Border Agency's Country Specific Policy Team and Mr Becker's evidence.

37. As far as the relevant principles of law are concerned, they are not in dispute save at the margins. The starting point is the decision in *Javed's* case, to which I have referred. In that case Lord Phillips MR as he then was, delivered the judgment of the Court of Appeal. He stated that the question whether the Secretary of State had identified a country as one in respect of which there is "in general no serious risk of persecution", is technically one of legality rather than rationality (see paragraph 57) but the question is whether that state of affairs exists. Whether that state of affairs pertained he said, was a question of fact: paragraph 56. But (see paragraph 57), because the language defined in the statement of affairs that would have to exist before a country can be designated as "safe" is "imprecise", the question of whether there is "in general a serious risk" is one which might give rise to a genuine difference of opinion by rational observers. Judicial review has to have regard to "that considerable margin of appreciation." Lord Phillips stated: "There is no question here of conducting a rigorous examination that requires the Secretary of State to justify his conclusion." To succeed, a challenge to a designation has to demonstrate that the evidence clearly established that there is a serious risk of persecution in the designated country and that is a general feature in that country. For a risk to be serious it will have to affect a significant number of the populace.

38. The nature of this question is similar to the question considered by the House of Lords in *R v Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd.* [1993] 1 WLR 23, where the House was considering a decision by the Monopolies Commission that an area consisting of 1.65% of the area of the United Kingdom and 3.2% of its population was "a substantial part of the United Kingdom". That was a precedent jurisdictional fact and (at 25) "crucial" to the Commission's jurisdiction. But the question whether the particular area was "a substantial part of the United Kingdom" involved consideration of its economic significance, a matter which was relatively unjusticiable. Lord Mustill held (at 32-33) that although the question was a question of legality the Court had to recognise that it could not substitute its opinion for that of the Monopolies Commission, whatever the position in theory might be.

39. In *Javed's* case the court had the benefit of the decision of the House of Lords in *Islam v Shah* [1999] 2 AC 629 that there was in general a serious risk of persecution in Pakistan. The Secretary of State had maintained Pakistan in the list

of safe states after that decision. That factor and an analysis of the House of Lords' decision were important components in the Court of Appeal's decision in *Javed*'s case that the Secretary of State's decision to maintain the designation was not one to which a reasonable Secretary of State could come. The Court held that he erred in law in doing so and certifying the claims pursuant to the designation.

40. I also have before me the decision of Wilson J, as he then was, in *R (Husan) v Secretary of State* [2005] EWHC 189 (Admin), to which I have referred. I accept Mr Barnes' submission that the factual scenario considered in these other cases is not terribly helpful although he did urge me to consider *R (Balminder Singh) v Secretary of State* [2001] EWHC 925 (Admin). In both cases the width of the margin of appreciation was reaffirmed: see *Balminder Singh's* case at paragraph 23 and *Husan's* case at paragraph 60.

41. The position is that I have to consider the evidence in relation to The Gambia, and I have to do so having regard to the enhanced scrutiny that I have to give in a case involving human rights. I also have to balance that need for enhanced scrutiny with what was said by the Court of Appeal in *Javed*'s case as to the scope of review. So it is "enhanced scrutiny" while nevertheless according "a considerable margin of appreciation" to the Secretary of State. The facts of the other cases are of relevance in broadly identifying situations that take the Secretary of State beyond that margin of appreciation. In *Javed's* case, as well as the objective evidence, there was, as I have stated, the failure to reconsider designation after the House of Lords decision in *Islam's* case.

42. As to the factual scenarios in those cases, in *Balminder Singh's* case the problem was localised in Jammu and Kashmir and affected a small percentage of the population of India (0.7%), although a large number of people, some 7.7 million. In *Husan's* case, see paragraph 31, it is relevant that the "CIPU" assessment referred to the persistence of human rights abuses, the doubling of deaths in custody in the period and (paragraph 33) the routine use of torture, whether physical or psychological, by the police. The human rights abuses chronicled in the judgment in that case were more serious and extensive than those revealed in the objective evidence concerning the position in The Gambia. Moreover, things were getting worse, for example the number of deaths. His Lordship also concluded (paragraph 35) that, in the case of Bangladesh, the entire election campaign had been characterised by violence (cf. the reports about elections in The Gambia to which I have referred) and (see paragraph 55(e)) any member of the population, whether or not a member of a particular group, was at risk of having his human rights abused. That is not a position in this case.

43. Mr Mustakim submitted that as far as the margin of appreciation is concerned I should have regard to the decision in *TR (Sri Lanka)* [2008] EWCA Civ 1459 and in particular the judgment of Sedley LJ. Sedley LJ did not say, as is stated in Mr Mustakim's second skeleton argument at paragraph 24, that the margin may be slender in fresh claims cases. He said that in that case the defendant stated it could see that it may be slender<u>er</u> in such cases. Sedley LJ agreed for the three reasons set out in paragraph 33. But the context in that case is so different. First, it was concerned with whether a claim was a fresh claim. A court is well placed

to assess and compare a current claim now being made with a claim made in the past. That is a highly justiciable matter. Secondly, the issue in that case concerned the individual case. In this case the issue concerns the principles to be applied in a general decision designating a state. It was conceded in *Javed's* case that the court is not as well placed to make decisions in such cases. There is an extensive discussion in *Javed*'s case of the authorities on the review of secondary legislation: see paragraphs 42 to 54. Although is there is no principle of law restricting the extent of review, Lord Phillips stated: " There remains …the manner in which a court should approach the review in the circumstances of the case", which, as I have stated, was put as affording considerable margin of appreciation to the Secretary of State. Thirdly, the margin of appreciation was not a matter that fell to be decided in *TR (Sri Lanka)* (see Sedley LJ at paragraph 34) and Keene LJ did not (see paragraph 6) discuss it.

44. Taking into account the material both before and after the decision letter was served on the defendant I have concluded that while the situation in The Gambia is troubling and needs to be reviewed regularly, the situation is not such that puts the Secretary of State's designation and the certification pursuant to that designation into question. I have referred on several occasions to the parts of the objective evidence that referred to improvements since the alleged attempted coup in 2006 and to improvements between 2007 and 2008. For these reasons I have concluded that the first part of the challenge fails. I have also referred to the fact that Mr Mustakim's written submissions relied on the removal by the Swiss Federal Council of The Gambia from a list of safe countries. Although he did not refer to this in his oral submissions, I should add that it is not a matter which assists him. First the Swiss Federal Council removed The Gambia from the list in February 2007, before The Gambia was added to the United Kingdom's list in July 2007. Secondly, there is no information about the legal basis of the approach used in Switzerland. Thirdly, given the margin of margin of appreciation set out in *Javed's* case the fact that another country has taken a different view, while it is of some interest, does not go to the legality of the decision.

45. I turn to the certification challenge. I have concluded that this also fails. I was troubled by, and had some concerns about, the fact that notwithstanding the passage of over twelve months between the time the decision was taken and the time it was served on the claimant, the Secretary of State did not revisit the question. Perhaps this was because the Secretary of State primarily relied on the safe country designation. Mr Mustakim relied on the various changes in the reports published after 25 February 2008, the date of the decision letter, which was served on the claimant on 25 June 2009.

46. There are of course differences in the way that matters are put in the reports. But with the exception of prison conditions, which the more recent material states do not meet international standards, the overall picture is broadly the same as it was at the date of the letter. If anything, as one gets further away from the alleged attempted coup in 2007 there is some marginal improvement, albeit there is also some movement in the other direction, for example in relation to homosexuals as far as the President's announcement is concerned. The test for certification is set out in paragraphs 16 to 18 of Mr Barnes' skeleton. The term "clearly unfounded"

requires the decision maker to consider how the claim would be treated before an immigration judge. In *Thangarasa v Secretary of State* [2002] UKHL 36, Lord Bingham stated:

> "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 if, after reviewing this material, he is reasonably and conscientiously satisfied that the allegations clearly fail."

47. In *ZT (Kosovo) v Secretary of State* [2009] UKHL 6, Lord Phillips stated that:

> "Where, as here, there is no dispute of primary facts the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion is rational other than by asking himself the same question she has considered. If the court concludes that the claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational."

This test is a similar test to that enunciated by the Court of Appeal in the context of fresh claims in *WM (DRC) v Secretary of State* [2006] EWCA Civ 1495.

48. In this case the Secretary of State has not challenged the factual basis of the claimant's case. I have set out what is stated in paragraph 7 of the decision letter. His case is set out there. At its highest it shows harassment by reason of police interrupting meetings and an arrest for fighting which has led to a summons to court which may lead him to prosecution for failure to attend. There is no description of being threatened with violence. As well as the recent reports, the claimant relies on Mr Nyassi's statement, his brother's affidavit, and the warrant for his arrest. Mr Mustakim submitted that there is a real risk that the claimant will be tortured if arrested and it cannot therefore be said that the claim is "wholly lacking in substance". The defendant accepts that a warrant has been issued because the claimant did not respond to the summons to appear in court as a witness but there is no evidence that he is himself to be charged with sedition. Mr Nyassi's statement gives different dates for the claimant's detention to those the claimant has given. Significantly, the objective evidence about membership of the UDP is that membership as such of that party would not put a person at risk. The party has taken part in demonstrations which were not disrupted by security

forces. The treatment of the claimant when he was arrested and detained on two occasions was also, on his account, such as not to put into question the defendant's certification. For these reasons this application is dismissed. I am grateful to both of you.

MR BARNES: My Lord, there is then only the question of costs. The claimant is Legal Services Commission funded, as I understand it. In the circumstances I invite my Lord to make an order that the claimant pay the defendant's costs not to be enforced without order of the court. My Lord, it is the usual order that is sought in these cases. Frequently when I have asked for it, I have been confronted by the question, what is the point, is it ever going to be enforced?

MR JUSTICE BEATSON: It is like when you want it on a written submission. You've taken them out of the country and they're poor and they've got no money anyway. You just wanted something hanging over their heads really. Not you, your lay client.

MR BARNES: My Lord, that may well be right.

MR JUSTICE BEATSON: But so in other words you have made the argument for, I have heard the argument for, you know what some judges say. Let me hear what Mr Mustakim says. Can I just ask, I refrained from doing it through all your submissions because I didn't want you to get the wrong… has there been any contact between the claimant and those representing him since he has been removed?

MR MUSTAKIM: I have no instructions.

MR JUSTICE BEATSON: So, really it's…right. What are your instructions about costs? It is really which pocket of the taxpayer is going to pay it.

MR MUSTAKIM: It is just that this case, in my respectful submission, does give rise to an issue of public reporters. Your Lordship mentioned that at the beginning and it was a case which was genuinely put before the court not purely to (inaudible), but because he wasn't given any opportunity for right of appeal or to have it assessed in the way you mentioned and throughout the history of the case. That is what I wish to say in relation to that. Following from that my Lord, would your Lordship be minded to grant permission in this case to the Court of Appeal?

MR JUSTICE BEATSON: No, I think you will have to ask the Court of Appeal for that? (To Clerk) Have you got a form for me to fill in? Could you get one to me? I'm not going to be able to fill in the forms I'm supposed to do now. I will tell you why I am not going to give permission to appeal. Although this case has raised an important issue, the factual context in which it was raised is not such as to have a substantial prospect of success so as to satisfy the requirements of CPR 52. As far as costs are concerned, I see no reason not to make a standard order of costs. If the Legal Services Commission chooses to use its hard-pressed budgets to fund the case it must fare as other litigants fare. I will fill in the form on Monday and if you leave the fax number with my learned clerk we will fax the

form to you so that can see what it is. We are not in the Administrative Court in London. Can I ask you, Mr Barnes, to draw up the order?

MR BARNES: Yes, my Lord.

MR JUSTICE BEATSON: And can you consult Mr Mustakim? If it is agreed, that's fine. If it is not agreed it's going to be a pretty simple order.

MR BARNES: Yes, My Lord. It's difficult to imagine we couldn't agree it.

MR JUSTICE BEATSON: Perhaps it's because I have been in the Commercial Court for a while where people seem to find it easy to disagree on the most extraordinary things.

MR BARNES: My Lord, if we have an email address. Yes, that would be fine.

MR JUSTICE BEATSON: Thank you very much. Yes, well, very well, thank you both for your help.