OUTER HOUSE, COURT OF SESSION

[2009] CSOH 86

P157/09

OPINION OF LORD BRACADALE

in the Petition of

SO also known as RZ

PETITIONER;

for

Judicial Review of a decision of the Secretary of State for the Home Department

Act: Forrest; McGill & Co
Alt: Stewart; C Mullin

18 June 2009

Introduction

[1] The petitioner is a citizen of Nigeria, aged 46 years, who arrived in the United Kingdom in 2005. Thereafter, he lived and worked illegally in the United Kingdom until 25 February 2008 when he was arrested and claimed asylum under the Geneva Convention relating to the Status of Refugees as amended by the 1967 Protocol ("the Refugee Convention").

[2] By letter dated 7 January 2009 ("the decision letter") the Secretary of State refused his application for asylum; concluded that he did not qualify for humanitarian protection under rule 339C of the Immigration Rules; and concluded that none of his circumstances, including his state of health, founded a basis for the grant of

discretionary leave to remain in the United Kingdom. The Secretary of State also certified under section 94(2) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") that the asylum claim was clearly unfounded. That had the effect that the petitioner could not appeal the decision to the Asylum and Immigration Tribunal ("AIT") while he remains in the United Kingdom; that is to say, he could not make an in-country appeal.

[3] In this application the petitioner seeks reduction of the decision to certify under section 94(2), thereby allowing him to appeal the merits of the decision to the AIT.

Section 94 of the 2002 Act

[4] Section 94 of the 2002 Act, so far as material for present purposes, provides:

> "(1) This section applies to an appeal under section 82 (1) where the appellant has made an asylum claim or a human rights claims (or both).
>
> (2) A person may not bring an appeal to which this section applies in reliance on section 92 (4) (a) if the Secretary of State certifies that the claim or claims mentioned in sub-section (1) is or are clearly unfounded.
>
> (3) If the Secretary of State is satisfied that an asylum claimant or human rights claimant is entitled to reside in a state listed in sub-section (4) he shall certify the claim under sub-section (2) unless satisfied that it is not clearly unfounded."

Nigeria (in respect of men) is included in the list of states in sub-section (4). In *MK* v *Secretary of State for the Home Department* [2007] CSOH 128 Lord Macfadyen at paragraph 22, under reference to *R (Yogathas and Thangarasa)* v *Secretary of State for the Home Department* [2003] 1 AC 920, focused the question to be considered by the court in a judicial review of a decision by the Secretary of State to certify under

section 94 as being whether on the material before her, properly and carefully considered, the Secretary of State was entitled to conclude that the claims were such as would be bound to fail. A further formulation of the approach of the court is to be found in the opinion of Lord Hodge in *FNG* v *Secretary of State for the Home Department* [2008] CSOH 22 at paragraph 14:

> "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."

That formulation was approved by the House of Lords in *ZT (Kosovo)* v *Secretary of State for the Home Department* [2009] UK HL 6 (see Lord Hope of Craighead, paragraph 54; and Lord Carswell, paragraph 65). In addressing these questions the Court requires carefully to scrutinise the claim and the approach of the Secretary of State.

The petitioner's claim

[5] In his claim for asylum the petitioner stated that he was a widower, had no children and both his parents were deceased. He claimed that in 2004 he was asked to join a militant group in his mother's village in the oil rich Delta State. The group which he joined was associated with a group called the Movement for the Emancipation of the Niger Delta (MEND) which is described in the Country of Origin Information Request concerning MEND, dated 9 January 2008, as being an active terrorist group that uses violent means to support the rights of the ethnic Ijaw people in the Niger Delta. There are about 120 groups associated with MEND. Its ultimate

goal is to expel foreign oil companies and Nigerians not indigenous to the Delta region from Ijaw land. The petitioner claims that he took an oath of secrecy when he joined the group, the punishment for breach of which was death. His role in the group was bookkeeper and keeper of the box of charms. He claimed to have been misinformed as to the activities of the group, which, he later discovered, included using charms on the Nigerian Navy; running guns to use against the oil workers; and kidnapping and robbing foreign workers. As a result, he stopped attending meetings of the group. He failed to return the box of charms and, one day in October 2004, when he was at the market, members of the group came to his house in Lagos looking for him. They attacked his wife, who died four days later. He reported the attack to the police. His store, in which he sold second hand clothes, was also attacked by members of the group. In addition, he claimed that when, after the attack, he moved to Badagary, members of his wife's family had come to find him. Their purpose was to kill him because they believed that he had used his wife for a ritual. He then moved to Ibadan, where, again, members of the group came looking for him. He left the country in September 2005 and flew to Italy where he remained for three weeks before coming on to London. He claimed that he could not return to Nigeria: the members of the militant group wanted to kill him because he did not return their box of charms; and his deceased wife's family wanted to kill him because they believed he had used his wife in a ritual.

The decision letter

[6] At paragraph 14 of the decision letter the Secretary of State considered these reasons for the petitioner's fear. She went on to conclude:

> "It is considered that the reasons you fear these groups of non-state agents, a group associated with MEND and your late wife's family, are not reasons covered by the 1951 Geneva Convention, namely race, religion, nationality, political opinion or membership of a particular social group. It is considered that you have not established a well founded fear of persecution by non-state agents for a Convention reason on return to Nigeria and so you do not qualify for refugee status under the auspices of the Geneva Convention."

In his submissions Mr Forrest did not challenge that finding. Rather, he went on to criticise the approach of the Secretary of State in later paragraphs of the decision letter to the issues of sufficiency of protection and internal relocation. Mr Stewart, on behalf of the Secretary of State, pointed out that the substance of the decision was to be found in paragraph 14 and that the discussion of the issues of sufficiency of protection and internal relocation were only of relevance to the issue of asylum if the Secretary of State was wrong in her conclusion that the reasons for the petitioner's fear were not covered by the Refugee Convention. He submitted that in the light of the failure to challenge the decision in paragraph 14 itself the attack on the decision of the Secretary of State was without foundation. It seems to me that Mr Stewart is correct in that submission. No argument was advanced before me that the fears expressed by the petitioner did fall within the Refugee Convention. Nor do I see any obvious reason why the Secretary of State was not entitled to come to the conclusion that she did in paragraph 14. She went on to examine the issues of sufficiency of protection and internal relocation in the context of whether, although not meeting the requirements of

refugee status under the Refugee Convention, the petitioner should be afforded humanitarian protection. If she was wrong in coming to the conclusion that she did in paragraph 14 then, because the petitioner sought to demonstrate persecution by non-state agents, the issues of (a) whether the authorities could provide a sufficiency of protection in the petitioner's home area; and (b) if not, whether the option of internal relocation was available would come into play in relation to the question of asylum. Accordingly, lest I be wrong in my conclusion that the Secretary of State was entitled to come to the decision that she did in paragraph 14 I shall go on to consider the submissions in relation to the questions of sufficiency of protection and internal relocation.

[7] The Secretary of State concluded that there was protection available from the police in Nigeria against groups such as that of which the petitioner had been a member and from the family of the petitioner's wife. In addition, it was considered that the petitioner had not established that there was no sufficiency of protection in that he had not tested the police protection available. Although he had reported the matter to the police he had left Lagos the day after making the report and thereafter left the country instead of remaining to assist the police with their investigation. In addition, the Secretary of State concluded that the petitioner was a person for whom internal relocation was a viable option and that it would not be unreasonable or unduly harsh for him to relocate within Nigeria.

Sufficiency of protection

[8] At paragraph 17 of the decision letter the Secretary of State quoted at length from section 3.8 of the Operational Guidance Note, Nigeria 2007, headed "Fear of the Bakassi Boys (or other vigilante groups)". It appears that such groups carry out patrols, arrest persons, determine guilt summarily and exact various punishments,

including extrajudicial executions. The Federal government oppose such groups and the police are instructed to suppress them, although with only limited success.

[9] Mr Forrest submitted that in relation to the question of sufficiency of protection the Secretary of State was not entitled to rely on the section in the Operational Guidance Note Nigeria 2007 which applied to the Bakassi Boys and other vigilante groups. She was not entitled to include MEND and its associated groups within the description "other vigilante groups". They were not mentioned in the list of examples given and there was no basis for describing MEND as a vigilante group. This was not an adequate basis to justify concluding that there would be sufficient protection. It was not an adequate basis to come to the conclusion that the claim was clearly unfounded, particularly bearing in mind the careful scrutiny required in arriving at that conclusion.

[10] Mr Stewart submitted that the Secretary of State was entitled to take the Operational Guidance Note in relation to vigilante groups into account, although I did understand him to accept that MEND did not have the character of a vigilante group. He also drew attention to the Secretary of State's analysis of the actions of the petitioner in reporting the matter to the police but thereafter leaving instead of remaining to be available to assist the police. She was entitled on that material to conclude that he had failed to demonstrate that there was no sufficiency of protection from MEND or his late wife's family because he had failed to test the police protection available. In any event, even if the decision with respect to sufficiency of protection was flawed the decision on internal relocation was in itself sufficient to have allowed the Secretary of State to come to the decision which she did.

[11] In my opinion, the Secretary of State has not sufficiently explained the basis on which she used the information in relation to the Bakassi Boys or other vigilante

groups as a ground for concluding that "there is protection available from the police in Nigeria against vigilant [*sic*] groups, such as MEND or the family of your late wife." In paragraph 18 she simply asserts that this is the case. It is clear from the Country of Origin Information Request concerning MEND dated 9 January 2008 that MEND is a terrorist group with specific aims. It is not in the nature of a vigilante or non-police law enforcement organisation. The Secretary of State has not explained how she felt able to draw the inference from the information in relation to the ability of the state to provide protection from vigilante groups that the authorities could provide sufficient protection from a terrorist group such as MEND. I am not satisfied that the analysis in paragraph 18 meets the requirement for careful scrutiny which is required in the context of being satisfied that a case is clearly unfounded. However, in my opinion the Secretary of State was entitled to conclude that the petitioner had not established that there was no sufficiency of protection from MEND or his late wife's family in respect that he had not tested the police protection available. The fact that he had reported the matter to the police in itself indicated that some level of police protection was available and that the petitioner must have had sufficient confidence in that to take the step of making the report. In the event he left before the effectiveness of the protection could be tested. The information before the Secretary of State as to the ability of the police to afford protection from the vigilante groups would be available as part of the general picture of the ability of the authorities to provide sufficient protection. Accordingly, although I consider that the Secretary of State erred in her analysis in paragraph 18, she was entitled overall to conclude that the petitioner had not demonstrated a lack of sufficiency of protection.

Internal relocation

[12] As was pointed out by the Court of Appeal in *R* v *Secretary of State for the Home Department ex parte Robinson* [1997] Imm.A.R.568 at paragraph 17 of the Opinion of the Court, "if the Home State can afford what has variously been described 'a safe haven', "relocation", 'internal protection', or "an internal flight alternative" where the claimant would not have a well founded fear of persecution for a Convention reason, then international protection is not necessary". The Secretary of State concluded that it would be safe for the petitioner to relocate to another part of Nigeria.

[13] Mr Forrest submitted that the terms of the Country of Origin Information Request concerning MEND was couched in tentative and negative terms, that is to say that no reports could be found from internet sources to indicate whether MEND had the means to harass or persecute people outside the Niger Delta region. That, he submitted, was an insufficient basis for the conclusion of the Secretary of State. In relation to the question as to whether internal relocation would be unduly harsh Mr Forrest made reference to the Country of Origin Information Report (production 6/2) at paragraph 36 which dealt with the issue of internally displaced people. It was irrational to suggest that the petitioner could go elsewhere in Nigeria without giving consideration as to whether he would become part of the displaced people and be subject to mistreatment.

[14] In my opinion Mr Forrest's submissions in relation to the question of internal relocation are bound to fail. He recognised that he had difficulties. In coming to her conclusion the Secretary of State relied on the Country of Origin Information Request concerning MEND dated 9 January 2008. MEND was a group operating in the Delta region. In the absence of objective information stating that MEND had the means to persecute people outside the Niger Delta region and the fact that there is freedom of

movement throughout Nigeria, it was considered that internal relocation outside the Niger Delta region was an option for the petitioner. The Secretary of State also referred to the Danish Immigration Service Report on Human Rights Issues in Nigeria 2005 which observed that there was no longer state persecution in Nigeria. Persons who encountered any difficulties from non-state agents were able to relocate internally. Mr Stewart drew attention to the passages in the Operational Guidance Note (production 7/2) dealing with the Niger Delta. At paragraph 3.8.8 it was stated that internal relocation to escape any ill treatment from non-state agents is almost always an option. It went on to assert that in the absence of exceptional circumstances it would not be unduly harsh for any individual, whether or not they had family or other ties in any new location, to relocate internally to escape a threat. Mr Stewart also drew attention to the case of *CO (Sufficiency of Protection - Internal Relocation (Nigeria CG)* [2002] UK IAT 04404 ("The Country Guideline Case"). That remained the current guideline case. The guideline case recognised that internally displaced people did experience problems but held that that was not sufficient to indicate that it would be unduly harsh for the appellant to locate elsewhere in Nigeria. The Secretary of State did not refer to the Country Guidance Case in terms: I was given to understand that it is not her practice to do so in a decision letter. It is, however, clear from the decision letter that her approach was consistent with that set out in *CO*. In addition, it is clear from the analysis of the Secretary of State in the decision letter that, although she did not refer to the Operational Guidance Note in terms, she did have regard to its terms. Having regard to that formidable body of information pointing towards relocation being an option for the petitioner and the absence of any exceptional circumstances which would overcome the conclusion that it would not be

unduly harsh for him to do so, I am satisfied that the Secretary of State was entitled to come to the conclusion that she did.

Conclusions

[15] I am satisfied that, with the exception of her unexplained reliance on the section in the Operational Guidance Note Nigeria 2007 in relation to the Bakassi Boys and other vigilante groups, the Secretary of State did properly address the information which was before her. She considered the claim on the basis that it was true. She concluded that the reasons for the fear of the petitioner did not fall within the Refugee Convention and was entitled so to conclude. While I consider that her conclusion based on the references to the Bakassi Boys and other vigilante groups is flawed, I do not consider that that vitiates her conclusion that the claim was clearly unfounded. She was entitled to have regard to that material by way of background and to the petitioner's failure to test the ability of the police to deal with his report. In any event, as was conceded by Mr Forrest, provided her conclusion that internal relocation was open to the petitioner and that it would not be unduly harsh for him to relocate was well founded, that would be sufficient to allow her to conclude that the claim was clearly unfounded.

[16] I am satisfied that the Secretary of State's decision met the tests developed in the authorities. She was entitled to conclude that the claim was bound to fail. Accordingly, she was bound to certify under section 94(2) of the 2002 Act that the petitioner's claim was clearly unfounded. I shall sustain the respondent's plea-in-law and dismiss the petition.