Neutral Citation Number: [2013] EWCA Civ 666

Case No: C5/2012/1662

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
Mr. Nicholas Paines Q.C.
[2012] EWHC 1660 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 June 2013

Before :

LORD JUSTICE PILL
LORD JUSTICE MOORE-BICK
and
LADY JUSTICE BLACK

- -

Between :

THE QUEEN (on the application of JB (Jamaica))	**Claimant/ Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant/ Respondent**

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- -

Mr. Stephen Knafler Q.C. and **Mr. Paul Nettleship** (solicitor advocate) (instructed by **Sutovic & Hartigan Solicitors**) for the **appellant**
Mr. Matthew Barnes (instructed by the **Treasury Solicitor**) for the **respondent**

Hearing dates : 26th & 27th February 2013

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Judgment

Lord Justice Moore-Bick :

Background

1. This is an appeal against the order of Mr. Nicholas Paines Q.C., sitting as a Deputy Judge of the Queen's Bench Division, whereby he dismissed the appellant's claim for judicial review of the Secretary of State's decision to include, and subsequently retain, Jamaica among the states designated in section 94(4) of the Nationality, Immigration and Asylum Act 2002 as generally not presenting any serious risk of persecution to those entitled to reside within them. By the same order the Deputy Judge dismissed the appellant's claim for damages for false imprisonment in respect of the period during which he was detained pending the determination of his claim for asylum.

2. The appellant, JB, is a national of Jamaica. He entered the United Kingdom on 7th May 2010 on a visitor's visa. On 14th October 2010, having overstayed his leave to remain, he claimed asylum. About a week later, on 20th October 2010, the appellant was detained pursuant to the respondent's policy of detaining applicants whose claims are considered to be suitable for fast track determination or whose claims are not such as to suspend the right to remove them pending appeal. This policy, to which it will be necessary to refer in more detail at a later stage, is known as the DFT (Detention Fast Track)/ DNSA (Detention Non-Suspensive Appeals) policy. It is published in the form of a document entitled *DFT & DNSA – Intake Selection (AIU Instruction).* Broadly speaking, the purpose of the document is to describe the circumstances under which the Secretary of State may exercise her power to detain those whose claims are capable of being determined quickly so that they can be removed promptly if they fail.

3. The appellant claimed asylum on the grounds that he is homosexual and that in Jamaica homosexuals, together with bisexual and transgender people (sometimes referred to as the LGBT community) are subjected to ill-treatment amounting to persecution. He was screened on 14th October 2010 and allowed to go home but was told to return on 20th October 2010. When he did so he was detained pursuant to the DFT/DNSA policy. On 15th November 2010 the appellant's claim for asylum was rejected and he lodged an appeal to the Immigration and Asylum Chamber of the First-tier Tribunal. The appeal was originally put on the fast track, but at a hearing on 24th November 2010 the tribunal removed it from the fast track and as a result the appellant was released from detention. In a decision promulgated on 10th February 2011 his appeal was allowed and his claim for asylum upheld.

4. In November 2010, while he was still in detention, the appellant started proceedings for judicial review seeking to have the respondent's decision to include Jamaica in the list of states set out in section 94(4) of the Act declared unlawful. He also claimed damages for false imprisonment on the grounds that his claim for asylum was not capable of being determined quickly in accordance with the DFT/DNSA policy and because in any event the policy had not been properly applied in his case.

The statutory provisions

5. Section 94 of the Nationality, Immigration and Asylum Act 2002 makes special provision for appeals against the refusal of claims for asylum and humanitarian

protection which are regarded as clearly unfounded. So far as is relevant to this case it provides as follows:

> "**94 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.
>
> (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 subsection (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 subsection (4) he shall certify the claim under subsection (2) unless satisfied that it is not clearly unfounded.
>
> (4) Those States are—
>
> . . .
>
> (n) Jamaica
>
> . . .
>
> (5) The Secretary of State may by order add a State, or part of a State, to the list in subsection (4) if satisfied that—
>
> (a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and
>
> (b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention.
>
> . . . "

6. Jamaica was added to the list of designated states by regulation 4 of the Asylum (Designated States) Order 2003. Its inclusion in that list was reviewed and confirmed in April 2007.

7. The effect of section 94 is that a person such as the appellant who seeks to appeal against the refusal of his claim for asylum has no right to remain in the United Kingdom pending the determination of his appeal if the Secretary of State has certified that his claim is clearly unfounded. If the claim has been made by a person who is entitled to live in a state listed in section 94(4), the Secretary of State is obliged to certify that the claim is clearly unfounded unless she is satisfied that it is not.

8. The basis upon which states are included in section 94(4) is made clear by subsection (5), namely, (a) that there is in general in that state no serious risk of persecution of persons entitled to reside there and (b) that removal to that state of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention. The two most important phrases for present purposes are "in general in that state" and "no serious risk of persecution" in subsection (5)(a).

Can Jamaica be considered to meet the statutory requirements?

9. Mr. Knafler Q.C. for the appellant submitted that Jamaica cannot properly be considered to meet the requirements of section 94(5)(a) because it is a deeply homophobic society, in which LGBT people generally are ostracised and ill-treated because of their sexuality. Homosexuals and those thought to be homosexual are routinely reviled and physically attacked by members of the public and can expect no protection from the authorities. Indeed, some members of the authorities are not above contributing to the persecution themselves. All that was accepted by the respondent as being the case. However, Mr. Barnes submitted on her behalf that LGBT people together represent a small minority of the population – no more than between 5% and 10% – and that viewed as a whole it can properly be said that there is *in general* in Jamaica *no serious risk of persecution* of persons entitled to reside there.

10. In *R (Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] Q.B. 129 the court considered the effect of the Asylum (Designated Countries of Destination and Designated Safe Third Countries) Order 1996, a precursor of section 94, which designated Pakistan as a country in respect of which there was in general no serious risk of persecution. The applicants applied for judicial review of the Secretary of State's decision to include Pakistan in the list of designated countries on the ground that, having regard to evidence concerning its treatment of women and Ahmadis, Pakistan was not a country in respect of which it could be said that there was in general no serious risk of persecution. The court held that, in the light of the evidence available to the Secretary of State that women in Pakistan were in general at serious risk of persecution and of the evidence relating to the treatment of Ahmadis, his inclusion of Pakistan in the Order was unlawful. Lord Phillips of Worth Matravers M.R., giving the judgment of the court, said:

> "56. Although rational judgment or evaluation was called for from the Secretary of State, what had to be evaluated was the existence of a state of affairs. Whether that state of affairs pertained was a question of fact. If he concluded that Pakistan was a country in which there was in general no serious risk of persecution, the Secretary of State then had to consider a further question which was essentially one of policy: should he designate Pakistan?

> 57. . . . Whether there was *in general* a *serious* risk of persecution was a question which might give rise to a genuine difference of opinion on the part of two rational observers of the same evidence. A judicial review of the Secretary of State's conclusion needed to have regard to that considerable margin of appreciation. There was no question here of conducting a rigorous examination that required the Secretary of State to justify his conclusion. If the applicants were to succeed in showing that the designation of Pakistan was illegal, they had to demonstrate that the evidence clearly established that there was a serious risk of persecution in Pakistan and that this was a state of affairs that was a general feature in that country. For a risk to be serious it would have to affect a significant number of the populace."

11. As can be seen from that passage, the court recognised that the Secretary of State is entitled to a considerable margin of appreciation when deciding whether on the evidence there is in general a serious risk of persecution in the country in question. Moreover, the court clearly thought that for there to be a serious risk of persecution a significant proportion of the population would have to be affected. Since women alone represented half the population of Pakistan, that criterion was clearly met. However, as Elias L.J. pointed out in *R (MD (Gambia)) v Secretary of State for the Home Department* [2011] EWCA Civ 121, paragraph [22], persecution must be systematic before it can properly be described as a "general feature" of the country concerned, which in turn requires that it affect a significant number of people. In my view both factors have an important part to play in determining whether the test in section 94(5)(a) is satisfied.

12. *R (MD (Gambia)) v Secretary of State for the Home Department* concerned an attempt to challenge by judicial review the designation of Gambia by the Secretary of State for the purposes of section 94(4) of the Act. There was evidence of widespread human rights abuses in the form of detention beyond the time permitted in law, politically motivated arrests, the use of torture by the security forces against people in custody, prison overcrowding combined with insanitary conditions, the lack of an independent judiciary, the criminalising of homosexual conduct and arbitrary abduction. Nonetheless, Elias L.J., with whom Ward and Tomlinson L.JJ. agreed, held that the Secretary of State was entitled to conclude that the human rights infringements were not so systematic or general as to compel the conclusion that Gambia could not as a matter of law properly be included among the list of designated countries.

13. In support of his argument Mr. Knafler drew our attention to section 6 of the Interpretation Act 1978, which provides that in legislation, unless the contrary intention appears, words in the plural include the singular. On that basis he submitted that the word "persons" in section 94(5)(a) should be read as meaning "any person" and that the subsection should be understood as referring to states in which, generally speaking, no one who is entitled to reside there is at any serious risk of persecution; or, to put it another way, that the question is whether any particular person or category of persons is in general at serious risk of persecution. Mr. Knafler accepted that

isolated or sporadic incidents of persecution do not prevent a state from being listed in section 94(4), but he submitted that systematic persecution, even of a small minority, does. Accordingly, he submitted that the requirement of subsection (5)(a) is not met in the case of Jamaica, because homosexuals generally, who represent a significant minority of the population, are systematically persecuted.

14. The judge considered that Mr Knafler's argument directed attention away from the general situation in the designated country to that of particular persons, irrespective of the proportion of the population that was affected, and was to that extent inconsistent with the decision of this court in *Javed*. He considered that the question to be decided was whether, faced with evidence that between 5% and 10% of the population was affected, the Secretary of State could rationally designate Jamaica as "safe" because there was in general no serious risk of persecution of those entitled to reside there. He held that the numbers affected were not so large that no reasonable person could fail to find that the risk of persecution affected such a significant proportion of the population as to be "serious" within the meaning of section 94(5)(a) and that the claim therefore failed.

15. In addition to the arguments made to the judge Mr. Knafler sought to rely in support of the appeal on statements made by Ministers in the course of debates on the 1996 Asylum and Immigration Bill, clause 1(2) of which introduced for the first time by way of amendment to paragraph 5 of Schedule 2 to the Asylum and Immigration Appeals Act 1993 the expression "in general no serious risk of persecution". He submitted that section 94(5)(a) of the 2002 Act was ambiguous and that in accordance with the principles enunciated in *Pepper v Hart* [1993] A.C. 593 and subsequent authorities the uncertainty surrounding its proper interpretation could be resolved by reference to statements made during the debates on the earlier legislation and on subsequent statutory instruments designating various states as safe for the purposes of that legislation. We declined to receive that evidence, however, primarily because we did not think that the language of section 94(5)(a) was ambiguous, but also because none of the statements on which he sought to rely was made in the course of debates on the 2002 Act and in most cases they did not exhibit the necessary degree of clarity.

16. At the heart of the present dispute lies the correct interpretation of section 94(5)(a). That subsection has to be read in the context of section 94 as a whole and with proper regard to the legislative purpose of that section, which is to draw a distinction between claims for asylum which may be well-founded and those that are clearly unfounded. All those claiming asylum whose claims are rejected have the right to appeal against the decision, but the section draws a distinction between those whose claims may be well-founded and those whose claims are certified by the Secretary of State as clearly unfounded. The former are entitled to remain in this country while their appeals are heard; the latter are not. Moreover, there is a strong likelihood that claims which are certified as clearly unfounded will be considered suitable for fast track determination.

17. Section 94(3) creates a presumption that claims for asylum made by those who are entitled to reside in countries which are in general free of persecution are unfounded and accordingly the Secretary of State is required to certify their claims as unfounded, unless she is satisfied that they are not. It follows that even in the case of an asylum-seeker who is entitled to reside in a designated country the Secretary of State must consider the claim on its merits and, having done so, may be satisfied that the claim is

not clearly unfounded. In such a case the claimant will be entitled to make an in-country appeal, as happened in this case. In that context I think it is clear that the purpose of section 94(5) is to distinguish between those states which are in general free from persecution and those which are not. It is consistent with that purpose that the language of section 94(5)(a) requires consideration of the general state of affairs in the state in question rather than the position in relation to any particular person or group of people. I agree with the judge that Mr. Knafler's suggested interpretation distorts the language of the subsection and is inconsistent with the legislative purpose of the section as a whole. It may be said that to accept the interpretation of subsection (5) for which the respondent contends allows the designation of a state in which a small proportion of the population is routinely persecuted, but that objection is met by the power to decline to certify the claim as clearly unfounded if there are proper grounds for doing so.

18. The next question is whether in the light of the evidence it was irrational for the Secretary of State to designate Jamaica as a safe state for the purposes of section 94 and subsequently to retain that designation. As was noted in *Javed*, the statutory language is concerned with whether there is *in general* a *serious* risk of persecution of those entitled to live in the state in question. It is accepted that in Jamaica there is in general *a* risk of persecution, but that risk is confined to a defined group and that makes it necessary to determine whether the risk affects a sufficient number of people to render it serious viewed from the perspective of the population as a whole. That is the point that was being made by the court in the final sentence of its judgment in paragraph [57] of *Javed*.

19. The test contained in section 94(5)(a) of the Act involves a substantial element of judgment and for that reason it is accepted that the Secretary of State must be accorded what has been termed a significant margin of appreciation. Whether the proportion of LGBT people in the population of Jamaica is so substantial as to lead to the conclusion that, viewed from the perspective of the population as a whole, there is a *serious* risk of persecution is in my view a matter on which opinions might legitimately differ. Although the point is not free from difficulty, I am not persuaded that the proportion of LGBT people in Jamaica is so great as to make it irrational for the Secretary of State to conclude that in general there is no serious risk of persecution of persons who are entitled to reside in Jamaica.

20. For these reasons I would dismiss the appeal against the judge's refusal to declare unlawful the inclusion of Jamaica among the states listed in section 94(4) of the Act.

Detention

21. The power to detain a person pending a decision whether to give directions for removal is contained in section 62 of the Nationality, Immigration and Asylum Act 2002, but for its exercise to be lawful it must not be arbitrary and must, in particular, be for a short period of time in reasonable conditions: see *Saadi v Secretary of State for the Home Department* [2002] UKHL 41, [2002] 1 W.L.R. 3131. In practice detention must comply with the relevant policies, in this case the DFT/DNSA policy. Mr. Knafler submitted that in this case there had been a failure properly to apply the policy with the result that the detention of the appellant was unlawful.

The policy

22. The operation of the DFT/DNSA policy hinges on the identification of claims which are capable of fair and sustainable determination quickly, that is, within a period of about two weeks. (The policy itself recognises that this time scale is to be applied flexibly, but it remains the best indication of the paradigm case to which it is intended to apply.) Section 2 of the policy sets out criteria by which officers dealing with claims for asylum are to determine whether a claim is capable of quick determination and so suitable for handling in accordance with the processes covered by the policy. It emphasises the need for assessments to be made on a case by case basis and in the light of all the facts (paragraph 2.2.1). Among the types of case that it recognises may not be suitable for a quick decision are those in which it is foreseeable that further enquiries are necessary to obtain clarificatory or corroborative evidence, without which a fair and sustainable decision could not be made and where it is not possible to foresee that the necessary enquiries can be completed to enable a decision to be made within about two weeks (paragraph 2.2.3). It follows that (as is also expressly recognised) a careful assessment of the claim is necessary in order to ascertain whether it meets the criteria for the fast track process.

23. Section 3 sets out the process to be followed in assessing a claim's suitability for handling in accordance with the detention policy. It requires that the applicant be fully screened in accordance with the standard form used for screening those claiming asylum (ASL.3211) with such follow-up questions as may be necessary to obtain any additional details required. The assessment must be based on all information and evidence held on file and otherwise known about the applicant, whether from a written statement, documentary evidence and statements made during screening interview or earlier. If the case is thought to be suitable for handling under the DFT/DNSA process it is passed to the Asylum Intake Unit where a further assessment must be made of its suitability for handling under that process.

24. On 14th October 2010 the appellant was questioned by an officer of the UK Border Agency using form ASL. 3211 as a template for the interview. In accordance with the provisions of that form the appellant was told that he would not be asked at that stage to give details of his asylum claim as that would be covered in a later interview. In response to the question why he could not return to his home country he said that he feared persecution from the local community and local authorities because he was gay. He admitted that he had visited the United Kingdom on a previous occasion in February 2010, but said that he did not know that he could claim asylum here because of his sexuality until his aunt told him that he could do so.

25. The screening interview was the only step taken to assess the appellant's claim before he was detained (a more detailed interview did not take place until 8th November 2010) and the information it produced was limited. The officer who conducted it elicited that the appellant had visited the United Kingdom in February 2010 before returning to Jamaica, that he had entered the United Kingdom again in May 2010, that he was claiming asylum because he feared persecution in Jamaica on the grounds of his homosexuality and that he had not claimed asylum at an earlier date because he did not know that he could do so. No supplementary questions were asked with a view to probing his account or establishing the means by which he expected to substantiate it. He was not asked, for example, anything about his life in Jamaica or when he had first learnt that he could claim asylum on the grounds of persecution due to his sexuality.

26. The appellant was not interviewed again until 8th November 2010, by which time he had already been detained for nearly three weeks. In the course of that interview he was questioned in some detail about his experiences in Jamaica and his sexual partners. Much of what he said could have been corroborated only by evidence obtained from Jamaica or elsewhere abroad and the appellant told the interviewing officer that he would be submitting evidence in the form of medical records and statements from friends and relatives. On 15th November 2010 the respondent rejected the appellant's claim on the grounds that parts of his account were inconsistent, that he had failed to produce evidence in support of his case and that she did not believe that he was in fact homosexual. Thereafter the appellant was detained on the basis that his appeal was suitable for the fast track procedure in the First-tier Tribunal. He was released on 24th November 2010 when an immigration judge directed that the appeal be removed from the fast track.

27. Mr. Knafler submitted that the appellant's case had not been properly assessed in accordance with the DFT/DNSA policy before the decision had been taken to detain him. He also submitted that, given the nature of the appellant's claim, this was not a case in which any reasonable person could have formed the view that a fair and sustainable decision could be made on it within about two weeks, since it was obvious that the appellant would need time to obtain evidence in support of his case. Mr. Barnes submitted, however, that since the appellant had overstayed his visa by about four months by the time he claimed asylum, he had already had a reasonable opportunity to obtain whatever evidence was available to support his claim. The judge accepted the respondent's argument and held that it was not apparent at the outset that this was not a case in which a quick, fair and sustainable decision could be made.

28. The standard screening interview conducted in accordance with the limited requirements of Form ASL.3211 no doubt serves a valuable purpose in most cases, but the form was not designed with the DFT/DNSA policy primarily in mind. In particular, it does not direct the interviewing officer's attention to the need to investigate the nature and circumstances of the claim in a way that would enable an informed assessment to be made of the likelihood of being able to make a fair and sustainable decision within about two weeks. In this case the interviewing officer made no attempt by means of supplementary questions to ensure that the kind of detailed assessment required by the policy was carried out and as a result I do not think that in this case the respondent complied with her own policy.

29. A failure properly to comply with a policy relating directly to the exercise of a power to detain is sufficient of itself to render the detention unlawful: see *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 2012 1 A.C. 245 and *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 W.L.R. 1299. The matter does not end there, however, because there is also the question whether this was a claim which, in the light of all the information that should have been available, could ever have been regarded as one in respect of which a fair and sustainable decision could be made within about two weeks. Given the nature of the appellant's claim, I find it difficult to see how it could. Homosexuality is a characteristic that cannot be reliably established without evidence from sources external to the claimant himself. On the face of it, therefore, the appellant did need additional evidence to support his claim and since some of that evidence was likely to be available only in Jamaica or elsewhere abroad, it was likely

that he would need additional time in order to obtain it. A failure to allow him that time was likely to lead (as in the event it did) to a decision that was neither fair nor sustainable.

30. The principal ground on which the respondent sought to justify the decision to treat the appellant's claim as one that could be decided quickly so that his detention would comply with the DFT/DNSA policy was that, having been in this country since May 2010, the appellant had already had enough time to obtain any evidence in support of his case that might be available to him. On that view of the matter allowing him further time was unlikely to result in his obtaining additional evidence of any value and therefore unlikely to assist her in making a fair and sustainable decision. In some cases there might be force in an argument of that kind, but in this case it fails to take proper account of the particular circumstances of the appellant's case. It was relevant to know, for example, not merely that he had been in this country for about five months before he claimed asylum, but when he had learnt that he could claim asylum on the grounds of his sexuality, since he could not be expected to have obtained evidence to support a claim which he did not know he could make. It was also relevant to know what, if any, steps he had taken to obtain legal advice and with what results, since without that information it was not possible safely to conclude that there was no real prospect of his obtaining supporting evidence if further time were made available to him. It is true that the appellant was in receipt of legal advice early in October 2010, but that did not mean that by the time the decision was taken to detain him he had had sufficient opportunity to obtain the evidence needed to support his claim. It is said that the case was on the face of it a simple one and indeed it may have appeared so, in the sense that it gave rise to only one question relating to the appellant's sexuality. However, it should have been obvious to anyone who considered the claim with care that the decision was not a simple one because of the difficulty of ascertaining where the truth lay. In my opinion no reasonable person in possession of all the information about the appellant that could and should have been available if his case had been assessed in the manner required by the DFT/DNSA policy could have been satisfied at the time of his detention that a fair and sustainable determination of his claim could be made within a period of about two weeks.

31. In those circumstances it is unnecessary to decide whether, as Mr. Barnes submitted, the court's function in a case of this kind is limited to reviewing in accordance with established public law principles the respondent's decision to detain the appellant, or whether, as Mr. Knafler submitted, the court has a duty to decide for itself whether the requirements of the policy were satisfied in this case. Our attention was drawn to a number of cases in which different views have been, or appear to have been, expressed on that question, many of them obiter. Having considered them, I am inclined to think that much may depend on the correct identification of the question which the court is being asked to decide. However, I do not think that it is necessary to enter that debate in order to dispose of the present appeal and I therefore prefer to express no conclusion on the point.

32. For the reasons I have given I am satisfied that the appellant was unlawfully detained between 20th October and 24th November 2010. I would therefore allow the appeal in respect of that part of his claim and remit the matter to the High Court for damages to be assessed.

Lady Justice Black :

33. I would allow this appeal in relation to both aspects of the determination of Mr Nicholas Paines QC. Like my Lords Pill LJ and Moore-Bick LJ, I am satisfied, for the reasons given by Moore-Bick LJ, that the appellant was unlawfully detained between 20th October and 24th November 2010. I share Pill LJ's view that the respondent's decision to include Jamaica in the states listed in section 94(4) of the Nationality, Immigration and Asylum Act 2002 ('the Act') was unlawful.

34. I need say no more on the subject of detention but must explain my reasoning for my conclusion in relation to the other issue. I am grateful to my Lords for relieving me of the need to set the scene before going to the heart of the question. Where I reiterate what they have said, I do so merely for convenience in following through the argument. As no question of the designation of only part of Jamaica arises, I will ignore that possibility in what follows.

35. The starting point is obviously the Act. Section 94(5) provides that the Secretary of State may add a State to the list of states in section 94(4):

> "if satisfied that –
>
> (a) there is in general in that State …. no serious risk of persecution of persons entitled to reside in that State….., and
>
> (b) removal to that State …. of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention."

36. In *R (Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, the provision in question was an earlier one (paragraph 5 of Schedule 2 to the Asylum and Immigration Appeals Act 1993). Paragraph 5(2) referred to countries "designated in an order made by the Secretary of State by statutory instrument as a country or territory in which it appears to him that there is in general no serious risk of persecution". The Secretary of State had designated Pakistan and the question for the Court of Appeal was "whether or not the order was valid in so far as it identified Pakistan as a country in respect of which there was 'in general no serious risk of persecution'".

37. In §56 of the judgment (quoted by Moore-Bick LJ at §11 above), Lord Phillips MR followed the words of paragraph 5 when he stated that the question of fact for the Secretary of State was whether "Pakistan was a country in which there was in general no serious risk of persecution". In §57, he reformulated the question as whether "there was in general a serious risk of persecution". This might not be quite the same as the question set out in paragraph 5 but I doubt that Lord Phillips meant to suggest anything different from the natural meaning of the original provision. The purpose of §57 was to set out, in the light of the margin of appreciation that would have to be afforded to the Secretary of State in judicial review, what the applicants would have to establish in order to show that the designation of Pakistan was illegal, namely that the evidence clearly established "that there was a serious risk of persecution in Pakistan and that this was a state of affairs that was a general feature in that country". Lord Phillips expanded on this formulation saying that "[f]or a risk to be serious it would have to affect a significant number of the populace".

38. In *R (MD (Gambia) v Secretary of State for the Home Department* [2011] EWCA Civ 121, Elias LJ (with whom Ward LJ and Tomlinson LJ agreed) was dealing with section 94(4) as we are. He reminded himself of what Lord Phillips MR had said in §57 of *Javed*, then said:

> "It is not, therefore, enough to demonstrate occasional breaches of human rights standards even where they amount to persecution. The persecution must be sufficiently systematic [sic] properly to be described as a 'general feature' in that country, and this in turn requires that it should affect a significant number of people." (§22)

39. The evidence about Gambia made "bleak reading" (§32) and Elias LJ commented that there was "no doubt that there are certain passages in [the] reports which suggest that the degree of human rights abuse is extensive and affects numerous different groups" (§29). He encapsulated the thrust of the Secretary of State's case as being "that notwithstanding that there are human rights abuses of the kind outlined in [various reports], when one looks at the detail of these reported abuses provided in the reports, they do not suggest that they are so widespread as to compel the conclusion that they constitute a general feature of life in Gambia" (§32). Having examined seven aspects of human rights infringements upon which the appellant focussed and the Secretary of State's observations on them (§§34 – 49), Elias LJ concluded that "the Secretary of State was entitled to conclude …..that the human rights infringements were not so systemic [sic] or general as to compel the conclusion that as a matter of law Gambia could not properly be designated under section 94(4)" (§50).

40. Assistance can be gained from what Elias LJ said in general terms at §22 which I have quoted above but I am doubtful whether the actual decision in relation to the designation of Gambia is of much help to us in considering the designation of Jamaica, given that it turned on the particular facts about Gambia available to the Secretary of State.

41. In contrast to the diffuse problems in Gambia, in Jamaica the situation is much more focussed and, it seems to me, clearer. It is accepted that one whole sector of society, the LGBT community, is at serious risk of persecution. There can be no certainty as to what proportion of those entitled to reside in Jamaica should properly be viewed as part of that community so it seems to me that the proper approach for a Secretary of State considering the inclusion of Jamaica in the section 94(4) list would therefore be to assume a figure at the top of the postulated range of 5 – 10%. Accordingly, 10% of the population must be taken to be at risk. The figures quoted in the deputy judge's judgment suggest that this is in excess of a quarter of a million people. Pill LJ has referred to some of the material in which the nature of the risk is identified. It includes violence, including rape and murder, and in general there is no effective protection provided by the authorities.

42. To consider the implications of this, I first return once more to what Lord Phillips said in *Javed*, remembering of course that unlike the Act, the Court of Appeal's judgment in that case must not be construed as if it were a statute. Lord Phillips contemplated that a risk would be serious if it affected a significant number of the populace. "Significant" is a flexible word but it is useful to remind oneself that it is defined in the Shorter Oxford Dictionary as "important, notable; consequential". It seems to me

therefore that 10% of the population of Jamaica readily qualifies as "a significant number of the populace". Is the state of affairs "a general feature" in Jamaica? Nobody has suggested that it is confined to a particular geographical area in Jamaica so we can take it that it is generalised geographically. For persecution to be a general feature it does not have to be generalised amongst the entire population as opposed to affecting a particular identified sector of it; *Javed* was concerned with persecution of particular groups in Pakistan. The only question therefore is whether persecution throughout Jamaica of a group making up 10% of the population should be described as "a general feature" of Jamaica or, to use Elias LJ's words in the Gambian case, whether the persecution is sufficiently systematic (or systemic) to be described as a general feature.

43. These alternative formulations provide useful insights but ultimately it is to the words of the Act that one must return. The question is whether the Secretary of State was entitled to conclude that "there is in general [in Jamaica] no serious risk of persecution of persons entitled to reside" there. Bearing in mind the proportion of the population affected, the fact that the entirety of that sector of the populace is at risk, and the failure of the state to offer sufficient protection, even making full allowance for the margin of appreciation to be afforded to the Secretary of State, I do not consider that she was. It follows that in my view Jamaica should not have been designated.

44. I would add in conclusion that I share Pill LJ's unwillingness to be reassured that proper claimants such as the appellant are not disadvantaged by the designation of Jamaica because of the Secretary of State's power to decline to certify their claims as clearly unfounded. The designation of a state changes the complexion of the analysis of the claim and, as Pill LJ says, this case illustrates the difficulties that may be involved in establishing certain claims.

Lord Justice Pill :

45. Section 94 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") empowers the Secretary of State to certify that asylum claims and human rights claims are clearly unfounded. If she does so, limitations are placed on the right of appeal against relevant immigration decisions (section 94(2)). The purpose of the provision is clear, to relieve the appeal system of the burden of dealing with unmeritorious cases.

46. Consistent with that purpose is the power conferred on the Secretary of State to designate states as states in relation to which it may be assumed that a human rights or asylum claim is clearly unfounded unless the Secretary of State is "satisfied that it is clearly not unfounded" (section 94(3)). Designated states are listed in section 94(4) and include Jamaica. Section 94(5) provides:

> "The Secretary of State may by order add a State, or part of a State, to the list in subsection (4) if satisfied that -
>
> (a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and

> (b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention."

47. As Moore-Bick LJ states, at paragraph 8 of his judgment, the two most important phrases for present purposes are "in general in that state" and "no serious risk of persecution" in subsection (5)(a).

48. That there is a serious risk of persecution of homosexuals, together with bisexual and transgender people (referred to as the LGBT community) in Jamaica is plain and is not disputed on behalf of the Secretary of State. The judge considered the question in detail citing decisions of the Immigration and Asylum Tribunal, the Upper Tribunal and Operational Guidance Notes issued by the Secretary of State. In *SW v Secretary of State* [2011] UKUT 251, a case involving lesbians, the Upper Tribunal stated:

> "Jamaica is a deeply homophobic society. There is a high level of violence, and where a real risk of persecution or serious harm is established, the Jamaican state offers lesbians no sufficiency of protection."

It was also stated that "lesbianism (actual or perceived) brings a risk of violence, up to and including 'corrective' rape and murder".

49. The Guidance of May 2011 described Jamaica as having "an aggressively homophobic culture". The Guidance of February 2012 considered the size of the LGBT community (3.7.10), stated at 3.7.12 that "In general the Jamaican authorities do not provide gay men, lesbians, bisexuals and transgendered persons or those perceived as such with effective protection" and concluded at 3.7.13:

> "As gay men, lesbians and bisexuals in Jamaica may be considered to be members of a particular social group, they should be granted asylum."

50. The judge stated at paragraph 21:

> "As to the number of gay and lesbian people in Jamaica, Mr Knafler referred me to an e-mail from the JFlag organisation that has been referred to containing an estimate of 5 per cent of the population, equating to some 135,000 people. He also referred me to a report prepared for the Jamaica Ministry of Health in 2003, which estimated that between 100,000 and 120,000 men in Jamaica engaged in homosexual activity. The report referred to the international estimate of the prevalence of male homosexuality as between 5 and 10 per cent of the male population. Paragraph 3.7.10 of the OGN to which I have read refers to an estimate of 270,000 LGBT people in Jamaica. That would equal 10 per cent of the country's population."

51. On the designation issue, the judge concluded, at paragraph 31:

> "In maintaining as she has done the designation of Jamaica, the Secretary of State has been faced with evidence of a risk of persecution affecting a group which, insofar as can be estimated, probably accounts for 5 to 10 per cent of the population. It does not seem to me possible to be any more precise than that. The issue for me is whether the Secretary of State could rationally maintain, in late 2010, the conclusion that there was, despite that evidence, in general no serious risk of persecution of the population of Jamaica. It does not, in my judgment, assist my task to weigh nicely percentages of a population. Quite apart from the difficulty of estimating the size of the LGBT Community in Jamaica, I do not think it can be said, at the estimated percentage levels that we are dealing with, that a percentage level of say 5 per cent, 8 per cent or 10 per cent, represents a level such that no reasonable person could fail to find that the risk of persecution affected a significant percentage of the population. It is different when one gets to percentages in the region of 50 per cent, such as the entire female population of a country, as in *Javed*. I also bear in mind that the reference in paragraph 57 in *Javed* to a significant number of the populace is not part of the statutory test, but rather a judicial description of the test's implications, in any event not laying down a precise numerical threshold."

52. Following a review in April 2007, that is long before the case and Guidance cited, the Secretary of State maintained the designation of Jamaica. The policy opinion referred to gay men and other groups and provided:

> "The discrete groups identified above are relatively small and, even when taken together, are not such a significant portion of the population that it could be argued in a designation challenge that the "in general" test is not met."

53. In *R (Javed) v Secretary of State* [2001] EWCA Civ 789, Lord Phillips MR stated, at paragraph 57:

> "Thus on analysis, the challenge made by the applicants to the inclusion of Pakistan in the Order was to its legality rather than to its rationality. However, the language defining the state of affairs that had to exist before a country could be designated was imprecise. Whether there was in general a serious risk of persecution was a question which might give rise to a genuine difference of opinion on the part of two rational observers of the same evidence. A judicial review of the Secretary of State's conclusion needed to have regard to that considerable margin of appreciation. There was no question here of conducting a rigorous examination that required the Secretary of State to justify his conclusion. If the applicants were to succeed in showing that the designation of Pakistan was illegal, they had to demonstrate that the evidence clearly established that there was a serious risk of persecution in Pakistan and that this was a

> state of affairs that was a general feature in that country. For a risk to be serious it would have to affect a significant number of the populace."

54. Mr Barnes, for the Secretary of State, in seeking to uphold the judgment, relies on the considerable margin of appreciation allowed to the Secretary of State and submitted that persecution is not a "general" feature of the state as contemplated in *Javed*. The persecution was directed to a specific section, defined by sexual orientation, the very opposite of the 'general' test required by section 94(5)(a).The section of the population concerned was insufficiently large to require a decision that the serious risk existed 'in general' in the state. From the perspective of the population as a whole, there was no serious risk.

55. Mr Knafler QC, for the appellant, submitted that, when there is a serious risk of persecution, the words "in general" were intended to exclude only cases such as *R (MD) (Gambia) v Secretary of State* [2011] EWCA Civ 121, where instances of persecution were low in number or occasional and not a reflection of any systemic problem. In Jamaica there was routine and systemic persecution of the LGBT, where persecution of that community is tolerated and even encouraged by state agents. Mr Knafler went as far as to submit that, where persecution is systematic, it need only be applied to 1% of the population for persecution to be a feature or characteristic of that state preventing designation. He gave historical examples. Lord Phillips, at paragraph 57 of *Javed*, did, however, contemplate a quantitative as well as a qualitative test. If his first submission is not accepted, Mr Knafler submitted that persecution of an entire section of the community, substantial in number and defined by sexual orientation, prevented a state from claiming that in general there was no serious risk of persecution.

56. I do not accept the argument on behalf of the Secretary of State that it makes no difference whether or not a state is designated because, in either case, the Secretary of State must give anxious scrutiny to a claim. Designation has been introduced for a purpose, the admirable purpose of speeding up immigration procedures but where time and other constraints are to be applied, care must be taken in making the decisions, including designation, which achieve it. To permit a relaxed approach to designation would be to defeat the underlying statutory intention. The facts of the present case also illustrate the difficulties that may be involved in establishing a claim, particularly when the risk of persecution does not arise from an easily recognisable physical characteristic.

57. My conclusion is that a state in which there is a serious risk of persecution for an entire section of the community, defined by sexual orientation and substantial in numbers, is not a state where in general there is no serious risk of persecution. As Lord Hope stated in *HJ (Iran) v Secretary of State* [2010] UKSC 31 at paragraph 11, the group is defined by "the immutable characteristics of its members' sexual orientation and sexuality". It does not follow from the absence of risk to the much larger heterosexual community that in general there is no serious risk in section 94(5)(a) terms where an entire section of the community of significant size and defined by its immutable characteristics, is at serious risk of systematic persecution. I add that I do not consider that the repetition of the expression 'in general' in section 94(5)(b) gives it a broader meaning in subsection (5)(a).

58. In support of that conclusion, I refer to Ministerial statements on the subsection, not on *Pepper v Hart* grounds, but respectfully to adopt the view expressed. Having acknowledged that universal safety is not a pre-requisite of designation, Ministers have repeatedly stated that designation is ruled out "where there is a significant level of persecution, even if it is targeted at minorities". I agree with that approach to section 94(5)(a) and it precludes a construction of the expression "in general" to cover a state that permits systematic persecution of a significant minority of its population defined by sexual orientation.

59. On the detention issue, I agree with the conclusion of Moore-Bick LJ and with his reasoning. I would allow the appeal on both grounds.