

CO/6987/2005

Neutral Citation Number: [2007] EWHC 2578 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 25th October 2007

B e f o r e :

MR JUSTICE MITTING

Between:

THE QUEEN ON THE APPLICATION OF ANDREASEN

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

Miss A Weston (instructed by Luqmani Thompson & Partners) appeared on behalf of the
Claimant

Mr S Kovats (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T

1. MR JUSTICE MITTING: The claimant was a sergeant in the South African Police based in and around Durban. He investigated the activities of organised criminal gangs. He claims -- and for present purposes there is no dispute -- that he achieved considerable success in that respect, getting right up to or very close to the head of one or more of the gangs. He asserts that the gangs are growing in power and reach in South Africa and that they are ready and able by the use of violence, including extreme violence, to enforce their sway in the areas in which they operate. He claims that at all levels in the South African Police Service there are officers who are corrupt and who lend assistance to the gangs.
2. He ceased work as a police officer due to stress in October 2001 and left the force in early 2003. He says in a witness statement, which for present purposes is to be accepted as truthful, that from August 2002 onwards serious threats were made against him and his family, culminating in August 2005 in an incident in which he and his wife were shot at in the Durban area in what appeared to him to be an attempt to kill him and her. He speaks (and it is not necessary for me to set it out in detail) of incidents which led up to that which plausibly suggest that he was indeed the target of criminal gangs and remained a target even after he had ceased active work in the police force and after he had left the police force.
3. He came to England immediately after the incident in August 2005 and claimed asylum. His claim for asylum was founded upon the experiences that he had had in South Africa.
4. In a lengthy and well-reasoned letter dated 2nd September 2005, the Secretary of State rejected that claim and certified under section 94(3) of the Nationality Immigration and Asylum Act 2002 that the claim was clearly unfounded, thereby depriving the claimant of an in-country right of appeal. He did so on a number of grounds but principally upon two. First, that whatever the situation may have been in the Durban area, he could, with his family, safely relocate to other parts of South Africa. Secondly, and in any event, the South African state provided a sufficiency of protection for those threatened by non-state agents, such as the criminal gangs who repeatedly threatened him. South Africa was and is on the so-called White List. The letter, however, did not simply refer to that fact. As I have indicated, it was lengthy and reasoned.
5. If matters had stood at that stage, I would have had no difficulty in upholding the Secretary of State's certificate. The claimant at that stage was unable to point to anything more than his own personal experience. There was nothing to rebut the Secretary of State's view that he could safely relocate to another part of South Africa and, generally speaking, the evidence available to the Secretary of State simply is that there existed a functioning police service in South Africa required by law to protect its citizens; in short, a sufficiency of protection in an ordinary democratic state.
6. The Secretary of State's certificate was given on 2nd September 2005. On 12th December 2005, the claimant received, and shortly thereafter submitted to the Secretary of State, a letter from Captain Munro, a captain in the detective branch of the South African Police Service based at Brighton Beach, the Branch Commander of the police area in which the claimant had been employed. He confirmed that during his police

service he had investigated high profile cases and secured numerous sentences of syndicate members for crimes ranging from murder downwards. He confirmed that he retired in 2003 because of stress related incidents. He confirmed that in 2005 he had received death threats from syndicate members and had been the subject of the attack of which I have spoken in August 2005 upon his car. The letter went on to say:

"At present no effective protection exists for [the claimant] and his family and should he return to the Republic of South Africa, I am of the view that a strong possibility exists that syndicate crime members would be able to trace and harm his family and himself."

7. The Secretary of State considered that letter and upheld his conclusion in a letter of 6th January 2006. The letter pointed out, correctly, that the statements by Captain Munro were in general terms and asserted again that internal relocation was an option available to the claimant. The claimant accordingly sought judicial review of the Secretary of State's certification. He seeks in short to have his appeal against the Secretary of State's refusal of asylum and humanitarian protection heard by an Immigration Judge.
8. A great deal of information has been produced on both sides about the general state of the South African Police Service. It is common ground that there is a degree of corruption within it. There is a report to the institute of security studies prepared by Jenny Irish and Kevin Qhobosheane which on page 521 states:

"Corruption within the SAPS is so pervasive that officers involved in crucial investigations may refuse to share information with other officers because they are not sure whom to trust."

In a nutshell, the claimant's case is that observations such as that, taken together with Captain Munro's comments about the specific threats to the claimant and to the lack of effective protection for him in the Republic of South Africa mean that he has an arguable claim, that is not bound to be rejected by an Immigration Judge, that a sufficiency of protection does not exist for him in South Africa.

9. The law on the question that I have to answer is not in doubt. From **Yogathas** to **ZL and VL**, it has been, allowing for differences in language, exactly the same. A decision-maker must consider the practical substance and detail of the claim and how it stands with the known background data, and consider whether in the round it is capable of belief and, if so, whether it is capable of coming within the Convention, a reference to Article 3. If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded. If not, not. (See [2003] 1 WLR pages 1245-6, paragraph 57, a quotation from Lord Phillips' speech in **L v Secretary of State for the Home Department**).
10. Applying that test here to the asylum claim, the Secretary of State's certificate is clearly well-founded. There is no question here of persecution by state agents for a Refugee Convention reason or otherwise. The heart of the claim must stand or fall on Article 3 of the European Convention on Human Rights or the entitlement to humanitarian protection now found in Rule 339C of the Immigration Rules. For present purposes

both counsel submit that the test is the same under either provision. In a case such as this where the risk arises from non-state agents, the test is set out in **Bagdanavicius v Secretary of State for the Home Department** [2005] 2 AC 668 at paragraph 24:

"Non-state agents do not subject people to torture or the other prescribed forms of ill-treatment, however violently they treat them: what, however, would transform such violent treatment into Article 3 ill-treatment would be the state's failure to provide reasonable protection against it."

11. The underlying issue in this case is accordingly whether the South African state provides reasonable protection against the risk to this claimant from harm caused by criminal gangs. The issue which I have to decide is whether or not, taking all of the material to which I have been referred into account, this claim could not on any legitimate view succeed.
12. I find the ultimate question on merits much easier to decide than the one which I have to decide. It is not appropriate for me to express any view about that because it is not for me to decide, but were I to have had to have done so I would have had no great difficulty. The precise question which I have to decide is actually far more difficult to resolve. It is very, very close to the border. I conclude that it comes just on the side of striking down the certificate and allowing the claimant an in-country right of appeal and I do so for two reasons. First, the statement by Captain Munro which I have cited in full has not clearly been rebutted by any of the material to which I have been referred. Secondly, it is lent some general support by reports about corruption within the South African Police Service, including that which I have cited.
13. If and when an Immigration Judge hears this matter, he will no doubt wish to have Captain Munro's views explored in greater detail than his letter permits. Is the risk of which he speaks, for example, confined to Durban or is it general? What, if any, impact does corruption in the police service, in his view, have on the availability elsewhere in South Africa than Durban of protection for this claimant and his family? Does corruption in truth mean that even if this claimant were to relocate elsewhere in South Africa he would nonetheless be exposed to the risk of death or serious harm from criminal gangs, such that the protection afforded by the South African state is inadequate? These are questions which will require to be explored in far greater detail than is possible on this judicial review. All that I can observe at the moment is that the claimant has satisfied me just that these matters are arguable and would not inevitably result in the rejection of his appeal by an Immigration Judge. Accordingly, I allow this claim. I quash the certificate and, if invited to, will direct that the claimant's appeal should be heard by an Immigration Judge.
14. MR KOVATS: As I understand it from your Lordship's judgment, strictly speaking the certificate should be quashed on the Article 3 and humanitarian protection grounds but not on the asylum ground.
15. MR JUSTICE MITTING: Yes.

16. MISS WESTON: My Lord, it is actually not possible to do that because the legal mechanism by which the certificate is issued means that it is a composite decision taken under the Human Rights Act --
17. MR JUSTICE MITTING: It is all or nothing.
18. MISS WESTON: Yes.
19. MR JUSTICE MITTING: Is that right?
20. MR KOVATS: It is not my understanding, I have to say.
21. MISS WESTON: It used to be separate and then under the 2002 Act it became one question. Sorry, it used to be the situation where you would have asylum certificates separate from human rights --
22. MR JUSTICE MITTING: They came under different statutory provisions.
23. MISS WESTON: Exactly. But they were consolidated under the 2002 Act.
24. MR JUSTICE MITTING: They are all together.
25. MISS WESTON: It is one decision.
26. MR JUSTICE MITTING: If that is right, Mr Kovats, then I just have to quash the certificate.
27. MR KOVATS: It has always been my understanding that although there is only one claim it is perfectly in order for the court, or indeed the Secretary of State, to make clear that one or more particular grounds are clearly unfounded. There is, certainly as far as I am aware, nothing in the statute which prevents that.
28. MR JUSTICE MITTING: We have MacDonald here so presumably the 2003 Act is set out.
29. MISS WESTON: It is the 2002 Act.
30. MR JUSTICE MITTING: The 2002 Act, sorry.
31. MISS WESTON: Could I just talk through what flows from my Lord's decision. The appellant will have a right of appeal under section 82(1) and then they will be entitled to rely on grounds set out in section 84. What flows from your decision, my Lord, is that the right of appeal now pertains. What circumstances or what grounds that the appellant decides to take --
32. MR JUSTICE MITTING: Let us look at section 94:

"The section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim or both."

33. Then 1A, which is inserted by the Immigration (Treatment of Claimants etc) Act 2004 says:

"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."

Which appears to provide for a split between the two.

34. MISS WESTON: I had not applied my mind to that amendment. I had proceeded on the basis of the way in which the Secretary of State had certified this case, and he had not certified it under any separate limbs. He had made one decision.
35. MR JUSTICE MITTING: Yes, but the certificate, applying as it does to both claims, can now, by virtue of this amendment, be subdivided.
36. MISS WESTON: My Lord, could I just say this and that is --
37. MR JUSTICE MITTING: The asylum claim is hopeless anyway. He is never going to get himself within the Refugee Convention.
38. MISS WESTON: My Lord, it would be inappropriate on a threshold test, in my respectful submission, to make comments about the ultimate success or otherwise of the --
39. MR JUSTICE MITTING: I agree, and I have been careful not to about that part of the claim which in my view is arguable. But on the asylum claim I am perfectly entitled to express a view about that if I agree with the Secretary of State that it is clearly unfounded, which I do.
40. MISS WESTON: Indeed. In which case I would ask your Lordship, given that we have not looked at the specific statutory provisions I am not in a position to respond in any considered way now, but my Lord has made his views perfectly clear in the judgment which I am sure the Secretary of State will put before the Immigration Judge on the appeal.
41. MR JUSTICE MITTING: I have a specific task which is to uphold or quash a certificate. If I can do and I am invited to quash part of it or the whole of it then I should. I am doing a task which I am supposed to do on the review.
42. MR KOVATS: If, as indeed this may be the case, there clearly was no refugee claim because there clearly was no Refugee Convention reason, it would make no sense for the Secretary of State to be precluded from making that the subject of a certificate if it was accepted on the facts that there really was a live Article 3 claim. My learned friend's submission has no support either in the wording of the statute or in the rationale of the legislation. The other point is your Lordship does not give this claimant a right of appeal, he always had one. It is just a question of whether it is an in-country right of appeal or an out of country right.

43. MR JUSTICE MITTING: Exactly. Miss Weston, I am looking at what seems to me to be clear statutory provision and I will rule against you. I will deal with the final question which is whether or not I should quash the whole certificate or only part of it. The certificate was issued at a time, I think I am right in saying, when the amended legislation was not in force. In any event, it did not distinguish between the refugee claim and the humanitarian protection or Article 3 claim. There is no doubt at all in my view that section 94(1) and (1A) permits a court to quash a certificate in relation to one category of claim while upholding it in relation to another. Section 94 provides:

"(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."

44. The Secretary of State is thus permitted to certify that one aspect of a claim is clearly unfounded while not so certifying another aspect of the claim. He could certify that an asylum claim is clearly unfounded while not certifying a human rights claim, though it would be unlikely that he would do the reverse. If the Secretary of State has that power then this court must have the power, when considering a certificate, to do likewise; to quash one part of a certificate or both or neither. In my view, there is a clear statutory power both in the Secretary of State and in the court to distinguish between asylum and human rights claims. I do so. I quash the certificate in relation to the Human Rights claim and, in so far as it encompasses it, the humanitarian protection claim. But I do not quash the certificate in relation to the refugee asylum claim. As I have explained, any claim under the Refugee Convention is clearly hopeless and should not proceed. There is nothing to be served by allowing it to do so and everything to be gained by dealing with it at this stage.

45. Do you have any further applications?

46. MISS WESTON: Only for costs, my Lord.

47. MR JUSTICE MITTING: Mr Kovats, I do not think you can resist that.

48. MR KOVATS: I cannot.

49. MR JUSTICE MITTING: The defendant to pay the claimant's costs to be the subject of detailed assessment if not agreed.

50. MISS WESTON: Can I ask for detailed assessment as well just in case --

51. MR JUSTICE MITTING: Public funding?

52. MISS WESTON: Yes.

53. MR JUSTICE MITTING: Yes, you can have a public funding assessment of your costs and detailed assessment of the due costs.