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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY CHILINDA FULA FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

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MAGUIRE J

Introduction

[1] The applicant in this case is Chilinda Fula. He is a man now aged 23 years. He is a Zambian national. The decision challenged is that of the Secretary of State for the Home Department ("the respondent") taken on 10 September 2015 and revised in July 2016. That decision may be viewed as an ancillary decision to a substantive decision to deport the applicant to Zambia. It takes the form of a certification that any appeal the applicant may wish to bring in respect of the issue of whether the substantive deportation decision breaches his human rights can only be brought after he has left the United Kingdom. This decision was made pursuant to the terms of section 94B of the Nationality, Immigration and Asylum Act 2002.

[2] The background for present purposes is that the applicant in December 2005 arrived in the United Kingdom with his mother, who at that time was also a Zambian national. The applicant was on arrival 14 years of age. His father (also a Zambian national) had died. His mother had the offer of work as a nurse in the United Kingdom and decided to take this up. The mother and son's arrival in the United Kingdom was lawful.

[3] The applicant and his mother have resided in the United Kingdom ever since. The applicant attended school in Northern Ireland and has achieved 8 GCSEs. His mother has been in regular employment and clearly, in accordance with testimonials

the court has seen, has been a valued employee. Both were granted indefinite leave to remain on 9 November 2010. The applicant's mother is now a naturalised British citizen.

[4] On 12 December 2011 the applicant committed an offence of causing death by dangerous driving. As a result he was on 7 February 2013 sentenced to a custodial sentence of 5 years and 10 months. Half of this term was to be served on licence so that he was to be released back into the community in January 2016. From the papers before the court, it is evident that the applicant while in custody conducted himself in an exemplary manner and has used the period of his imprisonment constructively. He has also shown remorse in respect of his offending behaviour and has met personally with the family of his victim. The Governor of the Young Offenders Centre at one stage wrote to the Home Office about the applicant in glowing terms. The applicant, moreover, appears to have been viewed by the probation authorities as at low risk of re-offending.

[5] On 9 April 2015 the applicant was served with documentation relating to his deportation from the United Kingdom. It principally was indicated to him that the Home Secretary was minded to deport him. However, he was invited to make any representations he wished to as to why he should not be deported. The applicant, through his solicitor, duly did so on 15 May 2015. In those representations he made the case that any decision to deport him would be in breach of his human rights, in particular, would be in breach of article 8 of the ECHR. This was because he had now resided in the United Kingdom for a lengthy period and was settled here with his mother and had no life to return to in Zambia. Ultimately a decision was made by the Home Office about his case. The decision was dated 10 September 2015. Under it the applicant was told that he would be deported to Zambia. A copy of a deportation order was served on him. Unfortunately, due to an administrative failure which the court need not go into to, the applicant was not served with the reasons for the decision, though they had been prepared. This omission some months later was rectified and the episode can be viewed as closed. While the respondent sought at the hearing of this application to argue that the application for judicial review should be rejected on grounds of delay, following substantial investigation of this issue, the court is satisfied that any delay was related to the non-service upon the applicant of the reasons for the deportation, a matter in respect of which the applicant was blameless. It would, in the court's view, be unjust if the applicant was to be damnified in respect of a failure which was not of his making and the court indicated at the hearing that it saw no merit in the time point.

[6] Since the making of the decision to deport in this case there have been exchanges of correspondence between the applicant's solicitors and the Home Office. As already noted, the applicant was subsequently provided with the original reasons for the deportation order. The applicant's solicitor provided to the Home Office a range of documents in support of the applicant's contention that his Article 8 rights would be breached if he was to be deported to Zambia. Ultimately, the Home Office's posture in respect of the applicant has not changed. These

proceedings began on 16 March 2016. Leave to apply for judicial review was granted after a contested hearing on 8 June 2016. While the original Order 53 Statement contained multiple grounds of challenge, at the full hearing it was indicated by Mr McTaggart BL for the applicant that only one ground was now being proceeded with. This was in respect of the certification decision referred to at paragraph [1] above. It is claimed that the Home Office acted irrationally by failing to take into account relevant factors and evidence in relation to article 8 ECHR when considering the certification.

[7] An affidavit was filed on behalf of the respondent on 8 September 2016. The deponent was Robert Huggins who is described as a Criminal Caseworker employed by the Home Office. It would appear that he was not the original caseworker dealing with the case but he did become involved in the case later. His affidavit sets out the chronology of the case and provides helpful contextual material and commentary. It refers to various actions on the part of the Home Office. In particular there is reference to a supplementary letter being sent by the Home Office to the applicant's solicitor dated 11 July 2016. This addresses the issue of certification and seems to be designed to deal with some issues as regards certification raised at the leave hearing. Reference is made to the decision to certify having been the subject of a review at this time. The letter runs to some 4 pages and affirms the certification decision originally made but it does make clear that consideration had been given both to the issue of breach of section 6 of the Human Rights Act 1998 and to the question of whether removal pursuant to the certification would give rise to a real risk of serious irreversible harm either to the applicant or his mother. It concludes that removal in connection with the certification "will not give rise to a real risk of serious irreversible harm to you or any other person or otherwise breach human rights". In particular, the position adopted in the letter by the Home Office was:

- that the applicant as a 21 year old in good health could reintegrate into Zambian society to the degree necessary while his appeal was pending.

- that the applicant spoke English which was an official language in Zambia.

- that the applicant had spent the majority of his life in Zambia, including his formative years.

- that there was no reason why the applicant's mother could not visit the applicant in Zambia. She could remain in contact using modern means of communication e.g. Skype, e mail or telephone.

[8] The letter also asserted that all of the applicant's circumstances were considered including his good behaviour in custody and his restoration work with his victim's family. This passage within the letter went on:

> "While your behaviour post-conviction and engagement in the various programmes is commendable and puts forward compassionate grounds in favour of you remaining in the United Kingdom, this does not reduce the public interest in your deportation nor comprises part of your family and private life under Article 8 of the ECHR. Therefore, your behaviour and the letters of support are not relevant to the decision to certify your case under section 94B of the Nationality, Immigration and Asylum Act 2002".

[9] On 27 September 2016 the applicant's solicitor wrote to Mr Huggins in respect of the above passage in his letter of 11 July 2016. It was asserted that the Home Office position was wrong in law as it gave no weight for Article 8 purposes to the applicant's rehabilitation. The letter went on:

> "It is settled law that 'rehabilitation' and the impact of such work on someone like the applicant post-conviction can be and, it is submitted, is in this instance an important factor to be taken into account when considering private and family life (see Danso v Secretary of State for the Home Department [2015] EWCA Civ 596 (11 June 2015))".

[10] On 28 September 2016 Mr Huggins replied to the applicant's solicitor. He stated that:

> "Your assertion that your client's rehabilitative work were given no weight in the consideration of his article 8 rights is incorrect. It has been clarified in the supplementary letter of 11 July 2016 that, at the time of your client's decision issued on 10 September 2015, all information that was available to the Home Office was considered prior to that decision being made. This position remains the same. It is maintained that your client's rehabilitative work does not comprise part of his family and private life rights under Article 8 ECHR in terms of certification however, this evidence was considered in the wider aspects of Article 8 and the decision as a whole. Therefore the decision is maintained and will not be withdrawn to be remade anew".

The stance of the parties at the hearing

[11] The court has received substantial skeleton arguments from each side in this case and is grateful to Mr McTaggart BL on behalf of the applicant and

Ms McMahon BL on behalf of the Home Office for the considerable care which has clearly gone into their compilation.

[12] As acknowledged by Mr McTaggart, the decision to deport in this case is one which the respondent is compelled to make under the provisions of section 32(5) of the Borders Act 2007 unless the case falls within one of the exceptions found in section 33. As he frankly puts the matter at paragraph 5 of his skeleton argument, "[i]n this case the only possible exception is on the basis that it would breach the ECHR rights of the applicant".

[13] Section 94B of the 2002 Act deals with certification. It reads:

> *"Appeal from within the United Kingdom: certification of human rights claims made by persons liable to deportation*
>
> (1) This section applies where a human rights claim has been made by persons liable to deportation under-
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> (a) Section 3(5)(a) of the Immigration Act 1971 (Secretary of state deeming deportation conducive to public good) or
>
> (b) Section 3(6) of that Act (court recommending deportation following conviction).
>
> (2) The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of an appeal in relation to P's claim, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
>
> (3) The grounds upon which the Secretary of State may certify a claim under subsection (2) include (in particular) that P would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed".

[14] In the recent decision of the Court of Appeal in England and Wales in Kiarie and Byndloss v Secretary of State for the Home Department [2015] EWCA Civ 1020 Richards LJ discussed the terms of section 94B under the heading "The correct approach to section 94B in the context of article 8". Having referred to sub-section

(2) it is stated that "the Secretary of State cannot lawfully certify unless she considers that removal pending the outcome of an appeal would not be in breach of any of the person's Convention rights as set out in schedule 1 to the Human Rights Act" (see paragraph [34]). The role of subsection (3) is then referred to as follows:

> "…a ground for certification is that the person would not, before the appeals process is exhausted, face "a real risk of serious irreversible harm" if removed to the country or territory to which he or she is proposed to be removed. That ground does not, however, displace the statutory condition in subsection (2), nor does it constitute a surrogate for that condition. Even if the Secretary of State is satisfied that removal pending determination of an appeal would not give rise to a real risk of serious irreversible harm, that is not a sufficient basis for certification. She cannot certify in any case unless she considers, in accordance with subsection (2), that removal pending determination of any appeal would not be unlawful under section 6… That the risk of serious irreversible harm is not the overarching test was rightly accepted by Lord Keen on behalf of the Secretary of State at the hearing of the appeal"(see paragraph [35]).

Richards LJ went on to note the following:

(i) That consideration must be given to whether the removal pending determination of an appeal would interfere with the person's rights under article 8.

(ii) If so, the decision maker would also have to consider whether the removal for the interim period would meet the requirements of proportionality.

What is made clear is that unless the decision maker considers that there would be no such interference or that any such interference would be proportionate, the claim cannot lawfully be certified under 94B (see paragraph [38]). It also is clear from Richards LJ's judgment in Kairie that the public interest is a relevant factor which commands substantial weight to be given to it even where the issue is that only of removal on an interim basis by reason of the terms of the section (see paragraph [44]).

[15] Against this background, Mr McTaggart drew attention to the series of letters about rehabilitation set out above and submitted that the position adopted by the Home Office in that correspondence was irrational. In his submission, the issue of rehabilitation is an important factor in the context of certification, contrary to the approach adopted by the Home Office in this case. Moreover, he asserted that the certification will "have an impact on his (the applicant's) rehabilitative work" and

that the failure to consider this impact renders the certification decision unlawful. In support of his case that rehabilitation was an aspect of the article 8 consideration for the purpose of certification Mr McTaggart relied on the cases of Danso (referred to above at paragraph [9]), Velasquez Taylor v Secretary of State for the Home Department [2015] EWCA Civ 845 and R (X) v Secretary of State for the Home Department [2016] EWHC Admin 1997. In support of his submission that if the applicant was removed by virtue of the certification his rehabilitation would be interfered with, counsel relied on the terms of the licence which the applicant would be required to adhere to which contained provisions requiring him to actively participate in any programme of work his supervising officer recommended designed to reduce any risk he represented.

[16] For the respondent Ms McMahon did not dispute the considerations referred to by Richards LJ in Kairie. Her argument proceeded on the basis that on the facts of this case there was no ongoing rehabilitation work in progress and nor was any such future work identifiable from the evidence placed before the court. Moreover, as regards the applicant's progress and behaviour while in custody, the decision maker was familiar with this and had taken these factors into account.

[17] In counsel's submission the cases relied on by the applicant did not demonstrate that the issue of rehabilitation was a factor which had to be considered for the purpose of article 8 in the present context. The applicant was reading too much into what the judges' had said in these cases.

[18] While she did not rule out the possibility that in some case an aspect of rehabilitation might be capable of being viewed as an article 8 factor, that was not this case.

The court's assessment

[19] It is evident and not in dispute between the parties that the issue which the court has to decide in this case is a limited one. It is not about whether or not a deportation order should have been made in respect of the applicant. It is one only about certification. Moreover, it is an issue only about one aspect of certification which is that concerned with the requirement that certification would not breach Convention rights, in the present context, article 8 of the Convention. No argument has been presented to the court concerning the question of whether the removal of the applicant to Zambia on an interim basis would breach subsection (3) of section 94B *viz* that the applicant would face a real risk of serious irreversible harm if removed. As regards the case which has been made, it also is targeted on a particular aspect of the article 8 consideration, namely that it is claimed that the issue of interim removal and how it may conflict with the applicant's post-custody rehabilitation was not considered at all so leading to illegality.

[20] The court, in order to find for the applicant, has to be satisfied that there was material relevant to the article 8 assessment which was not considered and which therefore was left out of account.

[21] In respect of the issue of the evidence available in this case about the applicant's rehabilitation, the court is not satisfied that there was anything of substance which the applicant had provided in this context. The reason for this is probably that the case which the applicant has consistently made was that he was not an offender who was to be viewed as at risk of committing further offences in the future. Indeed, this appears to have been the view of the probation authorities. On the contrary, his risk was a low risk. Moreover, it is evident from material supplied to the decision maker that the applicant while in custody had applied himself to a wide range of courses designed to assist him in the future. The picture which had been presented was of a model prisoner who had done all he reasonably could have to enable him to obtain the most from his experience in custody. There is no reference in the materials submitted to the decision maker that the applicant was about to embark upon his release on licence on a programme of rehabilitation. While, speculatively, it may be that some further step might be taken in this regard nothing definite had been organised or presented to the immigration authorities. On the facts of this case, this was not surprising given the circumstances of the applicant's offence; his previous clear record; the work he had done in custody and his risk status. Any further rehabilitative initiative, one suspects, would have at most have been at the modest end of the spectrum, if such occurred at all.

[22] In view of the court's conclusion above, the court is not satisfied that the applicant has shown that in fact there is identifiable material which should have been considered for the purpose of assessing any breach of article 8 in the context of the certification decision. This finding is fatal to this application for judicial review but the court will also, in case this conclusion is wrong, consider whether material relating to rehabilitation in any event should properly to be viewed as a factor essential to the assessment of article 8 in this context.

[23] It is necessary for the court to look carefully at the authorities that have been cited to it as there is a plain conflict between how these are viewed by the applicant and how they are viewed by the respondent.

[24] The case of Danso was not a case which was concerned directly with the issue which is before this court. It involved an appeal to the Court of Appeal against a decision of the Upper Tribunal which itself had dismissed an appeal to it from a decision of the First Tier Tribunal which had held that the appellant's appeal against a decision to deport him to the Gambia should be dismissed. The appeal to the Court of Appeal was unsuccessful.

[25] In Danso there was a short discussion in relation to the subject of the significance of the fact that the appellant had undergone various courses while in prison designed to address aspects of his offending. That factor, together with the

fact that there was evidence that he did not pose a significant risk of re-offending, were said to be factors which could be weighed in the balance against the public interest in the offender's deportation, as the scheme for deportation indicated that it would only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors. Addressing this Moore-Bick LJ at paragraph [20] said:

> "Mr Dixon submitted that the tribunal should have placed much greater weight on the appellant's rehabilitation and the fact that he did not pose a significant risk of re-offending. He suggested that far too little importance is attached to factors of that kind, with the result that those who commit offences have little incentive to co-operate with the authorities and make a positive effort to change their ways. I have some sympathy with that argument and I should not wish to diminish the importance of rehabilitation. It may be that in a few cases it will amount to an important factor, but the fact is that there is nothing unusual about the appellant's case. Most sex offenders who are sentenced to substantial terms of imprisonment are offered courses designed to help them avoid re-offending in future and in many cases the risk of doing so is reduced. It must be borne in mind, however, that the protection of the public from harm by way of future offending is only one of the factors that makes it conducive to the public good to deport criminals. Other factors include the need to mark the public's revulsion at the offender's conduct and the need to deter others from acting in a similar way. Fortunately, rehabilitation of the kind exhibited by the appellant in this case is not uncommon and cannot in my view contribute greatly to the existence of the very compelling circumstances required to outweigh the public interest in deportation".

[26] The particular context in which the above discussion took place was related to the operation of Immigration Rule 398. This does not arise in the applicant's challenge. Here the issue is not that of the proportionality of the deportation decision as a whole but the question of interim removal following certification pending the outcome of an appeal. But, what seems to the court to be of more importance still is the fact that the argument presented to the court in that case did not relate to the effect deportation would have on the appellant's <u>future</u> ability to avail of rehabilitation in the host country.

[27] The court would be wary about reading too much into the passage set out above, though it accepts that the comments were made in the broad context of a

balancing exercise between the public interest in deportation and the existence of countervailing factors.

[28] The case of Velasquez Taylor, on analysis, adds little to the debate. Again this case came to the Court of Appeal by way of an appeal against a decision of the Upper Tribunal which had dismissed the appellant's appeal against a deportation order. Interestingly, in doing so, the Upper Tribunal itself had overturned a decision of the First Tier Tribunal which had allowed the appellant's appeal against deportation. Indeed, the Upper Tribunal concluded that in reaching its decision the Lower Tier Tribunal had failed to attach sufficient weight to the public interest in deporting a foreign criminal. The Court of Appeal upheld the Upper Tier Tribunal's dismissal of the appellant's appeal.

[29] It is clear that, as with Danso, the territory under discussion in Velasquez Taylor was concerned with the striking of the balance between the public interest in deporting a foreign criminal and other countervailing factors. Again the countervailing factors had to be exceptional. In this case the argument advanced on the appellant's behalf before the Court of Appeal was similar to that in Danso. It was alleged by counsel for the appellant that the Upper Tribunal had failed to give sufficient weight to the degree of rehabilitation which the appellant had achieved.

[30] As in Danso, the judgment of the Court of Appeal was given by Moore-Bick LJ. Unsurprisingly, he said in substance what he had already said in Danso. However he went on to say (at paragraph [21]:

> "The fact that rehabilitation has begun but is as yet incomplete has been held in general not to be a relevant factor".

For the above proposition the judge cited a number of authorities which the court has considered. These clearly support the general statement made. By way of example, in SE (Zimbabwe) v Secretary of State for the Home Department [2014] EWCA Civ 256 Jackson LJ, giving the judgment of the court, dealt with an argument that a deportation order should not be made in respect of a foreign criminal who while in the United Kingdom had been making good progress towards rehabilitation and had reduced his risk of re-offending. In those circumstances it was claimed that if he was deported to Zimbabwe he would not receive the same level of support and assistance in continuing his rehabilitation process. Thus it might be thought desirable that he remain in the United Kingdom. However, the judge did not think this was a valid consideration under article 8. He could not say that as he was only part way through the process of rehabilitation he must stay in the United Kingdom to complete it. Absent exceptional circumstances, this was not a valid argument and "[t]he offender cannot rely upon his own partially unreformed criminality as a factor relevant to either his family life or his private life" (see: paragraphs [48]-[50] of the court's judgment).

[31] It therefore appears to the court that Velasquez Taylor, apart from the statement quoted above, adds little to the argument.

[32] The third authority relied on by the applicant is the judgment of Walker J in R (on the application of X) v The Secretary of State for the Home Department. Only a small portion of a lengthy judgment is relevant to the present case. The issue of interest for this court related to a certification decision in relation to a Romanian national under Regulation 24AA of the relevant EEA Regulations. Under this provision, it was open to the Secretary of State to remove despite the deportation appeal process not having begun provided that such would not be unlawful by reason of section 6 of the Human Rights Act. The Regulations also contained a real risk of serious irreversible harm test, not dissimilar to that which applied to the certification decision in this case under section 94B (3).

[33] In fact the court held that the certification decision was flawed as being in breach of the requirement to comply with section 6 of the Human Rights Act in the same way as had occurred in the Kiarie case (referred to above). In other words the decision maker in this case had certified by treating the serious irreversible harm test as decisive when in fact he or she should independently of this have also applied section 6 to the circumstances of the case.

[34] A point, however, arose as to whether by reason of this flaw the decision of the Home Office to certify should be quashed. In Kiarie the court had concluded that in one of the cases before it, even if the correct approach had been adopted, the decision would have been the same and this issue arose for consideration before Walker J. At paragraph [150] the court decided to quash the certification. It noted that an assessment of this sort was inherently fact sensitive but what weighed heavily with the court was the fact that the applicant was a recovering alcoholic who also suffered from depression and other illnesses giving rise to impairment of his cognitive ability. The judge held that his prospects of long term recovery in the United Kingdom were excellent, given the availability of support here, as against removal to Romania where there was a risk of a return to destitution. In those circumstances the conclusion reached was that the court could not say that those acting for the Home Secretary would, if they had properly understood their task, inevitably have concluded that pre-redress exclusion of the applicant would not be a breach of section 6.

[35] It does appear to the court that the decision in X, while admittedly fact specific, is a case where the need for rehabilitation going into the future was a factor of importance in a certification situation. Notably there is no reference to Danso or Velasquez Taylor in X; nor is there reference to any of the authorities referred to by Moore-Bick LJ in the latter case at paragraph [21].

[36] Viewing the authorities together, the court is inclined to accept that there will, at least, be some cases, like X, where the damage which may be sustained to a rehabilitation plan or programme may represent a factor of substance in the

assessment of a person's article 8 rights in the context of certification. However, such cases are unlikely to arise routinely and for such a factor to be of any importance for article 8 purposes there would need to be material suggestive of a significant adverse disruption of the person's development related to his or her removal for the interim period with which certification is dealing.

[37] In the court's view, the facts of the present case are not such as to sustain an argument that any substantial and material factor relevant to the article 8 assessment was overlooked but it is the case that the Home Office view, expressed by Mr Huggins, puts the matter in too inflexible a way. For the court's part, it would not endorse the view that an issue of rehabilitation could never be a relevant factor in the balancing of interests required in a certification situation.

[38] Finally, if the court had been willing to hold that on the facts of this case that there had been a failure to take into account a relevant factor in the article 8 balancing exercise, the court would not have granted an order of *certiorari* quashing the certification decision. Rather it would have adopted the approach taken in Kiarie of considering whether the outcome would have been the same even if the issue of rehabilitation had been considered. In the present case the court is satisfied, in view of the factual matrix in this case read as a whole, that if the rehabilitation material had been overlooked specifically in the context of article 8, this would not have made any difference to the outcome.

Conclusion

[39] For the reasons it has given the court has decided to dismiss this application for judicial review.