Neutral Citation No: [2011] NIQB 92 | *Ref:* **TRE8339**

Judgment: approved by the Court for handing down | *Delivered:* **13/10/2011**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

JR61's Application (Leave stage) [2011] NIQB 92

IN THE MATTER OF AN APPLICATION BY JR61 FOR JUDICIAL REVIEW

_____

TREACY J

Introduction

1. The applicant challenges a decision of 14 July 2011 by UKBA certifying his human rights claims under section 94(2) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") as "*clearly unfounded*" applying section 94(3). The applicant seeks to have this decision quashed to allow him to exercise an "in-country" right of appeal.

Factual Background

2. The applicant sought asylum in the UK on the basis of a fear of persecution from those who wish him to take up his deceased father's position as King/Tribal Chief for an area in Nigeria. This requires participation in traditional/occult religious practices that are, it is said, incompatible with the applicant's strongly held Christian faith. If he returns to Nigeria and refuses to take up the throne a successor cannot be appointed until his death. He claims that if returned to Nigeria he will be killed because he will refuse to take up a role which is in conflict with his Christian beliefs. The applicant claims that he cannot safely relocate to another part of Nigeria and that he would not be afforded sufficient protection by the Nigerian authorities in the face of this threat to his safety. The respondent argues that the applicant's claim does not fall within the 1951 Refugee Convention and that, in any event, internal relocation and/or sufficiency of protection mean that his asylum claim must fail.

Grounds of Challenge

3. The applicant's Order 53 Statement sets out the grounds of challenge as follows:

> **"(i) The impugned decision is unlawful as an error of law as contrary to the tests laid down in *Yogathas v SSHD* [2002] UKHL 36 and *ZT (Kosovo) v SSHD [2009] 1 WLR 348* in respect of decisions to certify under section 94(2) of the Nationality, Immigration and Asylum Act 2002, applying section 94(3) of the said Act.**
>
> **(ii) The impugned decision is irrational as Wednesbury unreasonable. This flows from ground (i) above.**
>
> **(iii) The impugned decision is unlawful because the respondent took into account, or gave inappropriate weight to, an irrelevant factor, namely the applicant's ostensible failure to give the Nigerian authorities any opportunity to assist him in respect of his fear of persecution."**

4. A person may not bring an "in-country" appeal if the Secretary of State certifies that the claim is clearly unfounded under section 94(2) of the 2002 Act. Under section 94(3) of the 2002 Act if the Secretary of State is satisfied that an asylum claimant is entitled to reside in a State listed in subsection (4) he shall certify the claim under section 94(2) unless satisfied that it is not clearly unfounded. Those states include, for male claimants, Nigeria. As such it is common case that section 94(3) applies. Applying section 94(3) the Secretary of State must therefore certify the applicant's asylum claim unless satisfied that it is not clearly unfounded. The SOS so certified holding that the applicant's claim is clearly unfounded. The applicant contends that his claim is not clearly unfounded and that the SOS erred in concluding that it was. Given the operation of section 94(3) the burden of proof is on the applicant to show that his claim is not clearly unfounded.

5. Despite the operation of section 94(3) the English Court of Appeal concluded in ***ZLand VL v SSHD and Lord Chancellor's Department*** **[2003] 1 All ER 1062** at paras 57 and 58 that there was *"no intelligible way"* of certifying a claim from a listed country except by the same process which applied in respect of claims from countries not listed. As such it appears, as the applicant contends, the

Secretary of State is still required to consider the merits of the case – even when the applicant comes from a listed country.

6. In the leading case in respect of certification decisions, ***ZT (Kosovo) v SSHD*** **[2009] 1 WLR 348** Lord Phillips said:

> **"22. The test of whether a claim is "clearly unfounded" is a black and white test. The result cannot, for instance, depend upon whether the burden of proof is on the claimant or the Secretary of State, albeit that section 94 makes express provision in relation to the burden of proof-in R (L) v Secretary of State for the Home Department [2003] 1 WLR 1230 , paras 56–58 I put the matter as follows:**
>
> > **56. Section 115(1) empowers—but does not require—the Home Secretary to certify any claim 'which is clearly unfounded'. The test is an objective one: it depends not on the Home Secretary's view but upon a criterion which a court can readily re-apply once it has the materials which the Home Secretary had. A claim is either clearly unfounded or it is not.**
> >
> > **57. How, if at all, does the test in section 115(6) differ in practice from this? It requires the Home Secretary to certify all claims from the listed states 'unless satisfied that the claim is not clearly unfounded'. It is useful to start with the ordinary process, such as section 115(1) calls for. Here the decision-maker will (i) consider the factual substance and detail of the claim, (ii) consider how it stands with the known background data, (iii) consider whether in the round it is capable of belief, (iv) if not, consider whether some part of it is capable of belief, (v) consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention. If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not.**
> >
> > **58. Assuming that decision-makers—who are ordinarily at the level of executive officers—are sensible individuals but not trained logicians, there is no intelligible way of applying section 115(6) except by a similar process of inquiry**

> **and reasoning to that described above. In order to decide whether they are satisfied that the claim is not clearly unfounded, they will need to consider the same questions.** ***If on at least one legitimate view of the facts or the law the claim may succeed, the claim will not be clearly unfounded.*** **If that point is reached, the decision-maker cannot conclude otherwise. He or she will by definition be satisfied that the claim is not clearly unfounded. Miss Carss-Frisk for the Home Secretary has properly accepted that this is the correct approach.**
>
> **23. Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer.** ***If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded.*** **It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational."**
> (Emphasis added)

7. Lord Carswell, noting the draconian nature of the power to certify, summarised the test at para 58:

> **"...in order to justify its exercise the claim must be so clearly lacking in substance that it is bound to fail."**

8. If therefore any reasonable doubt exists as to whether a claim may succeed the claim is not clearly unfounded and the SOS cannot so certify. To justify certification the SOS must be satisfied that the claim is *so lacking in substance that it is bound to fail***.** The reasoning behind the imposition of such a stringent test is obvious.

9. The applicant contends that his claim falls within the 1951 Convention and that sufficient protection would not be afforded to him and that internal relocation is not a viable option. He submits that this case is principally concerned with whether these claims, if eventually believed in whole or in

part, are "*capable of coming within the Convention*", per part (v) of the approach advocated by Lord Phillips, above. This Court is not, therefore, primarily required to come to any firm conclusion about whether or not the applicant is telling the truth but rather to consider whether or not – if he is eventually believed in whole or in part – that his claim might fall within the protections of the Convention.

10. In order to succeed in his asylum claim the applicant must be able to demonstrate a "*reasonable degree of likelihood*" that his genuine fear of persecution will materialise, i.e., that persecution will take place; see ***R v SSHD ex parte Sivakumaran*** **[1988] AC 958**. In short, a real risk of persecution.

11. The applicant submitted that his asylum claim is based on his religion and/or his membership of a particular social group. Both are protected categories under the terms of the 1951 Convention. The applicant contends that there is a real risk he will be harmed by those who feel that he has rejected his divinely ordained selection as his father's successor as the tribal Chief. The applicant claims that he will not take up this role primarily on account of his strongly held Christian beliefs. He contended that his claim of being a Christian does not appear to be disputed by the proposed respondent and that it is acknowledged that he has been involved in voluntary church work in the UK [paragraph 42 of the impugned decision] and that he gives ample evidence of his knowledge of Christian beliefs and practice in his substantive asylum interview [Q.49 et seq].

12. It was submitted the key issue in a case based on religious persecution is how the applicant's adherence to his Christian faith will be viewed by the agents of harm and that the 1951 Convention addresses harm emanating from state *and* non-state actors, see ***R v Secretary of State, ex parte Aitseguer*** **[1999] 4 All ER 774**. He submits " it is obvious that the agents of harm in this case will view …[his] adherence to his Christian faith as a rejection of their own divinely ordained plans …[him] and that – in accordance with those plans – no other successor can be appointed unless the applicant dies. As such persecution flows as a direct consequence of the applicant's adherence to his faith." This issue he contended was not even considered in the impugned decision.

13. In addition, the applicant also claims the protection of the Convention as a member of a particular social group namely a group which shares a common immutable characteristic – beyond their power to change, **see *Islam v SSHD, R v Immigration Appeal Tribunal, ex p Shah*** **[1999] Imm AR 283, [1999] 2 AC 629, HL**. The applicant contends that he is a member of a particular social group in so far as he is a member of a "royal" family group with particular obligations and expectations attached to this status within his community.

14. Underpinning the rejection of the applicants claim for asylum were the twin conclusions that the applicant can safely relocate within Nigeria and that there is sufficient protection available in Nigeria from the police. The applicant mounted a detailed attack on both conclusions.

Sufficiency of Protection

15. In ***Horvath v SSHD*** **[2001] 1 AC 489** Lord Clyde stated [page 510 *et seq*]:

> **"There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of acting contrary to the purposes which the [Geneva] Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case.**
>
> **It seems to me that the formulation presented by Stuart-Smith, L.J. [in the court below] may well serve as a useful description of what is intended:**
>
> > **'In my judgment there must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the law.** ***There must be a reasonable willingness by the law enforcement agencies, that is to say the police and courts, to detect, prosecute and punish offenders.'***
>
> **And in relation to the matter of unwillingness he pointed out that inefficiency and incompetence is not the same as unwillingness, that there may be various sound reasons why criminals may not be brought to justice, and that the corruption, sympathy or weakness of some individuals in the system of justice does not mean that the state is unwilling to afford protection.** ***"It will require cogent evidence that the state which is able to afford protection is unwilling to do so, especially in the case of a democracy"*****. The formulation does not**

> **claim to be exhaustive or comprehensive, but it seems to me to give helpful guidance."**
> (Emphasis added)

16. ***Horvath*** was considered by the Scottish Court of Session in ***Hussein v SSHD*** **[2005] CSIH 45; 2005 1 SC 509** :

> **"[15]** ***Horvath*** **makes clear that 'adequate protection' requires not just the existence of an effective criminal system, but a willingness to operate it, including a willingness on the part of the police to take the necessary first step of investigation. A system in which the police, as a matter of general practice, require a bribe in order to investigate a serious incident of shooting would not meet this test."**

17. The applicant submitted that impugned decision *itself* sets out ample evidence to doubt whether he would be afforded sufficient protection from the Nigerian police [see para15 *et seq* of the impugned decision] including that: (a) due to NPF [police] inability to control societal violence, the government continued to rely on the army in some cases; (b) the NPF committed human rights abuses, generally operated with impunity in the apprehension, illegal detention, and sometimes execution of criminal suspects; (c) policing in Nigeria is characterised by pervasive corruption. Corruption and extortion are perhaps the *"defining characteristics"* associated with the NPF with a majority of police officers using the police uniform as a tool for generating income. This conduct is described as *"pervasive and institutionalised"*.

18. Despite citing this material the impugned decision concludes with he submits "massive understatement", that the Nigerian police are only *"susceptible"* to corruption [para21] and that this did not demonstrate a *"systemic or institutionalised unwillingness to afford protection to the victims of persecution by non-state agents"* [para.21].

19. He contends this conclusion is inconsistent with and contradicted by the very material contained in the impugned decision. The material demonstrates that corruption in the Nigerian police is endemic, institutionalised and pervasive. It is the *defining characteristic* of Nigerian policing. He submits it is certainly arguable that the applicant may not be afforded sufficient protection from a police force that is known primarily for being corrupt to the extent that corruption in the police has been described as *"pervasive and institutionalised"* by sources considered accurate enough to be referenced by the proposed respondent. As in *Hussein* it is submitted that the decision to certify in this case is at odds with the country evidence which at least creates an arguable claim that there would not be sufficiency of protection in Nigeria should that applicant be returned. Echoing *Hussein*, the applicant also relies on the need

to pay police bribes in order to prompt them into any form of action. A system in which the police, as a matter of general practice, require a bribe in order to investigate a serious incident would not meet the test set out in *Horvath* according to *Hussein*.

20. Although the impugned decision does cite some relevant cases it is submitted that these ought to be treated with caution and may be distinguished because of their vintage and because they all relate to the *Ogboni* cult. The impugned decision acknowledges that this is not the cult actually feared by the applicant. It is therefore questionable he submits whether principles derived in cases relating to this cult are relevant to the determination of his asylum appeal. Such matters are always factually specific and ought to be a matter of evidence for the First-tier Tribunal to consider.

21. He further submitted the impugned decision adopts a confusing approach to the issue of sufficiency of protection acknowledging that there is no *requirement* for a person to seek internal protection before seeking international protection [para 23] whilst simultaneously holding against him the fact that they consider he has not given the Nigerian authorities "any opportunity" to help him. He argued that aside from this being an impossibility (given that he had already exited Nigeria before his troubles arose) it is also logically inconsistent with the statement that he was under no requirement to do so. It is, he asserts, clearly unfair and irrational to hold against him that he did not go to the Nigerian police with his problems when those problems did not materialise until he had left Nigeria.

Internal Relocation

22. The proposed respondent maintains that it would not be "unduly harsh" or unreasonable to expect the applicant to relocate to another part of Nigeria were he would be safe from persecution. The applicant submits these are matters which can only be resolved by evidence regarding, inter alia, the geographic influence and reach of those from whom he fears death and persecution. He contends that the proposed respondent simply rejected without any evidential foundation the idea that the feared persecutors would have either the means or the motive to trace the applicant to another location in Nigeria [para. 31]. The means are something which he says the proposed respondent simply knows nothing about and is an opinion "plucked from thin air". In respect of the motive the applicant maintains that these people are involved in occult religious practices which have, in the past, involved human sacrifice. As far as they are concerned the gods have chosen the applicant to be the new king. His rejection of this role is not just refusing a position of honour but amounts to a grievous insult to their religion and tradition. Motive cannot, therefore, be discounted so easily.

23. In the case of ***SA (political activist – internal relocation) Pakistan*** **[2011] UKUT 30 (IAC)** the Upper Tribunal stated:

> **"In our judgement also, the only way the appellant could achieve safety by relocation was if he effectively decided to live in hiding or in political exile. In UK asylum law, requiring a political activist to live away from his home area in order to avoid persecution at the hands of his political opponents has never been considered as a proper application of the internal relocation principle: see e.g. Nolan J in R v Immigration Appeal Tribunal, ex p Jonah 1985] Imm AR 7. And (since October 2006) such a requirement cannot be considered to be consistent with para 339O of the Immigration Rules (Article 8 of the Qualification Directive). Indeed, the pitfalls of requiring a person to act contrary to his normal behaviour in order to avoid persecution have been further emphasised by the Supreme Court in HJ (Iran) [2010] UKSC 31."**

24. Based on this case the applicant submits that notwithstanding the possibility of safe relocation it may still not be lawful to require him to live in hiding or in some form of religious exile. In addition he contends that, as the son of King and heir to the throne he is no ordinary citizen but may be someone with a higher profile than others.

25. The applicant submits therefore that his claims under the Convention are not hopeless or bound to fail, that his case clearly comes within the Convention and *may* succeed. If on at least one legitimate view of the facts or the law the claim may succeed, the claim will not be clearly unfounded (per Lord Phillips). It is submitted that the applicant has raised just such a legitimate view in this case.

26. The fact that many of the arguments resolve to evidential matters strongly suggests he submits that his claim should not have been certified particularly when his asylum claim has been determined under the detained fast track procedure which he asserts makes it more difficult to seek legal advice and gather supporting evidence in support of his claim because his liberty is severely restricted and the process is conducted in a much shorter time scale than a regular asylum claim. These difficulties are further exacerbated he says given the operation of section 94(3) which creates an effective presumption in favour of certification and shifts the burden of proof to the applicant. In those circumstances the Court ought, he contended, to be slow to endorse certification decisions in cases involving disputed facts, complex legal issues and high stakes.

Conclusion

27 This is an application for leave and I am satisfied the applicant has established a case fit for further and more detailed consideration at a substantive hearing. Important and potentially complex legal and other issues may arise and the stakes are high which is why the bar for certification by the SOS has been set so high.