OUTER HOUSE, COURT OF SESSION

[2011] CSOH 121

P938/10

OPINION OF MORAG WISE QC
(Sitting as a Temporary Judge)
in the Petition
of
M.N. (assisted Person)
Petitioner;
For judicial review of a decision of the Secretary of State for the Home Department to certify her decision to refuse the Petitioner's asylum claim in terms of section 94 of the Nationality, Immigration and Asylum Act 2002

Petitioner: Caskie; Drummond Miller LLP
Respondent: D Davidson; Office of the Solicitor to the Advocate General

20 July 2011

[1] The petitioner seeks judicial review of a decision of the Secretary of State for the Home Department ("the Secretary of State") taken on 22 July 2010. The respondent is the Advocate General for Scotland on behalf of the Secretary of State. The petitioner was born in Zimbabwe but settled in South Africa. She first came to the UK in July 2003, using her Zimbabwean passport. She returned to South Africa in 2004 and obtained South African citizenship and a passport. She returned to the UK in November 2005 as a student. She applied for further leave to remain as a student in May 2006 but that application was rejected. She did not return to South Africa and has resided illegally in the United Kingdom since 21st May 2006. She claimed asylum on 26 February 2008. Her claim was rejected and the decision letter of 22 July 2010 (No 6/1 of process) sets out the reasons for refusal.

[2] In refusing the petitioner's application for asylum, the Secretary of State certified her claim in terms of section 94(2) and (3) of the Nationality, Immigration and Asylum Act 2002. As a result of such certification the petitioner is unable to appeal to the First Tier Tribunal whilst in the United Kingdom and she seeks reduction of the certification decision in order that she might so appeal. The test to be applied by the Secretary of State in both section 94(2) and (3) of the 2002 Act is

whether the claim made is "clearly unfounded". Section 94(3) of the Act has a list of states known informally as "the white list". If a claimant is entitled to reside in one of the listed states there is a presumption that certification will be granted unless it can be shown that the claim is not "clearly unfounded". Accordingly the two subsections of section 94 effectively have the same test. If certification is successfully challenged under section 94(2) then it follows that there cannot be certification under section 94(3). The petitioner claims that on her return to South Africa she will be subjected to torture, inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights ("ECHR"). That human rights claim is also one to which section 94(3) of the 2002 Act applies. The test for that is accordingly the same.

[3] The basis of the petitioner's claim for asylum is that she suffered persecution and harassment as a result of her ethnicity, nationality and language. Her fear is said to be of violence as a result of xenophobia in South Africa. The full basis for the petitioner's claim is set out at paragraphs 6 to 15 inclusive of the decision letter (No 6/1 of process). In particular, she claims that the shack in which she lived in South Africawas burned down in 1999 by South African residents. It is said that the police were present at this incident and they were trying to help injured people and calm the situation down. The petitioner claims that the acknowledgement that the police were unable to protect her property from destruction means that she should not be required to rely upon those authorities in the future. The criticisms of the South African regime for its slow response in arresting and prosecuting perpetrators of the widespread xenophobic violence in South Africa and evidence that attacks were orchestrated by local politicians who appear to act with impunity were also relied upon as having been noted by the Secretary of State. It is said that having regard to this and other material, it would be open to another decision maker such as an Immigration Judge to reach a contrary conclusion to that reached by the Secretary of State.

[4] Mr Caskie for the petitioner focused the issue as being whether there was more than a fanciful prospect of an Immigration Judge concluding that the petitioner would not secure sufficient protection from the police in South Africa were she to return there. It was submitted that the test of whether a claim was "clearly unfounded" was a similar but marginally lower test than the very low test in Immigration Rule 353 of a "realistic prospect of success". In *AK (Sri Lanka)* v *The Secretary of State for the Home Department* [2009] EWCA Civ 447 the Court of Appeal analysed the possible difference between the test of a realistic prospect of success under Rule 353 and the "clearly unfounded" test for certification under section 94 of the 2002 Act. The court noted that in *ZT (Kosovo)* [2009] 1 WLR 348 the House of Lords may have suggested that the tests were effectively the same. Having analysed the views expressed in *ZT (Kosovo)* on the point Laws LJ expressed the following view:

> "For what it is worth I should have thought that there is a difference, but a very narrow one, between the two tests: so narrow that its practical significance is invisible. A case which is clearly unfounded is one with *no* prospect of success. A case which has no realistic prospect of success is not quite in that category; it is a case with *no more than a fanciful* prospect of success." (para 34)

Accordingly, Mr Caskie submitted that a claim which is clearly unfounded is effectively one that is unstateable. In *Princely* v *The Secretary of State for the Home Department* [2009] EWHC 3095 Sales J had expressed the view that if there was any "reasonable doubt" about whether a claim should succeed then it was not "clearly unfounded" for the purposes of section 94. It was also said in that case that new material could be considered by the court by agreement of the parties.

[5] Mr Caskie submitted that the court's assessment required a view on the substance of the Secretary of State's decision rather than an assessment of whether the reasons were adequate and the approach correct. The consequences of the court requiring to agree or disagree with the Secretary of State that the petitioner's claim

is "clearly unfounded" are twofold. One was said to be to the respondent's advantage in that the petitioner is not entitled to succeed if the correct answer was reached but the reasons inadequately stated. The other consequence, however, was that so long as it might be thought that the view expressed by the Secretary of State was wrong the petitioner must succeed. The illegality or unlawfulness of the decision arose from the Secretary of State getting the answer wrong. It was submitted that what the respondent required to show in the matter was that the Tribunal would "inevitably conclude" that the claimant faces no real risk of ill treatment if returned to South Africa. In *FNG* v *Secretary of State for the Home Department* 2008 SC 373 Lord Hodge had analysed the test under section 94 of the 2002 Act. It was said that the normal role of judicial review was extended in such cases. Lord Hodge expressed the view that the reviewing court may have to consider the legality of the decision in light of material which was not before the decision maker. Reference was also made to decisions of Lord Malcolm in the petition of *JS for Judicial Review of a decision of the Secretary of State* [2010] CSOH 75 and Lord Tyre in the petition of *IM for Judicial Review of a decision of the Secretary of State* [2010] CSOH 103. Mr Caskie submitted that it had become clear that in section 94 cases the court can look at new material. He accepted however that Lord Hodge's decision in *FNG* in this respect differed from the decision of the Court of Appeal in *R (YH)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116. In any event what had occurred in the present case was that the Secretary of State in dealing with the petitioner's application had found material on the background situation in South Africa and had looked up information from the United States about what was happening in that country. In carrying out that research it was submitted that the Secretary of State had done what the court should now do, but that new material that was available at the time and could have been sourced by the Secretary of State could also be taken into account. Reference was made to the case of *M.S.S.* v *Belgium and Greece* a decision of the Grand Chamber of the European Court of Human Rights on 21

January 2011 (Application No 30696/09) where the court had taken up to date materials into account where these had been put before the court to suggest that Greece was no longer Article 3 compliant in the context of an asylum claim. If Article 3 ill treatment is in issue and if there were warnings from ostensibly reliable sources that there is a problem in the country involved, then it is the responsibility of the State to investigate that. Accordingly, it was submitted that in the present case any material that might suggest the Secretary of State did not reach the right answer in granting certification should be considered.

[6] Mr Caskie's primary position for the petitioner was that even on the materials the Secretary of State chose to look at and relied upon certification should not be made. His fallback position was that, even if that was wrong, in looking at the additional material he sought to present to the court it became clear that certification should not have been made. It was said that the Secretary of State had defined the limit of the inquiry and should not therefore be allowed to argue that material could not be looked at because of the limits of that inquiry. The decision maker required to consider whether any relevant material supported the view that the petitioner was entitled to remain and even if the conclusion was that it did not, to ask whether an Immigration Judge could reach a different view on that matter. In *WM (DRC)* v *The Secretary of State for the Home Department* [2006] EWCA 1495 the test for fresh asylum claims under Rule 353 was set out. The requirement for anxious scrutiny applied equally to the present case. So far as sufficiency of protection was concerned the leading authority was said to be *Horvath* v *The Secretary of State for the Home Department* [2001] 1 AC 489 where the House of Lords had expressed views on that test in the context of whether the Slovakian authorities would give sufficient protection on a return. In *Hovarth* Lord Hope opined that the obligation to afford refugee status arose only if the person's own State is unable or unwilling to discharge its own duty to protect its own nationals. Thus, Mr Caskie submitted, it is clear that the primary duty to provide protection lies with the home State. The sufficiency of State protection is relevant to a

consideration of whether each of the two aspects of "fear" and "protection" is satisfied. He accepted that there requires to be some kind of structural or systematic problem in the system to be able to argue that it was unable or unwilling to provide the relevant protection. In this context reference was made to Council Directive 2004/83/EC. This is one of three principal Directives relating to refugee issues. It sets a common standard for recognising who is and is not a refugee. It is clearly binding on member States. Importantly, protection includes protection from non-State agents. The domestic regulations which purport to implement the 2004 Directive are the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI 2006/2525. Regulation 4 implements Article 7 of the 2004 Directive. However the words "*inter alia*" which appear in Article 7 of the Directive do not appear in Regulation 4 of the Regulations. Those words make clear that the provision of protection by the State includes, but is not limited to, effective legal systems for the detection, prosecution and punishment of relevant acts. It could be said, therefore, that the Regulations do not implement the Directive. Thus even if *Hovarth* is still good law the difficulty for the respondent was said to be that the requirement in Article 38 of the Directive that member States bring their laws into compliance by 10 October 2006 post-dated *Hovarth* which was heard in 2000. On the basis that, if not fully transposed the words of the Directive become fully effective, the words "*inter alia*" require to be read into the provision on protection. In this respect *Hovarth* can no longer be said to be good law at the current time because it does not take account of the 2004 Directive. Thus, where the court in *Hovarth* expressed the view that a proper system of protection is always enough, that is necessary but not sufficient so far as the Directive is concerned.

[7] Mr Caskie went on to examine the factual material before the Secretary of State and the additional material he sought to introduce in argument. So far as the former was concerned the decision letter refers to two reports from the US State Department. These reports are issued in February each year and provide an up to

date assessment of the human rights situation in all other countries. As the UK has no country information report for South Africa (it not being in the top thirty countries for asylum seekers) information on South Africa from the US State Department was of interest. Number 6/2 of process is the US State Department Human Rights Report on South Africa for 2008, published on 25 February 2009. At page 10 there is a discussion of internally displaced persons. Details of xenophobic attacks that took place in mid-May 2008 are narrated. Mr Caskie argued that while the decision letter at paragraph 27 includes a quotation from this report the quote selected was restricted to the part that focuses on the number of arrests and charges brought against the citizens in question. He argued that there was nothing to suggest that the Secretary of State took the rest of the report into account. On closer inspection the rest of the report confirms that after the May "pogrom" (as it was termed by Mr Caskie) there were widespread complaints from humanitarian organisations about the failure of the South African authorities to take appropriate action. So far as the subsequent year was concerned the Secretary of State also took into account No 6/3 of process which was the relevant US State Department Report for South Africa for 2009, published on 11 March 2010. At pages 26 to 27 of that report it is recorded that although not as pervasive as in the previous year, there had been further xenophobic attacks on foreign African migrants and ethnic minorities which sometimes resulted in displacement. Several instances of such attacks are narrated. If the Secretary of State thought these sources were reliable then what they illustrated were failure by the South African government to address the root causes of such xenophobic attacks. While it had to be accepted that matters did not appear to be as bad in 2009 as they had been the previous year and the police were now taking action, that was not sufficient to demonstrate an ability and willingness to bring an end to random attacks. Again there was criticism of the way in which the decision letter quoted from the report No 6/3 of process. In paragraph 28 various passages of No 6/3 of process are quoted and, argued Mr Caskie, made to look as if they were a continuous passage

from the report. However it was clear that there had been "deliberate excision" by the Secretary of State such that the quotations were an inaccurate representation of how the information appeared in the report. The decision letter was also criticised for failing to include the estimated figure of 80,000 migrants having been displaced by the violence.

[8] According to Mr Caskie, what the Secretary of State had done in paragraph 28 of the decision letter was put forward a submission rather than exhibit an open mind to the question of whether there was no chance of an Immigration Judge deciding in the petitioner's favour. There was no good reason for the Secretary of State to have used the quotations in the way she did unless she was trying to justify her decision. She had taken out of the quotations material that would clearly be in the mind of an Immigration Judge when she reached her conclusion that the application would be bound to fail. It could not be said that the Secretary of State looked at the excised material. It could be said that she failed to take account of the severity of the problem. It was conceded that some defects in the decision letter would not result in it being wrong. The strongest part of the Secretary of State's argument was that there would be sufficient protection for the petitioner in South Africa however she had failed to look at the evidence and draw proper conclusions. Reference was also made to paragraph 26 of the decision letter where the Canadian IRIN Report was referred to. That report dated 21 May 2008 referred to the South African Army having been called in to bolster police efforts to end xenophobic clashes. However, when read with the US State Department Report for 2008 (No 6/2) it was clear that the police efforts had not been effective. . What the Secretary of State had done, according to Mr Caskie, was take a snapshot of the problem under excision of important paragraphs about subsequent events. That failed to approach the material with a fair and impartial mind. It was reiterated that the test was not one of what a hypothetically reasonable Immigration Judge would do. One had to consider whether there was any chance that an Immigration Judge would

decide differently if taking the most favourable view to the petitioner of the factual material.

[9] Mr Caskie submitted that paragraph 24 of the decision letter simply clarified that there are a large number of police officers in South Africa. An Immigration Judge might interpret that paragraph as indicating that the South African government were making an effort with the problem of xenophobic violence. Alternatively, such an Immigration Judge might conclude that if there remained so many camps and displaced persons then the extra police were not making any difference. Where there were two possible conclusions it could not be said that the petitioner would be bound to fail. It was reiterated that at each step towards the overall conclusion the most favourable interpretation to the petitioner must be taken. Reference was also made to extracts taken from the internet by searching under "Xenophobia: South Africa". These comprise No. 6/4 and 6/5 of process and are dated 21 July 2010 and 16 July 2010 respectively. Therefore, the Secretary of State could have accessed them. The reports downloaded indicate concerns on behalf of the South African Human Rights Commission in relation to the level of response of the South African government to the problem with xenophobic violence. It was said that the tenor of the reports was that the Commission was waiting to see if the government had put appropriate systems in place. Further additional material, not taken into account by the Secretary of State was produced as No. 6/6 of process. This is an extract from a book entitled "*From Foreign Natives to Native Foreigners, explaining xenophobia in post-apartheid South Africa. Citizenship and Nationalism, Identity and Politics*". The text was first published in 2006 and updated in 2010. It was contended that this was a reputable academic text and that the thesis of the work was that xenophobia in South Africa is a problem not yet resolved. Ultimately, Mr Caskie's position was that the petitioners would probably succeed in an appeal but that all that was required for success in these proceedings was more than a fanciful prospect of success. It was accepted that South Africa offered a sufficiency of protection on domestic violence

and no issue was taken with paragraph 55 to 70 of the decision letter. So far as the issue of internal relocation was concerned, paragraph 71 of the decision letter dealt with this. However, it was said that there was no need in this case to consider the internal relocation issue. The central issue was whether or not there was sufficiency of protection on a return to South Africa. That was the nub of the certification decision.

[10] For the respondent, Mr Davidson invited me to sustain the respondent's second plea-in-law and dismiss the petition. He invited me to look at the averments made by the petitioner in a broad prospective that takes into account the extreme human conditions such as torture that have given rise to successful asylum claims. At his highest the key allegation for the petitioner would appear to be that her house was destroyed in 1999. The issues of domestic violence and bullying having been effectively discarded that remained the only relevant issue. Mr Davidson argued that the chronology was important. The petitioner continued to live in South Africa for four years after the alleged destruction of her house. She returned to South Africa after her first visit to the United Kingdom. She became a South African citizen many years after the alleged destruction of her house. Further, between 2006 and 2008 the petitioner resided in the UK illegally and made no claim for asylum. The focus of the submissions made by Mr Caskie on the events of 2008 in South Africa require to be considered against the background of the complaint being of an event to the petitioner's property in 1999. Even then, the highest case for the petitioner was that in 1999 the police attended to calm down the victims of the xenophobic attack but did not arrest and prosecute those responsible. The facts of this case should be compared against the test outlined in *Hovarth* v *Secretary of State for the Home Department* [2001] 1 AC 489. Further, in *Hussein* v *Secretary of State for the Home Department* 2005 1 SC 509, an Extra Division of the Inner House had confirmed that it was not enough to point to corruption, inefficiency or incompetence on the part of individual members of the police, prosecution or justice system; that there must be evidence of systematic

or institutionalised unwillingness to afford protection to the victims of persecution by non-state actors.

[11] While the decision letter of the Secretary of State had been criticised for including a selective and edited view of the passages in the US State Department Reports, it was submitted that it was clearly wrong to say that if any decision maker summarises a text there is a presumption that he has overlooked the parts not quoted. It would be different if the Secretary of State had downloaded partial information from the South African Tourist Board or similar. However, the material produced by the Secretary of State was on one level critical of South Africa and was not partial. As the United States produced reports on all countries, it could not be assumed that the existence of such a report was any indication of Human Rights problems existing. It was common knowledge that the lack of a robust police response was not a problem in South Africa. Such criticisms as could be made of the police there were that on occasions excessive force might have been used to quell violence. The central question was whether the country provided sufficient police protection in accordance with the rule of law. South Africa is included in the UK government's "White List" because they are regarded as "a safe pair of hands". The US State Department Reports have to be viewed against that background. It could hardly be said that South Africa was a lawless country. It had a civil law system similar to that in this jurisdiction. It has a highly sophisticated legal system and an independent bar.

[12] Mr Davidson was critical of the production of the text No. 6/6 of process. There was no material to judge the quality of the text or where it fell in the hierarchy of respected publications. The language used in some of the passages in the text was hardly indicative of a careful dispassionate analysis of the situation in South Africa. Rather it was suggestive of someone with a motive and parts of it were virtually unintelligible. It could not be said that there was a reason for the Secretary of State to rely on such material.

[13] So far as the law on the relevant test was concerned, Mr Davidson agreed that the leading authorities were as set out by counsel for the petitioner. The context of the Statute, however, was that hopeless causes were slowing down the immigration system and damaging worthy cases. Such hopeless cases, of which the petitioner's is one, were said to frustrate the progress of genuine asylum seekers. The role of the court in such situations was to make an independent judgement on whether the decision was correct on the material available. Under reference to *R(Yogathas)* v *Secretary of State for the Home Department*[2003] 1 AC 920 it was submitted that it is clear that a case can be manifestly unfounded even if it takes more than cursory look at it to reach that decision. The fact that the Secretary of State had taken such a comprehensive approach in this case does not suggest that the decision was in anyway borderline or difficult. On the additional material issue, counsel wanted to reserve his position were the matter to be raised in other cases. However, as in this particular case the new material in question was of such poor quality that it made no difference, Mr Davidson was happy for it to be considered. In those circumstances, the question of whether in principle the court may look at material the Secretary of State had not considered did not require to be determined.

[14] It was clear that the petitioner was founding on "non-state persecution" in this case, Mr Caskie having made no attempt to suggest anything more than the averments within the petition. As there was no suggestion of persecution by the state authorities, the test to be satisfied was whether South Africa was willing and able to provide the petitioner with protection. It was noteworthy that no complicity by the authorities was claimed. It was insufficient to point to isolated incidents within a democratic regime. In the absence of any systematic failings by the South African authorities there is nothing to indicate that the State would do anything other than make a genuine and effective response to crimes committed. Further, it was submitted that the State reports did not support the petitioner's case. A careful reading of Nos. 6/2 and 6/3 of process would show that such concerns as the United States had were that the perpetrators of crime had been dealt with too harshly by

the South African authorities. The real question arising from the quotations by the Secretary of State in respect of these reports was whether the summary given was balanced. It was important, according to Mr Davidson, that the decision-maker appeared to face up to such criticisms as were made in those reports. Paragraph 28 of No. 6/1 of process contains an acceptance that there had been difficulties in South Africa. However, paragraphs 24 to 28 inclusive of the decision letter constituted a full and fair treatment of the reports in question. The conclusion, in paragraph 29, was that the police were willing and able to protect the public against acts of violence and xenophobia. Thus an objective and fair assessment of the US material was made. In contrast, it was argued that the extract from the book No. 6/6 of process was anything but measured and specific. The references to "pogroms" were four in number. Such emotive language was no where to be found in the more balanced State Department Reports. The Oxford English Dictionary definition of a pogrom is either (1) an organised massacre, or (2) an organised and officially tolerated attack on a community or group. It was argued that the book provided no new information at all and that the author was simply expressing an extreme view on events that had occurred in 2008. The fact of the death of 62 people in 2008 was part of the information available to the Secretary of State. A specific and careful description of what occurred in South Africa in May 2008 could be found at page 13 of 6/13 of process, the 2009 Report. It was submitted that the Secretary of State was correct to rely on that material rather than consider the polemic outpourings of the author of the book now produced by the petitioner.

[15] In relation to the arguments about whether the decision in *Hovarth* was still good law, Mr Davidson referred to McDonald, *Immigration Law and Practice* (8th edition) from paragraph 12.53 onwards. That text was critical of Lord Hope's approach in *Hovarth* but *Hovarth* was a decision of the House of Lords and clearly of far greater authority than a commentator. Ultimately, the respondent's argument was that even if one took *pro veritate* the petitioner's averments, these fall far short of the type of persecution required. While the police may have been

unable in 1999 to punish the culprits of the crime against the petitioner's property that was not the focus of the petitioner's argument. Rather it was claimed that one should "fast forward" to May 2008 when there was widespread violence and 62 people were killed. It had to be asked whether it was feasible for the petitioner to rely on those facts to try to remain in the United Kingdom. It was not a question of whether law and order was always kept. The test was whether there was a system in place for dealing with the perpetrators of crime. Far from there being a "blood bath" in South Africa since 2008, the country was well known to be a popular tourist destination and had hosted a particularly large world sporting event in 2010. There is a very good reason for the country being on the White List. It is a proper democracy where the rule of law is maintained. The petitioner's case could be contrasted with the facts of *Hussein v Secretary of State for the Home Department* 2005 1 SC 509 where there were allegations of systematic corruption in the police force in Pakistan.

[16] While it was noted that the petitioner had made nothing of the internal relocation point, under reference to paragraph 71 to 76 of the decision letter, Mr Davidson submitted that there was no reason to think that the petitioner could not find somewhere suitable to live within South Africa. It was submitted that as the Secretary of State's decision was lawful, there was no reason for reduction of it and the prayer of the petition should be refused.

[17] Mr Caskie replied to some of the points made for the respondent. He said that the cumulative effect of what had happened to the petitioner and her class of people would give rise in the mind of an Immigration Judge to a well founded fear of persecution. He reiterated that it was for the court to determine only whether, on the most favourable view of the facts, an Immigration Judge might so conclude. By indicating that the petitioner should go to the South African authorities for protection the decision letter implied that there was a well founded fear. The US State Reports were relevant because persecution in the past must be indicative of what might happen in the future. While Mr Davidson had referred repeatedly to the

62 people who had been killed in the violence, it is important to note No 6/3 of process also referred to 80,000 migrants displaced by the violence. This demonstrated the scale of the fear. In relation to the matter whether *Horvath* was still good law, the point was that prior to the European Directive the decision letter in question might have been acceptable but could not now be so regarded. The press reports produced showed that the United Nations had been brought in to deal with the xenophobia in South Africa. There had to be more than a fanciful prospect that an Immigration Judge would allow the petitioner's appeal.

Discussion and decision

[18] It is agreed in this case that in order to justify certification under section 94(2)of the 2002 Act the petitioner's claim must, after anxious scrutiny, be so clearly lacking in substance that it is bound to fail. Accordingly, I must decide whether the Secretary of State was correct to certify the present petitioner's claims as clearly unfounded. In this context the view most favourable to the petitioner of the factual material should be taken. In short, if the Secretary of State was correct in concluding that the claim was bound to fail then the petition must be refused. However, if there is more than a fanciful chance that an Immigration Judge would reach a different decision the petition will succeed. The "clearly unfounded" test for certification under section 94 of the 2002 Act and its close relationship with the "realistic prospect of success" test under Immigration Rule 353 was explored in *AK (Sri Lanka)* v *The Secretary of State for the Home Department* [2009] EWCA Civ 447 and I shall proceed on the basis of the views expressed therein. Effectively a case which is clearly unfounded is one with no prospect of success. In determining this matter I also propose to make my own assessment of how an Immigration Judge might have decided the matter on the basis of the material available to the Secretary of State. This is consistent with the approach taken in a number of similar cases in this court including that of Lord Malcolm in *JS, Petitioner* [2010] CSOH 75 at paragraph 30.

[19] The basis for the Secretary of State's decision and the material relied on is comprehensively set out in the decision letter No. 6/1 of process. The paragraphs in which nationality and race are discussed in the context of the petitioner's claim that she is at risk of persecution on a return to South Africa for which the police were unwilling or unable to provide sufficient protection are dealt with in paragraphs 21 through to 47 but in particular the first eight of those. The criticisms that were levelled at the decision came down to two main aspects. First the treatment of the available material by the Secretary of State and the substance of additional material not considered by her and secondly the conclusion that there is a sufficiency of protection for the petitioner in South Africa. So far as the first of these is concerned, I have considered the two Human Rights Reports of the US State Department lodged at 6/2 and 6/3 of process. These were available to the Secretary of State and would be before an Immigration Judge. The context of these reports is to analyse, on an annual basis, human rights issues in every country. The South African report records that the government there generally respects the human rights of its citizens. However, in the 2008 report of February 2009 a number of problems were identified including violence resulting from racial and ethnic tensions and conflicts with foreigners. In mid-May 2008 xenophobic attacks were carried out against foreign African migrants and ethnic minorities by South African civilians in a number of locations. The report records that sixty two people were killed in those attacks. The motivation for the attacks seems to be that the perpetrators blamed the immigrants for job and housing losses and increasing levels of crime. The report records a significant number of arrests and subsequent criminal charges being brought. An estimated 80,000 migrants were displaced by the violence and these people fled to seventy two temporary shelters set up by non-government organisations and the government in the wake of the attacks. Subsequently most of these internally displaced persons returned to their countries of origins or returned either to their former homes or other accommodation within South Africa. The 2009 Human Rights Report of the US State Department

published on 11 March 2010 provided an update on the foreign African migrants who had been displaced by the xenophobic attacks of May 2008. The report records that the 80,000 displaced persons from the 2008 attacks had dispersed or reintegrated by the year end, the last shelter in Western Cape having closed in November 2008. However, the report makes clear that some attacks on foreign African migrants continued to occur, with one significant event on 17 November 2009 being recorded. The reports are to some extent critical of the speed with which the South African authorities prosecuted the perpetrators of the violence. That is recorded in the reports and picked up by the Secretary of State in the decision letter at paragraph 28. However, the particular steps taken by the South African Police Service as recorded in the US State Department report were to deploy additional forces into townships to assist in dealing with these xenophobic attacks.

[20] It is clear, taking both of the US State Department reports together, that South Africa is a state with a large police force that has taken steps to quell an outbreak of violence against foreigners within the state. The particular passages cited by the Respondent in the decision letter include the criticisms made about speed of prosecution as well as the delay in the South African Human Rights Commission setting up an inquiry into the attacks. The passages in the US State Department reports are lengthy. I am unable to accept the contention that there has been any "deliberate excision" by the Secretary of State. The excerpts produced are a summary of some of the salient aspects of the events in question The context is an examination of the police action taken against non-state agents who perform random attacks. The central facts are all covered by the chosen material.

[21] So far as the additional material referred to in the course of argument is concerned, primarily the extracts from the book No 6/6 of process, in my view these add nothing to the facts stated in the US State Department reports. The views stated within the text are extreme and the language used at times incomprehensible. So far as the reports taken from the internet Nos 6/4 and 6/5 of process are

concerned, these also include some criticisms of the steps taken to try to find out what was causing the violence against foreigners. The report of 21 July 2010 (No 6/4 of process) ends with a statement attributed to South African Human Rights Commission's chairperson indicating that he was glad about the action taken by the police and military to quell the violence, which had convinced people that the government was serious about the issue. In summary, there is nothing in the additional material produced that would better inform a decision on the petitioner's application.

[22] Turning to the issue of sufficiency of protection which is the issue of substance on which is said that an Immigration Judge could reach a different decision, the starting point is the decision of the House of Lords in *Horvath* v *Secretary of State for the Home Department* [2001] 1 AC 489. That case involved a Roma citizen of Slovakia who claimed asylum on arrival in the United Kingdom on the ground, among others, that he feared persecution in Slovakia by "skinheads", against whom then Slovak police failed to provide adequate protection for Roma people. When the case reached the House of Lords, there was a discussion on the issue of the alleged insufficiency of state protection against persecution by non-state agents. On that issue Lord Hope expressed the following view:-

> "...I consider that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think it follows that, in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consists of acts of violence or ill treatment against which the state is unwilling or unable to provide protection."

Mr Caskie for the petitioner argued that the dicta in *Horvath* could no longer be relied upon because of the subsequent Council Direction 2004/83/EC. Article 7 of the Directive sets out what protection against persecution or serious harm can be provided by the state or other parties or organisations. Paragraph 1 of Article 7 of

the Directive states that protection can be provided by the state or by parties or organisations, including international organisations, controlling the state or a substantial part of the territory of the state. Paragraph 2 of Article 7 is in the following terms:-

> "Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection."

The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI2006/2525 seeks to implement the Directive. Regulation 4 effectively reproduces Article 7 paragraphs 1 and 2 with the exception of the omission of the words "*inter alia*" from Regulation 4(2). I can accept that the words of the Directive must be read in to the provision on protection and that the protection by the state thus includes, but is not limited to, effective systems for the detection, prosecution and punishment of relevant acts. However, I do not consider that in the circumstances of the present case the substantive decision is in any way affected by that argument. The particular complaint of the petitioner left for consideration is that she feels that the police would be unwilling and unable to protect her in South Africa if she was subjected to any attack on her return there. There is no suggestion or complaint that South Africa in any other way failed to take steps to prevent the persecution or suffering of serious harm. As it happens, the decision letter records that the South African government has facilitated investigations into violations of human rights (paragraph 38 of 6/1 of process). The test to be satisfied is whether South Africa is willing and able to provide the petitioner with protection where no complicity by the authorities is claimed. There is no suggestion that South Africa is a country that does not otherwise respect the rule of law. It is a democracy. It has a Human Rights Commission. In the absence of any indication as to what other specific forms of protection ought to be provided

to the petitioner, I do not consider anything turns on the additional words *"inter alia"* in the Directive so far as the petitioner's claim is concerned. There may well be cases in which the implementation of systems to deal with the perpetrators of crime is shown to be insufficient to provide sufficient protection. A failure to take steps to investigate the causes of racist attacks with a view to preventing future outbreaks might be criticised. In this case it was accepted by Counsel for the petitioner that there requires to be some kind of structural or systematic problem in the system to be able to argue that there was an insufficiency of protection. The available material suggests nothing of that nature. An outbreak of violence against a group of people can occur in any country. The issue is whether a member of such a group can be confident of sufficient protection being provided by the authorities in the event of a random attack which includes consideration of how those authorities dealt with any previous attacks. There is simply no basis for contending that the South African authorities have exhibited the kind of systemic failures required for the petitioner to succeed with an insufficiency of protection argument. [23] Accordingly, applying my own mind to the question of whether the respondent was correct to certify the petitioner's claims as "clearly unfounded" I consider that an Immigration Judge would reject the petitioner's claim. I agree with the submissions of counsel for the respondent that the chronology of the case speaks for itself. Taking the petitioner's case at its highest, her house was destroyed in a random attack in South Africa in 1999. She continued to live in South Africa for some four years thereafter. After her first trip to the United Kingdom in 2003 she returned to South Africa and applied to become a South African citizen. On gaining such citizenship she then returned to the United Kingdom as a student and was here for two years after the expiry of her visa before she made any claim for asylum. Of course, the outbreaks of violence against foreign migrants in May 2008 in South African constitutes material information that required to be considered by the Secretary of State and would require to be considered by an Immigration Judge. However far from the available material indicating systematic or institutionalised

unwillingness to afford protection to the victims of persecution by non-state actors, the relevant reports narrate the steps taken to detect, prosecute and punish those involved. There is no question of it being a sufficient basis for a claim of this sort that such attacks have happened. What is required is material illustrating an inability or an unwillingness on the part of the state authorities to provide sufficient protection against such acts. There is no relevant material to support a contention of insufficiency of protection.

[24] I have reached the conclusion that if all of the material presented by the petitioner was considered by an Immigration Judge her application would be bound to fail. The respondent was correct so to conclude. I will therefore refuse the petition.