Hilary Term
[2015] UKSC 8
On appeal from: [2013] EWCA Civ 666

JUDGMENT

R (on the application of Jamar Brown (Jamaica)) (Respondent) *v* Secretary of State for the Home Department (Appellant)

before

Lady Hale, Deputy President
Lord Sumption
Lord Carnwath
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

4 March 2015

Heard on 26 November 2014

Appellant
James Eadie QC
Matthew Barnes

(Instructed by Treasury Solicitors)

Respondent
Stephen Knafler QC
Paul Nettleship
Raza Halim
(Instructed by Sutovic and Hartigan Solicitors)

Intervener (Liberty)
Karon Monaghan QC
Philip Dayle
(Instructed by Liberty)

LORD TOULSON: (with whom Lady Hale, Lord Sumption and Lord Carnwath agree)

Introduction

1. Is the description that "there is in general in that State … no serious risk of persecution of persons entitled to reside in that State", in section 94(5) of the Nationality, Immigration and Asylum Act 2002, applicable to a state in which a) there is a serious risk of persecution of gays and other members of the LGBT community, b) that community is estimated to amount to between 5% and 10% of the population and c) there is no such risk affecting the remainder of the population? The state in question is Jamaica.

2. At first instance Mr Nicholas Paines QC, sitting as a Deputy High Court Judge in the Administrative Court, held that the Home Secretary could rationally find that the words applied to Jamaica, since 90% or more of the population did not face a serious risk of persecution. The Court of Appeal reversed his decision by a majority [2014] 1 WLR 836. Moore-Bick LJ agreed with the deputy judge. He considered that opinions might legitimately differ on the question whether the proportion of LGBT people in Jamaica was so substantial as to lead to the conclusion that there was a serious risk of persecution, viewed from the perspective of the population as a whole, and that it was not irrational for the Home Secretary to reach a negative conclusion.

3. Pill and Black LJJ took a different view. Pill LJ said (at para 57):

> "My conclusion is that a state in which there is a serious risk of persecution for an entire section of the community, defined by sexual orientation and substantial in numbers, is not a state where in general there is no serious risk of persecution. As Lord Hope stated in *HJ (Iran) v Secretary of State* [2011] 1 AC 596 at para 11, the group is defined by 'the immutable characteristics of its members' orientation and sexuality'. It does not follow from the absence of risk to the much larger heterosexual community that in general there is no serious risk in section 94(5) terms where an entire section of the community of significant size and defined by its immutable characteristics, is at serious risk of systematic persecution."

Black LJ's judgment was to similar effect.

Legislative framework

4. Under section 82(1) of the Act there is generally a right of appeal to the Asylum and Immigration Chamber of the First Tier Tribunal in respect of an "immigration decision", which includes a decision that a person is to be removed from the UK.

5. Section 92 limits the circumstances in which such an appeal may be made in-country. They include cases where an appellant has made an asylum or human rights claim while in the UK, as the respondent did. But section 92 is qualified by section 94(2) so as to exclude an in-country appeal if the Home Secretary has certified that the asylum or human rights claim is clearly unfounded. And section 94(3) requires the Home Secretary to certify the claim if satisfied that the claimant is entitled to reside in a state listed in subsection (4), unless satisfied that the claim is not clearly unfounded.

6. Jamaica was added to the list of states designated under section 94(4) by article 3 of the Asylum (Designated States) Order 2003 (SI 2003/970).

7. Section 94(5) sets pre-conditions on the exercise of the power of designation under subsection (4). It provides:

> "The Secretary of State may by order add a State, or part of a State, to the list in subsection (4) if satisfied that –
>
> (a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and
>
> (b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention."

8. Under section 94 (5A) to (5C), if the Home Secretary is satisfied that the statements in subsection (5) are true of a state, or part of a state, in relation to "a description of person", an order may be made adding it to the list under

section 94(4) in respect of that description of person. A description for this purpose may refer to a person's gender, language, race, religion, nationality, membership of a social or other group, political opinion or "any other attribute or circumstance". These subsections were inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, section 27.

Facts

9. The respondent is a citizen of Jamaica. He was referred to by his initials in the judgments of the courts below but has no further wish to be anonymous. He came to the UK on 7 May 2010 on a visitor's visa with leave to remain for one month. On 14 October 2010 he applied for asylum on the ground that he is a Jamaican homosexual and feared persecution if returned to Jamaica. On 20 October 2010 he was detained under section 62 of the Act pending a decision on his removal. The detention power was exercised in conjunction with a policy for fast tracking cases eligible to be dealt with under the so-called Detained Non Suspensive Appeals ("DNSA") process. It is not necessary for the purposes of this appeal to explain the details of the process, except to say that it applied only to asylum or human rights claimants from states designated under section 94(4).

10. Solicitors for the respondent complained to the Home Secretary that his case was not suitable for the DNSA process and his detention was unlawful. The complaint was rejected and on 15 November 2010 the respondent issued a claim for judicial review, seeking declarations that the decision to include Jamaica in the list of states designated under section 94(4) and the respondent's detention were both unlawful.

11. On the same day the appellant served a decision on the respondent refusing his claim for asylum, but not certifying it as clearly unfounded. This meant that the respondent was free to pursue an in-country appeal, and on 4 February 2011 the Tribunal upheld his claim to be a homosexual and at real risk of persecution if he were returned to Jamaica. Meanwhile the respondent had been released from detention on 24 November 2010.

12. The deputy judge dismissed the respondent's claim in its entirety. The Court of Appeal not only allowed his appeal (by a majority) on the issue of the designation of Jamaica under section 94(4), but also held (unanimously) that his detention had been unlawful on other grounds. There is no appeal against the latter part of the Court of Appeal's decision.

Case law

13. The leading authority relevant to the interpretation of section 94(4) is the decision of the Court of Appeal in *R (Asif Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789; [2002] QB 129. The case arose under para 5(2) of Schedule 2 to the Asylum and Immigration Act 1993, as substituted by the Asylum and Immigration Act 1996. The sub-paragraph applied to a claim if "the country or territory to which the appellant is to be sent is designated in an order made by the Secretary of State by statutory instrument as a country or territory in which it appears to him that there is in general no serious risk of persecution". The claimant challenged the validity of an order designating Pakistan as such a country on the ground that women and Ahmadis were generally at risk of serious persecution.

14. Giving the judgment of the Court of Appeal, Lord Phillips MR said at para 57:

> "… the challenge made by the applicants to the inclusion of Pakistan in the order was to its legality rather than to its rationality. However, the language defining the state of affairs that had to exist before a country could be designated was imprecise. Whether there was *in general* a *serious* risk of persecution was a question which might give rise to a genuine difference of opinion on the part of two rational observers of the same evidence. A judicial review of the Secretary of State's conclusion needed to have regard to that considerable margin of appreciation … If the applicants were to succeed in showing that the designation of Pakistan was illegal, they had to demonstrate that the evidence clearly established that there was a serious risk of persecution in Pakistan and that this was a state of affairs that was a general feature in that country. For a risk to be serious it would have to affect a significant number of the populace." (Original emphasis)

15. The reference in the final sentence to the need for the risk to affect "a significant number of the populace" has given rise to debate, but it needs to be read in context. The evidence on behalf of the Home Secretary explained his reasoning in reaching his decision as follows:

> "… although certain minority groups [by which he included Ahmadis] may be subjected to acts of ill-treatment by members of the general populace, the Government of Pakistan does not

> itself engage in such acts and Pakistan is not regarded as a country where the State is in general unwilling or unable to offer effective protection to its citizens against such acts. For that reason it is considered to be a country where there is in general no serious risk of persecution either from the State itself or from members of the public, either acting with the State's sanction or encouragement, or against whose acts the State is in general unwilling or unable to protect."

16. It was not part of the Home Secretary's case that he regarded Ahmadis as too small a segment of the population to be relevant to his decision, and there was no evidence as to their estimated overall number or percentage of the general population. The case proceeded on the basis that they were a recognised religious minority.

17. The court held that the evidence clearly established that among women in Pakistan there was in general a serious risk of persecution. In relation to Ahmadis, the court referred to a nuanced judgment of the Immigration Appeal Tribunal available to the Home Secretary at the time of his decision, which had concluded that each case involving Ahmadis must be looked at on an individual basis, and that, while not all Ahmadis would be entitled to claim asylum, they lived in Pakistan as a religious minority who were likely to meet examples of intolerance, discrimination and at times persecution in their daily lives (*Kaleem Ahmed v Secretary of State for the Home Department* (unreported) of 7 December 1995, per Judge Pearl). The Court of Appeal concluded that if the evidence about Ahmadis had stood on its own, it would not have been incompatible with the Home Secretary's decision, but that when considered in conjunction with the evidence about women it added weight to the court's conclusion that the decision was irrational. The court's comments about the evidence concerning Ahmadis clearly related to the degree of risk which they faced and not to their size as a proportion of the community.

18. Lord Phillips did not amplify what he meant by his comment that for a risk to be serious, it would have to affect "a significant number of the populace", but I doubt that he meant that the persons affected must not only be sufficient in number to form a recognisable section of the community but must exceed an unspecified percentage of the total population. If that was his intended meaning, he did not spell it out and it would have been unrelated to the argument.

19. In *R (MD) (Gambia) v Secretary of State for the Home Department* [2011] EWCA Civ 121, para 21, Elias LJ applied the words of Lord Phillips MR in *Javed*, para 57, to section 94(5) of the 2002 Act and said:

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

One of the groups alleged to be at risk in that case was homosexuals. The Home Secretary's response was to point out that there were no reports of homosexuals being arrested on a widespread basis or of other legal action being taken against them, although they were likely to face some social hostility. As in *Javed*, there was no reference to the number of homosexuals in Gambia or their percentage as a proportion of the community.

Analysis

20. Mr James Eadie QC on behalf of the Home Secretary submitted that the judgment of Moore-Bick LJ should be preferred to the majority of the Court of Appeal for the following main reasons:

i) The natural meaning of section 94(5) was that it required the Home Secretary to reach a global judgment about the risk generally to those entitled to reside in the state (or relevant part of it) rather than the risk to any particular minority group.

ii) Any other construction would mean that the identification of any group, however small, as being at risk of persecution would prevent the possibility of designation of the state, and this would seriously undermine the scheme.

iii) Minority groups would still be properly protected under the statutory scheme, because designation did not necessarily result in an appeal being certified as clearly unfounded. The Home Secretary had still to consider under section 94(3) whether the appeal was clearly unfounded before issuing such a certificate. The present case was an example in point, because the Home Secretary decided not to issue

such a certificate in the case of the respondent notwithstanding that Jamaica was a designated state.

iv) The purpose of the legislative scheme, properly understood, was not to take away the protection of a vulnerable minority, but to achieve administrative efficiency in relation to the vast majority while still affording proper protection for the minority.

v) It would be wrong to use the provisions of section 94(5A) to (5C), which enabled a state to be added to the list in relation to a particular description of person, as an aid to the construction of section 94(5), since subsections (5A) to (5C) were added by later amendment and therefore could not affect the meaning of section 94(5).

21. Section 94 is concerned with the return of unsuccessful asylum and human rights claimants. It is in that context that the Home Secretary may designate a state (or part of a state) only if satisfied that there is in general no serious risk of persecution of persons entitled to live there. I take section 94(5) in its natural meaning to refer to countries (or parts of countries) where its citizens are free from any serious risk of systematic persecution, either by the state itself or by non-state agents which the state is unable or unwilling to control. This is the effect of the words "in general" and "serious". I do not read the words "there is in general … no serious risk of persecution of persons, …" as meaning "there is no serious risk of persecution of persons in general", and therefore as intended to permit the designation of a state which systematically carries out or tolerates persecution provided that it is limited so as not to affect the large majority. I read the words "in general" as intended to differentiate a state of affairs where persecution is endemic, ie it occurs in the ordinary course of things, from one where there may be isolated incidents of persecution.

22. I am influenced by the fact that persecution within the meaning of the Refugee Convention will by its nature often be directed towards minorities (as Wilson J said in *R (Husan) v Secretary of State for the Home Department* [2005] EWHC 189 (Admin), para 55), and the great majority of asylum and human rights claimants belong to minorities of one kind or another. For a serious risk of persecution to exist in general, ie as a general feature of life in the relevant country, it must be possible to identify a recognisable section of the community to whom it applies, but to require it to be established also that the relevant minority exceeds x% of the population is open to several objections. The first is the absence of any yardstick for determining what x should be. If the Home Secretary was entitled to conclude that 10% was insufficient, would the same apply to 15%, 20% or 25%? It is no answer to

say that it is a question of degree for the judgment of the Home Secretary, within a wide margin of appreciation, if there is simply no way of deciding it. Secondly, if it were possible to place a value on x, it is nevertheless hard to see any reason why it should make a difference whether the group represented, say, more than 20% or only 15%. Thirdly, in the case of many minority groups there will be no way of obtaining reliable information as to their total size for obvious reasons. Even without the risk of persecution, a person's sexuality is a matter which many would prefer to keep private, and to disclose something which carries with it a serious risk of persecution is to court trouble.

23. I am not persuaded by Mr Eadie's argument that it makes little or no difference to members of minority groups who are exposed to a serious risk of persecution whether the state has been designated under section 94(4). As Mr Stephen Knafler QC argued, although there may be a different outcome in some cases, the purpose of designation is that applicants from designated countries will normally be detained and fast tracked. In the present case, although the Home Secretary did not certify that the respondent's claim was clearly unfounded, he was previously detained as a claimant from a designated state. I would endorse Black LJ's comment at [2014] 1 WLR 836, para 44 that the designation of a state "changes the complexion of the analysis of the claim".

24. Since the hearing the court has received written submissions from both parties on the issue whether it is permissible to have regard to the provisions of section 94(5A) to (5C) when construing section 94(5). The Secretary of State submits that it is impermissible and relies on *Boss Holdings Ltd v Grosvenor West End Properties* [2008] UKHL 5, [2008] 1 WLR 289, para 23, in which Lord Neuberger endorsed the proposition that a later amendment does not affect the construction of earlier legislation. The appellant submits that the revised statute should be construed as a whole, ie in its present form, and relies on *R v Brown (Northern Ireland)* [2013] UKSC 43, para 34, where Lord Kerr endorsed the proposition that an amended statute is to be construed as a whole in its amended form, although in so doing he did not suggest that the legislative history is to be ignored and he examined the purpose of the relevant amendment in its context. There is no inconsistency between what was said in the two cases. In construing any legislation it is relevant to consider its purpose and that may include considering the purpose of an amendment. Parliament may sometimes amend legislation in order to correct a previous interpretation by the court. That said, and with the qualification that we have not heard full argument, I am content for present purposes to accept that generally speaking an amendment cannot affect the construction of an Act as originally enacted, and therefore that it would not be right to be influenced by the later introduction of section 94(5A) to (5C) in interpreting

section 94(5). It is nevertheless of interest that Parliament has considered it appropriate to give the Home Secretary the additional power to add a state to the list in relation to a particular description of person. The court was told that so far the exercise of this power has been limited to adding a state in relation only to men (as in the case of Gambia), but the language of the statute expressly contemplates a wide variety of descriptions of person. Parliament was therefore alive to the problem of designation of states where there is a serious risk of persecution limited to a particular target group or groups and has provided a means of addressing it.

25. I would dismiss the appeal.

Postscript: Hansard

26. Mr Knafler asked the court to admit a considerable amount of Hansard material, including ministerial statements made during the passage of the predecessor Act, the Asylum and Immigration Act 1996, and in the debate on the motion that the draft statutory instrument which added Jamaica to the list of designated states should be approved. The attempt to rely on Hansard material was misjudged, and the Court of Appeal rightly refused to admit it. Moore-Bick LJ gave three reasons - the language of section 94(5) is not ambiguous, the statements relied upon did not have the necessary degree of clarity and they were not made in debates on the 2002 Act. I agree with the first and second reasons. As to the third, nothing said during the debate on the Order could possibly be admissible as an aid to construing the parent Act, but I would not wish to lay down a firm rule that the Hansard record of a ministerial statement in a debate on predecessor legislation can never be admissible in circumstances where the wording of the later Act is materially identical. However, it is unnecessary to discuss the point further because it is academic.

27. A full reading of the relevant debates in both Houses of Parliament on the 1996 Act shows why ministerial answers to questions should only be admitted under *Pepper v Hart* [1993] AC 593 in the plainest of cases. Ministers were asked a number of questions in an attempt to pin them on the meaning of "in general". To extract a sentence here and a passage there from such a debate and use it as a legal tool would serve neither the Parliamentary nor the judicial process. Not surprisingly, the answers given were somewhat generalised and fell far short of a definitive statement of ministerial purpose.

LORD HUGHES:

28. I agree with Lord Toulson that this appeal ought to be dismissed. For my part, however, I would add a few words of qualification to the reasons which he so clearly expresses.

29. The issue of principle raised by this appeal is the correct approach to the two related expressions in section 94(5) of the Nationality, Immigration and Asylum Act 2002, namely:

i) in subsection (a): "in general … no serious risk of persecution"

and

ii) in subsection (b): "(removal) … will not in general contravene the United Kingdom's obligations under the Human Rights Convention".

30. I respectfully entirely agree that these expressions, and in particular the words "in general", do not mean that a state can be designated so long as the population as a whole is not at risk of persecution, or unless the removal to it of *any* person will involve a breach by the UK of the Convention. Such an approach would substitute "universal" for "general". Moreover, it is in the nature of persecution that it is very often applied to minority groups. I also agree that it is quite impossible to lay down any numerical threshold for a defined percentage of the population which needs to be at risk before it can be said that there does exist "in general" a serious risk of persecution or of removal contravening this country's Convention obligations. It does not, however, follow that the Secretary of State is prevented from designating a destination state under section 94(4) simply because it is possible to identify some common feature or grouping of a few persons who may suffer persecution or ill-treatment in breach of the Convention in that state when in general the state is free from those two risks. Such grouping will almost always be possible when persecution under the Refugee Convention is in question, since the status of refugee is there defined in terms of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. Whilst in theory there is perhaps room for a risk of ill treatment such as will occasion a breach of Convention rights in the event of removal (section 94(5)(b)) arising in the case of a single individual, or unconnected single individuals, it will much more often be the case that, as with a risk of persecution, the individual will be capable of categorisation into some form of grouping, or, as Lord Toulson

puts it, "recognisable section of the community" which constitutes the reason why he is at risk. So, to treat the existence of risk to a "recognisable section of the community" as a bar to certification however small the section will in effect be in danger of preventing certification of any state where there is any risk of persecution to anyone. That was indeed the construction urged upon us by the claimant, but as I understand it that is not the construction upheld.

31. Designation of a destination state does not mean automatic removal. Whether a state is designated or not, the Secretary of State is required to give individual consideration to each case and to reach a decision whether to certify the asylum or human rights claim as "clearly unfounded". It is established law that the test at this stage is restrictive. The claim must be one which is so manifestly unfounded that it is bound to fail, or, to put it another way, one which cannot, on any legitimate view of fact and law, succeed. It is an objective test, not one which depends on the opinion of the Home Secretary and accordingly certification is, if challenged, to be subjected to the most anxious scrutiny; the court substitutes its own conclusion for that of the Secretary of State. For these rules of law, see *R (Yogathas) v Secretary of State for the Home Department* [2002] UKHL 36; [2003] 1 AC 920, para 34 and *R (L) v Secretary of State for the Home Department* [2003] EWCA Civ 25, [2003] 1 WLR 1230, paras 56-58. The designation of the state alters the starting point because section 94(3) requires certification as clearly unfounded unless the Secretary of State is satisfied that the claim does not qualify. Nevertheless the test for certification remains the same; the operation of this test is illustrated by the present case in which the claim was not certified, because as a homosexual the claimant was or might be at risk.

32. Designation of the destination state is a significant legal act, because the practice of the Secretary of State is to fast-track decisions in relation to claimants from such a state. Thus, as Black LJ neatly put it, designation "changes the complexion of the analysis of the claim". It is therefore important that the decision as to designation should be made with careful attention to the level of risk of persecution or of removal involving breach of human rights.

33. This decision has to be made by the Home Secretary. It will be subject to review on ordinary public law grounds. I agree with Lord Toulson that although subsections 94(5A) to (5C) cannot alter the meaning of "in general", the presence of those subsections and the possible means of dealing with some situations in destination states which they now provide will be relevant to that decision. But there will, as it seems to me, remain instances where the risk of persecution (etc) is unusual in a particular state but still can be said to apply to an identifiable grouping of persons and thus, in that sense, to be systemic or systematic. I do not think that in ordinary language a risk

becomes one which exists "in general" because it exists in common for those who belong to an identifiable grouping, however limited in size. Hypothetical examples are no doubt dangerous, but one might be a few linked cells of political campaigners of particular and unpopular views whose activities have attracted the hostility of the public at large and/or of the state authorities and who are, as a result, not protected as they ought to be from persecution or inhuman treatment. Another might be social campaigners who favour a religious rite which the great majority of the local population regards with extreme distaste. These are classic examples of refugee claimants who may be at risk in a state otherwise entirely safe. There is no doubt that their claims to asylum ought where appropriate to succeed notwithstanding the designation of their home state. But it would, as it seems to me, be a misdescription of such a state to say of it that there was "in general" a serious risk of persecution, on the grounds that all members of this group were at risk, and the risk accordingly systemic. A systemic risk is a necessary but not always a sufficient basis for non-designation.

34. In the case of such a state it is perfectly sensible to designate it under section 94, so that the great majority of asylum or human rights claims from its nationals can correctly be refused, and to leave individual cases of applications by members of such a group to be considered separately. In other words, the assessment of when there is or is not "in general" a risk is a matter of degree and one on which reasonable people may take different views: see Lord Phillips MR in *R (Asif Javed) v Secretary of State for the Home Department* [2001] 1 EWCA Civ 789; [2002] QB 129 in the passage cited by Lord Toulson at para 14 above. But that is in the nature of a great many decisions which fall to be made in all fields of public administration. It is not a reason to substitute for the judgment committed to the Home Secretary a bar to designation whenever the risk can be described as systemic, in the sense that it applies to members of an identifiable group. That, as it seems to me, is to risk re-defining the expression "in general". Given the extra essential step of individual consideration of whether or not to certify a claim as clearly unfounded, it is entirely appropriate to allow the Secretary of State a degree of flexibility in considering the manifold different political and social situations which may obtain in different foreign states; that is the clear purpose of the term "in general" in the statute. That expression would no doubt be too imprecise without further definition if the outcomes of individual claims depended upon it, but they do not.

35. The clear purpose of section 94 designation is to streamline the administration of the great majority of decisions where the destination state can in general be relied upon to be safe. That is a legitimate aim, especially given the notorious delays which attend the processing of the very large number of immigration and removal cases in which asylum or human rights

claims are made. It is in the interests of the public at large but also of meritorious asylum or human rights claimants that the latter's good claims should not be delayed by large numbers of clearly unfounded ones.

36. In the present case, however, the risk attaches to all who are homosexual, lesbian, bisexual or transsexual. That risk, as it seems to me, can only properly be described as a "general" risk in Jamaica. As Pill LJ put it in the Court of Appeal, the risk applies to "an entire section of the community, defined by sexual orientation and substantial in numbers". Accordingly, whilst I agree that a decision on designation is one on which reasonable people may take different views, it does not seem to me that there is more than one answer which can be given on the present facts. It follows that I agree that the Secretary of State's appeal ought to be dismissed.