OUTER HOUSE, COURT OF SESSION

[2025] CSOH 88

P744/24

OPINION OF LORD LAKE

In the Petition of

SV

Petitioner

for

Judicial Review

Petitioner: Shabbir; Drummond Miller LLP (as agents for McGlashan MacKay Solicitors)
Respondent: Smeaton; Office of the Advocate General

26 September 2025

[1] The petitioner is an Indian citizen. In 2019 he applied for and was granted a student visa. While he was in the United Kingdom, he applied for and was granted leave to remain and, later, the period of leave was extended to 20 December 2023. On 1 November 2023, the petitioner made a protection and human rights claim to remain in the United Kingdom. The basis of his claim to stay was that he was a homosexual man and that he sought asylum on protection grounds and also, under Article 8 and Article 3 of the ECHR, on human rights grounds. On 3 June 2024, the respondent refused both claims. Further, the respondent certified both claims as "clearly unfounded" in terms of the Nationality, Immigration and Asylum Act 2002, section 94. It is this certification that the petitioner seeks to challenge in

this action. He challenges the certification only in relation to the claim made under Article 8 of the ECHR.

Applicable legal principles

[2] There was a large degree of common ground as to the principles to be applied and they are summarised in the following paragraphs.

[3] Section 94 of the 2002 Act says that the respondent may certify a human rights claim as clearly unfounded. This restricts rights of appeal against the decision. Section 94(3) states that if the respondent is satisfied that a person is entitled to reside in a state listed in section 94(4), the respondent *shall* so certify the claim unless satisfied that it is not clearly unfounded. India is a state listed in section 94(4) and, as a national, the petitioner is entitled to reside there. The practical difference made by section 94(3) is, however, very modest. It has been described as being, "so jesuitical as not to have measurable legal effect" (*R (Husan)* v *Secretary of State for the Home Department* [2005] EWHC 189 (Admin), paragraphs 26-28). The assessment that is to be carried out for section 94(3) to determine if the claim is not clearly unfounded is therefore, to all intents and purposes, the same as the case-by-case assessment required under section 94(1).

[4] Whether or not a claim is "clearly unfounded" admits of only one rational answer (*ZT (Kosovo)* v *Secretary of State for the Home Department* [2009] UKHL 6 para [23]). The effect of this is that if the court disagrees with the decision made by the respondent, it is concluding that the decision is irrational. The consequence is that in determining a challenge such as this, unlike the position generally in judicial review, the court simply takes its own decision on the underlying merits. If the result is not the same as the decision by the respondent, it will follow as a matter of logic that that decision is irrational. The end result

of this exercise was stated by the Inner House in *Tsiklauri* v *Secretary of State for the Home Department* 2020 SC 495 as follows:

> "Thus, although this is an appeal, this court is able to cut through the underlying layers of decision-making and go directly to the certification question which we must answer for ourselves."

[5] The test for being clearly unfounded is met only where the claim will clearly fail (*ZT (Kosovo)*). If any reasonable doubt exists as to whether the claim may succeed, then it is not clearly unfounded (*Tsiklauri, SP (Albania)* v *Secretary of State for the Home Department* [2019] EWCA Civ 951). In making its decision, the court must take account of the fact that a Tribunal might make a different decision.

[6] The test is a low one (*ZT Kosovo)*). This is consistent with it being a decision which takes away a right of appeal that would otherwise exist. The test that is applied in deciding whether a claim is a fresh claim is been described as a low one but this is even lower (*SN* v *Secretary of State for the Home Department* [2014] CSIH 7, para [17]).

[7] In carrying out the assessment of whether or not a claim is clearly unfounded, the evidence made available by the petitioner is to be assessed at its most favourable (*SNi,* para [21]).

[8] The assessment is objective. It requires consideration of the likely reality for the person on resuming life in their home country but can take account of their subjective fear (*NC* v *Secretary of State for the Home Department* [2023] EWCA Civ 1379 at paragraphs 25 - 26).

Principles not agreed

[9] Moving on from matters where there was agreement, the position of the parties differed slightly as to the use that may to be made of Home Office Country Policy and Information Notes (CPIN) and Country Guidance cases. In relation to CPIN, the petitioner

contended that these were not binding. The weight to be given to the country background evidence is dependent upon the quality of the raw data from which it is drawn and the quality of the filtering process to which that data has been subjected (*Roba (OLF - MB confirmed) Ethiopia CG* [2022] UKUT 1 (IAC) at paras [84]-[85]). The respondent did not take a contrary position. I therefore adopt the approach in *Roba* in relation to CPIN.

[10] In relation to Country Guidance cases, the respondent contended that an Immigration Judge would be obliged to treat them as authoritative in the absence of evidence to the contrary (*Roba* paragraphs 20-21). The petitioner accepted that CG cases were authoritative but submitted that this was only in relation to country specific risk of persecution or serious harm (paragraph 9.2 of the Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal). It was submitted that they are not determinative in human rights appeals such as this and they do not address the test of whether a person would suffer "very significant obstacles to integration" although many of the issues they address are relevant to that issue. The respondent submitted that while caution might be required where time had elapsed since a CG case was decided, the petitioner had not provided any information to suggest that conditions in India had changed since the relevant Country Guidance case for India (*MD* – considered below), such that the position would now be worse for him.

[11] The decision in *Roba* states that the decision in a "CG" case "constitute a legal rule imposing a presumption of fact" (paragraph 20). As a presumption, it can be overcome by evidence to the contrary. It notes that as time passes, it is more likely that there will be evidence to overcome the presumption but that the age of the decision does not itself affect the presumption. As to the scope of the presumption of fact, the Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal from November 2024 states,

> "A reported decision of the Upper Tribunal, the AIT, or the IAT, bearing the letters 'CG' shall be treated as an authoritative finding on the country guidance issue identified in the decision, based upon the evidence before the members of the Tribunal who decided the appeal. Thus, unless it has been expressly superseded or replaced by any later 'CG' decision, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:
>
> (a) relates to the country guidance issue in question; and
>
> (b) depends upon the same or similar evidence."

This appears to go further even that *Roba* and I adopt this approach.

[12] In this case, the CG authority relied on is *MD (same-sex oriented males: risk) India CG* [2014] UKUT 65 (IAC). This contains the following statements (paragraph numbers in brackets):

- "The reality is that although homosexuality remains taboo and is still seen as socially unacceptable in India it is emerging into the public sphere. We do not accept that the decision of the Supreme Court in *Koushal* will lead to a national or general reversal of the positive changes that have occurred in India for LGBTI persons and in particular for same-sex oriented males." (118)

- "We conclude, therefore, that on the evidence before us we are not satisfied that there is a real risk of consensual sexual activities between males being prosecuted in India. (132)

- There can be no dispute that violence and extortion of same-sex oriented males still occurs in India and that those of lower caste, or working class (such as the Hijra or Kothi), are more vulnerable to such actions. However, the evidence before us comes nowhere near establishing that the scale and frequency of police violence against, or extortion and blackmail of, same-sex oriented males is so prevalent as to constitute a real risk to any given same-sex oriented male, whatever their class or status in Indian society." (144)

- "We accept that homophobic violence does occur in India and that (i) it is more prevalent in urban areas and (ii) those of 'working class' are the most likely to be subjected to violent acts. However, we do not consider that the evidence establishes that there is generally a real risk of an openly same-sex oriented male, whether upper, middle or working class, being the subject of such violence." (149)

- "Each family will treat the disclosure of homosexuality differently, although we accept that there is a strong cultural family expectation that a son/daughter will engage in a heterosexual marriage." (153)

- "We accept that there is some discrimination in employment of those who are known to be, or who are openly or perceived to be, same-sex oriented males." (155)

- "We do not, however, accept that the difficulty in obtaining, or keeping, employment in India for openly homosexual males is of the scale suggested by Dr Khanna in his oral evidence i.e. that it is 'difficult to imagine' a person known to be a homosexual obtaining employment in India, unless it is in a business where a homosexual person had risen to a managerial level and homosexuality is not discussed at work." (157)

- "we are prepared to accept that there is some discrimination against LGBT persons in the provision of health care in India." (164)

- "Given the prejudice against gay persons in India, we have no difficulty in accepting that there are landlords who also hold such prejudices and that those landlords would be reluctant to rent their properties to openly gay persons, let alone to a gay couple." (167).

[13] The guidance contained in paragraph 174 of the decision is as follows:

"(a) Section 377 of the Indian Penal Code 1860 criminalises same-sex sexual activity. On 2 July 2009 the Delhi High Court declared section 377 IPC to be in violation of the Indian Constitution insofar as it criminalises consensual sexual acts between adults in private. However, in a judgment of 11 December 2013, the Supreme Court held that section 377 IPC does not suffer from the vice of unconstitutionality and found the declaration of the Delhi High Court to be legally unsustainable.

(b) Prosecutions for consensual sexual acts between males under section 377 IPC are, and have always been, extremely rare.

(c) Some persons who are, or perceived to be, same-sex oriented males suffer ill treatment, extortion, harassment and discrimination from the police and the general populace; however, the prevalence of such incidents is not such, even when taken cumulatively, that there can be said to be in general a real risk of an openly same-sex oriented male suffering treatment which is persecutory or which would otherwise reach the threshold required for protection under the Refugee Convention, Article 15(b) of the Qualification Directive, or Article 3 ECHR.

(d) Same-sex orientation is seen socially, and within the close familial context, as being unacceptable in India. Circumstances for same-sex oriented males are improving, but progress is slow.

(e) It would not, in general, be unreasonable or unduly harsh for an open same-sex oriented male (or a person who is perceived to be such), who is able to demonstrate a real risk in his home area because of his particular circumstances, to relocate internally to a major city within India.

(f) India has a large, robust and accessible LGBTI activist and support network, mainly to be found in the large cities."

I have had regard to these factors in making my decision.

Home Office guidance

[14] The issue for determination is whether there would be very significant obstacles to the individual's integration into the country where he would have to live (if they were required to leave the United Kingdom – in this case, India. Home Office guidance states:

> "there may be a 'very significant obstacle' where a person would be at a real risk of significant harassment or discrimination as a result of their sexual orientation or faith or where their rights and freedoms would otherwise be so severely restricted as to affect their fundamental rights, and therefore their ability to establish a private life in that country" (Home Office Guidance (Private Life – version 3.0) dated 17 October 2024.

Petitioner's submissions

[15] The petitioner contends that the respondent has applied the wrong test and had considered whether he would be able to live safely as an openly gay man. The issue of whether there were significant obstacles requires consideration of the likely reality for the person on resuming life in their home country, given their subjective fear; *NC* v *Secretary of State for the Home Department* [c at paras [25 - 26]. The respondent has failed to consider parts of the CPIN and did not consider how discrimination and stigma that he would face might affect his private life or ability to reintegrate. The fact that the petitioner may be required to hide or minimise his sexual orientation while in India might be considered to represent a very significant obstacle to the petitioner's reintegration into India. The petitioner referred to paragraphs 10.2.1, 11.1.4, 12.1.1, 12.1.2, 12.1.3, 12.2.1 and 13.2.1 within the CPIN. It was noted that conditions which do not breach Article 3 can still give rise to a violation of Article 8; *Napier* v *Scottish Ministers* 2005 1 SC 229 at paras [79 - 80].

[16] It was said that a Tribunal hearing his appeal might conclude that there was discrimination and widespread disapproval of homosexuality in the general community in India and that although homosexual acts were no longer criminalised, there were no provisions for same-sex marriage India, there remained the risk of harassment and violence against gay persons and that the petitioner might be forced to hide his sexual orientation or to live a discreet life on the basis of his fear of being attacked, abused, harassed or discriminated against. It was emphasised that for the purposes of my decision, it was not necessary that the petitioner would succeed and that it was enough that he was not bound to fail.

Respondent's submissions

[17] On behalf of the respondent it was submitted that the decision considered all aspects of the claim and that it was sufficiently detailed. It was submitted that a First-tier Tribunal that properly directed itself as to the law and facts would refuse the petitioner's claim and that, even taking the petitioner's claim at its highest, his fears as to what he might experience if he returned to India, although genuine, were subjective and are not supported by objective material. It was contended that the petition that does not set out the significant obstacles the petitioner would face and that his fear seems to be centred on the reaction of his own family and their ability to find him.

[18] It was contended that the petitioner had not demonstrated that it was appropriate to depart from the Country Guidance case. My attention was drawn to the fact that *MD* says that it would not be unduly harsh for someone to relocate within India and that there is a LGBT support network. It was submitted that there was no basis established on which to depart from the Country Guidance. Having regard to the petitioner's particular case, it is

submitted that demonstrating "strong grounds" to depart from *MD* would mean demonstrating why the petitioner would not have access to the same LGBT support network as other LGBT persons in India, and that he would face very significant obstacles to reintegration. It was said that the petitioner had provided no evidence of this.

Decision

[19] It is necessary to keep in mind the test that must be applied to the issue before me. So, although I agree with the submission for the respondent that the decision which was made takes into account relevant factors and is properly reasoned, while those factors would be determinative or at least very relevant in a normal judicial review, on the test that must be applied here they are of little assistance. Similarly, although if I was required to address the merits of the petitioner's claim, I might very well decide against him, that too is not the issue before me. What I have to decide is whether or not his claim is clearly unfounded. As noted in *SN* v *Secretary of State for the Home Department*, this is a low test.

[20] Concentration on the correct test means that the issue before me is a narrow one. The decision in *MD* is to the effect that it cannot be said that the threshold for a protection claim is met. Here, however, the claim made is no longer a protection claim - it is solely that the petitioner's Article 8 rights would be infringed. I do not consider it is necessary to go behind or disregard what he said in *MD* to reach a conclusion that a Tribunal in future might reach a conclusion that the petitioner's sexuality means he would be unable to integrate. Paragraph 174(c) of that decision quoted above indicates a number of forms of treatment which might arise and which, if they did, might present a very significant obstacle to integration. I accept entirely that there are arguments to be made to the contrary, but the dispute between these positions is not for me to resolve in this action. Having regard to the

material put before me, I consider that it cannot be said that there is no possibility that a Tribunal would accept that, on return to India, the petitioner would face very significant obstacles to reintegration and decide in his favour. On that basis I conclude that it cannot be said that his claim is "clearly unfounded" and I therefore sustain the first and second pleas-in-law for the petitioner, repel the respondent's pleas in law and grant reduction as sought in statement of facts 4(a).