EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 36
P650/17

Lady Paton
Lady Clark of Calton
Lord Malcolm

OPINION OF THE COURT

delivered by LADY PATON

in the reclaiming motion

by

SEKOU LOUIS TELESPHORE OUATTARA

Petitioner and reclaimer;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

Petitioner and reclaimer: Caskie; Drummond Miller LLP
Respondent: R Anderson; Office of the Advocate General

9 July 2019

Introduction

[1] The petitioner, Mr Ouattara, was born on 18 June 1970. He is a French-speaking citizen of the Ivory Coast, Africa. He left the Coast in 2004 at a time of civil war, believing that he was being targeted by pro-President Laurent Gbagbo forces on the basis of his name, religion, region, and political views (see page 2 of the First Tier Tribunal decision dated 23 May 2011). His wife and child remained in the Coast. He has no relatives in the UK.

[2] The petitioner initially travelled to France. He arrived in the UK on 9 March 2011, seeking asylum. He made various asylum and human rights applications and appeals, latterly focusing upon his mental health problems and his private and family life (Article 8 of the ECHR). He has been diagnosed as suffering from PTSD and a depressive disorder with psychotic symptoms, for which he has received treatment in the UK. All of the petitioner's applications and appeals were refused, including his latest dated 3 February 2017, argued (but not accepted) to be a fresh claim for asylum and/or human rights in terms of Immigration Rule 353. In the Secretary of State's decision letter dated 20 April 2017, the petitioner's submissions were noted as follows:

- You claim that removal to the Ivory Coast would breach your rights under Article 3 (Medical) of [the] ECHR, on the grounds of your mental health, as well as the treatment available in the Ivory Coast. You also claim that removal would breach your Article 8 rights.
- You claim that removal will interrupt your ongoing treatment and support in the United Kingdom and that you would potentially be forced to live on the streets as highlighted in paragraph 6 of the 22 page US Department of State report you have submitted.
- You claim that you are vulnerable and are in a position [where] you are unable to travel.
- You also claim that removal would be a disproportionate breach of your private life in terms of Article 8 of the ECHR.

In support of his application, the petitioner enclosed:

- Letter from Peter G Farrell solicitor dated 2 March 2017.
- Further submissions *pro forma*.

- Psychiatric report by Dr Khairubahri Idris dated 4 January 2017.
- 22 page US Department of State report.
- Previously issued Home Office correspondence.
- Copy of e-mail correspondence.

Relevant provisions

Article 8 of the ECHR

[3] Article 8 of the ECHR provides:

> "*Article 8*
>
> *Right to respect for private and family life*
>
> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Immigration rules 276ADE(1) and 353

[4] Immigration rule 276ADE(1) of Appendix FM (as amended with effect from 28 July 2014) provides:

> "**Private life**
>
> **Requirements to be met by an applicant for leave to remain on the grounds of private life**
>
> 276ADE(1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of the application, the applicant:
>
> …(ii) has made a valid application for leave to remain on the grounds of private life in the UK;

…(vi) … is aged 18 years or above, has lived continuously in the UK for less than 20 years … but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

[5] Immigration rule 353 provides:

"353 When a human rights or asylum claim has been refused … the decision-maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

(i) has not already been considered; and
(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection …"

Decision letter dated 20 April 2017

[6] In her decision letter dated 20 April 2017, the Secretary of State refused the petitioner's application, stating:

"Your further submissions have been fully considered and I have concluded that you do not qualify for leave [to remain in the UK] on any basis …

Article 8 – Family and Private Life based submissions

Your application has been considered on the basis of your family and/or private life in the UK under Appendix FM to and/or paragraphs 276ADE(1) – DH of the Immigration Rules, and outside the Rules on the basis of exceptional circumstances …

Private Life

Consideration has been given to the requirements for limited leave to remain on the basis of private life in the UK under paragraph 276ADE(1) of Appendix FM of the Immigration Rules …

In order to meet the requirements of paragraph 276ADE(1)(vi) an applicant must show that they are aged 18 or above and that there would be significant obstacles to their integration into the country to which they would have to go if required to leave the UK.

It is not accepted that there would be very significant obstacles to your integration into the Ivory Coast. It is noted that your wife and daughter reside in the Ivory Coast, who can provide support and emotional assistance upon your return to the

Ivory Coast. It is also of note that you have brothers and sisters there too. It is therefore considered that you have family support. It is also noted from a response to a COI request dated the 24 November 2014 that there are psychiatrists and facilities to treat people with PTSD and suicidal tendencies. You would also have the assistance of the AVR [Assisted Voluntary Return] scheme to negate any hardships that may occur along with medical escorts to ensure your safe travel to your home country and ensure that you continue to receive the appropriate treatment throughout your removal. The medical escorts will also take into account any difficulties you may have with travel and put in place a plan appropriate to you. This will ensure your wellbeing.

You have also lived in the Ivory Coast for 40 years, and are therefore familiar with the language and culture. It is also noted that the political situation in the Ivory Coast is much more favourable for you compared with the situation at the time of your departure.

Consequently you fail to meet the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules.

Your application on the basis of your private life in the UK is therefore refused under paragraph 276CE with reference to 276ADE(1)(iii), (iv) and (vi) of the Immigration Rules.

Exceptional Circumstances

It has also been considered whether your application raises any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules.

You claim that you have a clearly established private life in the UK and are currently relying on medical treatment more favourable to the Ivory Coast. It is not considered that these circumstances are exceptional. It is noted that you have a wife and child in the Ivory Coast along with brothers and sisters, who could offer emotional support upon your return. It is also noted from the following link below that there are several sites in the Ivory Coast that can provide facilities for those with mental health issues: -

http://www.who.int/mental health/policy/legislation/3 Voices NGOs HR&Legislation.pdf

It is therefore concluded that there is a support network in the Ivory Coast that can assist you along with the AVR scheme and medical escorts to protect you and ensure safe travel as a vulnerable person.

Removal to the Ivory Cost would not be a breach of Article 8. It is not considered that removal would have unjustifiably harsh consequences.

It has therefore been decided that there are no exceptional circumstances in your case. Consequently your application does not fall for a grant of leave outside the Rules.

Therefore, it is concluded that your further submissions would have no realistic prospect of success in front of an immigration judge.

Non-protection based Submissions: Other ECHR articles

Below is a consideration of your non-protection based submissions that have not previously been considered, but that taken together with the previously considered material, do not create a realistic prospect of success before an Immigration Judge: [There is then a consideration of "Article 3 medical" and the psychiatric report from Dr Khairubahri Idris dated 4 January 2017. The drugs currently being taken by the petitioner are listed, together with the availability of those drugs or substitutes in the Ivory Coast.]

… A MedCOI response, dated 25 September 2014, stated that there are psychiatrists and facilities available in the Ivory Coast to treat people with PTSD, and who also have suicidal tendencies …

The objective information above highlights that there are services and treatment available in the Ivory Coast which you could access. Whilst it is accepted that the availability of treatment in the Ivory Coast might not be as easily accessible or to the standard of that in the UK, it is not accepted that removal to the Ivory Coast would cause the United Kingdom to breach its obligations under Article 3 (medical) of ECHR …

… it appears that you have responded well to treatment, and that there appear to be no significant obstacles which would prevent further recovery. It is noted that you are currently treated at an outpatient clinic, and your condition is not so severe that you require inpatient care …

It is also acknowledged that medical cases can in principle fail under Article 3 yet succeed on Article 8 considerations. [*Razgar* [2004] UKHL 27]. To engage the UK's obligations under Article 8(1) you would have to show that removal would interfere with your right to respect for private life and that this interference would be disproportionate under Article 8(2) of the ECHR. It is not accepted that, if returned to the Ivory Coast, the difference in treatment and support available to you in the United Kingdom when compared to that which is available in the Ivory Coast would be substantial enough to cause serious harm to your physical and moral integrity, amounting to a flagrant violation of your rights under Article 8 ECHR …

> You have also claimed that removal will interrupt your ongoing treatment and support in the United Kingdom and that you would potentially be forced to live on the streets as highlighted in paragraph 6 of the 22 page US Department of State Report you have submitted. However no evidence has been provided that this will happen in your circumstances or that this will be the case with you. In your situation your wife, daughter and other siblings remain in the Ivory Coast and you have not provided any evidence that they would be unable to support you or that they would force you to live on the streets. Your circumstances therefore cannot be considered to come within the 'very exceptional' category referred to above. Removal cannot be resisted merely on the grounds that medical treatment or facilities are better or more accessible in the UK than in [the] Ivory Coast.
>
> It is therefore not accepted that if removed to the Ivory Coast that the support, treatment and medication available to you in the UK, when compared to that in your home area, would be substantial enough to cause serious harm to your physical and moral integrity, amounting to a flagrant violation of your rights under Article 8 ECHR. There is no breach of Article 8 on removal solely because health care facilities are better or more accessible in the UK than in the Ivory Coast as not every act or measure which adversely affects personal integrity will interfere with the right to respect to private life, under Article 8(1).
>
> Therefore for all the reasons raised above there would be no realistic prospect of success before an Immigration Judge …
>
> … I have concluded that your submissions do not meet the requirement of paragraph 353 of the Immigration Rules and do not amount to a fresh claim. The new submissions taken together with the previously considered material do not create a realistic prospect of success. This means that it is not accepted that should this material be considered by an Immigration Judge, that this could result in a decision to grant you asylum, Humanitarian Protection, limited leave to enter/remain on the basis of your family and/or private life or Discretionary Leave for the reasons set out above …"

Judicial review of the decision of 20 April 2017

[7] The petitioner sought judicial review of the decision of 20 April 2017. In his petition, he averred *inter alia*:

> "Statement XXII. In the light of the combination of the petitioner's medical conditions, the interruption to his ongoing treatment and support in the United Kingdom inevitably caused by removal, the lack of facilities available in Cote d'Ivoire for the management and treatment of his conditions, and the impact caused by his removal predicted by the professionals who deal with him, there is [a realistic prospect of an appeal by the petitioner being allowed by an immigration judge]. Each of those matters were adverted to in the submissions made to the Secretary of

State. The petitioner does not assert that his claim will succeed outside the Immigration Rules ***as adverted to in the Answer lodged***. Reference to the dicta of cases such as *GS (India) v SSHD* [2015] EWCA Civ 40, [2015] 1 WLR 3312 are therefore irrelevant. Rather he asserts the Secretary of State has in Immigration Rules 276ADE(iv) [*sic*] *inter alia* provided a mechanism by which a person who would fail in a *Razgar* type assessment of an Article 8 claim may succeed in obtaining Leave to Remain. That Immigration Rule stands apart from such an Article 8 assessment and is confined to whether the petitioner faces very significant obstacles to integration in the Cote d'Ivoire. In *AH (Petitioner)* 2011 CSOH 7 Lord Malcolm said 'If one concentrates only on factors adverse to the claim, a distorted view is likely to emerge'. That is what occurred in the present case. There was evidence for example that in Cote D'Ivoire those with conditions such as that of the petitioner are widely viewed as witches and of the other difficulties the petitioner would face. The Secretary of State has reached a distorted view [emphasis added; and as reference is made to Answer 22, that answer is set out below].

Answer 22. Admitted that each of the matters averred was adverted to in the submissions made to the Secretary of State. Quoad ultra denied. Explained and averred that an absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return cannot be relied on at all as a factor engaging Article 8: *GS (India) v SSHD* [2015] EWCA Civ 40, [2015] 1 WLR 3312 para 111 per Underhill LJ. If Article 8 is engaged by other factors, the fact that the petitioner is receiving treatment in this country which is not available in the country of return may be relevant to the proportionality exercise to be carried out under Article 8(2). But this factor cannot be treated by itself as giving rise to a breach of Article 8. In the present case, the respondent records (6/1) that the petitioner is 46 years of age, claims to have lived in the UK since 9th March 2011. At 6/1/7 the respondent, in addressing whether there would be 'very significant obstacles' to the petitioner's integration into the Ivory Coast, the respondent records that the petitioner's wife and daughter reside in the Ivory Coast, and that the petitioner's brothers and sisters are there too. Reference has been made to the availability of facilities in the Ivory Coast for those with mental health issues. The respondent has expressly considered (6/1/12) the submission that removal will interrupt the petitioner's ongoing treatment and support in the UK and that he would potentially be forced to live on the streets, as highlighted in the US Department report (6/3/3). The respondent explained that the petitioner's wife, daughter, brothers and sisters are believed to be in Cote d'Ivoire and that no evidence had been provided to suggest that the petitioner's family would not be able to support the petitioner or that they would force the petitioner to live on the streets. The decision letter must be read as a whole: *Zoumbas v SSHD* 2014 SC (UKSC) 75 para 19.

Statement XXIII: … Reference is made to *Mostapha* (Article 8 in entry clearance) [2015] UKUT 00112 (I AC), where the Upper Tribunal indicated that where an individual meets the terms of the relevant Immigration Rule that is a powerful (but not necessarily determinative) factor in the overall Article 8 assessment …

Statement XXVIII: The Secretary of State asserts that the petitioner's case hinges on whether the medical facilities in Cote d'Ivoire are so poor as to 'provide inhuman treatment'. The petitioner's case in fact hinges on whether there would be very significant obstacles to the petitioner's integration into Cote d'Ivoire. In failing to so recognize, the Secretary of State erred in law and left out of account relevant matters. An Immigration Judge would not so proceed. The Secretary of State both in her decision and Answers has left out of account that the petitioner is not relying upon Article 3 or 8 directly, or how they interrelate. He bases his case on whether he faces very significant obstacles to integration, which is simply a different test. For example, the petitioner's unlawful immigration status in the UK would impact on his Article 8 claim. It is irrelevant in an Immigration Rules 276ADE assessment. By seeking to conflate those matters, the respondent has provided an irrelevant answer. Reference is made to *Mostapha* (supra) …

Statement XXX: The Secretary of State refers to [there] being other facilities in Cote d'Ivoire without noting there is no information as to whether those facilities provide the type of care the petitioner needs. That some treatment is available for some conditions does not mean the petitioner can access the treatment he requires to facilitate his integration into Cote d'Ivoire. To be relevant to the Secretary of State's decision she must be satisfied treatment at such an establishment relevant to the petitioner's conditions would be available or at least an Immigration Judge might so conclude in assessing whether the petitioner could integrate. Immigration Rule 276ADE does confer a right to reside in the UK (and for treatment to be continued) where the withdrawal or alteration in treatment would take the cumulative obstacles faced by the petitioner in integrating in Cote d'Ivoire into the 'very significant' category …

Statement XXXVI: It is clear from the above the Secretary of State required to consider what a new Judge would make of the petitioner's case that there would be very significant obstacles to his integration and has singularly failed to address the Immigration Rules 276ADE decision as she should have. The Secretary of State has concentrated only on the factors adverse to the petitioner's case and an unbalanced conclusion has been reached (see *AH (Bangladesh) v SSHD* [2011] CSOH 7 at paragraph 33) …

Statement XXXIX: The Secretary of State failed to identify and explain her reasons adequately in her decision and in so failing erred in law.

PLEA-in-LAW for the PETITIONER

The decision of the Secretary of State to not accept the petitioner has made a fresh claim being inadequately reasoned, unlawful *et separatim* unreasonable, reduction should be granted as sought."

The opinion of the Lord Ordinary

[8] The Lord Ordinary refused the petition for judicial review ([2018] CSOH 50). In his opinion, the Lord Ordinary noted *inter alia*:

> "[3] … It was accepted by the petitioner that the respondent, in refusing the petitioner's claim, dealt appropriately with the claims in terms of articles 3 and 8 of the European Convention on Human Rights (statement 12). The petitioner's challenge was directed at the respondent's consideration of the petitioner's case in terms of immigration rule 276ADE. It was averred that rule 276ADE, which is designed to reflect the UK's article 8 private and family life obligations, is distinct and stands apart from articles 3 and 8 convention jurisprudence (statements 13 and 14) and may be more generous to claimants than article 8 requires (statement 15) … The petitioner accepts that his fresh claim will not succeed outside the rules (statement 22). The petitioner asserts that he could succeed under the rules (276ADE(vi)), and that the respondent in reaching her decision did not properly take into account the factors in support of the petitioner's claim and has failed to provide adequate reasons in reaching the decision. As a result, the respondent reached her decision on a distorted view (statement 22) leaving out of account relevant matters which an immigration judge would not leave out of account (statements 25, 28 and 38). Further, in reaching her decision, the respondent has taken account of an irrelevant matter, namely the petitioner's unlawful immigration status in the UK which albeit was relevant to an article 8 assessment, was irrelevant in an assessment under the rules (rule 276ADE) (statement 28). The respondent conflated the convention tests with the immigration rule 276ADE test and erred in law in doing so (statement 38) …
>
> [5] … The fresh claim also submitted that his removal would be a disproportionate breach of his private life in terms of article 8 of the convention. That part of the petitioner's claim is not subject to this review …
>
> [9] … The petitioner argues that a tribunal judge could conclude on the material that there are very significant obstacles to integration into the Ivory Coast. The test under rule 353 of the Immigration Rules was a modest one … The petitioner bases his claim upon immigration rule 276ADE and not the convention …
>
> [11] … The petitioner does not challenge the decision on human rights grounds and the ability to satisfy the immigration rules is not being used to determine proportionality. Applying *Mostafa* [2015 UKUT112 (IAC)], a tribunal judge would have no power to entertain a ground of appeal alleging that the decision was not in accordance with the Immigration Rules and there would clearly be no prospects of success for such an appeal before an immigration judge … [it would be irrelevant to consider] the merits of a decision where no appeal against that decision was competent …"

In paragraph [12], the Lord Ordinary further indicated that, had he been required to consider whether the Secretary of State had erred in concluding that the petitioner did not have a realistic prospect of success if his appeal was considered by a tribunal judge, he would have concluded that the Secretary of State had not erred.

[9] The petitioner appealed (reclaimed) against the Lord Ordinary's decision.

Submissions for the petitioner in the reclaiming motion

[10] Mr Caskie candidly accepted that statement 22 of the petition, taken with his own oral submissions, may have inadvertently misled the Lord Ordinary. He apologised for any misunderstanding, and explained that he had tried (by adjusting into statement 22 the words "as adverted to in the Answer lodged") to flag up the petitioner's reliance upon "an Article 8 private life and significant obstacles case" rather than "an Article 8 medical case". The petitioner had not abandoned any claim under Article 8 of the ECHR before the Lord Ordinary. The petitioner's case was based on Article 8 private life and significant obstacles to integration, as (i) the petitioner had serious mental health problems; (ii) the Ivory Coast did not have the facilities to treat those problems; and (iii) if the petitioner was forced to return to the Coast, he would, for those reasons, face significant obstacles to his integration there. Accordingly the Lord Ordinary erred at paragraphs [3] and [11] of his judgment when he stated that the petitioner did not challenge the decision on human rights grounds. While it was not submitted that a decision to return him to the Coast would automatically be a breach of Article 8, the petitioner's position (as set out in points (i) to (iii) above) constituted a clear signpost indicating that a decision to return him might be judged disproportionate in the circumstances. The immigration rules provided guidance about where the proportionality balance should be struck.

[11] The petitioner's case was presented under Immigration Rule 353 (a fresh claim). Thus the hurdle which he had to surmount was a modest one, namely whether there was a "realistic prospect of success" that an immigration judge could conclude that the removal was disproportionate. The concept of "integration" called for a broad evaluative judgment (*SSHD* v *Kamara* [2016] EWCA Civ 813, paragraph [14]). Resources for mental health problems were limited in the Ivory Coast (page 136 of the Appendix: Fondazione Saint Camille De Lellis). There was therefore a realistic prospect in the present case that an immigration judge might conclude that there were significant obstacles to the petitioner's integration in the Coast and thus that it would be disproportionate for the purposes of Article 8 to return him there: cf the approach adopted in *HAA* v *SSHD* [2017] CSOH 11, paragraph 24 *et seq.* While the petitioner had family in the Coast, what he needed was proper clinical intervention, such as that provided in the UK.

[12] Guidance as to proportionality when assessing an Article 8 claim could be found in Lord Reed's *dicta* in *KBO* v *Secretary of State for the Home Department* [2009] CSIH 30, 2009 GWD 19-315, and in the immigration rules (*R (Agyarko*) *v Secretary of State for the Home the Department* [2017] 1 WLR 823). A decision taken in accordance with the rules would normally be proportionate, other than in exceptional cases (*Agyarko* paragraphs 6 to 13).

[13] Counsel accepted that the petitioner had to persuade the court that the Secretary of State was wrong in law in her conclusion that there was no realistic prospect of success. She had erred by erroneously compartmentalising the factual information and not having regard to all the evidence. For example, over 76 per cent of those affected by mental disorders in the Coast did not receive care (Appendix page 136: Fondazione Saint Camille de Lellis). Not all the necessary drugs were available (Statements 30 and 36 of the petition).

[14] Counsel further submitted that, when answering the question whether there was a realistic prospect that an immigration judge would reach a different conclusion on the basis of the new material, the immigration judge should look at *all* the material, including (i) the fact that 76% of those with mental disorders did not receive care; (ii) the difficulties faced by persons with disabilities (US Department of State "2015 Country Reports on Human Rights Practices: Cote d'Ivoire, 12 April 2016", Appendix page 67, referring to persons with mental disabilities living on the street, and persons with disabilities begging on urban streets); (iii) the state of disrepair of one psychiatric hospital serving the Coast (Appendix page 146 – 150). Reference was made to *GS (India)* v *Secretary of State for the Home Department* [2015] EWCA Civ 40, [2015] 1 WLR 3312.

[15] When answering the question whether there was a realistic prospect that an immigration judge might reach a different conclusion, the Secretary of State had not engaged with significant parts of the materials before her. In particular, the petitioner had limited family support, as he had been absent from the Coast for ten years; he had difficult medical needs; he would lose access to the drugs he required. The cumulative effect resulted in "significant obstacles". Counsel submitted that an immigration judge could, on the materials, conclude that removal from the UK would be disproportionate. The reclaiming motion should be allowed; the petitioner's plea-in-law sustained; the decision of 20 April 2017 reduced; and the case remitted to the Secretary of State to be reconsidered.

Submissions for the respondent in the reclaiming motion

[16] Counsel for the respondent submitted that, on the basis of the petitioner's pleadings and the respondent's submissions, the Lord Ordinary's approach was entirely understandable. Ultimately the issue whether the Lord Ordinary had erred at paragraphs [3] and [11] of his

judgment was a matter for the court. Counsel further submitted that neither Article 3 nor Article 8 imposed an obligation upon states to provide medical treatment. The inadequacy of medical treatment in the country of return could not be relied upon as a factor engaging Article 8. If Article 8 was engaged by other factors, the inadequacy of any medical treatment might be a factor in the proportionality exercise, but could not of itself give rise to a breach of Article 8.

[17] When carrying out the proportionality exercise, it was important to note that the petitioner had never been granted leave to remain in the UK (section 117A and B of the Nationality, Immigration and Asylum Act 2002). Also inadequate medical treatment on its own was not enough: there required to be other factors which, taken cumulatively with inadequate medical treatment, affected the proportionality of removal: cf *GS (India)* v *Secretary of State for the Home Department* [2015] 1 WLR 3312; *MM (Zimbabwe)* v *Secretary of State for the Home Department* [2012] EWCA Civ 279; *SL (St Lucia)* v *Secretary of State for the Home Department* [2018] EWCA Civ 1894, paragraph 27. Only "wholly exceptional" cases would succeed. In striking the proportionality balance, only the most compelling humanitarian considerations were likely to prevail over the legitimate aim of immigration control. The petitioner averred only a generic risk, referred to in the State Department document, of those with mental health problems being forced to live on the streets. But on the petitioner's own averments, the generic risk was not one which seemed relevant to his case, as (a) the petitioner's wife, child, brothers and sisters lived in the Coast; (b) the petitioner did not aver that these family members would not support him; and (c) there were no relevant averments to support the proposition that the generic risk would be a real risk for the petitioner.

[18] The Secretary of State had considered all the materials supplied by the petitioner. The decision letter addressed all the issues raised by him. No breach of Article 8 had been identified. There was no realistic prospect of success before an immigration judge, and the Secretary of State was entitled to reach that conclusion. The reclaiming motion should be refused.

Discussion

[19] We accept counsel's explanation that the petitioner did not intend to abandon an argument before the Lord Ordinary based on Article 8 of the ECHR and significant obstacles to integration in the Coast. It must be said, however, that this position was far from clear in the petitioner's pleadings and oral submissions before the Lord Ordinary. On the basis of the material put before him, the Lord Ordinary's notes and reasoning, quoted in paragraph [8] above, were rational, logical, and fully reasoned. Thus we wish to make it clear that we do not accept that the Lord Ordinary erred as the case was presented to him, both in writing and by oral submission.

[20] As we heard the submissions in full, we have decided to express our views about the submissions presented to us.

[21] In the context of Article 8, we note the guidance given by the House of Lords in *Razgar cit sup* at paragraph [59]:

> "Although the possibility cannot be excluded, it is not easy to think of a foreign health care case which would fail under article 3 but succeed under article 8. There clearly must be a strong case before the article is even engaged, and then a fair balance must be struck under article 8(2). In striking that balance, only the most compelling humanitarian considerations are likely to prevail over the legitimate aims of immigration control or public safety. The expelling state is required to assess the strength of the threat and strike that balance. It is not required to compare the adequacy of the health care available in the two countries."

[22] Also of assistance are the observations of Underhill LJ in *GS (India)* v *Secretary of State for the Home Department* [2015] 1WLR 3312 at paragraph 111:

> " … where article 8 is engaged by [factors other than the adequacy of medical treatment in the country of return], the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach, since that would contravene the 'no obligation to treat' principle."

[23] As for the concept of "integration", as Sales LJ explained in paragraph [14] of *Kamara* v *Secretary of State for the Home Department* [2016] 4 WLR 152:

> "… The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.'"

[24] We also note and agree with the observations of McCloskey J in *Treebhawon (NIAA Part 5A – compelling circumstances test)* [2017] UKUT 00013 (IAC) at paragraph 37 when he said:

> " … 'very significant obstacles' erects a self-evidently elevated threshold, such that mere hardship, mere difficulty, mere hurdles, mere upheaval or inconvenience, even where multiplied, will generally be insufficient in this context."

[25] In this particular case, the Secretary of State considered all the materials provided, including the psychiatric report and the 22 page US State Department report. She took those into account, together with *inter alia* the following matters. The petitioner had lived in the Ivory Coast for 40 years. He was familiar with the language and the culture. The political situation had changed since his departure, and was more favourable for him. His wife and daughter lived in the Coast, and could provide support and emotional assistance. He also had brothers and sisters living there, who could provide family support. He had responded well to treatment in the UK, and his condition was not so severe as to require inpatient

treatment. The Coast had psychiatrists and facilities available to treat people with PTSD and suicidal tendencies, albeit not of the same standard or accessibility as those offered in the UK. Of the various drugs currently prescribed for the petitioner, many, or their equivalent, were available in the Coast. There could not be said to be a breach of Article 8 solely because health care facilities were better or more accessible in the UK than in the Coast. Medical escorts could ensure appropriate treatment during travel.

[26] Against that background, the Secretary of State carried out the proportionality balancing exercise required by Article 8(2). The fair balance which has to be struck under Article 8(2) means that only "the most compelling humanitarian considerations" would prevail over the legitimate aims of immigration control (*Razgar cit sup*). The Secretary of State balanced the more negative features (such as the general risk for those with mental problems in the Coast) against the more positive features of the petitioner's case, referred to above. She concluded that the petitioner's case could not be said to be so exceptional that a return to the Coast would be likely to be held to be a violation of Article 8, and that there was no realistic prospect of success before an immigration judge.

[27] In our opinion, in so doing, the Secretary of State did not err in law. She did not leave any relevant factors out of account, or take irrelevant factors into account. The conclusion reached was one which was open to her, and was not an unbalanced or unreasonable one. Weighing up the material before her, she was entitled to conclude that there was no realistic prospect of an immigration judge coming to a different conclusion, and therefore that there was no realistic prospect of success before an immigration judge. The Secretary of State gave clear and full reasons. We do not accept the petitioner's criticisms of her decision.

[28] Ultimately therefore the Lord Ordinary did not err in his *esto* reasoning in paragraph [12] of his opinion when he indicated that, had he been required to consider whether the Secretary of State had erred in concluding that the petitioner did not have a realistic prospect of success if his appeal was considered by a tribunal judge, the Secretary of State had not, in his view, erred.

Decision

[29] For the reasons given above, we refuse the reclaiming motion. We continue any question of expenses.