ASYLUM AND IMMIGRATION TRIBUNAL

LB (Medical treatment of "finite" duration) Bangladesh [2005] UKAIT00175

THE IMMIGRATION ACTS

Heard at: Field House On 28 November 2005	Determination Promulgated 12 December 2005

Before

Mr N H Goldstein-Senior Immigration Judge
Mrs W Jordan
Mr P Bompass

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Carroll, Counsel
For the Respondent: Ms V Chapman, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is a reconsideration of the determination promulgated on 26 May 2005 following a hearing on 19 May 2005, of Mr C C Wright, Immigration Judge, who dismissed the appeals of the Appellant, a citizen of Bangladesh, against the decision of the Respondent dated 20 January 2004 to refuse her application for variation of her leave to remain in the United Kingdom. The Immigration Judge dismissed both the Appellant's immigration

appeal and her human rights appeal under Article 8 of the ECHR.

2. Ms Catriona Jarvis, Senior Immigration Judge, in ordering reconsideration on 23 June 2005 considered that the grounds of appeal disclosed arguable material errors of law. Ms Jarvis continued:

> "It is arguable that the Immigration Judge erred in law in determining that the Appellant's course of medical treatment was not finite. It is arguable that the Immigration Judge misdirected himself as to the meaning and application of the requirement that the proposed course of treatment be of finite duration. It is further submitted that the Immigration Judge took into consideration and gave weight to an irrelevant fact in calculating the duration of the proposed stay".

3. At the outset of the hearing we reminded the parties that the issue for the Tribunal was whether the Immigration Judge made a material error of law, this being an error of law that affected his decision on the appeal: Rule 31(2)(5) of the 2005 Procedure Rules. The Tribunal further drew to their attention the decision of the Court of Appeal in **R [2005] EWCA Civ 982**, in which it was held, inter alia, that before the Tribunal could set aside a decision of an Immigration Judge on the grounds of error of law, it had to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings. Further the finding might only be set aside for error of law on the grounds of perversity, if it was irrational or unreasonable in the **Wednesbury** sense, or one that was wholly unsupported by the evidence.

4. In **R** their Lordships pointed out that an Immigration Judge determination ought not to be overturned for want of reasons, unless the Tribunal could not understand the thought processes employed to make material findings.

5. The Appellant sought an extension to her leave to remain as a visitor for private medical treatment. The Appellant suffers from rheumatoid polyarthritis.

6. The Appellant first entered the United Kingdom on 20 July 2000 and was subsequently granted a number of extensions to enable her to continue her treatment in the United Kingdom.

7. The Appellant submitted a further application to extend her leave as a visitor which was refused on 20 January 2004 because the Secretary of State was not satisfied that the Appellant could produce satisfactory evidence, from a registered medical practitioner, who held a NHS Consultant

post that the medical condition required consultation or treatment or satisfactory arrangements for private medical consultation or treatment and as to its likely duration.

8. It is clear from the papers before us and in particular the Immigration Judge's determination, that it was accepted by both the Immigration Judge and the Respondent that the Appellant came to the United Kingdom as a genuine medical visitor.

9. As set out in the grounds of appeal, it was the Appellant's intention to return to Bangladesh once her treatment was completed and this was never a matter in issue in this case. Indeed the unchallenged evidence demonstrated that the Appellant was from a very wealthy Bangladeshi family who wholly supported her in the United Kingdom and that all her immediate family were resident in Bangladesh except for one of her sons who was here on a temporary student visa.

10. It is apparent that the Immigration Judge was satisfied that the Appellant had provided satisfactory evidence of her medical condition from a consideration of the correspondence from Dr B K Sharma, a Consultant Rheumatologist who was treating the Appellant. Dr Sharma was indeed listed on the General Medical Council's Register of Specialists.

11. The Immigration Judge however rejected the appeal on the basis that the Appellant's proposed course of treatment was not of "finite" duration. At paragraph 20 of this determination the Immigration Judge stated as follows:

> "Applying the dictionary definition to the word 'finite', I have come to the conclusion that, at the date of the immigration decision, the Appellant was bound by the requirements of paragraph 51(iii) and was unable to show that her proposed course of treatment was of finite duration. The post-decision evidence reinforces my view that, in effect, the Appellant's application is an indefinite one".

12. It is noteworthy that at paragraph 21 of his determination, the Immigration Judge briefly summarised the submissions of the Presenting Officer before him in relation to which no mention was made of any issue raised on this particular matter.

13. The Immigration Judge continued at paragraph 22 as follows:

> "While the Appellant's medical condition has been recorded in the correspondence and I am satisfied that there is a serious probability that it is an accurate description of her present condition, the totality of the

> evidence weighed against the word 'finite' satisfied me that the Respondent's decision was at the date of the immigration decision in complete accord with the mandatory provisions of paragraph 51(iii) of HC 395 and of the other relevant Immigration Rules and I dismiss the immigration appeal".

14 We begin by observing that at no stage of the determination did the Immigration Judge explain what he meant by "the other relevant Immigration Rules" in that it is apparent that insofar as the Appellant's immigration appeal was concerned, he dismissed it for the sole reason that the Appellant was unable to show in accord with the requirements of paragraph 51(iii) that her proposed course of treatment was of finite duration. Indeed it is apparent that in all other respects the Immigration Judge was satisfied that the requirements for leave to enter as a visitor for private medical treatment were met.

15. With respect to the Immigration Judge, he was incorrect in referring to paragraph 51(iii) as a mandatory provision in the sense that it requires the applicant to:

> ".. show, **if required to do so**, that any proposed course of treatment is of finite duration". (Our emphasis).

16. Under the sub-heading "Findings", the Immigration Judge considered the correspondence with Dr Sharma, beginning with what is described by him as his "second" letter dated 6 January 2004. It was in response to a Home Office letter where Dr Sharma stated that the Appellant would require staying on her medication in the 'long term' and it was impossible to give 'a probable end date' of the treatment. In Dr Sharma's third letter dated 13 April 2005, some fifteen months later, he estimated that the course of treatment needed to be continued 'for another five years' and a fourth letter dated 18 May 2005 recorded Dr Sharma's difficulty in being categorical about the Appellant's future prognosis.

17. It would however be as well for the sake of completeness to set out below Dr Sharma's third and fourth letters. The letter of 13 April 2005 stated as follows:

> "I hereby confirm that (the Appellant) is still undergoing treatment for her long-standing rheumatoid polyarthritis under my care. Over the past four years she has shown a great deal of improvement.
>
> "The approximate annual cost of treatment is £5,000. All dues are being adequately met.

"Currently she is taking Methotrexate Sulphasalazine, Prednisolone, Folic Acid, Alendronate Tramacet. She does require her blood counts to be monitored regularly while she is on the above medications.

"This course of treatment needs to be continued for another five years. According to her doctor in Bangladesh this course of treatment and proper supervision for this kind of therapy is not available in Bangladesh. This therefore means that she needs to stay in the UK whilst she is undergoing treatment with the above medication".

18. Dr Sharma's fourth letter dated 18 May 2005 stated as follows:

"This is in response to further queries raised:

(1) (The Appellant) has got to have her blood counts monitored every two months and the results need to be checked by a medical practitioner, so that any appropriate action can be taken if so demanded. The consultation with the Consultant should be every three months but it can be more frequent depending on her condition.

(2) It is very difficult to be absolutely categorical about the prognosis. So far her response has been satisfactory and if she continues to respond in this fashion, one can expect a satisfactory prognosis in the future. Rheumatoid arthritis is a chronic illness and is subject to ups and downs from time to time. This is why she needs to be under supervision of her specialist.

(3) In addition to the above, I would like to add that she is at the moment taking Alendronate which is a biphosphonate being given to her in order to preserve her bones against the possibility of adverse effects of corticosteroids that she is taking systemically. I have been given to understand that this medication is not available in Bangladesh.

"One can expect that after a period of say five years, if her rheumatoid disease remained satisfactorily in remission she may not need corticosteroids, namely Prednisolone. Consequently she may not need supplementation with drugs like Alendronate. I am

> also given to understand that the other medications which she is on namely Methotrexate Sulphasalazine, Prednisolone and Folic Acid etc are available in Bangladesh".

19. The Immigration Judge then considered the IDI Guidance Notes at paragraph 18 as follows:

> "18. The IDI Guidance Notes record that a common-sense view should be taken of the meaning of 'finite' and that a long period of treatment, although not precisely defined, may be acceptable. The dictionary definition of finite is 'not infinite, limited, bounded …'."

20. We pause there to point out, that with respect to the Immigration Judge, in quoting from the IDI Guidance Notes, he omitted to mention a key passage and for this purpose as regards duration of treatment we set out below in full Annexe F of the policy document at paragraph 2 that states as follows:

> "A common-sense view should be taken of the meaning 'finite'. A long period of treatment, although not precisely defined, may be acceptable, **providing that there is a clear need for the patient to be here to receive that treatment and has sufficient funds**". (Our emphasis).

21. We were indeed persuaded in this regard by Ms Carroll's submission, that accordingly, the meaning of "finite" insofar as the Immigration Directorate Instructions on the matter were concerned, was before the Immigration Judge, namely that even if a long period of treatment could not be precisely defined, it was likely that it would be acceptable provided that the case worker was satisfied on the evidence before him/her that there was a clear need for the patient to be in the United Kingdom to receive that treatment and had sufficient funds for the purpose.

22. We would agree with Ms Carroll that there was no suggestion on the part of the Respondent or indeed within the findings of the Immigration Judge, that the Appellant did not have sufficient funds for the purposes of her treatment and it was apparent from the various reports and letters from her Consultant Dr Sharma, that there was a clear need for the Appellant to remain here in order to receive that treatment.

23. Dr Sharma pointed out in his letter of 13 April 2005 that the Appellant's course of treatment needed to be continued for another five years and that according to the Appellant's doctor in Bangladesh such a course of treatment and the proper

supervision for the kind of therapy required, was not available in Bangladesh. Dr Sharma continued "This therefore means that she needs to stay in the UK whilst she is undergoing treatment with the above medication".

24. In Dr Sharma's subsequent letter of 18 May 2005, he repeated that one could expect after a period of "say five years" if the Appellant's condition remained satisfactory in remission, that she might not need some of the medication presently prescribed, but in such circumstances other medication that the Appellant received would on his understanding be available in Bangladesh.

25. Dr Sharma's reference to the Appellant's doctor in Bangladesh was reflected in the letter before the Immigration Judge from Dr Halimur Rhashid dated 15 December 2003 in which he confirmed inter alia, that it was:

> ".. not possible in Bangladesh to have an appropriate medical care and better treatment for the disease, rheumatoid arthritis, (that) (the Appellant) is suffering from. Before going to (the) UK for treatment, (the Appellant) was under the treatment of several doctors for (a) couple of years in Bangladesh; but within a short time because of the lack of appropriate medical care her condition became very bad. All of her major joints had been affected and because of her serious pain in her joints, movement has also been seriously affected. Because of her quickly deteriorating condition, we have advised her to go to (the) UK for better and appropriate treatment".

26. Indeed there was before the Immigration Judge a detailed statement from the Appellant's daughter signed and dated 13 May 2005. At paragraph 7 she claimed that there was no Consultant or Rheumatologist available in Bangladesh and as a consequence and upon the recommendation of the Appellant's doctors in Bangladesh, her mother had decided to take treatment under a Consultant Rheumatologist in the United Kingdom.

27. We have concluded that the Immigration Judge indeed materially erred in law.

28. He misdirected himself as to the meaning and application of the requirement that the proposed course of treatment be of "finite" duration.

29. It is apparent to us that the appropriate IDI Guidance Notes, to which the Immigration Judge partially referred under the heading of "Findings", provided the answer to the approach of

Home Office case workers to this issue. We would agree with Ms Carroll that bearing in mind the evidence before the Immigration Judge he should have concluded that the Appellant met the necessary criteria.

30. In this regard it was noteworthy that Ms Chapman in responding to Ms Carroll's submissions sought to suggest that in terms of "clear need" it should not be the case that someone who could afford to pay for her medical treatment could as a consequence be entitled to some form of guarantee as to a right to stay in the United Kingdom. There must be a clear need to stay here. Significantly, Ms Chapman did not however challenge Ms Carroll's interpretation, with which we agree, as to the relevant IDI Guidance Notes that a long period of treatment although not precisely defined might be acceptable provided there was evidence of "a clear need" for the patient to be here to receive that treatment and that she had sufficient funds. Most fairly, Ms Chapman accepted that the issue before the Immigration Judge was whether or not the Appellant met the requirements of the Rules.

31. Ms Chapman's suggestion that the Appellant might have misled the Home Office about her condition was with respect to her misguided, as the final letter from Dr Sharma was clearly written with the view to further clarifying his estimate and prognosis as it related to the Appellant's medical condition and as set out in his previous correspondence.

32. There is no doubt, as is apparent from Dr Sharma's last two letters, that the evidence showed, that the Appellant is suffering from a difficult disease to treat and it is clear that the medication provided by her Consultant included various methods of drug treatment such that the Appellant had now stabilised upon a group of drugs.

33. We were not persuaded by Ms Chapman's earlier opening remarks, (which in fairness to her began by acknowledging "a degree of sympathy with the Appellant"), that the Appellant had asked for eighteen months leave to remain initially and then another twelve months and this was followed by four extensions over a period of three-and-a-half years. In acknowledging that the Appellant was suffering from a chronic condition, Ms Chapman maintained that the Appellant had failed to demonstrate that she could not obtain in Bangladesh the medication she received in this country. However the medical evidence before the Immigration Judge suggested the contrary.

34. Further, it appeared to us that the submission amounted in effect to a contention that "enough was enough" but that of course with respect to Ms Chapman and indeed the Immigration Judge, is not a relevant requirement of the Rules.

Visitors may be admitted for private medical treatment at their own expense provided they meet the ordinary requirements of the visitor Rule and must be able to show that any proposed course of treatment is of finite duration and that it is intended to leave the United Kingdom at the end of it.

35. As pointed out in Macdonald's Immigration Law and Practice Sixth Edition paragraph 9.22, to which we referred the parties, there is no requirement to be precise about the length of any proposed course of treatment. The requirement is to produce evidence of the medical condition, the arrangements for consultation and treatment, the estimated costs, the likely duration and the availability of sufficient funds in the United Kingdom to meet the costs. Further the IDI at Annexe F paragraph 2 demonstrates that the availability of treatment in the applicant's own country is not a ground for refusing admission.

36. An extension of stay for a medical visit can only be granted if the requirements for entry continue to be met and evidence must be produced from a registered medical practitioner, who holds an NHS Consultant post, of satisfactory arrangements for private medical consultation or treatment and its likely duration. If that treatment has already begun its progress (see paragraph 54(ii) of HC 395) patients must also be able to show that they have met any costs and expenses incurred in relation to their treatment in the UK out of the resources available to them and that they have sufficient funds available in the United Kingdom to meet further likely costs and intend to do so.

37.. Indeed Macdonald's, at paragraph 9.23 points out that, that:

> "If sufficient evidence of these matters is produced an extension of stay will normally be given". (Paragraph 55(vi)).

38. It was indeed on the basis of these requirements that, as should have been apparent to the Immigration Judge, earlier extensions of stay were granted by the Respondent. We would agree with Ms Carroll that the Immigration Judge erred in misdirecting himself concerning the contents of Dr Sharma's medical report. Dr Sharma did not state that the treatment was of uncertain duration but that the Appellant would require to stay on medication "long term" and he could not be categorical about the Appellant's future prognosis and that her course of treatment needed "to be continued for another five years".

39. There was in our view and for the above reasons, a failure by the Immigration Judge to give proper consideration to the guidance on Home Office policy in this matter and for that

purpose the proposed five years' duration as indicated by Dr Sharma was "finite" within the meaning of that policy.

40. We have therefore concluded that in this regard the Immigration Judge clearly materially erred in law in his interpretation of the proper application of the relevant Rule. Further that his understanding of the policy of the Home Office in such matters was not only misguided but consequently played a material role in his decision to dismiss the immigration appeal.

41. Ms Chapman notably took no issue within her submissions to paragraph 6 of the grounds of appeal which contended that the Immigration Judge further erred in giving inappropriate consideration and weight to an irrelevant fact in calculating the duration of stay if the Appellant was successful when determining whether her treatment here was finite. At paragraph 10 of his determination the Immigration Judge stated:

> "The evidence is that she has applied for extension of leave to remain for another five years until the summer of 2010, in consequence of which the Appellant will face the prospect of remaining in the UK for private medical treatment for up to ten years".

42. As the grounds rightly contended and as further argued before us by Ms Carroll, neither the Immigration Rules nor Home Office policy placed relevance on the duration of the term of stay of a medical visitor. The Appellant's intention to leave the United Kingdom after treatment was completed was never in issue. It follows that the term of stay as the grounds put it "the unspoken consequence of that stay (that the Appellant might then qualify for settlement by reason of long-term residence) was irrelevant to the issue whether her treatment was finite".

43. We would agree with Ms Carroll, who submitted that there was nothing in the IDI Guidance Notes to say that simply because the Appellant had the benefit of the extensions of stay for treatment in the past this should somehow prejudice future renewals.

44. It follows that in this regard, we have concluded that the Immigration Judge reached conclusions unsupported by the evidence and therefore irrational or unreasonable in the **Wednesbury** sense.

45. In effect the Immigration Judge had before him a clear definition within the IDI Guidance Notes as to the meaning of "finite" for the purposes of the application of the Rules by case workers and went outside of them. His consideration of

whether the Appellant might be applying for further extensions of leave could result in her remaining in the United Kingdom for up to ten years, was not based on the evidence or the requirements of the Rules but upon his own speculation. It was, upon our reading of the determination as a whole, and as Ms Carroll rightly submitted, indicative that such a matter was "in the forefront of his mind, yet of no relevance and outside his remit".

46. Bearing in mind the issue before us was whether the grounds upon which reconsideration of this appeal was granted disclosed material errors of law on the Immigration Judge's part, we were able to inform the parties that we had concluded, (for reasons that we now disclose in this determination), that such material errors of law were indeed disclosed.

47. The parties' representatives informed us that in the circumstances they did not propose to make further representations and were content that the Tribunal should make a fresh decision on the basis of the evidence already before them.

48. For the reasons given by the Tribunal identifying the material errors of law in the Immigration Judge's approach to this appeal we are for like reasons satisfied that the following decision be accordingly substituted.

DECISION

49. The immigration appeal is allowed.

50. As no issue was raised within the grounds or indeed the order of reconsideration in relation to the Appellant's human rights appeal, it follows that her human rights appeal remains dismissed.

N H GOLDSTEIN
SENIOR

IMMIGRATION JUDGE
Approved for electronic distribution. 06.12.05