H-MGM-V1

Heard at Field House
On 29 September 2004

FM (Articles 3/8 in medical cases) Uganda [2005] UKIAT 00012

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

17/01/2005

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Before :

Mr P R Lane – Vice President
Mr M E Olszewski
Mr R Baines JP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

Representation:

For the Appellant: Ms T Hart, Senior Home Office Presenting Officer

For the Respondent: Ms L Bailey, Counsel, instructed by Messrs Christian Khan Solicitors

DETERMINATION AND REASONS

1. The Appellant, who is the Secretary of State for the Home Department, appeals with permission against the determination of an Adjudicator, Mr D J Ross, sitting at Hatton Cross, in which he allowed on human rights grounds the Respondent's appeal against the decision of the Secretary of State to give directions for the Respondent's removal from the United Kingdom.

2. The Respondent arrived in the United Kingdom in 1999 and claimed asylum, asserting a fear of the authorities in Uganda. The Adjudicator dismissed the Respondent's appeal on asylum grounds and she makes no complaint in that regard.

3. The Adjudicator, however, allowed the Respondent's appeal on human rights grounds. At paragraph 5.5 of the determination the Adjudicator made the following findings:-

> "5.5 I accept that the [Respondent] suffers from AIDS. According to a letter from Dr Gary Brooke… she has severe late stage HIV, she requires antiretroviral treatment which is not available in Uganda. If deported he says that she will die within 2 years. Another letter from Dr Steven Dawson dated 28 November 2002 also emphasises her fragile health, and the need for continuous treatment and monitoring. A further letter from him dated 7.8.03 makes it clear that the [Respondent] is being treated with a combination of three drugs, which in his view are unlikely to be available in Uganda. I have also considered the reports of Dr Barnett dated 11.6.03. There is also a report from Dr Catalan which concludes that the [Respondent] is suffering from post-traumatic stress, and dysthymic disorder. I accept therefore that there are strong indications that if returned to Uganda her mental and physical health will suffer, and that she may die."

4. At paragraph 5.6 of the determination, the Adjudicator contrasted the evidence regarding the availability of HIV/AIDS treatments in Uganda, as found in the Home Office CIPU Report, on the one hand, and the report of Professor Barnett, on the other. Noting that Professor Barnett acknowledged that treatment was available in Kampala, the Adjudicator was also aware that Professor Barnett considered that this would be at a cost that the Respondent could not possibly afford and that she would also be at far greater risk in Uganda of picking up an infection. The Adjudicator concluded that "it seems clear that there is a real risk that if returned she will not survive, and that she will suffer a cruel and debilitating death".

5. At paragraph 6.2, having made brief reference to various reported cases, including that of ***D (1997) 24 EHRR 42*** and ***Razgar [2003] EWCA Civ 840***, the Adjudicator concluded that what needed to be shown in order for an Article 3 case to succeed where what was alleged was a disparity in medical treatment between the United Kingdom and Uganda, was "a real risk that the [Respondent] will die or suffer grievously if returned to her home country". Finding that "there is a real risk that if returned to Uganda she would die within 2 years",

the Adjudicator allowed the appeal both under Article 3 and Article 8 of the ECHR.

6. Of central importance in the determination of this appeal is the status and scope of the Court of Appeal judgments in ***N [2003] EWCA Civ 1369***. There, the majority of the Court of Appeal held that it would not violate Article 3 of the ECHR to return to Uganda a female HIV/AIDS sufferer who was currently receiving anti-retroviral treatment in the United Kingdom. On the assumption that the majority judgments in ***N*** represent the correct legal approach to determining the scope of Article 3 of the ECHR in its application to such cases, there can in the Tribunal's view be no doubt but that the Adjudicator's brief assessment at paragraph 6.2 of his determination was legally flawed. Instead of asking whether there was "a real risk that the [Respondent] will die or suffer grievously if returned to her home country", the Adjudicator should, in the words of Laws LJ, have found that:-

> "The application of Article 3 where the complaint in essence is of want of resources in the Applicant's home country (in contrast to what has been available to him in the country from which he is to be removed) is only justified where the humanitarian appeal of the case is so powerful that it could not in reason be resisted by the authorities of a civilised State. This does not I acknowledge amount to a sharp legal test; there are no sharp legal tests in this area. I intend only to emphasise that an Article 3 case of this kind must be based on facts which are not only exceptional, but extreme; extreme, that is, judged in the context of cases all or many of which (like this one) demand one's sympathy on pressing grounds."

7. To go any further would, in the judgment of Laws LJ, be to distort:

> "The balance between the demands of the general interest of the community, whose service is conspicuously the duty of elected government, and the requirements of the protection of the individual's fundamental rights" (paragraph 40).

8. At paragraph 41, the Learned Lord Justice found that:

> "If on facts such as those of this case we were to fix the Secretary of State with a legal obligation to permit the Appellant to remain in the UK, we would in my judgment effect an unacceptable – constitutionally unacceptable – curtailment of the elective government's power to control the conditions of lawful immigration. I do not believe that our benign obligations arising under the Human Rights Act 1998 require us to do any such thing. Quite the contrary;

> our duty is to strike the very balance between public interest and private right to which I have referred."

9. At paragraph 46, Dyson LJ held that:

> "It is only in a very exceptional case, where there are compelling humanitarian considerations in play, that the application of the extension to the extension [created by Strasbourg in ***D***] is justified. It is clear that what was considered by the court to be very exceptional about the facts in ***D*** … was that the Applicant's fatal illness had reached a critical stage and that:
>
> "the limited quality of life he now enjoys results from the availability of sophisticated treatment and medication in the United Kingdom and the care and kindness administered by a charitable organisation. He has been counselled on how to approach death and has formed bonds with his carers."

It was the removal of these facilities in these circumstances that would expose the Applicant to the risk of dying under the most distressing circumstances. As Judge Pettiti pointed out, it was not the inequality of medical treatment that made the removal of ***D*** a violation of Article 3. It was the fact that the Applicant was to be deported in the final stages of an incurable disease".

10. At paragraph 47, Dyson LJ went on to find that there are sadly many examples of persons who enter the United Kingdom suffering from HIV/AIDS and who receive treatment here that they could not hope to obtain in their country of origin. If returned:

> "Their life expectancy may, and in many cases almost certainly will, be substantially reduced. But, tragic though all such cases are, it seems to me it is clear from ***D*** that the ECtHR would not, without more, recognise such cases as raising humanitarian considerations so compelling as to engage Article 3. The court would not regard such circumstances as exceptional, still less very exceptional. The fact that an Applicant's life expectancy will be reduced, even substantially reduced, because the facilities in the receiving country do not match those in the expelling country is not sufficient to engage Article 3. Something more is required."

11. At paragraph 49, the Learned Lord Justice concluded by stating that:

> "Tragic though such cases undoubtedly are, unless they have some special feature which gives rise to particularly

compelling humanitarian considerations, they do not meet the stringent requirement that they be truly exceptional in order to satisfy the Article 3 criteria."

12. If the majority judgments in ***N*** represent the law in this area, then this Tribunal is bound by them and so must find that the Adjudicator in the case before us erred in law in his approach to Article 3. Ms Bailey, in her forceful submissions on behalf of the Respondent, contended, however, that ***N*** should no longer be regarded as representing the law. This was because the approach of the majority in that case had in effect been disapproved by the House of Lords in the case of ***Ullah [2004] UKHL 26***.

13. The Tribunal is unable to accept this submission. Nowhere in the opinions in ***Ullah*** can we find any statement that ***N*** is overruled or disapproved. Nor can it be said that ***N*** has been disapproved by implication. Although the Court of Appeal judgments in ***Ullah*** are referred to by Laws LJ at paragraph 31 of ***N***, the actual conclusions of the Court of Appeal in ***Ullah*** cannot in any sense be said to underpin his judgment. The essential question in ***Ullah*** was whether and to what extent the denial of ECHR rights in a country to which a person is proposed to be sent entitles that person to invoke the ECHR in order to resist his removal from a signatory State to the country concerned. Both the Court of Appeal and the House of Lords were agreed in finding that a denial of rights protected by Article 3 of the ECHR could confer such an entitlement. The question in ***N***, however, was what is required is required to establish a breach of Article 3, where the complaint is not ill treatment at the hands of man but rather a "want of resources in the applicant's home country (in contrast to what has been available to him in the country from which he is to be removed)" (Laws LJ at paragraph 40). None of the House of Lords' opinions in ***Ullah*** can be said to answer this question.

14. As Ms Bailey said, the decision in ***N*** is, we understand, under appeal to the House of Lords. We are not aware that the Secretary of State has indicated that he intends to concede that appeal, in the light of the House of Lords' opinions in ***Ullah***. In conclusion, the Tribunal has no hesitation in finding that ***N*** continues to represent the law and that the Adjudicator in the present case has erred in his application of the relevant legal principles identified in ***N*** to the facts of the case before him. We find ourselves in complete agreement with the tribunal determination in ***UK (Use of N judgment as a benchmark in ill-health cases) Rwanda [2004] UKIAT 00262***, where the importance of ***N*** was recently confirmed.

15. Ms Bailey submitted that, whether or not ***N*** continues to govern the position, its facts could be distinguished from those of the present case, in that the latter was, properly construed, an

"exceptional and extreme" one of the kind envisaged by Laws L.J and Dyson LJ.

16. Upon analysis, however, the Tribunal is unable to accept that this is so. The claimant in ***N*** had been diagnosed as suffering from an AIDS condition. So too has the present Respondent. The evidence before the Adjudicator in the present case showed (as at 28 November 2002) that the Respondent's CD4 count stood at 390 and her viral load was below 50. As Laws L.J observed at paragraph 4 of ***N***:

> "The progress of AIDS is monitored by what is called the CD4 cell count, which decreases as the immune system weakens, and by the viral load (VL) which increases. The CD4 cell count in a normal healthy individual is over 500."

At paragraph 3 of the judgment, N's CD4 count was 20 and her viral load was around 50,000 copies-ML at base line.

17. Given that the Adjudicator materially erred in law in his approach to Article 3, the Tribunal is not precluded from considering evidence as to the Respondent's condition, which has been produced since the hearing before the Adjudicator. The most recent available evidence, set out in a letter of 27 May 2004, indicates that the Respondent's CD4 count is now "just over 400".

18. What is, however, plain from the latest evidence is that during the course of her treatment, the Respondent has developed resistance to certain named drugs (described at pages 240 and 241 of the Respondent's bundle) used in combination therapy. This has necessitated the use of a new combination of drugs, which includes Abacavir, a drug not currently available in Uganda. Ms Bailey submitted that this was a distinguishing feature from the facts of ***N***. That is, however, not the case. The majority Lords Justice in ***N*** were at pains to emphasise that they were taking the Appellant's case at its highest, in order to determine whether, if the appeal were to have been remitted to the Immigration Appeal Tribunal, the Appellant could possibly have succeeded by reference to Article 3 (see paragraph 43 of the judgments). As recorded at paragraph 16 of the judgments, it was Ms N's case that the formulation of drugs she was currently taking was not available in Uganda.

19. A further feature of the latest evidence in the present case is that, according to the letter of 27 May 2004 from Dr Dawson, whilst a person who had not already been on treatment and who had a CD4 count of 400 would not reach "a danger level of opportunistic infection" until after three years, a person who had been on anti-retroviral therapy and whose therapy was interrupted would be likely to suffer "a much more rapid rebound of viral load and a much more precipitous fall in the

CD4 count. It is therefore likely that the time schedule mentioned would be much more rapid and a quicker development of fatal opportunistic infections".

20. The fact is, however, that (as can be seen from paragraph 3 of ***N***) Ms N had an anticipated life expectancy of "under twelve months if she were forced to return to Uganda". There is nothing in the evidence before us to show that the Respondent's expected decline in health, though more rapid than for someone who had never been on therapy, would be any graver than that of Ms N.

21. Professor Barnett's latest report asserts that the Appellant would have practical difficulties in travelling to or remaining in Kampala, even if she were to obtain treatment there. However, ***N*** faced similar difficulties (see paragraph 10 of the judgments).

22. Ms Bailey submitted that the latest written statement of the Respondent showed that she would be without any system of support, were she to be returned. At present, the Respondent's aunt is looking after the Respondent's children but would be unlikely to be able to look after the Respondent. The Respondent's mother "is already looking after seven children", is old and has not apparently been told about the Respondent's medical condition. There is, however, nothing in the supplementary statement that compels the conclusion that it is reasonably likely that the Appellant's mother, though burdened with other obligations, and though no doubt of modest means, would be unable to provide some form of emotional support for the Respondent. The Respondent also has brothers, each of whom are said to have twelve children and to be "poor rural people". Again, the point just made about the mother applies here.

23. By contrast, five of N's six siblings had already died of HIV related conditions, as well as other close relatives, and both of her parents were dead (paragraph 10).

24. Ms Bailey rightly did not seek to place any great weight upon the fact that the Respondent suffers from depression and has been diagnosed as having PTSD. According to the letter of 2 August 2004 from Dr Shah-Armon, Consultant Clinical Psychologist, the Respondent is seen on a monthly basis "largely to provide support". Not surprisingly, the Respondent is said to be "very frightened of dying a painful death and the impact this will have on her children who remain in Uganda with the Respondent's aunt". Although the Respondent "has talked of suicide recently" Dr Shah-Armon considers that "she has suicidal ideation but no intent". If returned to Uganda, the doctor is "concerned both for the mental health support she will receive and also the social support".

25. The Tribunal notes that Ms N had problems with depression. The Respondent's difficulties in this regard do not, in our view, either alone or in combination with other relevant factors, take her case into the "exceptional and extreme" category identified by the Court of Appeal in ***N***.

26. Although not cited in argument before the Tribunal, we have had regard to the Court of Appeal judgments in ***CA [2004] EWCA Civ 1165***, in order to see whether they might be of assistance to the Respondent. They are not. What was regarded as significant in that case was the position of the claimant's then unborn child. That feature is absent from the present case. Indeed, as we have demonstrated, the present case is in all essential respects on all fours at least with the facts in ***N***. Whilst noting that at paragraphs 31 and 32 of the judgments in ***CA***, Laws L.J emphasised the point he had made in ***N*** that "there are no sharp legal tests in this area", there is nothing in ***CA*** that casts any doubt upon the ratio in ***N***. At paragraph 32 of the judgments, Laws LJ found that he was "unable to hold in the present case that the Adjudicator's decision, *which was arrived at (as it happens) before the judgments in* ***N*** *were given* was legally flawed by reference to" the reasoning in the case of ***N*** (our emphasis). We do not consider that there is anything in that finding which suggests that the Adjudicator in the present case cannot be said to have erred in law, on the basis that the judgments in ***N*** had not been delivered at the time he promulgated his determination. To suggest otherwise would be to go against the principle of English common law jurisprudence, that judges reveal the law instead of making or declaring it in a purely prospective fashion. Had the majority of the Court of Appeal in ***N*** meant their interpretation of Article 3 to be purely prospective, they would have said so.

27. Finally, the Tribunal must deal with Article 8. Although the Adjudicator stated in his determination that he was allowing the appeal under both Article 3 and Article 8, he said no more than that. Article 8 plainly cannot be used, by reference to its "moral and physical integrity" aspect, contained within the right to respect for private life, so as to allow an appeal in a case, such as the present, unless a high threshold is met or, to put the point another way, unless the circumstances are exceptional, in the context of "ill health" or "medical" cases. Given its qualified nature, Article 8 could avail the Respondent only if the circumstances of her case were such that her removal could not be said to be within the range of reasonable responses open to the Secretary of State. In this of all areas, Courts and Tribunals must recognise that the Secretary of State's policy will be to pay particular regard to the importance of maintaining effective immigration controls. We are unaware of any authority from a Higher Court to the effect that, in an "ill health" case such as

the present, the decision to remove should be regarded as disproportionate.

28. We are fortified in our conclusion on the Article 8 issue by what the House of Lords has recently said in ***Razgar [2004] UKHL 27*** about the scope of Article 8 in cases involving persons whose health or welfare are said to be at risk were they to be removed to another country. At paragraph 4 of the opinions in that case, Lord Bingham, having quoted from the judgment of the European Court of Human Rights in ***Henao v The Netherlands (Application No 13669/03, 24 June 2003, unreported)***, regarded ***Henao*** not only as illustrating "the stringency of the test applied by the Court when reliance is placed on article 3 to resist a removal decision" but also as showing "importantly for the Secretary of State that removal cannot be resisted merely on the ground that medical treatment or facilities are better or more accessible in the removing country than in that to which the claimant is to be removed. This was made plain in ***D v United Kingdom 919970 24 EHRR 423***, paragraph 54. Although the decision in ***Henao*** is directed to article 3, I have no doubt that the Court would adopt the same approach to an application based on article 8. It would indeed frustrate the proper and necessary object of immigration control in the more advanced member states of the Council of Europe if illegal entrants requiring medical treatment could not, save in exceptional cases, be removed to less developed countries of the world where comparable medical facilities were not available".

29. After finding that the Court of Appeal in ***Razgar*** did not propose a test in Article 8 cases based on relative standards of treatment, Lord Bingham stated categorically that the ECHR "is directed to the protection of fundamental human rights, not the conferment of individual advantages or benefits". At paragraph 20 of the opinions, Lord Bingham held that "Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case-by-case basis".

30. The Adjudicator in the present case completely failed to explain why the facts of the Respondent's case were so exceptional as to compel the overriding of the decision to remove her from the United Kingdom, taken as it was in pursuance of the lawful operation of immigration control. Upon analysis, we can find nothing of an exceptional nature in the facts of the present case to entitle the Respondent to succeed under Article 8.

31. In conclusion, the Tribunal finds that:-

(a) The case of ***N*** continues to be binding authority in cases such as this;

(b) The adjudicator accordingly erred in law in failing to appreciate that the facts of the present case, assessed against the "benchmark" of ***N***, conspicuously fail to show that the present case should be treated as exceptional and extreme. The use of ***N*** as a benchmark in ill-health cases of this kind has been specifically endorsed by the Tribunal in the case of ***UK Rwanda [2004] UKIAT 00262*** and that approach remains correct in the light of both ***Ullah*** and ***CA*;**

(c) It is irrelevant that the adjudicator promulgated his determination in the present case before the judgments in ***N*** were handed down;

(d) The adjudicator erred in law in allowing the appeal under Article 8 in the absence of any "exceptional" feature such as to override the Secretary of State's policy of immigration control.

32. This appeal is accordingly allowed.

P R LANE
VICE PRESIDENT

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