JH
Heard at Field House
On 10 March 2003

DC (Article 3 - Article 8)
Albania [2002] UKIAT00060

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

4th September 2003

Before :

Mr J Barnes (Chairman)
Mrs S Hussain, JP
Mr A Smith

Between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

DETERMINATION AND REASONS

1. The appellant was represented before us today by Ms K Negus of Counsel instructed by Salmons and the Secretary of State was represented by Ms M Walton, Home Office Presenting Officer. We would like to record our indebtedness to both Counsel for their able submissions before us and for the assistance which they have given to us.

2. The appellant is a citizen of Albania born on 25 January 1960 and he arrived clandestinely in the United Kingdom on 12 November 2000 accompanied by his wife and two children. He claimed asylum on 13 November 2000 and after submitting a self evidence form and an interview the Secretary of State refused his asylum application for the reasons set out in a letter dated 18 December 2000. On 29

November 2000 although this did not become effective until its delivery with the refusal letter the Secretary of State had also prepared removal directions for the removal of the appellant to Albania as an illegal entrant. The wife and two children who accompanied the appellant had claimed as his dependants and so it follows that their position will be governed by the outcome of this appeal since they will fall to be treated in line with the appellant. The appellant appealed against the Secretary of State's decision on both asylum and human rights grounds and his appeal was heard on 10 June 2002 by Mrs D Taylor an Adjudicator. She dismissed his asylum and human rights claims including that put forward on the basis of the effect of removal under Articles 3 and 8 of the European Convention by reason of the medical condition of the appellant and his eldest son. Leave to appeal against that decision to the Tribunal has been granted only in respect of the claims under Articles 3 and 8 on the basis of the medical evidence and their psychological condition. Following Kehinde, a "starred" decision of the Tribunal [2002] UKIAT, we are concerned of course primarily with the situation of the appellant but we are able to take into account the situation of his dependants to the extent that they will impinge upon the appellant and any breach of his human rights by removal. In the present case the medical evidence is to the effect that the appellant is strongly concerned and influenced by the psychological problems of his eldest son and to that extent it is appropriate that we should consider the medical evidence in relation to the son also since it appears quite clear that it does impinge on the removability of the appellant, his father. It was accepted by the Adjudicator that there had been a serious attack upon the appellant in February 1999 following a situation where he had been charged with and acquitted of criminal charges relating to motoring in which an old lady had died in an accident. It was believed that those responsible for that assault and a subsequent assault in June 2000 were members of the family of the lady concerned but the Adjudicator found that there was in Albania a sufficiency of protection for the appellant and his family against any such attacks and on that basis his claims to asylum and to Article 3 treatment for that reason both failed, there is as we say no appeal against that part of the determination before us.

3. The arguments and submissions before us have centred on the question of whether the psychological condition of the father and his eldest son is such that it would be in breach of the United Kingdom's obligations under Articles 3 or 8 of the European Convention for the appellant and his family now to be returned to their own country where they are held not to

be in any danger otherwise of persecution or ill treatment which would engage Article 3.

4. The Adjudicator dealt with the matter at some length at paragraphs 15 to 19 of her determination and it is helpful if we set out what she then said to show the background to the case.

> "15. This family is clearly a very close one and a very loving one. There is no doubt that Mr Capi's principle concern is for his children. His older son Santiljano is not well. He was traumatised by witnessing the assault on his father. The family took him to hospital on 16 December 1999 because they were concerned about his state of health. There is a report from the Tirana University Hospital Centre which states that Santiljano was suffering from depressive neurosis. He was said to have arrived at the hospital in a state of delirium. He was immediately hospitalised and seen by a psychiatrist. He was given medication. I have no doubt that it was the family's concern for their son which led them to come to the United Kingdom. Mr Capi told me that he had been told by the doctors in Albania that they could not do anything for Santiljano.
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> 16. He is still unwell. A letter from his school states that he often has a vacant look in his eyes, has significant difficulty in remember simple instructions and is easily confused. A psychological report prepared for the hearing by L Carrick Smith , a Chartered Forensic Psychologist states that he is deeply traumatised. He is currently suffering severely from post traumatic stress. He needs intensive support. The psychologist considers that should he return to Albania there would be no realistic chance of treatment. The Communist party repressed psychology to the point of obliteration leaving a system dependent on medication and institutionalisation. The first graduates of psychology are starting work but they have neither clinical training nor depth of experiences. They return to a situation reminding Santiljano of previous stresses, carries the risk of serious generalised psychological harm. He states that a substantial period of stability is needed for this family.
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> 17. The Presenting Officer asked me to find that the appellant would receive the help that he needs at the Centre for Psychiatry at the University Hospital in Tirana. Mr Capi's representative asked me to find that

returning this family would breach their rights under Articles 3 and 8 of the ECHR.

18. Amongst the papers with which I have been provided there is an article by Anna Klein in Psychology International reporting on the current state of psychology in Albania. It states that psychology is being reconstructed after 50 years of Communist rule. Although great strides have been made it still has a long way to go to establish a professional standard. It is clear from the article that the role of psychology has now been recognised in Albanian society and that the young graduates are committed to providing professional psychological and counselling services to help Albanians cope with their own personal psychological problems

19. I have every sympathy for this family who have clearly done everything they possibly could to help their son. However, again, the human rights arguments must fail by reference to the objective evidence. The family would return as a unit, at least one grandparent remains in Albania, no evidence was given in relation to other family members. Clearly the family feel that the treatment which they are getting for Santiljano is better in the United Kingdom. It is wholly understandable that they therefore wish to remain here. Nevertheless it cannot be said that the UK would be in breach of its obligations under Article 3 or Article 8 upon their return to Albania. Whilst they may feel that the treatment Santiljano would receive there is inferior nevertheless it is clear both that there is a unit which could treat him in Tirana and that psychological services in Albania are expanding."

5. It is perhaps helpful if we note at this point that the article by Anna Klein referred to in paragraph 18 of the Adjudicator's determination is dated to Spring 2000 and is therefore now somewhat out of date. The medical evidence to which reference was made comprised two reports from Mr Carrick Smith; one on the appellant and one on his eldest son. The report on the appellant said that psychological features of his distress included severe depression with suicidal ideation, acute anxiety, sleep disturbance and social dysfunction and that a number of the features he described were consistent with a diagnosis of post traumatic stress. In terms of prognosis the psychologist said:

> "This is difficult. If he were able to assure himself that he was in a safe environment and even more so that there was safety and constructive future for his sons, also the opportunity of healing for his elder son, then it is probable that his own difficulties would recede. Should the converse transpire then it would prove to Mr Capi that his efforts, for right or wrong, had been to no avail and a helpless situation compounded such that I cannot speak for his psychological future, suicidal ideation does figure in the assessment. It is further to be noted that Mr Capi sees his own life and future as entirely secondary to the welfare of his son."

6. The psychologist therefore recommended that there should be a substantial period of stability for the family. "Not least so that some of the needs of his elder son can be approached". Although he said that in that context psychological input would be desirable for the appellant as well as his son, he noted that it might prove impractical for both and indeed there is no evidence before us that the appellant is in receipt of any medical or psychological treatment at all.

7. So far as the elder son is concerned, the report of Mr Carrick Smith is based on interviews which took place as Ms Walton properly pointed out at the family's solicitors office with an interpreter present and both on the same day. It is clear however from looking carefully at the report on the eldest son that as she submitted there does not appear to have been any questioning at all of the son and the diagnosis and prognosis of Mr Carrick Smith appears to be wholly dependent upon an acceptance of what he was told about the son's situation by his father, the appellant. He concluded that the son was currently suffering severely from post traumatic stress and was displaying a complex of symptomology typical both of children and adults in this situation. He said that he needed intensive support although that would not be easy only by reason of language. He recommended that a copy of the report be provided to those professionally involved to avoid need for reassessment and said this about the situation on return.

> "In terms of any treatment for Santiljano should he be returned to Albania, this seems beyond realistic consideration. The Communist Party repressed psychology to the point of obliteration (see Appendix Report) leaving a system dependent on medication and institutionalisation (and Santiljano has already had some exposure to this). Rebuilding of psychology is at the point of its first graduates but they have neither clinical

> training nor depth of experience. I cannot therefore be confident of effective provision. Furthermore return to anything like previous stressors (or even a situation reminding of them) carry risk of seriously generalised psychological harm to this boy."

8. Ms Negus laid her primary emphasis upon the report relating to the eldest son and it was her submission that return would first breach Article 3 rights by reason of the risk which had been identified by Mr Carrick Smith and the lack of treatment as she said which existed in Albania. It is perhaps right also to mention at this point that there was a report from the Tirana Hospital before the Adjudicator and before us made on 11 December 2000 which referred to the admission of the son on 16 December 1999 and that he had recovered from in-patient treatment by 21 December 1999, depressive syndrome and neurosis were diagnosed and it appeared that he had been given some medical treatment and that there was a recommendation that he be treated as an out-patient and to be "controlled (under observation) of the psychiatrist for depressive situation every date 13 of each month". It may be that the appellant and his family left Albania whilst such out-patient treatment was still continuing. There is no clear evidence one way or the other but what it does demonstrate is that there had been a recognition on the part of the Albanian hospital that there was a need for continuing treatment of this young child who is now nearly 16 years of age.

9. The issue with which we are concerned is primarily whether for the reasons advanced it can be said that the findings of the Adjudicator are not sustainable. Ms Negus urged us to that course saying that the family had now established a private life in this country where they were well settled and in their own accommodation with the children going to secondary school. It was her essential submission that the disruption to be caused would be so great if the family were now returned that it would effectively be to subject them to inhuman and degrading treatment for the purposes of Article 3 of the European Convention. That is a very high threshold to reach as is clearly illustrated in the European decision in Bensaid the United Kingdom of 6 February 2001 under application number 44599/98. It is perhaps helpful to set out the situation there. Mr Bensaid was a citizen of Algeria who had for a considerable period resided in the United Kingdom ultimately on the basis that he had a right to be here by reason of his marriage to a British citizen but it was subsequently held that the marriage was a sham simply for the purpose of preserving his residency in the United Kingdom

and the leave to remain initially granted to him was withdrawn and the Secretary of State issued directions for his deportation. At that point it was raised that by reason of his medical condition he could not be removed because it would be in breach of his human rights which were then not incorporated formally into English law as they are now by virtue of the Human Rights Act 1998 but which were nevertheless to be observed by the Secretary of State in his removal directions. The medical situation of Mr Bensaid is recorded in the following terms at paragraph 36 set in the decision of the European Court.

> "36. In the present case the applicant is suffering from a long term mental illness, schizophrenia. He is currently receiving medication, Lanzopine, which assists him in managing his symptoms. If he returns to Algeria this drug will no longer be available to him free as an out-patient. He has not enrolled in any social insurance fund and cannot claim any reimbursement. It is however the case that the drug would be available to him if he was admitted as an in-patient and that it would be potentially available on payment as an out-patient. It is also the case that other medication used in the management of mental illness is likely to be available. The nearest hospital for providing treatment is at Bleda, some 75 to 80 kilometres from the village where his family live.
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> 37. The difficulties in obtaining medication and the stresses inherent in returning to this part of Algeria where there is violence and active terrorism are alleged to endanger seriously his health. Deterioration in the applicant's already existing mental illness could involve relapse into hallucinations and psychotic delusions involving self-harm and harm to others as well as restrictions in social functioning, e.g. withdrawal and lack of motivation. The court considers that the suffering associated with such a relapse could in principle fall within the scope of Article 3.
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> 38. The court observes however that the applicant faces the risk of relapse even if he stays in the United Kingdom as his illness is long term and requires constant management. Removal will arguably increase the risk as will the differences in the available personal support and accessibility of treatment. The applicant has argued in particular that other drugs are less likely to be of benefit to his condition and also that the option of becoming an in-patient should be a last resort.

> Nonetheless medical treatment is available to the applicant in Algeria. The fact that the applicant's circumstances in Algeria would be less favourable than those enjoyed by him in the United Kingdom is not decisive from the point of view of Article 3 of the Convention.
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> 39. The court finds that the risk that the applicant will suffer a deterioration in his condition if he is returned to Algeria and that if he did he would not receive adequate support or care is to a large extent speculative. …
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> 40. The court accepts the seriousness of the applicant's medical condition. Having regard however to the high threshold set by Article 3 particularly where the case does not concern the direct responsibility of the contracting state for the infliction of harm, the court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. It does not disclose the exceptional circumstances of the D case where the applicant was in the final stages of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St Kitts."

10. Ms Negus sought to distinguish Bensaid on the basis that the risks were speculative and that the nature of his illness was different and in particular that he could suffer a deterioration in his condition in the United Kingdom even if not removed. She sought to rely on the Court of Appeal decision in Kilic of 27 January 2000 Neutral Citation No. 997005/4 CA. Kilic was a case in which the appellant sought leave to move for judicial review which had been refused at first instance and was concerned only with the question of whether it was appropriate to say that there was an arguable issue for consideration on judicial review. It does not to our mind materially assist this appellant because it reached no conclusion on the matters which he put forward but merely said, as has been accepted in this case, that the issue is arguable. Of more pertinence it seems to us is the later case referred to us by the Secretary of State of K v Secretary of State for the Home Department again heard in the Court of Appeal and reported at 2001 Imm AR. In that case the court was concerned with the question of a return to Uganda where it was said that the medical treatment available was not as easily available or as comprehensive as was the case in the United Kingdom. The Court of Appeal again distinguished the position from D v United Kingdom and referred to I v United Kingdom [1997] Imm AR172 in which the Court of Appeal had

held that albeit appropriate medical facilities in Uganda were inferior to those in the United Kingdom they were available and that it was not unreasonable for the Secretary of State to require the applicant to return to Uganda, although it might have been the case that the position would be different if there were no appropriate medical facilities at all. The fact that the applicant's lifespan and that of her daughter might but not necessarily would be reduced was not a reason for her not returning to Uganda. That proposition and ratio was adopted again by the Court of Appeal in K where they posed the question at paragraph of 11 of the judgment in the following terms:

> "What it comes to is this. Would it be inhuman or degrading treatment to send Mr K back to Uganda on the grounds that he may or may not be able to afford all the treatment that he requires. It does seem to be that if we were to accede to that argument we would be in effect adopting a rule that any country which did not have a health service which was available free to all people within its bounds would be a place to which it would be inhuman and degrading to send someone. I do not consider that the European Court of Human Rights would reach that conclusion. It seems to me that one has to weight up all the circumstances of the case as was done in the case of D and decide whether that test is fulfilled. In those circumstances I am unable to say that the Secretary of State's decision was illegal or irrational or procedurally improper or ought to be revisited by the courts."

11. In adopting that ratio the Court of Appeal was of course echoing the point made by the European Court in Bensaid that not only did the harm have to be looked at but that it was an important consideration whether there was any direct responsibility of the contracting state for the infliction of the harm. Quite clearly there is none such in the present case. For our part we reached the conclusion that it cannot be said that there is not appropriate medical treatment available to the appellant insofar as he needs any and to his son in Albania. The evidence satisfied the Adjudicator. She relied upon the CIPU assessment which we have before us in the October 2002 edition which deals with medical services in Albania at paragraphs 5.56 to 5.59. At 5.58 it says as follows:

> "The University Hospital in Tirana has a neurology and psychiatry clinic with qualified staff and various kinds of medicines available. A Danish NGO is providing therapy (physicians and social workers) within the hospital. A

neurology service is also provided in polyclinics in regional hospitals around Albania."

That effectively follows on from the report of Anna Klein which as we have noted was in the spring of 2000 and talked about the first psychologists graduating in that year and made it clear that the psychology school was well supported with additional under graduates in some numbers studying the subject so that the position will necessarily have improved since her report. It is also significant in our view that there was treatment offered to the son in Albania when it was sought and not simply on a short term but on a long term basis of counselling and for all these reasons we are entirely satisfied on the evidence that the Adjudicator was right in saying that Article 3 would not be breached. We are clear that the very high threshold involved in such treatment is not breached on the facts of this case.

12. That leaves Article 8 to be considered but we note from Bensaid that in any event again it is said there that a high threshold is to be applied and Mr Bensaid was no more successful under Article 8 than he was under Article 3 of the European Convention. We have in the "starred" Tribunal decision of Devaseelan [2002] UKIAT 000702 held that for there to be a violation or engagement of Article 8 under the head of physical or moral integrity there would need to be a flagrant denial or gross violation of the human rights concerned in the receiving country. Since then there has of course been a Court of Appeal decision in Ullah [2002] EWCA Civ 1856 which has held that where the European Convention is invoked on the sole ground of the treatment which an alien refused the right to enter or remain is likely to be subjected by the receiving state and that treatment is not sufficiently severe to engage Article 3 the English court is not required to recognise that any other Article of the Convention is or may be engaged. On the basis of the ratio in Ullah which binds us the Article 8 claim must fail in our view. Even were that not so we do not consider that there would be the flagrant denial or gross violation necessary under the ratio of Devaseelan.

13. Whilst therefore like the Adjudicator we have every sympathy for the appellant and his family, we are satisfied that none of the submissions put before us lead us to the view that the findings of the Adjudicator were based on any error of law or of approach having regard to her factual findings, and that her findings are sustainable. It follows from this that the appeal must be dismissed. We ought to add perhaps that were we considering the matter afresh now on the fact as found by the Adjudicator and having regard to the principles of law which

we have enunciated above we would also be of the same view that the appeal cannot succeed on the basis they are put before us. As we say this appeal is dismissed.

J Barnes
Vice President