



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/46629/2013

THE IMMIGRATION ACTS

Heard at Bradford

On 9th September 2014

**Determination
Promulgated**

On 8th October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

**MR ALSANA JAMMEH
(ANONYMITY NOT DIRECTED)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Unrepresented

For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Gambia who was born on the 16th March 1969. He appeals, with permission, against the dismissal of his appeal by the First-tier Tribunal (Judge Borsada) to refuse his application for discretionary leave to remain in the United Kingdom (outside the Immigration Rules) and to remove him from the United Kingdom.

2. The appellant's application for leave to remain was based upon his claim that his removal from the United Kingdom would be contravene his right to freedom from inhuman and degrading treatment under Article 3 and right to respect for his physical and moral integrity under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. These claims were in turn based upon the undisputed fact that the appellant is currently receiving treatment in the UK for a urethral stricture.
3. At paragraph 9, the First-tier Tribunal judge determined the appeal under Article 3 of the Convention in the following terms:

I note the appellant's sole reason for staying in the UK is to continue with his medical treatment. I do however agree with the respondent that there is a lack of authoritative evidence concerning this treatment including the 'on going' nature of such treatment and prognosis. There is no medical report provided which indicates the seriousness of the condition or whether as appears to be claimed that it is in any sense life threatening without treatment. Furthermore, the appellant has provided no evidence as to why he would not be able to obtain treatment in Gambia other than the assertion that it would not be available. Given the lack of evidence I can make no findings of fact on any of these issues and the appellant has failed to meet the burden of proof. The appellant clearly has a subjective fear of being returned to Gambia but he has provided no evidence to support his claim that this fear would be realised and the high threshold in article 3 cases has simply not demonstrably been reached. There is certainly not the near the certainty of death on his return that is required in article 3 cases and he has not established that he would suffer inhuman and degrading treatment.

4. At paragraph 10, the First-tier Tribunal judge considered Article 8 within the context of the appellant's social, cultural and family ties to the United Kingdom. He did not however consider it within the context of the medical issues raised in the appeal.
5. In refusing permission to appeal to the Upper Tribunal, Designated Judge Garratt noted that the appellant claimed that the First-tier Tribunal judge had failed to apply the decision in N v United Kingdom [2008] 47 EHRR 885 to the facts of his case. However, the Designated Judge concluded that this ground was not arguable because there was a lack of evidence concerning the treatment for and prognosis of the appellant's medical condition, or to show that any necessary treatment was unavailable in Gambia.
6. In granting a renewed application for permission to appeal, Upper Tribunal Judge Macleman noted that the appellant now relied upon JA and ES [2009] EWCA Civ 1353, and concluded that there appeared "to be principles in relation to which the case under article 8 may require further analysis".
7. Although this case was listed for an oral hearing, the appellant has always stated that he wished for his appeal determined without a hearing. It therefore came as no surprise to discover that he had not attended the hearing, of which I am satisfied he had been served with notice. I therefore decided to determine his appeal on the papers.

8. In his renewed application, the appellant implies that the United Kingdom may have assumed responsibility for his treatment and that he should therefore “be granted ELR [exceptional leave to remain] in the light of (JA) and (ES)”. He adds that “there was no finding by the Tribunal that I had much if any hope of securing treatment if returned to Gambia or as to the severity and consequences of removal”.
9. It is clear from the terms in which the appellant’s renewed application is couched, that his argument is founded entirely upon the observations of the Court of Appeal in JA (Ivory Coast) and ES (Tanzania) [2009] EWCA Civ 1353. It may thus be helpful to summarise those principles before returning to consider the First-tier Tribunal’s analysis of the instant appeal.
10. Firstly, “assumption of responsibility” in this context is neither a term of legal art nor a description of a legal obligation [paragraph 7 of the judgement in JA (Ivory Coast)]. Secondly, there is no fixed relationship between Art. 3 and Art. 8. Typically a finding of a violation of the former may make a decision on the latter unnecessary; but the latter is not simply a more easily accessed version of the former. Each has to be approached and applied on its own terms. It is not therefore the case that the appeal must either succeed under Article 3 or not at all [paragraph 17]. Thirdly, in order for Article 8 to be engaged in a medical case, it is necessary for the appellant to show that the United Kingdom has made a commitment, initially prompted by compassion and subsequently by a sense of moral obligation, to providing the appellant with NHS treatment [paragraph 23]. Fourthly, *if* it is found that such a commitment has been made in an individual case, then this is *capable* of tipping the proportionality balance against the appellant’s removal in furtherance of the economic well being of the country.
11. The First-tier Tribunal did not consider any of the above principles. Instead, it focussed entirely upon the test for engagement of Article 3 in medical cases, and considered Article 8 only within the context of the appellant’s social, cultural and family ties to the United Kingdom. In failing to consider whether the appellant’s removal might also amount to an unjustified breach of his right to moral and physical integrity, by reason of the interruption it would cause to the treatment he is currently receiving for his medical condition, the Tribunal erred in law. However, this error was immaterial to the outcome of the appeal. Although the appellant openly seeks to indentify the facts of his case with those of JA (as opposed to those of ES, in respect of whom the Court of Appeal found that Article 8 was not engaged) the fact remains that there was no evidence before the First-tier Tribunal to show that the United Kingdom had made any form of commitment to providing the appellant with long-term medical treatment, whether out of a sense of compassion, moral obligation, or otherwise. The appellant entered the United Kingdom as a Tier 5 TW (religious migrant). His treatment on the National Health Service was thus an incidental benefit of his having leave to remain in the United Kingdom in that category, rather than the reason for it being granted. The appellant cannot therefore have had any legitimate expectation that he would be permitted to remain in the

United Kingdom, beyond the limited period of his leave to remain, for the purpose of continuing to receive treatment on the NHS. Article 8 was not therefore engaged by the facts of the appellant's case, and the issue of the proportionality of his removal to Gambia did not therefore arise for consideration within this context.

Decision

12. The appeal is dismissed.

Anonymity not directed.

Signed

Date

Deputy Judge of the Upper Tribunal