



IAC-AH-VP-V1

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

Appeal Number: DA/01004/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 1 December 2015**

**Decision & Reasons Promulgated
On 15 January 2016**

Before

**THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
JUDGE OF THE FIRST-TIER TRIBUNAL ESHUN**

Between

**LFW
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Kandola

For the Respondent: Ms Justine Fisher of Counsel, Duncan Lewis & Co Solicitors
(Harrow office)

DECISION AND REASONS

1. The appellant is the Secretary of State who appeals with permission against a decision of the First-tier Tribunal Judge Nichols promulgated on 16 July 2015. That decision allowed an appeal on human rights grounds against a deportation order dated 15 May 2013. We refused the appeal at the hearing and advised that we would give our decision in writing.

History

2. The original appeal against the deportation order was refused by a First-tier on 20 December 2013. That decision was overturned by Upper-tier Tribunal Judge Goldstein by a decision dated 26 March 2014. He remitted the appeal back to the First-tier Tribunal to remake the decision. For reasons connected to the respondent's health the appeal was not heard until July 2015.
3. The respondent is a Jamaican national who originally came to the UK in 2001. On 17 December 2013 he was granted ILR as the spouse of a settled person. He was subsequently convicted at Snaresbrook Crown Court on 12 October 2011 of supplying controlled drugs (class A) and sentenced to 38 months' imprisonment. He was notified of his liability for deportation. He completed his sentence on 27 July 2012. On 22 August 2012 he claimed asylum. This was refused on 15 May 2013 and he was served with a deportation order.
4. Under Section 32 of the UK Borders Act 2007 the respondent is subject to automatic deportation unless one of the exceptions in Section 33 applies. In this case the respondent claimed that his deportation would breach his rights under Articles 3 and 8 of the ECHR and thus Exception 1 applied. The respondent was not present at the hearing before the FTT he was unfit to attend or give evidence. That was vouched by various medical reports. Indeed he collapsed at his original hearing and was taken by ambulance to hospital. Evidence was led on behalf of the respondent by Dr Arthur Anderson, Consultant Clinical Psychologist and Miss Julie Squire, a nurse, who is a friend and the appellant's present carer. The FTT had a witness statement from the respondent as well as a number of medical reports.

Background

5. The respondent's evidence was to the effect that when living in Jamaica he had formed a homosexual relationship. He had many friends who were homosexual or bisexual as well as an uncle who was homosexual. In 1991 or 1992 he had been shot in the head in the course of a homophobic attack. He spent a year in hospital. He subsequently left Jamaica in 2001 initially going to the Cayman Islands before moving to the UK. His uncle was subsequently poisoned by a homophobic gang and his son by a former partner was shot in the head and died in 2007. He said that was in substitution for himself. Judge Nichols accepted that that the respondent had been the victim of some form of serious trauma before he arrived in the UK. He noted that there was only his account that it was a homophobic attack but he noted the existence of homophobic attacks in Jamaica as set out in the country guidance cases summarised in paragraph 33 of his decision.
6. Some time after 2007 the respondent started to experience epileptic fits. Although he had retrained as a mechanic he was unable to obtain work because of his epilepsy. In addition he began to suffer from asthma. He

was confirmed as medically unfit for work. The evidence from Dr Anderson and the reports before Judge Nichols showed that the respondent was suffering a traumatic brain injury and major depression with psychosis features. The respondent experienced seizures which in turn contributed to his depression and psychotic symptoms of auditory hallucinations and mild delusional system. He had an intellectual ability which placed him in the mild retarded range. There had been a significant deterioration in the respondent's symptoms between the two interviews that he had had with him. He was now not aware of the day of week or the year. He had great difficulty holding attention. His personal appearance was dishevelled. There was a loss of brain tissue of between three and five percent. He suffered from PTSD. He had recently begun to remember incidents of sexual assault on himself either brought on or been brought on by PTSD. He was unable to function in the community, look after his day-to-day needs or manage his essential medication. There was "zero" chance of his reoffending because of his general medical condition.

7. Dr Anderson was clear in his evidence that the respondent would suffer a serious psychotic breakdown if efforts were made to remove him from the UK and that the respondent would in effect have to be comatose before such a removal could take effect.
8. Miss Squire gave evidence that she provided accommodation for the respondent and acted as his carer. When she was at work or out she asked her daughter to look in on him and see that he was alright. She administered his medication.
9. Counsel for the respondent had submitted that there would be a breach of Article 3 simply by the act of removing the respondent from the UK if that would either cause a severe psychotic breakdown or would result in the application of substantial sedation to effect the removal.
10. Judge Nichols found that there was a real risk that the practical arrangements for the removal of the respondent from the UK would cause consequences of sufficient seriousness to amount to inhuman and degrading treatment which would place the UK in breach of its obligations under Article 3. He also found that this was one of these very rare cases where the compelling features outweigh the public interest and that deportation of criminal criminals. He found that the deportation of the respondent would amount to unlawful breach of his Article 8 rights.

Submissions

11. The Secretary of State submitted grounds of appeal which challenged the findings on both Article 3 and Article 8. Mr Kandola adopted these but accepted that no issue arose from any consideration of disparity in medical treatment between the UK and Jamaica. Dealing first with Article 3 he accepted that the judge had applied the law correctly and had regard to the decisions of the Court of Appeal in **J [2005] EWCA Civ 629** and the House of Lords in **N (FC) [2005] UKHL 31**. Mr Kandola emphasised that

it was not part of the Secretary of State's policy to sedate mentally ill returnees in order to effect their return. The Secretary of State would act on medical advice. Accordingly there was no issue of a breach of Article 3 as a result of sedation. In any event he questioned the finding at paragraph 40 to the effect that administering substantial sedatives to an otherwise competent individual for the purpose of effecting a removal was probably inhuman and degrading treatment. While he accepted that proposition as a generality he suggested that it did not apply in this case.

12. On Article 8 it was acknowledged that the respondent did not meet the criteria under paragraph 398 and that the exceptions under paragraph 399 did not apply. Accordingly the issue was whether or not there was a sufficiently compelling case. In his submission Judge Nichols had not taken sufficient cognisance of the fact that the respondent did not require full-time care and that medical facilities were available in Jamaica. He had further failed to give sufficient weight to the public interest in the deportation of foreign criminals.
13. The respondent submitted a very full and helpful Rule 24 response which analysed the factual background and the medical evidence before the First-tier Tribunal in some detail. In essence the submission was that this was a careful and well reasoned decision which correctly applied the law. In submissions Miss Fisher said that the issue of sedation was raised in the course of the hearing at the Tribunal. However the submissions from Mr Kandola conflated the issue. The question was whether or not the respondent was fit to travel. It had been found that he was not. There was no evidence of rebuttal from the Secretary of State. The evidence thus was therefore clear that the act of removal would result in a severe psychotic breakdown. On Article 8 she submitted that there was a careful analysis of the evidence and in paragraphs 51 and 52 he set out his reasons for allowing the claim under Article 8. There was no error of law.

Decision

14. The decision of Judge Nichols is careful and well reasoned. He had the benefit of listening to substantial medical evidence from Dr Arthur Anderson and had before him a number of other medical reports from other practitioners including the psychiatrist. He did not hear evidence from the respondent as he was medically unfit to attend or give evidence. He did however have a statement from him and heard evidence from his carer Miss Squire. He has recorded this evidence in detail and the findings in fact are not challenged.
15. It is accepted that Judge Nichols applied the correct legal test. It is summarised at paragraphs 41, 42 and 43. In **N (FC)** Lord Brown said that notwithstanding that a state is entitled to deport aliens the exercise of such a power may itself constitute Article 3 ill-treatment. Exceptionally this could include if the applicant's removal would sufficiently exacerbate the suffering flowing from a naturally occurring illness. In these cases the court will assess whether the removal is itself to be characterised as

Article 3 ill-treatment in light of the present medical conditions. It is therefore for the Tribunal to consider whether the act of removing the respondent would amount to Article 3 ill-treatment. It is not, as Mr Kandola suggested, to be left to the Secretary of State to determine whether he can be removed safely and without infringing his Article 3 rights.

16. The evidence that Judge Nichols accepted was that the respondent was not fit to travel and could not do so without causing a severe psychotic breakdown or applying sufficient sedative as to render him comatose. Even without considering the application of sedatives there was in our opinion sufficient evidence that his removal would cause Article 3 ill-treatment. There is therefore no error of law.
17. That is sufficient to dispose of the appeal. However for completeness we should say that we find no error in the treatment of Article 8. It is accepted that this is a decision outwith the Rules. Judge Nichols recognised that for such an appeal to succeed there must be very compelling reasons outweighing the very substantial public interest in the deportation of foreign criminals. He sets out his reasoning from paragraphs 45 through to 52. He concludes that this is one of the very rare cases in which the compelling factors outweigh the public interest.
18. The appeal is refused.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

LORD BOYD OF DUNCANSBY
Sitting as a Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

Date:

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

LORD BOYD OF DUNCANSBY

Sitting as a Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

Date: