



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00848/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 2 December 2019

Decision & Reasons Promulgated
On 17 December 2019

Before

THE HON. MR JUSTICE LANE, PRESIDENT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DN

(ANONYMITY ORDER MADE)

Respondent (Claimant)

Representation:

For the Appellant: Mr Bates, Home Office Presenting Officer

For the Respondent: Mr Karnik, Counsel instructed by Broudie Jackson & Canter
(Claimant) (Dale House)

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Bradshaw who, in a decision dated 2 June 2018, allowed the claimant's appeal on human rights grounds against the decision of the Secretary of State who had refused to grant the claimant leave to remain.
2. The procedural history of this case is somewhat lengthy. The most recent aspects of it are as follows. Following the grant of permission to challenge the decision of

Judge Bradshaw, the matter came before Deputy Upper Tribunal Judge Juss, sitting in Manchester. Judge Juss found errors of law in Judge Bradshaw's decision. He set it aside and then proceeded to re-make the decision by dismissing the claimant's appeal. That decision of the Deputy Judge was challenged by the claimant before the Court of Appeal and, by order of October 2019, the Court of Appeal by consent allowed the claimant's appeal against the Deputy Judge's decision.

3. The statement of reasons sets out the agreed basis upon which it was decided by the parties that the Deputy Upper Tribunal Judge's decision could not stand. That is reflected in the order of the court. More problematic, however, is the following provision of the court's order:-

"The matter be remitted de novo to the Upper Tribunal for a fresh determination of the Appellant's appeal against the Respondent's decision dated 26 January 2016 to refuse the Appellant's human rights application under Articles 3 and 8 of the European Convention of Human Rights."

4. At the beginning of the proceedings before me, I questioned the representatives as to the contents of that paragraph. It is manifest on its face that the Upper Tribunal was told by the Court of Appeal that it should determine the claimant's appeal against the Secretary of State's decision of 26 January 2016. That in turn indicates that there was some legal problem with Judge Bradshaw's decision, such that that decision fell to be set aside.
5. Otherwise, the terms of the order would have been very different. They would have been that the Upper Tribunal is to consider the Secretary of State's challenge to Judge Bradshaw's decision. It would not have been a difficult matter to make that clear.
6. Nevertheless, both representatives informed me that they had understood the position to be that, in the light of the setting aside of the Deputy Judge's decision, the Upper Tribunal was in fact in the position of considering the Secretary of State's challenge to Judge Bradshaw's decision. I of course make no criticism of the Court of Appeal. It is hard-pressed and heavily relies in matters of this kind, where proceedings have been settled by consent, upon the assistance and co-operation of the parties. In the circumstances, it is regrettable that the parties allowed that part of the court's order to stand. They should have drawn attention to the difficulty that I have just outlined.
7. Nevertheless, by consent the proceedings before me are to decide whether Judge Bradshaw was wrong in law. In that regard I consider the grounds of application against her decision. Having set out what is said to be the relevant law, including N v Secretary of State [2015] 2 AC 296 and N v United Kingdom [2008] 47 EHRR 885, the grounds noted that the First-tier Tribunal Judge acknowledged that the claimant's mental health fluctuated, and that there was no clear or definite diagnosis of his mental health. Therefore, whilst the mental health condition of claimant is said to be serious, it was submitted that it did not cross the still very high threshold of being exposed to a serious rapid and irreversible decline in his state of health, resulting in intense suffering, or to a significant reduction in life expectancy. Rather,

it is said that the claimant's condition required treatment with medication, as opposed to self-medication with alcohol and cannabis. More importantly, the grounds said that the claimant needed to demonstrate that treatment would not be available at the date of the hearing, rather than relying on the findings made previously at that hearing in 2009.

8. In order to test those grounds, it is necessary to have regard to Judge Bradshaw's decision. She noted that the claimant had faced a decision to deport as long ago as 2008, although in January 2009 his appeal against that decision had been allowed on the basis that to remove him would be a breach of his Article 3 rights because he was assessed to be then at high risk of suicide. That decision of the Tribunal was not challenged by the Secretary of State and the claimant was accordingly granted discretionary leave, expiring in 2010.
9. An application was made in 2010 by those advising the claimant for further leave as it was thought, wrongly, that the application was made in time. It was not until 2016 that the application was refused and that generated the decision now under challenge.
10. The First-tier Tribunal Judge who heard the claimant's appeal in 2017 dismissed it; but that decision was set aside for a complete re-hearing, and it was on that basis that the matter came before Judge Bradshaw. She noted the submissions of the parties including Mr Karnik, who then as now appears on behalf of the claimant. She dealt in detail with the two reports before her of a Consultant Psychiatrist, Dr Ghosh, who had examined the claimant. Having gone into detail regarding those reports, Judge Bradshaw accepted that there was no clear or definitive diagnosis of the claimant's mental health. He had, however, variously been diagnosed with symptoms of bipolar, affective disorder, schizophrenia, PTSD and alcohol problems.
11. The claimant submitted before Judge Bradshaw that there had not, in fact, been a material improvement in his mental health since 2009. His health had fluctuated and was currently in a more precarious state than in 2009 and he was at very serious risk of suicide. He had developed a mistrust of the medical profession and there was nothing to suggest he would have access to, or even be in a state to avail himself of, the treatment he required. His time in the United Kingdom at this point had, of course, increased. By contrast his absence from Burundi, his own nation, had lengthened.
12. At paragraph 41, Judge Bradshaw turned to her assessment of the Article 3 risk. She acknowledged and applied the very high test set out in the cases of N to which I have made reference. She reminded herself that the question she had to ask was whether the claimant's condition had reached a critical stage in terms of the N criteria. She concluded that the evidence overall "does suggest that his illness in itself is at a critical stage such as to trigger Article 3". She said that this was not a question of any disparity of treatment between the United Kingdom and Burundi. She held:-

"The 2009 determination addressed the inadequacy of the ability to access proper treatment in Burundi and the respondent has adduced no evidence to undermine

that finding. Indeed, the appellant's reluctance to access help and his mistrust as already outlined might well mean that he would have a lack of access to treatment or would be unwilling to seek treatment and that his risk of suicide would increase."

13. In paragraph 42, the judge returned to the 2009 decision which concluded with an undisturbed finding that the claimant's Article 3 risk met the relevant threshold. She attributed weight to that. She also attributed considerable weight to the reports of Dr Ghosh. She accepted that another doctor, Dr Raffi, in 2011 had reached a different conclusion but she considered that that conclusion had been outweighed by the other evidence. She then made reference to delay, in weighing the public interest considerations under section 117B.
14. In paragraph 43, Judge Bradshaw concluded that she was satisfied the claimant had discharged the burden of showing that Article 3 was engaged on medical grounds. She accepted the risk of suicide was real and must be taken seriously. She found that he was suffering from a severe mental illness and his circumstances reached the high Article 3 threshold on the basis of his health problems, coupled with a very high risk of suicide. She concluded by saying "The appellant's moral and psychological integrity are at issue and his circumstances also engage Article 8".
15. I have set out the Secretary of State's grounds of challenge. I have also had regard to Mr Bates' oral and written submissions. In essence, Mr Bates submits that the most recent report made it evident that the removal of the claimant to Burundi would not in itself affect his mental health or the risk to suicide. There was a high risk of suicide present in the United Kingdom; but this was due to the fact that the claimant was not accessing appropriate medical treatment. This message came through very clearly from the second of the reports of Dr Ghosh of April 2018. This report indicated that the claimant's suicidal ideation had to do with his decision that he would commit suicide within a short period of time on the death of the Queen and alternatively that he was walking into traffic, intending or at least being reckless as to whether or not he would be hit by a vehicle. Unlike many cases involving suicidal ideation, there was, according to Mr Bates, no suggestion that the claimant would be so in fear of being removed to Burundi that he would seek to commit suicide for that reason.
16. I have had careful regard to those submissions. I have also had regard to the oral and written submissions of Mr Karnik on behalf of the claimant. He submits that this is in the nature of a perversity challenge by the Secretary of State to the First-tier Tribunal Judge's decision, masquerading as such, but that in reality it is no more than a disagreement with conclusions that were open to the judge on the evidence before her.
17. This is, I consider, a highly unusual case. It is striking and cannot be ignored that there was a finding by a judicial fact-finder as long ago as 2009 that the claimant was then at the requisite risk. That finding was not challenged by the Secretary of State. Accordingly, Mr Karnik submits that Judge Bradshaw was entitled, indeed obliged, to regard that finding of the judge in 2009 as the starting point and to see what, if

anything, had changed since that time. I consider that there is force in that submission.

18. Nevertheless, Mr Bates is correct to say that it was necessary for Judge Bradshaw to have regard to all the evidence, including the more recent evidence, in order to make up her own mind about this matter.
19. There are aspects of Judge Bradshaw's decision that can I find be criticised. At paragraph 42, she seems to put into the equation, in determining the Article 3 issue, the delay by the Secretary of State in responding to the out of time application made for leave on behalf of the claimant, when it is plain that, in determining Article 3 issues, "balancing" matters of that kind have no part to play.
20. However, the main thrust of the judge's findings are in my view not vitiated by legal error. The judge had before her the two reports of Dr Ghosh. Mr Karnik drew my specific attention to the earlier of those reports, dated 19 November 2016, the last four paragraphs of which contain the following stark assessment:-

"Any threat of removal will have a hugely detrimental impact on his mental health. This has already been recognised by a previous judge and is even more true at present. He is quite severely ill with command hallucinations which makes his health and his safety at risk. Any threat of deportation will lead to him killing himself."
21. The paragraph then ends by referring to the claimant as constantly ruminating in terms of suicidal thoughts and in believing that his future is foreshortened and that he is receiving command hallucinations from God, who is telling him he is about to die. The paragraph ends "Any threat of deportation therefore is going to lead to deterioration in his mental health which will make him a serious risk in relation to himself".
22. The more recent report of Dr Ghosh does not contain any specific reiteration of that stark conclusion. This report does, however, make reference to the earlier report. If Dr Ghosh had intended in any way to resile from the stark conclusions she had earlier set down, I consider that one would have expected to find something to that effect in her more recent report. I cannot see anything of that kind in it.
23. The overall situation as it was before Judge Bradshaw was, therefore, that there was a set of stark findings in the earlier report of November 2016 which had not been qualified by the later report. There was also the undisturbed judicial finding in 2009 that, as matters then stood, the claimant was at real risk of Article 3 harm, if removed. It is clear from Judge Bradshaw's decision that she did not consider there had been any improvement in the claimant's state since that time.
24. Notwithstanding what I have said about delay in the context of Article 3 risk, it is clear from paragraph 41 that Judge Bradshaw applied the very high threshold set out in the cases of N. I therefore conclude that there was material before the judge that supported her decision to allow the appeal on Article 3 grounds. I consider that she has sufficiently reasoned her conclusion. But even if that were not the case, on the basis of the reports of Dr Ghosh, I would have reached the same conclusion.

25. This is, in other words, not a case where the risk of suicide, properly interpreted, would in all respects be the same whether the claimant was removed from the United Kingdom or not. In any event, it appears to me that by analogy with the so-called “deathbed” cases that fall within N, this case is closely analogous. We have a claimant who is very seriously ill indeed. His life could end at any moment.
26. Although it is not strictly necessary for me to do so in light of my conclusion regarding Article 3, I shall address the challenge made to Article 8. Judge Bradshaw dealt with this briefly. She did so in terms of the claimant’s moral and physical integrity being at issue, if he were to be removed. Looking at the matters through the lens of the judgment of Laws LJ in GS (India) [2015] EWCA Civ 40, the mental health of the claimant can become properly a subject of consideration in Article 8 terms, provided- importantly- that one reaches the stage of considering proportionality under Article 8(2).
27. I fully accept that because of the claimant’s mental health, he has no family life and that his private life in the United Kingdom is severely circumscribed, compared with that of others who do not suffer from his problems. Nevertheless, he has been here for a considerable period of time and had been in June 2018, when Judge Bradshaw signed her decision. He has a private life of a kind, which properly fell for consideration.
28. I emphasise, however, that the main conclusion of Judge Bradshaw and my main focus in these proceedings has been Article 3. For the reasons I have given, I conclude that there is no error of law in Judge Bradshaw’s decision, such that I should set it aside pursuant to section 12 of the Tribunals, Courts and Enforcement Act 2007, and so her decision stands.
29. The Secretary of State’s appeal is dismissed.

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.

Signed

Date 11 December 2019

The Hon. Mr Justice Lane
President of the Upper Tribunal