IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01636/2015

THE IMMIGRATION ACTS

Heard at Field House
On 6 October 2015

Decision & Reasons Promulgated
On 15 October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR. DAT VAN NGUYEN
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Mr. T. Wilding, Home Office Presenting Officer
For the Respondent: Miss. C. Record of Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Barker who allowed Mr. Van Nguyen's appeal against the Secretary of State's decision to refuse leave to remain on the basis of human rights.

2. For the purposes of this decision I shall refer to the Secretary of State as the Respondent and Mr. Van Nguyen as the Appellant, reflecting their positions as they were before the First-tier Tribunal.

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3. Permission was granted on the ground that it was arguable that the judge erred in allowing the appeal under Articles 3 and 8 ECHR and in relying on GS (India) [2015] EWCA Civ 40. It was arguable that the judge erred in finding that there was a real possibility of a transplant within a short space of time if the Appellant's brother had been given entry clearance.

Submissions

4. At the hearing Mr. Wilding submitted that the decision lacked proper engagement with Article 3. I was referred to paragraph [34]. The judge found that the difficulty obtaining treatment in Vietnam would not breach Article 3. However he then identified other factors in relation to Article 3, but there was no evaluative exercise under Article 3.

5. Secondly, he submitted that the finding that there was a real possibility of a transplant in a short space of time was not a finding available to him on the evidence [35]. He submitted that the possibility of a transplant was not anything to do with Article 3. There was no evidence that the Appellant's brother had been tested to see if he was compatible and it was wrong to say that he would be. The evidence was that the Appellant's brother was coming to the United Kingdom in order to be tested. The details of the refusal of the brother's appeal were not before the First-tier Tribunal but he had not made an application to come for the transplant operation but for tests. He submitted that the analysis of Article 3 was unlawful in the way that it had been carried out.

6. He submitted that the judge appeared to allow the appeal under Article 3 but then went on to consider Article 8. Paragraph [35] included an analysis of Article 3 as well as the commencement of the judge's consideration of Article 8. In relation to Article 8, there was no consideration of sections 117A-D. There was no consideration of the strong public interest in such cases. I was referred to the case of MM (Zimbabwe) [2012] EWCA Civ 729. I was also referred to paragraphs [45] and [46] of Akhalu (health claim: ECHR Article 8) [2013] UKUT 400 (IAC). There was no engagement with the levels of treatment available in Vietnam or an acknowledgement that Article 3 not been made out. There was no engagement with paragraph [46] of Akhalu in the Article 8 analysis.

7. Little weight should have been given to the Appellant's private life as he had never had lawful leave. I was referred to [47] of Akhalu. Rose Akhalu had been lawfully in the United Kingdom and had been entitled to medical treatment from the NHS on that basis. There was a very different factual matrix here and the judge had not engaged with these issues.

8. In conclusion he submitted that, having found that Article 3 would not be breached by the fact that the Appellant would have difficulty obtaining treatment in Vietnam, consideration of Article 3 should have stopped there. The other factors to which the judge referred in [34] should have gone to his consideration under Article 8 not under Article 3.

9. Miss. Record submitted that the judge had been entitled to reach this conclusion. I was referred to [22] which showed that the judge was aware of the Appellant's circumstances and had considered everything including treatment in Vietnam. The country of origin information was before the judge. In relation to Article 3 it was submitted that he had correctly applied the most up-to-date authority. I was referred to [70] and [71] of GS which discuss transplant in the case of the appellant GM. The transplant was considered in the context of Article 3. The difference was that GM's donor was in the United Kingdom, whereas here the Appellant's brother would have to travel to the United Kingdom.

10. It was submitted that the Appellant's brother was offering himself as a donor and therefore there was a "real possibility of a transplant", which accorded with [70] of GS. It was submitted that Article 3 had been correctly handled in [34]. The real possibility of a transplant was a relevant factor as set out in the test in GS from the Court of Appeal. The finding that Article 3 had been violated had been made applying the correct law [35].

11. In respect of Article 8, the judge had taken into account every nuance and his findings were sustainable. In [36] he made clear that any grant of leave would only be limited leave as it was for the investigation of the potential donor. In relation to Akhalu it was submitted that she had already had the transplant, and it was ongoing treatment that was required. This was not a case where medical treatment would be continually required as the Appellant could return to his family in Vietnam after the transplant.

12. In conclusion she submitted that the judge was aware of the fact that the donor was in Vietnam but he still found that there was a real possibility of a transplant, which finding was open to him. Had entry clearance been granted to the Appellant's brother, the Appellant would have had the transplant and would have returned to Vietnam. The judge had made no error of law in finding that there was a real possibility of a transplant.

13. In response Mr. Wilding submitted that [70] of GS stated that it "may" be a question of whether removal would violate Article 3 and was not a definitive test. He submitted that there was no evidence before the First-tier Tribunal that the brother's presence in the United Kingdom would have led to a transplant. There was no evidence that they were compatible. The notice of decision refusing entry clearance was not before the First-tier Tribunal but financial issues had been raised and it was not just the case that the application had been refused because the Appellant did not have leave in the United Kingdom. If the Appellant were granted leave it did not follow that his brother would be able to gain entry clearance. In the absence of evidence that the Appellant and his brother were a match, the finding that was a real possibility of a transplant was irrational as there was no evidence on which such a finding could be based.

14. In relation to proportionality under Article 8 he relied on the case of Akhalu regarding the very strong public interest in medical cases.

Error of law decision

15. I have carefully considered the case of GS, in particular [70] and [71] relating to the appellant GM. I find that the facts relating to GM were significantly different in two important respects. First, the proposed donor was in the United Kingdom and secondly it had been established that the proposed donor was compatible.

16. In the Appellant's case, the Appellant's brother is in Vietnam, not in the United Kingdom. The evidence before the First-tier Tribunal was that his application for entry clearance had been refused.

17. Secondly, while there was evidence before the judge that the Appellant's brother had offered to donate his kidney, there had been no investigations as to whether he was a compatible donor. He had sought entry clearance in order to be tested to find out whether he would be compatible with the Appellant. There was therefore no evidence before the judge that the proposed donor was compatible.

18. In [70] of GS it states "it was clear that the proposed donor […] was compatible" before going on to state "If there is a *real possibility* of this transplant *in the near future* […] there may be a question whether GM's removal from the United Kingdom before it is carried out would violate Article 3 *on the specific footing* that to deprive him of such an *imminent* and transformative medical recourse amounts to inhuman treatment "(my emphasis). There is no indication here that the Appellant's brother is a compatible donor. Therefore to find that there is a real possibility of a transplant given that there was no evidence of a compatible donor is a finding which is not open to the judge.

19. GS also refers to the real possibility of the transplant "in the near future" [70]. It refers to a possible violation of Article 3 "on the specific footing" of depriving him of an "imminent" medical recourse. Given that the Appellant's brother has been refused leave to enter, and given that there is no evidence that he is compatible, a transplant cannot be described as "imminent". The judge finds in [35] that the treatment was imminent but this finding is not open to him on the facts. He also states that there was a "real possibility of a transplant in a short space of time had the visa been granted to the Appellant's brother". However, the visa was not granted, and there was no evidence of compatibility, so it cannot be said either that there was a real possibility of a transplant or that it would be "in a short space of time".

20. While I find that [70] and [71] of GS show that the possibility a transplant can be considered in the context of Article 3, I find that the finding that there was a real possibility of a transplant in the near future was not a finding open to the judge on the evidence before him. Having found that

the decision did not breach Article 3 by virtue of the difference in health care available in Vietnam, which finding was not challenged by the Appellant, the consideration of a transplant in the context of Article 3 was predicated on a finding of fact that was not open to him. I find that this is an error of law in respect of a material matter.

21. In relation to the judge's consideration of Article 8, this is also based on the finding that there is the real possibility of imminent treatment [35]. Further, the consideration of the public interest is inadequate, especially given that this is a case involving medical treatment.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

The appeal is remitted to the First-tier Tribunal for rehearing.

The Appellant is directed to provide up-to-date medical evidence for the rehearing.

No anonymity direction is made.

Signed Date 14 October 2015

Deputy Upper Tribunal Judge Chamberlain