IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05801/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 1st April 2015	**On 26th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

MR AMADOU JALLOW
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Dr Mynott, Counsel
For the Respondent: Mr G Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Amadou Jallow, a citizen of the Gambia born 10th February 1989. He appeals against the decision of the Respondent made on 28th July 2014 to refuse to grant asylum and to remove him from the United Kingdom. The Appellant appealed against that decision and his appeal was heard on 11th September 2014 by First-tier Tribunal Judge Birrell who dismissed it. Permission to appeal was granted and on on 5th January 2015 having heard submissions I found that there was a material

error of law in the determination of Judge Birrell in that she had applied the wrong version of paragraph 276ADE(vi) of the Immigration Rules. Having set her decision aside I now proceed to remake the decision.

2. The Appellant arrived in the UK in October 2013 with a visit visa having made a number of previous visits funded by an English couple, Mr and Mrs Prendergast, who at that time supported him and his sisters. He began to suffer from headaches and when he had an MRI scan it was discovered that he had a brain tumour. This was removed by surgery at Preston Royal Infirmary and he then had a course of radiotherapy which finished in March 2014. He has other health problems including dwarf deficiency which gives him the appearance of a child of around 10 to 12 years of age. Judge Birrell accepted that the removal of the tumour had been deemed a success but that it had left the Appellant with significant health problems because it had caused pituitary damage which gives rise to a lifetime requirement for three medications, namely Hydrocortisone, Desmopressin and Levothyroxine. She had medical evidence from an oncologist at the Christie Hospital which confirmed that the Hydrocortisone must be taken three times a day and if the Appellant stopped taking it he would rapidly become very unwell. If he developed an infection or other illness he would, according to Dr Higham, "certainly die". Dr Higham said that it is absolutely vital that the Appellant takes the medication every day for the rest of his life. Desmopressin has to be taken three times a day in order to concentrate the Appellant's urine and failure to take that would result in him rapidly losing significant amounts of fluid resulting in dehydration and to a high sodium level from which he could subsequently die. Dr Higham said that this could happen very quickly - within 24 hours. The Levothyroxine is to replace the thyroxine that the Appellant does not produce as a result of the deficiency in his pituitary gland. He could also die from this but it would not be as rapid as any death from the need for Hydrocortisone or Desmopressin. The medical report states that the Appellant requires other medication to improve the quality of life such as testosterone and a growth hormone. This medication is not vital to his survival but if he remained in the UK he would have access to it.

3. Judge Birrell also made findings on the availability of healthcare for the Appellant in the Gambia, findings which I preserved. She cited and relied upon the COIS Report on the Gambia along with more specific information provided by the Appellant's representatives. The COIS Report essentially said that there is a periodic shortage of medicines and other medical supplies and the long process involved in the procurement of pharmaceutical supplies requires improvement. The evidence from the representatives was as follows:

   - There are no endocrinologists and no oncologists in the Gambia.
   - Chemotherapy and radiotherapy are not routinely available.
   - MRI scans are not available.
   - Most clinics would not have the drugs the Appellant requires as they struggle to maintain a reliable supply of even basic essential drugs.

Some private clinics may be able to obtain them but the cost would be "significant" and "likely to be beyond the means of most Gambians".

- The main supplier for this NGO could not supply the drugs.
- The Medical Research Council might be able to help.

4. The Appellant's representatives had also provided a letter from a doctor at a teaching hospital in the Gambia who confirmed that the medicines required by the Appellant for survival rather than improved quality of life i.e. Desmopressin and Levothyroxine, were not readily available and would be too expensive for an average Gambian. They would have to be ordered from abroad on a regular basis. Some Hydrocortisone is in fact available in some pharmacies in the urban areas. There is no facility for neurosurgery and cancer treatment and it would not be possible to do an acceptable follow-up for the Appellant with regard to the removal of his brain tumour.

5. I have a statement from the Appellant in which he says that since he moved to Manchester he has been regularly attending the mosque. He met a friend of his father's there who he now calls "uncle" and who has become his family. They spend time together after Friday prayers and at the weekend. He has other friends that he has met. He gives details of them. Six months ago he joined the Gambia Support Network which meets on the last Sunday of every month. There are social gatherings. He has a large network of friends.

6. I heard oral evidence from the Appellant who adopted his statement.

7. In cross-examination Mr Harrison asked him about the Prendergast family who had sponsored him to come to the UK and who had looked after him and his sisters. The Appellant confirmed that this family had provided a property in Gambia for him and his sisters to live in. Mr Harrison asked him what had happened to make the Prendergasts fall out with them. The Appellant said he does not know. He has tried to find out. He phoned but they told him not to call back. They told him he was out of their lives. He said he has no idea what caused them to stop speaking to him. He confirmed that his involvement with the Prendergasts had lasted ten years and that they had promised his father that they would look after him and his siblings. They had provided him with a job and has lost that. He said they no longer have the business in Gambia for which he worked and he does not know where they are. He is in touch with his sisters on the internet. The oldest is 29 and the two younger ones are 16 and 13.

8. Judge Birrell accepted that on return to the Gambia the Appellant would in all likelihood die within weeks not because appropriate treatment and accommodation and support are not available but because he would not be able to afford to pay for the medication and it is not available free of charge. All the doctors agreed that the medication he needs would be beyond the reach of the average Gambian and would be difficult to source.

His sisters do not have the resources to provide the medication and there is no other family to help. I accept these findings.

9. Dr Mynott had made it clear at the hearing on the issue of whether the determination of Judge Birrell contained a material error of law that his main submission at the re-hearing of the appeal would be that the appeal should be allowed under paragraph 276ADE(1)(vi) of the Immigration Rules. Paragraph 276ADE is headed *'Requirements to be met by an applicant for leave to remain on the grounds of private life'.* 276ADE(vi) refers to an applicant who,

> '… is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but there would be very significant obstacles to the Appellant's integration into the country to which he would have to go if required to leave the UK.'

10. Dr Mynott notes that the position of the Respondent in the refusal letter was that the Appellant would be able to "Seek any necessary treatment you may require either immediately on your return or at any time in the future" and that medical treatment is available to him on return to the Gambia. Judge Birrell's undisputed findings in the First-tier Tribunal contradicted these presumptions. She said,

> "On return to Gambia I am satisfied that the Appellant would in all likelihood die within weeks".

Dr Mynott says that the question therefore is whether there would be very significant obstacles to the Appellant's integration into Gambia and using a commonsense reading of the Rule it is clear that imminent death would constitute a very significant obstacle to integration. If that proposition is accepted the relevant requirements of the Rules are met in this case. There is no requirement under the Rules to consider the degree of private life established by the Appellant in the UK and this approach is in accordance with the proper construction of an Immigration Rule as confirmed in **Mahad v Entry Clearance Officer [2009] UKSC 16** that an Immigration Rule -

> "… is to be discerned objectively from the language used, not divined by reference to supposed policy considerations".

He relies on **Singh v SSHD [2015] EWCA Civ 74** where Underhill LJ cited the statement in **Edgehill v SSHD [2014] EWCA Civ 402** that the Rules should be understood in accordance with the interpretation which any ordinary reader would place upon them. He says that the fact that paragraph 276ADE(1) is the means by which the Respondent has sought to incorporate Article 8 jurisprudence into the Immigration Rules does not displace the authorities cited above, particularly since **Singh** and **Edgehill** were both concerned with transitional provisions between the old Rules and the new Rules.

11. With regard to Article 8 ECHR it is submitted that the Appellant's removal would breach Article 8. It is accepted that Paragraph 117B of the

Nationality, Immigration and Asylum Act 2002 has to be taken into account. This states

> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5)Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6)In the case of a person who is not liable to deportation, the public interest does not require the person's removal where
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

12. Dr Mynott submitted that the considerations to which the Tribunal must have regard under 117B are factors which must be considered in light of all the relevant matters and the nature of the Appellant's private life is relevant in a structured Article 8 assessment. It is submitted that there are two particular factors which have to be taken into account when considering the nature of the private life established.

(1) Firstly the Appellant enjoyed lawful leave when he suffered the medical emergency resulting in his dependence on life-saving medication.

(2) Secondly his dependence on life-saving medication arose as a result of the intervention by the medical services in the UK.

13. Dr Mynott further submitted that the Appellant's case is one which falls within the scope of EU law because he is a person who has made a request for international protection under paragraph 327(b) of the Immigration Rules. Such a claim not only encompasses a claim under the Refugee Convention (which has never been substantively pursued by the Appellant) but also a claim for humanitarian protection granted when there is a real risk of "serious harm" including "inhuman or degrading treatment or punishment". He submitted that account would be taken of the core principle of "dignity" in the context of Directive 2004/83/EC discussed in the decision of **A v Staatssecretaris van Veiligheid en Justitie (UNHCR) intervening [2014] EUECJ – C – 148/13**.

14. In oral submissions Dr Mynott said that the meaning of "integration" is the establishment of an ongoing life. The Appellant has no home and no job in the Gambia. He cannot step back into his old life. He submitted that paragraph 276ADE(vi) can be applied in this way. The idea that a purposive construction should be given to the Immigration Rules was dismissed in **Mahad** and **Iqbal**. The fact that the Appellant is likely to die within a few weeks without the necessary medication must be interpreted as a significant obstacle to integration. The timescale is the issue.

15. Dr Mynott relied on paragraph 117B(1) pointing out that the reality of the situation is that the NHS undertook the Appellant's care then a different government department decided to throw him out of the country. "Effective" in the context of immigration control does not mean that people have to be removed. There is no public interest in the removal of this Appellant.

16. He relied on **GS (India) and ors v SSHD [2015] EWCA Civ 40** and **MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279** submitting that Article 8 is engaged. The Appellant has a private life here. With regard to Humanitarian Protection he pointed out that the definition of serious harm includes inhuman and degrading treatment. He also relied on the comments made about the right to dignity in **Pretty v United Kingdom (2002) 35 EHRR 1**.

17. Mr Harrison said that he had little to add to what had been said in the refusal letter. He questioned whether Judge Birrell was allowed to make a finding that the Appellant would have no funding for medication. He said that we do not have any information as to why the Prendergasts have withdrawn their support and the Appellant has friends here. He might be able to get the money. In any event the medication would be available on the internet. He submitted that there is settled jurisprudence on the weight to be given to medical issues in considering Articles 3 and 8 ECHR. He dismissed the submissions made by Dr Mynott under 276ADE(vi). There is nothing to stop the Appellant integrating. It would be possible to get the necessary medication. It is available. He pointed out that the Appellant is a gregarious person who makes friends easily. He has friends and family in the Gambia. His private life would be interrupted but not disproportionately interfered with. The drugs are available.

My Findings

18. This is a very difficult and troubling case. I have taken account of all the evidence before me and I have carefully considered the various points made by Dr Mynott.

19. I begin by saying that I must accept that I am bound to take into account the decisions of the Court of Appeal in **GS** and **MM (Zimbabwe),** that of the House of Lords in **N v SSHD [2005] 2 AC 296** and the decisions of the Strasbourg Court in **Bensaid v United Kingdom (2001) EHRR 205, D v UK (1997) 24EHRR 423** and **Pretty.** The position of the Secretary of State, simply put, is that the United Kingdom cannot and should not be expected to provided free health care for those who are unable to access the required care in their own country.

20. With regard to the decision in **GS, five** of the six Appellants were suffering from terminal renal failure or end stage kidney disease, an irreversible condition. One had already had a transplant and the others were hoping for a transplant and in the meantime were dependant on dialysis three times a week in the UK. It was accepted by the Court of Appeal that dialysis was either not available in their home countries, was limited or was too expensive and that these five Appellants would be at risk of 'a very early death', probably within 2-3 weeks, if returned. The sixth was at an advanced stage of HIV infection with a life expectancy without his current level of care of 'months or if lucky a year or two'.

21. The Court said at paragraph 46,

> "The case of a person whose life will be drastically shortened by the progress of natural disease if he is removed to his home State does not fall within the paradigm of Article 3. Cases such as those before the court can therefore only succeed under that Article to the extent that it falls to be enlarged beyond the paradigm. In response to humanitarian imperatives, the Strasbourg court and the House of Lords have accepted a degree of enlargement to Article 3. The starting-point for an examination of these departures is the *D* case."

22. They went on to discuss whether the exception to the Article 3 paradigm vouched by the **D** case is limited to a state of affairs in which the applicant is in effect on his deathbed whether or not he is removed from the host state. They then cited from **N**,

> "42. In summary, the Court observes that since *D v the United Kingdom* it has consistently applied the following principles.
>
> > Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or

> physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D* case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.
>
> 43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D v the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.
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> 44. Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights... While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.
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> 45. Finally, the Court observes that, although the present application, in common with most of those referred to above, is concerned with the expulsion of a person with an HIV and AIDS-related condition, the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost."

23. The Appellant is not on his deathbed. He is in no worse a situation that the Appellants in **N** or **GS**. Dr Mynott justifiably made much of the fact that the Appellant had been in the UK lawfully when he became ill and more importantly that the dependence on medication arose as a result of intervention by the UK medical services. This is a common situation in such cases and does not alter the position under the applicable caselaw. I am bound therefore to dismiss the appeal under Article 3 ECHR.

24. I turn now to Article 8.

25. Again the caselaw is clear. Lord Justice Laws said in **GS**,

> 86. If the Article 3 claim fails (as I would hold it does here), Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm.

That approach was, as it seems to me, applied by Moses LJ (with whom McFarlane LJ and the Master of the Rolls agreed) in *MM (Zimbabwe)* [2012] EWCA Civ 279 at paragraph 23:

> "The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

87. With great respect this seems to me to be entirely right. It means that a specific case has to be made under Article 8. It is to be noted that *MM (Zimbabwe)* also shows that the rigour of the *D* exception for the purpose of Article 3 in such cases as these applies with no less force when the claim is put under Article 8.

26. I cannot see anything in the Appellant's circumstances that would enable me to find that his removal would be disproportionate. I accept that he has a private life in the UK and that Article 8 is potentially engaged. His medical care is part of that private life. The Appellant has no family life in the UK. He has family in the Gambia where he lived for many years and where he was educated and had a job. There is nothing to indicate that he had any problems there. The only factor that would engage Article 8 is his need for medical treatment, medication and perhaps the follow up care following his surgery. I have taken account of section 117B of the 2002 Act and I accept that the Appellant with the aid of his medication would be able to get a job and support himself. I accept that he was legally in the UK and that he did not come here for medical treatment. Dr Mynott submitted that there is no public interest in the Appellant's removal. I see the force of that argument but it must be remembered that there is a financial cost to the UK of medical treatment and medication which *is* a matter of public interest. Having considered Article 8 in the light of the caselaw discussed above, I find that the Appellant has not established that his removal would be disproportionate so the appeal cannot succeed under Article 8.

27. The principal argument put by Dr Mynott was that under paragraph 276 ADE (1)(vi). It is an interesting argument to which I have given a great deal of consideration. There has to my knowledge been no decision by either this Tribunal or a higher Court on the meaning of 'very significant obstacle to integration'. I accept the submission of Dr Mynott that this phrase must be given its ordinary meaning. His submission was essentially that the Appellant will not be able to integrate because he will have no

money, will not be able to work and in any event will be dead within weeks. The objection from the Presenting Officer to this submission when it was first made at the error of law hearing was that paragraph 276ADE is relative to long residence in the UK. I do not agree with that. It is relative to private life and it is clear that paragraph 276ADE(vi) confirms an acceptance that there will be cases where an applicant cannot meet the 'length of residence' requirements at subparagraphs (i) – (v) but there is something which will amount to a very significant obstacle to him integrating into his home country that gives rise to a disproportionate interference with his private life and warrants a grant of leave to remain. As I have said, no indication is given of what would meet this test but it is clearly a very high threshold – presumably a deliberate move by those drafting the Rules to create a much more onerous test than the previous one of a lack of ties to an applicant's homeland. I accept that it was probably never in the contemplation of those responsible for the provision that it would be used in medical cases and I assume that any attempt to utilise it in this way would be met by a staunch challenge. To allow the appeal on the basis that the Appellant cannot integrate into his own country because he will die within weeks for want of necessary medication would fly in the face of the caselaw on Articles 3 and 8 which is clear that possible or indeed certain early death from lack of medication of itself fails to give rise to a breach of Article 3 or 8. I do take into account Dr Mynott's view that the UK voluntarily undertook the Appellant's care and are now abandoning him. I must however take the view that they were entitled to do that. He has had the benefit of the surgery to remove his brain tumour and the subsequent care.

28. I have to consider the ordinary meaning of 'integrate'. The root of the word 'integration' is the Latin verb meaning 'to make whole'. A person returning to their home country has to be able to have equal participation in the life of his country, to be part of society there, to fit in. Illness is not a bar to integration in one's home country and nor is the likelihood of early death. Illness and death are part of a society. I do not dispute that the probability of early death from lack of medication could arguably be a very significant obstacle to integration for a person who has been away from his homeland for a very long time and has no ties, or family or friends to support him but these factors would in any event be relevant in a consideration of Article 8. There are no such additional factors here. The Appellant is Gambian. He has lived all his life in the Gambia. There is nothing to suggest he had any difficulties there. He has only been in the UK since October 2013. He has three sisters in the Gambia. They are his family. They presumably have some means of support. He would be at home. He would not be returning to the same life as he had previously but that is not what 'integration' means.

29. I find therefore that the Appellant has not established that he meets the criteria set out in paragraph 276ADE(1)(vi) of the Immigration Rules.

30. I have a great deal of sympathy with the Appellant and have been very troubled by this case. The situation for such a young man is dreadful and

tragic. I have however considered the submissions made in terms of the applicable law as I am bound to do and find that I must dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal having been set aside is replaced with this decision. The appeal is dismissed under the Immigration Rules and on human rights grounds.

No anonymity direction is made.

Signed Date: 18th May 2015

N A Baird
Deputy Judge of the Upper Tribunal