Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03072/2018

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 22 March 2019	**On 28 March 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OB
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Mills, Senior Home Office Presenting Officer
For the Respondent: Mr Uddin

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and to the respondent as the appellant as they respectively appeared before the First-tier Tribunal. The appellant was born on 25 May 1973 and is a male citizen of Gambia. The appeal against a decision of the Secretary of State dated 15 November 2017 to refuse his human rights claim. The First-tier Tribunal (Judge Kelly) which, in a decision promulgated on 27 June 2018, allowed the appeal on human rights grounds (Article 3 ECHR and Article 8). The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The appellant entered the United Kingdom in or about July 1996. On 4 September 1998, the appellant was made the subject of a hospital order under section 37 of the Mental Health Act 1983, having been convicted of the offence of wounding. He made an asylum claim which is refused in June 2000. On 17 December 2000, the appellant was granted exceptional leave to remain for a period of three years. Upon conviction of the offence of possessing a bladed article in a public place, the appellant was sentenced to a period of 12 months community rehabilitation order in September 2002. Upon his application, the appellant was granted further leave to remain until 12 October 2005, apparently on the basis of his poor mental health. A further application was refused in October 2009 because the Secretary of State, whilst accepting that the appellant suffers from a schizoaffective disorder, considered that there was suitable treatment available in Gambia. An appeal against that decision was allowed in the First-tier Tribunal in October 2009; by that date the appellant had developed a relationship with his current partner are RS, a British citizen and mother of the couple's children (now ten in number). An appeal was allowed on Article 8 ECHR grounds, the judge having found that the appellant's 'mental well-being is an important aspect of his private life.'

3. Following a further grant of discretionary leave consequent upon the First-tier Tribunal decision, the appellant failed thereafter to regularise his status. On 18 November 2016, he was served with a notice of his liability to be detained and removed as an overstayer. On 31 May 2017, the appellant was arrested and charged with common assault and threatening behaviour; he had threatened to stab a woman in a supermarket and burn down the building. Having been detained, he was, in July 2017, moved to HMP Leicester having been deemed 'unsuitable for detention centre conditions.' He was sentenced to a term of imprisonment of 28 days for contempt of court on 24 July 2017. On 18 September 2017, he was sentenced to imprisonment for six months for common assault and threatening behaviour. (see above). In October 2017 (the day on which he was due to be released from his sentence of imprisonment) the appellant was transferred to Wathwood Hospital due to a serious deterioration in his mental health. I understand that the appellant has now left the hospital and is complying with his regime of medication. He and his partner attended the Upper Tribunal at Birmingham on 22 March 2019.

Article 3 ECHR

4. Judge Kelly allowed the human rights appeal on both Article 3 and Article 8 ECHR grounds. Mr Mills, who appeared for the respondent before the Upper Tribunal, accepted that this was not a medical case as in *N* (2005) UKHL 31; it was not pleaded that Article 3 ECHR would be breached because the appellant would die or be subjected to Article 3 ECHR only as a result of a deterioration of his medical condition in Gambia. Insofar as the grounds of appeal suggested otherwise, the grounds were not accurate. Rather, the judge had found that, if the appellant returned to Gambia and failed to follow an appropriate course of medication, he would suffer from severe psychotic episodes and a collapse in his mental health.

That collapse, in turn, was likely to lead to the appellant being detained in a medical facility where he would be chained subjected to ill-treatment by others. The judge was satisfied that the anti-psychotic drug the appellant is currently prescribed is not available in Gambia although alternatives are available. The judge relied upon the expert evidence of the treating psychiatrist, Dr Bloye, who stated that one of the drugs which is available (Chlozopine) would need to be administered by registered psychiatrist. The other drug (Olanzapine) the judge found, would be available to the appellant and could be prescribed by doctors practising in Gambia. At [45], the judge wrote:

> "The evidence in the Gambia Mental Health Report 2012 is based on 432 responses to a survey conducted by the mental health leadership and advocacy programme of West Africa. 75% of those who responded believe that mental health can be associated with evil spirits. The report notes that the Gambia still retains the outdated Lunatic Act 1917 which is no longer fit for purpose. 86% of the respondents stated that patients with mental health problems were chained up. This was confirmed by the two sets of traditional healers in Busura and Jappineh who said the patients are chained or beaten because they are uncooperative and it is necessary to calm them down. The mother of one patient arrange her son to be remanded into prison 'because it comfortably absconds from the psychiatric hospital any time he has admitted there.' I find that this evidence supports {the appellant's counsel's] submission that there is a real risk the appellant would be subjected to cruel, inhuman order grading treatment on return to the Gambia."

5. Mr Mills submitted that the judge's analysis is flawed because he has failed to take proper account of the support which the appellant would be likely to receive from family members living in the Gambia. He accepted that, if the appellant's mental health did collapse and family members could not prevent him being admitted to an institution such as described in [4] above, then there was a real risk that he would be treated in the manner which would breach Article 3 ECHR. However, he submitted that it was not reasonably likely that the appellant's mental health would collapse given family support and the availability of appropriate medication.

6. Judge Kelly has set out the evidence and his observations at [45] but has then proceeded to consider the appellant's appeal under section 117C of the 2002 Act and Article 8. Only at [59] does he return to the question of Article 3 ECHR risk, concluding that 'given my findings at paragraph 45 (above) I also hold that the appellant's deportation would be contrary to the obligations of the UK under Article 3 ECHR.'

7. The question remains, therefore, whether the availability of appropriate medication and the support of family members in the Gambia would be sufficient to ensure that the appellant would not become so unwell that he would suffer ill treatment in an abusive asylum. In considering that question, I note that there exists a very strong correlation between the

appellant's past failures/refusal to follow his regime of medication and his lapsing into psychotic and criminal behaviour.

8. I agree that the judge has not made findings in terms as to whether the family in Gambia would be able or willing to ensure the appellant's compliance with his medication regime. At [46], the judge notes that the appellant's father, a former senior police officer and now local chief, has remarried and lives in retirement. The appellant himself last travelled to Gambia in 2012 in order to visit his dying grandmother. The appellant has a sister who lives in the Gambia and another sister who lives in Leeds. It would have been helpful if the judge had made specific findings as to whether he believed the Gambian family would offer sufficient support to the appellant. However, earlier in the decision at [43], whilst discussing the psychiatrist's evidence, the judge recorded that there was no 'infrastructure of community mental care or any trained psychiatrists operating in [Gambia].' He found that there would be 'very high risk of relapse on return due to the stress and dislocation associated with separation from his family and adjusting to the change without stable social or medical support.' It is true to say that the judge is here summarising the psychiatrist's evidence and that in the subsequent paragraph, where he seeks to resolve conflicts in the evidence, he deals exclusively with the availability of drugs. However, it clearly must be the case given his conclusion at [59], that the judge did not consider that the level of family support in Gambia would be adequate to overcome or manage the negative effects of dislocation and stress. That plainly was a finding available to the judge on the evidence and the Secretary of State's challenge amounts to little more than a disagreement with that finding. It is certainly not the case that the evidence about the family in Gambia compels an opposite conclusion. It follows that the judge was right to allow the appeal on Article 3 ECHR grounds.

Article 8 ECHR

9. In the circumstances, I shall deal relatively briefly with the challenge of the Secretary of State to the judge's conclusion that the appeal should be allowed also on Article 8 grounds. I agree with Mr Mills that the judge's findings at [53] are difficult to reconcile with the recent decision of the Supreme Court in *KO (Nigeria)* 2018 UKSC 53. I also find troubling the judge's findings at [52]. The judge notes that the appellant currently has contact with his children by telephone and Skype. However, as he notes, 'social services have only sanctioned these arrangements on the basis that there is always a mental health worker standing nearby [presumably, near the appellant] to intervene should the appellant begin acting abnormally during contact.' The judge observed that that this safeguard would not be available if the appellant were exercising contact by telephone or Skype from Gambia. He also states that the appellant's partner could, in theory, take some or all the children to Gambia for them to exercise direct and unsupervised contact with the appellant. The judge finds that neither of these arrangements would currently be in the best interests of the children. I raised with the that advocates my concern that

the judge does not appear to have considered, first, the possibility that the appellant's partner could allow the appellant direct and unsupervised contact here in the United Kingdom and, secondly, that there would be nothing to prevent a mental health worker supervising Skype or telephone calls whilst the children are in the United Kingdom and the appellant in Gambia. The judge appears to identify difficulties where none exist. Consequently, his analysis of the children's best interests is arguably undermined.

10. I also agree with Mr Mills that the judge wrongly criticises the Secretary of State for an inconsistency of approach to the appellant's underlying mental illness at [57]. The judge observes that the appellant had been granted leave to remain on a number of occasions on account of his illness but now the Secretary of State seeks to remove the appellant. Mr Mills is right, in my opinion, to point out that, on each expiry of leave, the Secretary of State has taken a view as to whether it was appropriate to grant further leave. Quite reasonably, the Secretary of State considered the appellant's circumstances as at the date of each decision. The decision which is a subject of this appeal was taken following a recent and serious deterioration in the appellant's mental health and conduct.

11. The concerns which I have set out above regarding Article 8 are perhaps sufficient to cast doubt upon that part of the judge's analysis. However, in the light of my findings regarding Article 3 ECHR, nothing would be achieved by a re-examination of Article 8. Consequently, I dismiss the appeal.

Notice of Decision

12. This appeal is dismissed.

Signed Date 22 March 2019

Upper Tribunal Judge Lane

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 his 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.