Neutral Citation Number: [2009] EWCA Civ 1353

Case No: C5/2009/0153; C5/2009/0959

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM AND IMMIGRATION TRIBUNAL
C5/2009/0153
SIJ Latter and IJ Oxlade
HR/00204/2008

C5/2009/0959
IJ Clayton
HR/00220/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2009

Before:
LORD JUSTICE SEDLEY
LORD JUSTICE LONGMORE
and
LORD JUSTICE AIKENS

- -

Between:

JA (IVORY COAST) **ES (TANZANIA)**	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Stephen Knafler and Sadat Sayeed (instructed by **Elder Rahimi for JA (Ivory Coast) and Brighton Housing Trust for ES (Tanzania)**) for the Appellants
Miss Lisa Giovannetti (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing dates: 10-11 November 2009

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Judgment

Lord Justice Sedley :

1. All three members of the court have contributed to the judgment which follows.

2. Both appellants are African women, one from Ivory Coast and one from Tanzania, who entered the United Kingdom lawfully. Each was thereafter diagnosed for the first time as HIV-positive and was treated by the NHS with anti-retroviral drugs which stabilised her condition and have kept it stable ever since. With a minor (and for present purposes immaterial) hiatus in ES's case, both women had leave to enter and thereafter were given leave to remain until, in 2006, Home Office policy changed and renewal of leave to remain was refused. Their appeals to the AIT failed, and with permission they now appeal to this court.

3. In each case, importantly, the appellant's reason for seeking leave to remain here – to continue with her treatment - was given to and accepted by the Home Office. JA entered as a visitor in March 2000, was diagnosed in May that year and applied for exceptional leave to remain for treatment. This was granted in November 2002 for a year, and then renewed as discretionary leave in November 2003 for a further 3 years. But the application which she made shortly before the expiry of that period was eventually refused because, following the case of *N*, to which we will be coming, Home Office policy had changed. Much the same happened to ES, who entered the UK as a student in September 1998 with one year's leave. She became an overstayer, but in November 2002 was granted ELR for a year because she was by then being treated for AIDS. Before the expiry of this period she applied for and was granted discretionary leave to remain for a further 3 years. At the end of this time, in December 2006, she reapplied but was refused any extension.

4. It is submitted by Stephen Knafler, who appears with Sadat Sayeed on behalf of both appellants, that there was an assumption of responsibility by the United Kingdom which distinguishes the present cases from the line of leading cases in which no such obligation has been held to exist. Disclosure of documents has revealed that when each appellant was granted ELR it was explicitly on the ground that the UK had assumed responsibility for her treatment.

4.1 The caseworker's note on JA's application in December 2003 reads:

> Application for further leave to remain exceptionally outside the Rules on compassionate grounds in order to receive NHS medical treatment.
>
> Ms [A] initially entered the UK as a visitor for six months on 21 March 2000. She subsequently submitted an out of time application for EXLTR to receive NHS treatment for HIV. In considering her application the caseworker dealing with it acknowledged her physical condition, the lack of HIV/Aids treatment in her home country and also the case clearance exercise in force at the time. She was consequently granted 12 months EXLTR to expire on 09 November 2003. Ms [A] has now applied for FLTR. Her latest medical report states that her CD4 count is now 626 which is at the middle range of 400-1500 of a healthy person. Her HIV remains well suppressed

and will continue to be as long as she continues to take anti-retrovirals

As this applicant has been granted leave to remain in the past and her medical condition remains the same, the UK can be regarded as having assumed responsibility for her case and we may proceed to grant FLTR in line with present policy.

4.2 The caseworker's note on ES's application in November 2003 reads:

Application for further leave to remain exceptionally outside the Rules to continue to receive HIV medical treatment on the NHS.

Ms [S] was previously granted XLTR for 12 months on 16/11/2002. There has been no change and her condition remains the same. Her most recent medical report dated 30/09/2003, states that an AIDS diagnosis was made in August 2000 as she was found to have extrapulmonary tuberculosis. She was started on anti–retroviral therapy to inhibit further disease progression As the UK has already assumed responsibility for her care, we may proceed to grant FXLTR until 30 December 2006 in accordance with Home Office Asylum Policy Instruction on discretionary leave.

It would appear from the Charging Case Flag on file that this applicant was charged by Sheffield Caseworking in full £155.00 for her application. See ATOS Batch Number: 00004029 dated 28/11/2003. As there is no trace of a refund, I will refer this file to the Charging Support Team to investigate.

5. Neither woman was informed of this reason in the decision letter that was then sent to her, despite the existence of a policy that reasons should be communicated to applicants. But no claim to the enforcement of a legitimate expectation is made in these appeals, and for the rest we are willing to approach the appeals as if the reasons, having been recorded, had been communicated.

6. Neither we nor the Home Office know how many similar cases there are. Lisa Giovannetti, for the Home Secretary, tells us that the departmental estimate is hundreds, possibly thousands. The Civil Appeals Office for its part has already stayed a number of similar cases behind these.

7. As Ms Giovannetti points out, and as Mr Knafler accepts, "assumption of responsibility" in this context is neither a term of legal art nor a description of a legal obligation. It entered our immigration law and practice from the judgment of the ECtHR in *D v United Kingdom* (1997) 24 EHRR 423. That case concerned an illegal entrant who had been arrested on arrival as an intending visitor in January 1993 with a large amount of cocaine in his possession and had been diagnosed HIV+ while serving his consequent prison sentence. By the time he was due for release and deportation he was dependent for survival on anti-retroviral therapy provided by the NHS. The Court held that to send him to the near-certainty of a degrading and painful death would violate Art. 3 of the Convention.

8. The two critical paragraphs of the judgment for present purposes are these:

> 53. In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3.
>
> The Court also notes in this respect that the respondent State has assumed responsibility for treating the applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3, his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.
>
> Without calling into question the good faith of the undertaking given to the Court by the Government, it is to be noted that the above considerations must be seen as wider in scope than the question whether or not the applicant is fit to travel back to St Kitts.
>
> 54. Against this background the Court emphasis that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain on the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison.
>
> However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3.

9. The significance of August 1994 is that this was when *D*, by then a prisoner, had been diagnosed as HIV+. In that situation the state, as his custodian, had legal duties of care towards him, including a duty to provide medical treatment, which it did not have towards the generality of the settled population and certainly did not have towards the generality of unlawful entrants. So seen, the statement that the United Kingdom had assumed responsibility for treating *D* was highly case-specific. Given this, the background proposition set out in §54 suggests that what distinguished *D's* case from other cases where foreign nationals have benefited from treatment while in prison was that, for *D*, continuation of the treatment initiated by the state as his custodian was (or appeared to be) all that stood between a dignified and a degrading death. Without both elements – the "assumption of responsibility" and the critical state of *D's* health – Art. 3 would not have saved him from deportation.

10. The change of policy in 2006 was the direct result of the decision of the House of Lords in *N v Home Secretary* [2005] UKHL 31, holding in agreement with this court

([2003] EWCA Civ 1369) that ECHR jurisprudence made the protection of Art. 3 available to foreign nationals facing removal only in extreme and exceptional cases going beyond those where removal was going significantly to shorten their lives. In Strasbourg (2008) 47 EHRR 885 the Grand Chamber agreed, noting (§34) that *D* was still unique in finding a violation of Art. 3 by removal of a foreign national suffering from ill-health.

11. The reasoning of the House and of the ECtHR in *N* does not require fuller examination here (though we shall need to return to its facts below), because Mr Knafler makes no claim under Art.3. His contention is that the AIT in each case was wrong to exclude or marginalise the UK's de facto assumption of responsibility for the appellants' treatment when gauging the proportionality of removal under Art. 8(2).

12. Art. 8 of the ECHR provides:

> *Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

13. In JA's case the eventual refusal letter, dated 26 August 2008, followed the reasoning of *N* and declined any further extension of leave, notwithstanding the relative poverty of medical resources in Ivory Coast, because JA's case was not exceptional. On appeal to the AIT (SIJ Latter and IJ Oxlade) it was held that, while Art. 8 was engaged, removal was proportionate. The decision to allow her to remain for treatment "was right", but the Home Office had not led her to believe that she would be permitted to remain here indefinitely, and the law had now been clarified by *N*. There was no finding that she would be able to obtain treatment in her home country – rather that removal from the UK, where she has work, friends and access to medication, "will change all of that", not least because she did not dare let her children know of her condition.

14. In ES's case the AIT (IJ Clayton) likewise held that there had been no continuing undertaking of responsibility for her medical care, but found that, given her skills, earning capacity and family network in Tanzania, her HIV infection was "likely to remain [under control] upon return to Tanzania".

15. Ms Giovannetti does not dispute that the intended removal of these two appellants, given the length of time and the reason why they have been lawfully here, is a significant interference with their private lives, a concept to which Strasbourg jurisprudence has given a wide meaning. Mr Knafler for his part does not dispute that removal would be lawful or that its purpose would be within the permitted categories;

but he contends that in the circumstances of each case it would be disproportionate and therefore not "necessary in a democratic society".

16. This court has more than once stressed the need for structured decisions on proportionality. One of the elements of such a structure capable of having a bearing here is the need to relate the proportionality of an interference with private life to the purpose for which it is said to be necessary. Here the prescribed purposes are, or include, the economic wellbeing of the country, which cannot afford to be the world's hospital, and the prior right of a settled population to the benefit of its inevitably finite health resources. Against these may legitimately be weighed both the moral duty to help others in need and the fact that the United Kingdom has until recently found it both morally compelling and economically possible to extend such help to the appellants and others like them, alongside and not evidently to the detriment of the settled population.

17. There is no fixed relationship between Art. 3 and Art. 8. Typically a finding of a violation of the former may make a decision on the latter unnecessary; but the latter is not simply a more easily accessed version of the former. Each has to be approached and applied on its own terms, and Ms Giovannetti is accordingly right not to suggest that a claim of the present kind must come within Art. 3 or fail. In this respect, as in others, these claims are in Mr Knafler's submission distinct from cases such as *D* and *N*, in both of which the appellant's presence and treatment in the UK were owed entirely to an unlawful entry.

18. Although she accepts that there is a factual difference between a lawful entrant seeking to remain and an illegal entrant resisting deportation or removal, and that what Mr Knafler characterises as an assumption of responsibility is at least a description of facts potentially material to the proportionality of removal, Ms Giovannetti submits that Mr Knafler's distinction was true neither of *N* nor even of *D*. If she is right, she will have gone a long way towards assimilating the present cases, at least in policy terms, to the Art. 3 cases, and thereby have established in substance an exclusionary principle under Art. 8.

19. The first basis of her submission is the case of *Szoma* [2005] UKHL 64, in which the House of Lords held that a person was "lawfully present" in the UK even if he was liable to detention as an illegal entrant and at large only because he has been temporarily admitted. That decision concerned the interface between two provisions: the provision of s.11 of the Immigration Act 1971 that a foreign national who is not given leave to enter but is detained or temporarily admitted is deemed not to have entered the UK; and the provision made by regulations that persons "lawfully present" were entitled to certain benefits. It was held that an unlawful entrant who was at large by virtue of a temporary admission was lawfully present for the purposes of the benefit regulation.

20. We do not accept Ms Giovannetti's argument. *Szoma* neither decides nor gives any basis for inferring that an illegal entrant is to be assimilated for any wider purposes to a lawful entrant. As the House made clear in *Khadir* [2002] UKHL 39, temporary admission is a term of art within the Immigration Act 1971, allowing the temporary release (under strict limits prescribed by law) of persons otherwise liable to administrative detention pending removal as illegal entrants. Illegal entrants who are temporarily admitted rather than detained may thus be lawfully present here in the

restricted sense material to the decision in *Szoma*; but they remain without an entitlement to be here.

21. This, it seems to us, remains a material distinction notwithstanding the second matter on which Ms Giovannetti relies: the use by both the ECtHR and the House of Lords of the portmanteau term "aliens subject to expulsion" (see *D*, §54 ante; *N*, §15, per Lord Nicholls). It is perfectly true that the phrase is apt to cover both of the classes with which we are concerned – the illegal entrant who contrives to remain and the lawful entrant whose leave has expired. But it is not a term of legal art, and in neither of the two leading Art 3 cases was it necessary to differentiate within it, since the issue now before us was not before either the ECtHR or the House. The aliens subject to expulsion in both *D* and *N* were foreign nationals who had never been lawfully admitted to the United Kingdom.

22. In that critical sense we consider that the present appellants are in a significantly different legal position from both *D* and *N*. This in turn, as Ms Giovannetti contingently concedes, gives them a toehold on Art. 8. But we accept her submission that the purchase which this gives is not augmented by the exaggerated importance given for a time by the Home Office to the notion of assumption of responsibility in mistaken reliance on *D v United Kingdom*. The question is whether in either case the true toehold is sufficient to enable them to resist removal. This must depend in large part on the remainder of the material facts. It also depends, however, on law and legal policy, and it is here that we consider that Mr Knafler has demonstrated two errors in both divisions of the AIT.

23. First, both have treated *N* as, if not dispositive, then as the dominant standard for deciding these claims. Secondly, both have marginalised a potentially material factor – not a legal assumption of responsibility but a de facto commitment, not indefinite but not strictly time-limited (save for the policy or practice of giving indefinite leave to remain after six years of exceptional or discretionary leave), and prompted initially by compassion and subsequently by a sense of moral obligation. The consequent passage of time, without any allocation of fault, may also have a bearing: see *EB (Kosovo)*[2008] UKHL 41, §14-15. But the argument for a formal or legal assumption of responsibility goes, in our judgment, too high. Nor do we accept Mr Knafler's contention that renewal of leave to remain had become for these two appellants a reasonable expectation: it may have become a legitimate hope, but that in itself goes little distance. The real question is how far in each case the proportionality of removal is affected by the history of the compassionate grant and renewal of leave to remain for treatment, having regard to the impact both of that history and of the proposed discontinuance of treatment on the individual's private life.

24. Could this, however, have made a difference to either outcome? In the case of ES we consider that it could not. Once it was shown to the immigration judge's satisfaction that the appellant had the skills and experience to obtain work which could pay, or help to pay, for treatment in Tanzania, and familial support to turn to as well, the history of lawful entry and compassionate grants of leave to remain could not have staved off removal. ES's case is thus on a par with *DM (Zambia)* [2009] EWCA Civ 474.

25. JA's is a markedly different case. Her position as a continuously lawful entrant places her in a different legal class from N, so that she is not called upon to demonstrate

exceptional circumstances as compelling as those in *D v United Kingdom*. There is no finding by the AIT that she has much if any hope of securing treatment if returned to Ivory Coast, or therefore as to the severity and consequences of removal (see *Razgar* [2004] UKHL 27). Depending on these, the potential discontinuance of years of life-saving NHS treatment, albeit made available out of compassion and not out of obligation, is in our judgment capable of tipping the balance of proportionality in her favour.

26. Accordingly we propose to dismiss the appeal of ES but to allow that of JA to the extent of remitting it to the AIT (we see no reason why it should not be the same panel) for redetermination of all issues arising under Art. 8(2) in accordance with our judgment and – of course – with the methodological guidance given by Lord Bingham in *Razgar* [2004] UKHL 27. For the avoidance of doubt we make it clear that this permits the AIT, on the application of either party, to make an up-to-date appraisal of the availability of ARV and other treatment in Ivory Coast and of JA's potential access to it.