

Neutral Citation Number: [2014] EWCA Civ 415

Case No: C5/2013/0883&0377&0977&0590&1029&1244

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 12 March 2014

B E F O R E:
LORD JUSTICE MAURICE KAY
VICE PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION)

B E T W E E N

KK (CONGO)
EO (GHANA)
PL (JAMAICA)
GM (INDIA)
GS (INDIA)
BA (GHANA)

Applicants

-v-

SECRETARY OF STATE
FOR THE HOME
DEPARTMENT

Respondent

(DAR Transcript of
WordWave International Limited
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Official Shorthand Writers to the Court)

Mr Manjit Gill QC and Ms Shazia Khan (instructed by Parker Rhodes Hickmotts)
appeared on behalf of KK

Ms Nathalie Lieven QC & Ms Miriam Carrion Benitez (instructed by the Irving & Co
Solicitors) appeared on behalf of EO

Mr Raza Hussain QC and Ms Gemma Loughran (instructed by Turpin & Miller LLP)
appeared on behalf of PL

Mr Raza Hussain QC and Mr Duran Seddon (instructed by Birnberg Peirce & Partners)
appeared on behalf of GM

Mr Declan O'Callaghan (instructed by Jasvir Jutla & Co Solicitors) appeared on behalf of
GS

Ms Rebecca Chapman (instructed by Hardings Solicitors) appeared on behalf of BA

Ms Lisa Busch (instructed by the Treasury Solicitor) appeared on behalf of the Respondent

J U D G M E N T

1. LORD JUSTICE MAURICE KAY: These six renewed applications for permission to appeal all relate to what are sometimes called "health cases" in the context of Article 3 and Article 8 of the ECHR. All six applicants suffer from grave medical conditions which are being effectively treated in this country. On the evidence I think five of them would be at risk of a very early death if returned to their home countries; in the sixth case, the evidence is less certain and suggests a slightly longer, but not enormously longer, period.
2. It is well known that for some years the cases of D and of N in Strasbourg and N in the House of Lords in this country place considerable difficulties in the way of claimants who seek to resist removal on these grounds. At one level of abstraction or ramification, the one for which Ms Busch on behalf of the Secretary of State contends, the obstacles are insurmountable, at least at the level of this court, having regard to the authority of N.
3. However, I have indicated that I propose to grant permission to appeal in this case. I do so for a number of reasons. The first is that I accept the submissions on behalf of the applicants that there are arguable issues as to the precise scope of D and N, given the factual circumstances in which those decisions were made. They concern effectively illegal entrants who can properly be described as "health tourists". None of these six applicants falls into that category, although BA has never enjoyed lawful status in this country.
4. The second point is that not only are there features in the cases such as lawful residence prior to diagnosis and treatment, or long and mainly lawful residence, there is room for clarification of the criterion of exceptionality which derives from D and N. For example, virtually certain death within two weeks on return following a period of lawful and sometimes lengthy residence in this country may be susceptible to accommodation within exceptionality. It may be that Lady Hale's judgment in N permits such an approach. In any event it seems to me that there is room for a decision providing clarification.
5. I acknowledge that there are features in some of these cases which make them less attractive than others. I have already referred to BA's lack of lawful residence ever; in the case of KK, he is sought to be removed by reason of his recent criminal convictions, albeit outside the scope of section 32, and his anticipated period of survival upon removal is longer than those of the other applicants. On the other hand, he has been lawfully in this country for going on for 20 years.
6. Accordingly, with a view to this court producing a judgment on the scope and application of the existing authorities, I shall grant permission in all cases so that the court can have before it a selection of factual matrices. If I have been too generous in granting permission, that may turn out to be something of a luxury.
7. I should add that in the case of GM, there is a further ground of appeal to which I shall refer as the Ahmadi point. On the face of it that is or may be an irresistible ground of appeal. It would not in itself necessarily prevent removal in the not too distant future

because it is unrelated to the actual health issues; it is a technical point. But it is important that he be granted permission in relation to that. The Secretary of State will no doubt consider whether it is to be resisted.

8. In the circumstances, it is probably undesirable for me to say much more. I observe in passing, as Ms Lieven QC has pointed out, that the Strasbourg Court itself, or at least six of its members, have manifested a wish that the existing jurisprudence be reconsidered (this is the case of Mwanjay v Belgium). It is possible that it will transpire that it is in Strasbourg and Strasbourg alone where that may ultimately have to take place. However, I am persuaded that there is purpose and satisfaction of the second appeals test in granting permission to all six of these applicants.