Case No: C5/2007/2125

Neutral Citation Number: [2007] EWCA Civ 1438
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: IA/05524/06]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 14th December 2007

Before:

LORD JUSTICE TOULSON

- -

Between:

BC (INDIA) **Appellant**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr T Samuel (instructed by Messrs Heer Manak) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

- -

Judgment

Lord Justice Toulson:

1. The appellant comes from a village in the Punjab. His family live in rural India and are impecunious. He came to the UK on 3 January 2005 on a visitor's visa. Very shortly after his arrival, he collapsed and was taken to hospital. He subsequently put forward an asylum claim, which was refused. He has the tragic misfortune that he is suffering from end-stage renal failure, for which he is currently receiving dialysis three times a week. The evidence indicates that he is, under treatment, not at any current risk of death, but that if treatment were stopped he would die of kidney failure, probably within a matter of two to three weeks. On that basis, he contended that his removal would breach his rights under Article 3 of the Convention. The matter was considered by an immigration judge, who refused his appeal. Reconsideration was ordered by Silber J. On reconsideration, another immigration judge dismissed the appeal. Against that decision the appellant now seeks leave to appeal. There has also been raised an Article 8 point. This was not taken in the notice of appeal to the AIT, but Mr Samuel tells me that he argued the point. I will deal with that very shortly, because if the appellant cannot show a real prospect of succeeding on his Article 3 claim, on the facts of this case, I see no alternative basis on which he would have any real prospect of success under Article 8.

2. The argument in relation to Article 3 understandably concentrated on the cases of D v UK [1997] 24 EHRR 423 and N v SSHD [2005] 2 AC 296. Those cases concerned sufferers with HIV AIDS. It is a sad fact of life that, while in the UK we are blessed to have what are by international standards high quality medical facilities for people who suffer from otherwise life-threatening conditions, the same facilities are by no means so readily available in other parts of the world. The numbers of those suffering from life-threatening diseases in other parts of the world whose lives could be extended with proper medical treatment is incalculable, but must be enormous. This was the grim practical background in which the House of Lords had to consider, in the case of N, what are the UK's obligations under the Convention; and there the House was not prepared to interpret Article 3 as imposing any higher obligation in this regard than the Strasbourg Court has recognised.

3. Troubling as it may seem for understandable reasons, a distinction has been drawn in this type of case between somebody who is capable of being kept alive by continuing medical care, but whose life would be at real risk of being very greatly shortened on return; and, on the other hand, somebody who is actually dying. In the latter case, it has been recognised that Article 3 may be available, but not in the former case. Mr Samuel seeks to argue that in this case he does have a real prospect of showing that the removal of the appellant would breach Article 3. He founds on a particular sentence in the speech of Baroness Hale at paragraph 69 and 70, where she said:

> "69. In my view, therefore, the test, in this sort of case, is whether the applicant's illness has reached such a critical stage (ie he is dying) that it would be

> inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity. This is to the same effect as the text prepared by my noble and learned friend, Lord Hope of Craighead. It sums up the facts in D. It is not met on the facts of this case.
>
> 70. There may, of course, be other exceptional cases, with other extreme facts, where the humanitarian considerations are equally compelling. The law must be sufficiently flexible to accommodate them."

4. Now, I do not read paragraph 70 as intending to undermine the test stated by her in the immediately preceding sentences; and if that is the correct interpretation, then I have to say that on my reading it does not fall in line with the speeches of the other members of the House. What she was recognising was that there might be a different type of case altogether, where other exceptional considerations might possibly give rise to an Article 3 claim. When it comes to the facts, Mr Samuel points to a number of features which he says distinguish this from the types of case considered in N and in D. In particular, he emphasises the certainty of death in a short period without treatment. He says that there is a difference between, for example, somebody with HIV AIDS, where the risk of death would be (as mentioned in previous authorities) within 12 to 24 months, and death with in two to three weeks. He stresses also that on the facts of this case, the appellant is unlikely to be able to pay for treatment, and that although treatment for kidney disease sufferers is available in some parts of India, it is in the big cities, and not in the rural area from which the appellant comes. I, regrettably, am unable to see that the points which he identifies as compelling facts create a legal distinction. In terms of an exercise of the Secretary of State's discretion, the plea that particular consideration should be given to him because of the early proximity of death may have a real attraction; but to try to introduce some legal test which differentiated between somebody who is currently alive and will be kept well on treatment but who on a discontinuation of treatment would die within two to three weeks, or on the other hand within 12 months, would lead to the question: where would the cutoff be? Would it be at three weeks, or at three months, or at six months, or at what figure? I do not see that there can be a workable legal rule which said that proximity of death within X weeks engages Article 3, but in X plus one week does not.

5. I have to ask the question whether, applying the law, there is any real prospect of this appeal succeeding; and I regret that in my view the answer to that question is no. I agree in that regard with the observations of Keene LJ, who considered the matter on paper. At the end of his judgment in N, Lord Brown observed that in that case, while the return of the appellant to Uganda would not have been a violation of Article 3, it did not follow that the Secretary of State was bound to deport her. He clearly had the widest discretion in the matter. The same applies in this case. One can well see that

in this case a decision by the Secretary of State not to deport would not open floodgates in the way that might be the case with somebody suffering from HIV AIDS for this simple reason: the world is suffering from a major HIV AIDS epidemic. There is no equivalent epidemic of people suffering from advanced kidney disease. A decision in this appellant's case not to remove him would not (one imagines) give rise to a flood of people to the UK in similar circumstances. At a level of human sympathy, the points made by Mr Samuel are powerful. It goes against one's human sympathies to know somebody is at risk of being returned to what is likely to be death in the very near future.

6. But I have come to the conclusion that those are matters for the Secretary of State's discretion. I cannot extract from them a basis for finding that this appellant's removal would be a violation of Article 3.

Order: Application refused