Case No: C5/2007/2486

Neutral Citation Number: [2008] EWCA Civ 670
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: HR/00167/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 8th May 2008

Before:

LORD JUSTICE LAWS
and
LORD JUSTICE DYSON

- -

Between:

RU (SERBIA) **Appellant**

- and -

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

- -

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Dr C Fielden (instructed by the Immigration Advisory Service) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

(As Approved by the Court)

Lord Justice Laws:

1. This is a renewed application for permission to appeal against a determination of the Asylum and Immigration Tribunal ("the AIT") dated 2 August 2007, by which the AIT dismissed the applicant's appeal against the Secretary of State's decision to remove him as an illegal entrant. Permission to appeal to this court was refused by Senior Immigration Judge Grubb on 17 September 2007and further refused by Sir Henry Brooke on consideration of the papers on 15 January 2008.

2. The applicant is a national of Kosovo, born on 20 August 1954. He arrived in the United Kingdom clandestinely on 11 July 1998 and claimed asylum on 13 July 1998. That was refused by the Secretary of State and the applicant's appeal against that refusal was dismissed on 12 September 2001. However, in I think September 2003 the applicant was diagnosed HIV positive and applied for exceptional leave to remain in the United Kingdom on medical grounds. That was refused on 28 January 2004. His appeal was dismissed on 8 August 2006 but a reconsideration was sought. At length, on 11 April 2007, the AIT directed that there be a substantive reconsideration. Senior Immigration Judge King held that the first immigration judge had failed to deal comprehensively with the objective material relating to the treatment which the applicant might expect to receive for his medical condition were he returned to Kosovo.

3. The substantive reconsideration was dealt with by the AIT (Immigration Judge Denson and Immigration Judge Kaler) on 23 July 2007 and the decision given, as I have said, on 2 August 2007. The applicant did not himself give evidence but the AIT had the benefit of a report dated 21 July 2007 from a specialist in HIV medicine, Dr Jeanette Meadway, who also gave extensive oral testimony. The AIT summarised the applicant's relevant medical history to date at paragraphs 16 to 22 as follows:

> "It appears that the appellant was diagnosed with HIV positive in September 2003. At that time he had a CD4 count of 203 and a viral load of 56, 227. He had a history of recurrent shingles infections and recurrent upper respiratory tract infections, and back and leg pain. He began anti-retroviral therapy (ARVs) and with this therapy his viral load was undetectable. He was on effective ARVs with an undetectable viral load in June 2006 and Dr Sethi had commented that he was taking Atazanavir, Ritonavir and Truvada and at that time his most recent CD4 was 168 and his viral load was undetectable. These results with CD4 levels below 200 whilst the viral loads remain undetectable on treatment are known as discordant immune response.

17. After the appellant was diagnosed with HIV positive in September 2003 he began anti-retroviral treatment on 29 December 2003. The choice of anti-retrovirals was limited by his health, his mental health problems were a contraindication to the use of Efavirenz, an ARV which has a direct effect on the brain and severe psychological effects, particularly worsening pre-existing problems. He therefore began a triple ARV regime containing Nevirapine. In 2003 the preferred ARV regimes for starting therapy contained either Efavirenz or Nevirapine plus two ARVs of another group. The appellant also had Combivir which contains both Zidovudine and Lamivudine.

18. Combivir plus Nevirapine was effective at controlling the appellant's viral load. In November 2004 his viral load was undetectable but his CD4 had not risen and was 144. In June 2004 his viral load remained undetectable and his CD4 remained at 150. This was a discordant immunological response.

19. In May 2005 the appellant had troublesome neuropathy with pains particularly in his feet and it was considered very likely that this was related to one of his ARVs namely Zidovudine. Various changes were made in his medication to the extent that the ARVs now taken include the drugs Truvada and Atazanavir with Ritonavir.

20. The appellant's CD4 levels responded slowly to the new combination to the extent that they rose to 255 as at 2 July 2007 and the viral load measurements have been undetectable since the new ARVs were started and it appears that the new ARVs are more effective than the previous ARVs at controlling the HIV virus and also allowing the CD4 to rise.

21. The appellant continued to complain of pains all over and worse in his legs even after the change of the ARVs and Amitriptyline had little effect despite its direct effect on nerve fibres. The Appellant was referred to the Pain Clinic at his hospital and was given a TENS machine which works by external electrical stimulation and Dr Sethi described his as being so much better and completely different and that his attitude had become more positive which included some words of appreciation for those who were trying to help him.

> 22. The effect on his current treatment is that it appears his HIV is controlled and his CD4 count is increasing."

4. The AIT then proceeded to consider what treatment would be available in Kosovo. First, if there were no treatment, then according to Dr Meadway, the applicant's CD4 count would rapidly fall back. He would likely suffer AIDS-related complications and, as it was put in terms, be on his deathbed within a month. However, it was not the case that no treatment was available in Kosovo. An email from a Dr Tolaj indicated that two, but only two, anti-retroviral drugs were available, called Combivir and Sustiva. Combivir is made up of zidovudine and lamivudine, taken together in one tablet. The AIT canvassed with Dr Meadway what would happen if the applicant were treated with these drugs in Kosovo. I should read the balance of their determination from paragraphs 25 to 32:

> "We then canvassed with Dr Meadway what would happen if the appellant were to be returned to Kosovo and he were merely treated with the drugs that are available, namely Combivir and Sustiva. Combivir is made up of Zidovudine and Lamivudine. This is taken together in one tablet and if the appellant took this it would be extremely likely that the neuropathy which he has suffered would get worse and he would be in more pain, however the pain could be treated by some straightforward painkillers such as Morphine or Opiates and also the neuropathy could be relieved by the use of the TENS machine; and that the painkilling drugs would be available in Kosova.
>
> 26. It was also asked whether the appellant could manage on a combination of Combivir and Sutiva with the help of the TENS machine. As previously highlighted the Combivir would exacerbate the neuropathy and also the Sustiva would cause psychological side effects which in turn would need to be treated but it was considered that such treatment would be available, however without the treatment the psychological effects may be that the appellant would not adhere to any drug regime in any event.
>
> 27. Taking Dr Meadway's evidence into account we find that if the appellant were to remain on his current ARVs his life expectancy would be for many years hence if not decades. If he were to cease all treatment he would experience a dramatic fall in his CD4 count and would be liable to

succumb to AIDS-related infections or infections that would lead to an early demise.

28. The evidence that is before us is that the only available drugs in Kosovo at present are Combivir and Sustiva which, if the appellant were to be treated with would result in two additional factors namely that his neuropathy would be exacerbated and he may be prone to further psychological problems. However it appears that whilst the neuropathy would not be cured and whilst it is extremely uncomfortable and painful, the pain could be alleviated by the administration of Morphine and other Opiates and the use of the TENS machine; furthermore any psychological problems would be treated if the need arose.

29. The objective material in the COIS Report clearly shows that treatment for psychological conditions including post-traumatic stress disorder is available in Kosovo. The appellant at present does not appear to be suffering from a psychiatric disorder and this is evidenced by a letter from the South London and Maudsley NHS Trust dated 6 September 2006 in which Derrick Summerfield in the last paragraph states as follows:

'In summary, and notwithstanding his concerns about the head, I don't think there is much basis to see him as currently carrying a psychiatric disorder. In particular I don't think that there is clear cut evidence of psychotic symptomatology. The major scope for improvement in his quality of life would come through social provision rather than psychiatric. I did prescribe some sleeping tablets to see if he could be a little more settled at night.'

30. Whilst we accept that the treatment that the appellant would receive in Kosovo in relation to HIV would not be the same as the treatment he is receiving in the United Kingdom, he would nevertheless receive such treatment and any side effects from the change in the regime of the treatment could further be treated by the medical facilities and drugs available in Kosovo.

31. We are aware of the findings in the House of Lords case of N and as determined by their Lordships. The all important question is whether expelling the appellant would be inhumane treatment within Article 3 given the uncertainties

> confronting him through the shortage of the necessary drugs and medical facilities in Kosovo.
>
> 32. We find that there is treatment available in Kosovo albeit not to the same standard as the treatment available in the United Kingdom to the extent that if the appellant were to be returned to Kosovo he would not be subjected to inhumane degrading treatment or punishment by the disparity of the treatment available in Kosovo as to that available in the United Kingdom to the extent that we find that the appellant's removal would not cause the United Kingdom to be in breach of its obligations under Article 3 of the 1950 Convention."

5. It was submitted that the AIT ought to have allowed the applicant's appeal pursuant to Article 3 and/or 8 of the European Convention on Human Rights because if returned to Kosovo he would, in short, be forced into taking poisonous substances or else face an early death.

6. Dr Meadway has written a further report dated 17 August 2007 and that, of course, postdates the decision of the AIT. In effect it is a commentary on the judgment of the AIT. For my part I would propose to take it into account not as further evidence, but as part and parcel of the submissions made for the applicant by Ms Fielden of counsel. Dr Meadway claims in that document that the AIT misunderstood her evidence. She says at page 2:

> "After reading of this Determination, I believe that the judges and I have a different understanding of the words 'treat', 'treatment', 'relieved' and alleviated.'

The doctor then proceeds to refer to paragraph 25, 26, 28 and 30 of the determination. Then she says this:

> "From these paragraphs, my understanding of the definition of 'treat' which is being used would be: 'provide complete cure, provide total relief of symptoms', and this understanding is supported by the use in paragraph 28 of the word 'alleviate' which also implies 'providing complete relief, totally removing symptoms'.
>
> My responses were in answer to questions about whether drugs could be used to treat Mr [U] or his psychiatric/psychological symptoms if these

> worsened in response to him taking antiretroviral drugs known to cause the symptoms. The definition of the word 'treat' in my reply would be 'use in an attempt to cure or relieve symptoms, whether with full, partial or very little success.'"

7. Then, omitting some paragraphs, just before her report concludes with the required statement of truth, she says:

> "My understanding was, and still is, that for Mr [U] the side-effects of zidovudine and efavirenz would be so extreme that each constitutes a poison for Mr [U], and that the available treatments for their side-effects would not give adequate relief of symptoms to allow Mr [U] to lead a normal life."

The Senior Immigration Judge who has, as it happens, a long and considerable professional knowledge of medico-legal matters, considered Dr Meadway's letter of 17 August when he refused permission to appeal. This is part of his reasoning:

> "3. The essence of the Grounds is that both drug treatments were contraindicated: Combivir because it contains Zidovudine which has in the past, and would in the future, cause severe pain to the appellant; Sustiva because it is not suitable for those (such as the appellant) with a history of mental health problems as it would risk further psychotic episodes.
>
> 4. The Panel's conclusion at para [30] that the side-effects of the 2 HIV drug treatments 'could further be treated by the medical evidence and drugs available in Kosovo' is one entirely sustainable on the evidence set out at some length in the determination. The criticism by Dr Meadway that she was misunderstood is misplaced. The Panel is not saying that any physical and mental side-effects to the appellant would necessarily be removed but rather (para [28]) expressly that they would be 'alleviated' by means available in Kosovo which means made 'less severe'. Dr Meadway's oral evidence is set out at length in the separate written records by both immigration judges. Also, the Panel relied on the medical evidence (at paragraph [29]) that the appellant had no current mental health

problems. As a matter of law, the Panel's conclusion was properly open to it on the evidence"

8. Sir Henry Brooke expressly stated that he refused permission to appeal on the same grounds as Senior Immigration Judge Grubb. I have considered Immigration Judge Kaler's notes of Dr Meadway's oral testimony and have done so against the terms of the AIT determination. In my judgment, counsel's suggestion that returning the applicant to Kosovo would amount to requiring him to take poison is wide of the mark on the evidence before the Tribunal. The most that can be said, it seems to me, is that the AIT may have underplayed some of the difficulties which, according to the doctor, the applicant would face, but they have not misunderstood her evidence. They have not used the term "treat" as if it meant provide a complete cure. Certainly Dr Meadway was clear that the drugs' side effects would not be completely cured by treatment and he would face severe medical difficulties. That seems to me to be a position that is consistent with the reasoning of the AIT; their decision, in my judgment, contains no error of law.

9. The applicant seeks to distinguish the decision of their Lordship's House in N v SSHD [2005] UKHL 31 on the facts, but the question in any such case is whether expulsion would expose the applicant to such a severe degree of suffering as would violate his Article 3 rights. The AIT were well entitled in this case to hold that that was not made out. The threshold for Article 8 in cases of this kind is also a high one and again the AIT cannot, in my judgment, be held to be in error in having rejected this applicant's Article 8 case.

10. The court has now seen a number of cases of this kind. They are always worrying and troublesome, but we cannot usurp our own jurisdiction out of sympathy for an applicant by granting leave where there is no arguable error of law in the decision sought to be appealed. In my judgment there is no such error here and I would refuse the application.

Lord Justice Dyson

11. I agree.

Order: Application refused