Case No: (1) C5/2007/2305(A)
(2) C5/2007/2305

Neutral Citation Number: [2008] EWCA Civ 510
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AS/01476/2005]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 10th April 2008

Before:

LORD JUSTICE WARD
LORD JUSTICE DYSON
and
LORD JUSTICE THOMAS

- -

Between:

BK (ZIMBABWE) **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 N S Ahluwalia (instructed by Messrs Turpin & Miller) appeared on behalf of the **Appellant**.

Ms J Richards (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

- -

Judgment

(As Approved by the Court)

Lord Justice Dyson:

1. The appellant is a citizen of Zimbabwe. He is now 36 years of age. He was granted six months leave to enter the United Kingdom as a visitor in September 1999 and remained as an overstayer. In July 2002 he was diagnosed as HIV positive. He commenced Anti-Retroviral (ARV) treatment, initially in the form of Neviriprine. He developed a severe Stevens-Johnson reaction to this drug which resulted in his being covered in burn blisters from head to toe and significantly impaired sight. The drug was changed and the blisters disappeared. He no longer has full vision and his eyes are constantly red. He continues to be successfully treated with ARV medication. The treatment is not curative but it keeps the HIV/AIDS under control.

2. He applied for asylum in November 2004. His claim was rejected by the Secretary of State. He appealed on both Refugee Convention and human rights grounds. His appeal was dismissed on both grounds by Ms Thomas, adjudicator, in a determination promulgated on 20 April 2005. The basis of his asylum claim was that he was involved with the MDC, who are opposed to the ruling ZANU-PF party. The adjudicator found the appellant's evidence unreliable and she was not satisfied that he was involved with the MDC or had been persecuted as he claimed. The basis of his human rights claim was that his removal would be contrary to Article 3 and/or 8 of the European Convention on Human Rights on the grounds that in Zimbabwe he would not receive the medical treatment that he requires, and that as a result he would die a painful death within a reasonably short time.

3. A reconsideration was ordered *inter alia* because Ms Thomas had misconstrued the expert evidence in concluding that the appellant's specific treatment regime would be available in Zimbabwe. The appeal was heard by Senior Immigration Judge Perkins and in a determination promulgated on 31 July 2007 it was dismissed. The appellant appeals with the permission of Sir Henry Brooke, who in giving permission said:

> "Given the Senior Immigration Judge's clear finding as to the dreadful fate that awaits the appellant should he be returned to Zimbabwe, I consider that the Court of Appeal should review his decision under Article 8 and I cannot say that there is absolutely no real prospect of success."

4. Once again the court is faced with the appalling issue of deciding how to deal with the tragic case of a person who has no right to remain in this country, and who faces illness and death if he is removed to the country of his nationality.

5. ***The determination.*** There were a number of reports before the Immigration Judge. The most important of these were reports by Mr Tony Barnett dated 11 March 2005 and 1 May 2007. Mr Barnett is an Economic and Social Research Council Professional Research Fellow at the London School of Economics. He has a special interest in the implications of

the HIV/AIDS epidemic in Africa. The Immigration Judge was impressed by his evidence and accepted it without qualification as well-researched and authoritative. The Immigration Judge made the following quotations from Mr Barnett's earlier report in his determination.

> "14. In a reasoned opinion he reaches the conclusion set out at a paragraph numbered 4 under the heading 'The Cost of Your Client's Treatment in Zimbabwe' at page 94 of the bundle in these words:
> 'In other words, for all practical purposes, in my opinion and on the basis of my current knowledge, I believe that it would be impossible for your client to receive his current treatment in Zimbabwe for reasons of cost, dependable availability and accessibility.'
>
> 15. He opines that the best treatment the appellant could reasonably expect to get is common analgesics of the kind readily available from pharmacists in the United Kingdom. The appellant would also face a degree of social stigma as an AIDS patient. Mr Barnett describes the likely effect of removal in a long paragraph in the following terms:
> 'His Suffering would be made up as follows:
> Mental anguish and suffering: the knowledge before return and immediately after return but before the effects of his UK-provided medication wore off that he had to look forward to a long period of discomfort, extreme pain, indignity and mental and emotional confusion;
> Mental suffering: knowing that he would become a burden to those around him and become totally physically and emotionally dependent upon them;
> Mental anguish and suffering as he began to experience a range of OLS;
> Physical suffering: with the onset of OLS, he might experience any of the following: external and florid fungal infections of the mouth, genitals, nose, anus, throat and upper respiratory system with attendant irritation, choking, inability to breathe, inability to swallow, internal itching, discharges and unpleasant odours. He might experience a form of cancer called Kaposi's sarcoma and a form of shingles which is extremely painful.
> Physical suffering from AIDS-defining illnesses: he would be very likely to contract TB, experience bouts of acute pneumonia, suffer blindness and mental confusion.

> He would have swollen and painful lymph glands, acute, continuous and uncontrollable diarrhoea, wasting, dehydration, extreme pain. Terrible weakness as he lost body weight and experienced acute nerve pains.
> Mental anguish at the knowledge of what lay before him.'"

At paragraph 16 the Immigration Judge said:

> "The Tribunal is, regrettably, more than a little familiar with the declining conditions in Zimbabwe and it is not at all surprising to find that Mr Barnett says it is becoming increasingly difficult to get accurate information from that country. He quotes a report dated 21 February 2007 saying that 'Elements of a previously well-maintained healthcare infrastructure are crumbling'. Some non-governmental organisations do offer some sort of service but the government endeavours to ensure that such health services that are available are rationed so the ZANU-PF supporters are favoured. However the most likely conclusion is that the appellant would not get any treatment at all except, possibly, some analgesics."

In paragraph 17 the judge said that he had no hesitation in accepting Mr Barnett's conclusion, but in the event of the appellant's return "he will die and in the most appalling circumstances of pain, indignity and in all likelihood confused terror". At paragraph 18 the Immigration Judge said:

> "I have deliberately set out the grisly prediction in Mr Bennett's [sic] report because it is important that anyone reading this appreciates, as I do, the likely fate of this man in the event of his return. No one with any sense of human decency could help feeling pity for him in his circumstances and revulsion at his possible plight. Sadly there are a very large number of people in Zimbabwe and in the world at large that do face this fate. It is a consequence of living in a world where there is abject poverty and poor healthcare."

6. He then considered the appellant's claim under Article 3. He referred to the decision of the House of Lords in N v SSHD [2005] UKHL 31; [2005] 2 AC 296 and D v UK [1997] 24 EHRR 423. He concluded that the removal was not inhuman or degrading treatment:

> "It is the poor healthcare in Zimbabwe that is the problem."

The appeal under Article 3 was dismissed.

7. He then turned to the claim insofar as it was based on Article 8. He set out the guidance given by Lord Bingham of Cornhill at paragraph 17 of R (Rasgar) v SSHD [2004] UKHL 27; [2004] 2 AC 368:

> "In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:
> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
> (3) If so, is such interference in accordance with the law?
> (4) If so, is such interference 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?
> (5) If, so, is such interference proportionate to the legitimate public end sought to be achieved?"

Later the Immigration Judge said:

> "23. I answer the first two questions in the affirmative. A person's 'private and family life' is sometimes translated as a person's 'physical and moral integrity'. His health and well being is generally protected and this appellant's removal could be expected to lead to a cataclysmic decline in his health and so, potentially, engages the operation of article 8.
>
> 24. However I have no hesitation in saying that removal is proportionate to the proper purpose of enforcing immigration control. Dreadful as the

> consequences of removal are, the appellant has no right to remain in the United Kingdom and does not acquire such a right by reason of removal causing a deterioration in his health. It may, theoretically, be easier to succeed under article 8 than under article 3 because article 8, by its very nature, requires a balancing exercise that potentially includes a range of factors not relevant to an article 3 claim. However I see nothing in this case that makes removal disproportionate. If immigration control is to mean anything those not entitled to be in the United Kingdom have to be removed. This appellant's claim is based on his ill health and nothing else of much significance at all. I find that on the facts of this case, article 8 adds nothing useful.
>
> 25. As I indicated above, this is a sad case. The fate awaiting this appellant is a horrid one. However, for the reasons given I am quite satisfied that he does not have a right under the European Convention to avoid it."

8. ***The case law***. It is only necessary to refer to two authorities -- Razgar, and in particular the speech of Lord Bingham. At paragraph 4 he said:

> "As is clear from this judgment, the applicant in Henao placed reliance on article 3 alone. Read in isolation, the judgment might suggest that only article 3 can be relied to resist a removal decision made by the immigration authorities. But the House has held in Ullah that that is not so, and it seems clear that the court confined its attention to article 3 because that was the sole ground of the application. The case does however illustrate the stringency of the test applied by the court when reliance is placed on article 3 to resist a removal decision. It also shows, importantly for the Secretary of State, that removal cannot be resisted merely on the ground that medical treatment or facilities are better or more accessible in the removing country than in that to which the applicant is to be removed. This was made plain in D v United Kingdom [1997] 24 EHRR 423, 449 para 54. Although the decision in Henao is directed to article 3, I have no doubt that the court would adopt the same approach to an application based on article 8."

At paragraph 10 Lord Bingham said:

> "I would answer the question of principle in para 1 above by holding that the rights protected by article 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal does not violate article 3, if the facts relied on by the applicant are sufficiently strong. In so answering I make no reference to 'welfare', a matter to which no argument was directed. It would seem plain that, as with medical treatment so with welfare, an applicant could never hope to resist an expulsion decision without showing something very much more extreme than relative disadvantage as compared with the expelling state."

I have already referred to paragraph 17. At paragraph 20 Lord Bingham said this on the subject of proportionality:

> "The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity of consequences of the interference will call for a careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal … Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save the small minority of exceptional cases, identifiable only on a case by case basis."

9. The other authority to which I should refer briefly is the decision of this court in ZT v SSHD [2005] EWCA Civ 1421, where the court was concerned with a Zimbabwean overstayer who was diagnosed as being HIV positive. The facts of her case, in many ways, were strikingly similar to those of the case before us. Her appeal, on the grounds that the decision to remove her was contrary to Articles 3 and 8, was dismissed. At paragraph 18 of his judgment Buxton LJ said:

> "I can envisage a case in which the particular treatment afforded to an AIDS sufferer on return, in terms of ostracism, humiliation, or deprivation of

> basic rights that was added to her existing medical difficulties, could create an exceptional case in terms of the guidance given by Baroness Hale of Richmond, cited in paragraph 12 above. That would, in the first instance, be a matter for the Secretary of State."

10. The reference to the guidance given by Baroness Hale is to what she said in N v SSHD, which was an Article 3 case; and paragraph 18 of Buxton LJ's decision is in the section of his judgment that deals with the Article 3 appeal. But it is accepted by Miss Richards that, where Article 8 is in play, factors such as ostracism, humiliation and deprivation of basic rights are in principle capable of being relevant to the question whether it is proportionate to remove a person in what I might call a "health case".

11. ***The grounds of challenge***. There is no challenge to the dismissal of the appeal in relation to Article 3. Mr Ahluwalia submits, however, that the Immigration Judge should have allowed the appeal on Article 8 grounds and that he erred in law in failing to do so. He does not contend that the decision was perverse. He accepts that it was open to the Immigration Judge to dismiss the Article 8 claim. He submits, however, that the Immigration Judge failed to take into account a number of material factors. The first factor that the Immigration Judge is said to have failed to take into account is that, as a result of the Stevens-Johnson reaction, the appellant no longer has full vision. This is true, but in my judgment there was no legal error here. The only evidence before the Immigration Judge as to the appellant's visual impairment was that given by the appellant himself to Miss Thomas, which I have already summarised. It was not suggested that his visual impairment materially affected his daily life. Above all, there was no evidence that his sight would deteriorate if he were to return to Zimbabwe, still less that it would deteriorate more quickly or to a greater degree if he were to return to Zimbabwe than if he were to remain in the United Kingdom. In my judgment there is nothing in the first point.

12. The second factor that the Immigration Judge is said to have failed to take into account is that, even if the appellant were to seek some form of palliative care in Zimbabwe, he would be turned away from a hospital or care facility because he was not in possession of a ZANU-PF party card. But the Immigration Judge found at paragraph 16 and therefore took into account that the most likely conclusion was that the appellant would not get any treatment at all except possibly some analgesics. That was one of the "dreadful" consequences of removal to which he was referring in paragraph 24, and one of the reasons why the fate awaiting the appellant was a "horrid one", as said in paragraph 25. In my judgment the fact, if it be true, that the reason why the appellant would receive no treatment was because he was not in possession of a ZANU-PF party card adds nothing to the argument.

13. The third factor is that the Immigration Judge failed to take into account the fact that, as a person not in possession of a ZANU-PF party card, the appellant would be assumed to be an MDC supporter and would, on that account, be at

risk of intimidation, political harm and even death. The argument that the Immigration Judge erred in failing to take this factor into account derives from a section on page 2 of Mr Barnett's second report:

> "**How access to medication is used as political tool.**
> This question is hard to address for I cannot provide any names for my sources as to do so would put them in danger. The situation is that to get medical treatment in any public facility a ZANU-PF party card must be produced. If it is not produced, no treatment is available. This applies to many other interactions with government in Zimbabwe. If a party card is not produced, a person is assumed to be an MDC supporter. Such suspicions can result in intimidation, physical harm and even death."

14. But as Miss Richards points out, the risk of intimidation or worse, on the grounds of imputed political opinion, was not advanced as part of the appellant's human rights case before the Immigration Judge. It was not a point taken in the grounds for reconsideration or indeed in the grounds of appeal to this court. It formed no part of the way in which the case was put before the Immigration Judge. Nor should it be overlooked that the appellant was represented by counsel before the judge. In these circumstances the Immigration Judge cannot be criticised for not making appropriate findings, or, to the extent that he would have found that there would be a risk of intimidation and worse, not taking that into account in dealing with the proportionality question.

15. The fourth factor was that the Immigration Judge failed to consider the effect of ostracism that would result from the stigma attaching to HIV and AIDS sufferers in Zimbabwe. But it is clear that the judge did take this into account and, as I understand it, Mr Ahluwalia abandoned this point during the course of his oral argument.

16. The final factor is that the Immigration Judge failed to take into account the fact that, if returned to Zimbabwe, the appellant would be exposed to massive shortages of food and other basic commodities by reason of the dire state of the Zimbabwean economy and what has been referred to as the "politicisation of food", a policy whereby members of the ZANU-PF party receive food at the expense of the rest of the population. Mr Ahluwalia drew our attention to a document in the appeal bundle, paragraphs 30.29 and 30.30 of which appear to lend some support to the existence of such a policy, although there is some doubt as to whether this document was in the bundle that was before the Immigration Judge. But it was no part of the appellant's case under Article 3 or 8 that, in addition to the horrific affect on his health of the withdrawal of the ARV treatment if returned to Zimbabwe, the appellant was also at risk of being deprived of the basic right to food. As Miss Richards points out, the evidence before Miss Thomas was that, on return to Zimbabwe, the appellant would go to live with his parents and his sister, who would support him.

There was no suggestion that they would be deprived of food. The judge was not asked to and did not make any findings as to whether the appellant would be deprived of food at all, let alone to an extent that would adversely impact on his health. It is not possible for the appellant now to say that the Immigration Judge erred in law in failing to take this point into account.

17. In my judgment there is no substance in any of the criticisms of the Immigration Judge's determination. He was as alive as I am to the horrific nature of this case. A tragedy of truly epic proportions has struck Saharan Africa. Approximately 25% of the population of Zimbabwe suffers from HIV AIDS. Many flee from that sad country in order to escape from the toils of the appalling economic and political troubles from which it is suffering. Most go to neighbouring African countries, but substantial numbers come to this country. Sadly, the plight of the appellant is far from unusual. The case law makes it clear that it is only in an exceptional and extreme case that a claim will succeed under Article 3 or 8. The Immigration Judge loyally applied the law. He did not fail to take into account any relevant factors and that is why, reluctantly, but ultimately without hesitation, I have come to the conclusion that this appeal must be dismissed. I cannot end without expressing my admiration for the clear, eloquent and realistic way in which Mr Ahluwalia presented his arguments. I also wish to express my gratitude to Miss Richards for her clear and persuasive submissions.

Lord Justice Thomas:

18. I agree.

Order: Appeal dismissed