

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 22 March 2004

Date Determination notified:

30 April 2004

Before:

Dr H H Storey (Vice President)

Mr D R Bremmer, JP

Mr P Bompas

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representatives: Mr R. Beloff, Counsel, instructed by Sultan Lloyd Solicitors for the appellant, Mr J. Jones for the respondent.

DETERMINATION AND REASONS

1. The appellant is a national of Jamaica. He appeals against a determination of an Adjudicator, Mr R.D. Lewis, dismissing his appeal against a decision giving directions for removal.
2. The Adjudicator accepted that the appellant was a homosexual and that in Jamaica conditions for homosexuals are 'uncomfortable'. He also accepted that he was HIV positive with a skin disorder (prurigo nodularis) as a result of his co-infection of HIV and hepatitis B "e" antigen positive. Despite doubts, he accepted too the appellant's accounts of his father throwing him out when he was seventeen. He also (seemingly) accepted that the appellant, his aunt, with whom he had gone to live, asked him to leave the house when she found out about his relationship with a gay man. What he did not accept,

however, was that the appellant had any valid reason for failing to claim asylum until he had been in the UK staying with his grandfather some three years nine months.

3. In dismissing the appellant's asylum appeal the Adjudicator noted that the appellant had never come to the adverse attention of the police and, although suffering the indignity of being shouted at and having stones thrown at him, had not been beaten up. At most, he concluded, the appellant had faced difficulties falling short of serious harm or persecution. There was no reason, he stated, to think that the appellant would face serious harm or persecution on return. He accepted the appellant's condition might make it difficult but not impossible for him to find a job.
4. In relation to the appellant's health he further concluded that return would not expose him to a real risk of treatment contrary to Article 3. The appellant would, he agreed, clearly need medicines. However, in his view the drugs the appellant needed would be available in Jamaica: their cost was 'not truly unobtainable because of price'.
5. Turning to Article 8, the Adjudicator considered whether the appellant's relationship with his grandfather qualified as family life within the meaning of Article 8. Despite accepting that the appellant had looked after his grandfather, an elderly man in ill health, for some four years, he did not think the grandfather would be denied assistance from the social services were the appellant to be returned to Jamaica. He did not find that there was a 'further element of dependency' such as to make the relationship with his grandfather qualify under Article 8. 'In any event', he added, 'I am satisfied that the removal would be a proportionate response.'
6. The grounds of appeal challenged the decision on asylum and human rights grounds. As regards Article 3 they submitted that the Adjudicator underestimated the degree of societal prejudice and homophobic violence homosexuals face in Jamaica. The police, so far from protecting homosexuals, often ill-treated them. Issue was taken with the Adjudicator's finding that the appellant would be able to obtain employment, particularly given he had a skin condition and that HIV sufferers faced discrimination in any event. The Adjudicator failed to take proper account of the impact on the appellant of the cessation or withdrawal of medical and social facilities.
7. As to Article 8, the grounds submitted the Adjudicator had erred in not taking into account the adverse impact of the decision on the grandfather's human rights.

8. We have not set out in detail the challenge raised in the grounds to the Adjudicator's dismissal of the asylum appeal. That is because we considered this challenge decidedly ill-founded. Essentially the only objection raised was to the Adjudicator's decision to take adverse account of the appellant's failure to apply for asylum for some three years. However, the Adjudicator was quite entitled in our view not to accept that the appellant, who was an intelligent young man, would have failed to understand the need to apply for asylum. Whether or not he felt able to divulge his past difficulties as a homosexual in Jamaica to his grandfather, there was no satisfactory evidence to show he had been deprived of opportunities during his three years in the UK to seek advice or assistance about his asylum concerns.
9. We shall next address the Article 8 grounds of appeal. In relation to this issue too we consider the grounds lacked merit. It is right that an Adjudicator when considering Article 8 grounds of appeal must consider not just the human rights of the appellant, but also the human rights of other family members insofar as they adversely impact on the appellant. But that is precisely what the Adjudicator did. At paragraph 44 he reminded himself that 'it is the human rights of the appellant with which I am concerned, following the guidance of the Tribunal in Kehinde (01/TH/02669) those of his grandfather are relevant only so far as they impinge upon his' (emphasis added). Furthermore, he went on to consider whether there was a family life relationship between the appellant and his grandfather.
10. We see some force in the criticism that the Adjudicator was wrong to find that the appellant's relationship with the grandfather did not constitute family life. Earlier in his determination he accepted that the appellant's grandfather was 'an elderly man in ill health who has been looked after by the appellant since 1999.' Given this acceptance, it is not clear to us that he was justified in concluding that there was no element of dependency such as to bring a relationship between the appellant, an adult grandson, and his grandfather within the meaning of family life for Article purposes. However, it remains that the Adjudicator was justified in considering that this relationship was not integrally a dependant one, since, if the appellant returned to Jamaica, it was reasonable to assume the grandfather would be eligible for social services support: that went to the issue of the strength and depth of these family life ties. However in any event, the Adjudicator did go on in the alternative to find that even if there was a family life between him and his grandfather, the decision did not amount to a disproportionate interference with that family life. In this regard, the fact that the appellant was a young adult who had known from the outset that he had no entitlement to remain in the UK beyond his limited leave was a weighty factor.

11. Although not raised clearly in the grounds we have also considered, under the aegis of Article 8, whether the decision amounted to a disproportionate interference with the appellant's right to physical and moral integrity as an aspect of his right to respect for private life. However, we see no proper basis in this case for keeping the issue separate from that of whether the decision constituted a violation of Article 3. It is to this issue that we now turn.
12. Mr Beloff sought to argue that in comparison with the situation of the appellant in the Court of Appeal case of N [2003] EWCA Civ 1369 the appellant in this case was in an extreme and exceptional situation since he not only had HIV, he also had a skin disorder complication together with the prospect of a hostile homophobic environment. He reiterated the arguments raised about the appellant's job prospects and associated ability to pay for anti-retroviral drugs that he would need. He also drew attention to the recent medical evidence highlighting the lack of availability in Jamaica of the specific cocktail of drugs he would need to avoid a collapse of his health.
13. We do not consider the situation the appellant would face on return to Jamaica would expose him to a real risk of serious harm. Although the objective evidence did show that homosexuals in Jamaica faced societal discrimination and prejudice, it fell well short of establishing that homosexuals per se faced a real risk of serious harm. The appellant had not previously come to the adverse attention of the authorities and the Adjudicator did not accept that difficulties he had met in the past crossed the threshold of persecution, or that future difficulties would cross this threshold either.
14. As regards the appellant's state of health, as Mr Beloff conceded, his condition was not as serious as that of N. He was in the relatively early stages of HIV. The medical report of Dr Jeanette Medway dated 19 March 2004 described the appellant's CD4 count (prior to treatment) as 210 and an initial viral load of 500,000. She states that "[w]ithout appropriate treatment Mr Brown is likely to survive less than two years." Even taking account of his skin condition and past history of hepatitis, he was still able to function as an independent adult (and had engaged in education whilst here). His skin condition, as described by Dr Tan in his report of 9 March 2004, is described as having been controlled by various creams and ointments. The appellant himself had only seen fit to afford four sessions of ultraviolet light treatment.
15. As regards the availability of appropriate medical treatment in Jamaica, we are prepared to accept, on the basis of the medical reports, that he may not be able to obtain the ideal combination of drugs and treatment

in Jamaica for HIV sufferers, which would certainly prevent any dramatic deterioration in his condition.

16. Mr Beloff contended that, even if there was an adequate level of treatment potentially available to this appellant, in practice he would not be able to access it for reasons of cost. However, in the first place we see nothing unsustainable about the Adjudicator's finding that the appellant would be able to obtain employment in Jamaica. There is evidence that HIV-sufferers face discrimination in the job market, but given the appellant was found to be an intelligent young man, it was open to the Adjudicator to conclude that the appellant could overcome these difficulties.
17. In any event, it is clear from the Court of Appeal judgment in N that affordability cannot be determinative of the issue of whether a person needing medical treatment upon return to his country of origin faces a real risk of serious harm. We would observe that even though the medical experts noted shortcomings in the available medical facilities in Jamaica, it is certainly not a country in respect of which there is no framework of public medical provision for HIV sufferers: see CIPU Report for October 2003 at paragraphs 5.73 to 5.79. On the Adjudicator's findings, this appellant would also have the ability through employment to pay for treatment, thus avoiding cheap agency AVRs, at least to some extent.
18. With reference to N and in particular the dissenting judgment of Carnworth LJ, Mr Beloff pointed out that unlike N the appellant would not have any available structure of family support, having been rejected by his father and aunt. That would appear to be the case. Nevertheless, the Adjudicator for sound reasons found that the appellant would be able to obtain employment. In addition to being able to establish a working life, we do not think there is any reason why he would find it impossible to develop private life relationships with others, including, as before, with a homosexual partner or partners. We accept that his health difficulties would cause him some difficulties, but we do not consider the Adjudicator erred in concluding that they would not cross the threshold of serious harm. In reaching our conclusions we have taken particular account of the report of Dr Jeanette Medway which details stigma and discrimination attached to those with HIV/AIDS in Jamaica. However, we do not consider her report demonstrates that there is a consistent pattern of gross, flagrant or mass violations of the human rights of those with HIV/AIDS in Jamaica. Following the Court of Appeal judgement in Harari [2003] EWCA Civ 807, the appellant failed to show that there was a real risk of serious harm.

19. It is, as Mr Beloff has emphasised, necessary in considering Article 3 to assess the appellant's situation cumulatively. However, we are satisfied that this is what the Adjudicator did in this case. He took account of the difficult societal situation the appellant would face as a homosexual, his medical condition, including the fact that the appellant had a serious skin condition and the likely availability of medical treatment given "that the cost of the drugs is not truly unobtainable because of price". In short, the Adjudicator gave sustainable reasons for finding that the appellant's case was not extreme or exceptional and that the appellant had not demonstrated that the decision would cause serious harm to his physical and moral integrity.
20. For the above reasons, this appeal is dismissed.