IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01130/2014

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 17 August 2015	**On 14 September 2015**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR HUBERT ROBERT HALL

Respondent

Representation:
For the Appellant: Mr S Kandola, Senior Presenting Officer
For the Respondent: No Legal Representative

DECISION AND REASONS

Introduction

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department. I shall refer herein to Mr Hall as the claimant.

2. This is a troubling case, the claimant being a persistent offender whom the public interest clearly dictates should be removed to his homeland. The inability of the Secretary of State to remove the claimant is, however, rooted in Article 3 ECHR - a consideration of which does not incorporate a public interest element, neither does it incorporate any exercise of

discretion or balancing exercise. The rights protected by Article 3 are absolute.

3. The claimant is a national of Jamaica born in 1958. He arrived in the United Kingdom on 20 May 1991 and was granted leave to enter as a visitor for a period of six months. Thereafter he remained in the United Kingdom without leave until he was granted six months discretionary leave to remain on 9 May 2011.

4. Between 1993 and 2003 the claimant was convicted of sixteen criminal offences. *Inter alia*, in 1996 he was sentenced to three months' imprisonment for using threatening or abusive behaviour with intent to cause fear or provocation of violence and one month's imprisonment for deception. In 2000 he was sentenced to four years' imprisonment for robbery, and in 2003 to two months' imprisonment for having an article with a blade and 30 months' imprisonment for attempted robbery. The claimant was arrested in 2005 on suspicion of illegal entry and in connection with an outstanding charge for assault and failure to answer bail, and was served at that time with notice of a decision to make a deportation order against him – against which he brought an appeal to the Tribunal. This appeal was dismissed in a determination of 3 April 2006 and a deportation order was subsequently made in the claimant's name on 17 June 2006.

5. The Secretary of State was thereafter unable to effect deportation, it appears, because of the claimant's medical conditions. The claimant subsequently made an application for revocation of the deportation order, which was rejected. He appealed this refusal to the First-tier Tribunal and in a determination of 8 April 2011 a panel of the First-tier Tribunal (Immigration Judge A W Khan and Mr Sheward (non-legal member) allowed the appeal on the basis that the claimant's medical condition was such that requiring him to undertake the journey to Jamaica would lead to a breach of Article 3 ECHR.

6. On 31 May 2012 the claimant was convicted at Snaresbrook Crown Court after pleading guilty of committing arson with intent to endanger life – having set fire to clothing outside the room of another resident at the hostel he was residing at. The sentencing judge observed that the claimant had failed to take his medication on the day he had set the fire and that he had, also, taken cannabis and drunk alcohol on that date. The claimant was sentenced to four years imprisonment on 13 July 2012. This triggered the application of section 32 of the UK Borders Act 2007 - the claimant falling squarely within the definition of a foreign criminal therein. As a consequence, on 5 June 2014 the Secretary of State made a decision that section 32(5) of the UK Borders Act 2007 applies to the claimant and a further deportation order was signed in his name on that same date.

7. The claimant appealed this decision to the First-tier Tribunal and the appeal came before First-tier Tribunal Judge Stanford on 15 May 2015.

Judge Stanford allowed the appeal both on Article 3 ECHR grounds and under the Immigration Rules, in a decision promulgated on 11 June 2015.

8. It is not disputed that Judge Stanford came to the unimpeachable finding that there would be adequate medical services available to the claimant in Jamaica and that the high threshold required to establish a breach of Article 3 in Jamaica had not been met.

9. The appeal was allowed on Article 3 grounds for ostensibly the reasons summarised in paragraphs 32 and 33 of Judge Stanford's decision:

> "32. The conclusion reached by the Tribunal in 2011 that the risks to the appellant would cause the United Kingdom to be in breach of the appellant's rights under Article 3 if it were to deport him was based on medical opinion provided by both the appellant and respondent. There is no suggestion in the decision letter or the other documents provided on behalf of the respondent that there has been a change to the medical conditions suffered by the appellant. The conclusions reached by the respondent in the decision letter about the effect of his conditions on his fitness to fly are despite the risks specifically referred to in the descriptions of the conditions and without reliance on any further medical opinion made available to me.
>
> 33. I find, following the decision in Devaseelan [2002] UKIAT 00702, that the factual issue of the appellant's fitness to fly has been determined in the earlier Tribunal hearing. It has been determined that he is not fit to do so and there is no evidence before me that the situation has changed. Requiring him to fly to Jamaica would breach his rights under Article 3 of the Human Rights Convention even though his removal from the United Kingdom would otherwise be in the public interest."

10. For the same reasons, the appeal was also allowed under the Immigration Rules; the breach of Article 3 *en route* to Jamaica being found to amount to very compelling circumstances for the purposes thereof.

11. Designated First-tier Tribunal Judge Macdonald granted the Secretary of State permission to appeal to the Upper Tribunal in a decision of 6 July 2015.

Error of Law

12. The Secretary of State's grounds of appeal can be summarised thus:

    (i) The First-tier Tribunal irrationally concluded that there had been no material change in the claimant's medical condition since 2011 and/or it failed to give adequate reasons for such conclusion;

    (ii) Given that the claimant would not be returned until such time as a member of the relevant airline's medical department had given medical approval for him to fly, the Tribunal ought to have dismissed the appeal on the basis that there could be no circumstances in which removal would take place that would lead to a breach of the claimant's Article 3 rights.

13. At the hearing Mr Kandola sought to crystallise these grounds as follows: (i) although the findings of the 2011 Panel were to be taken as the starting point, that did not relieve the claimant of having to prove his case to the required standard before the Tribunal in 2015; and (ii) there had been insufficient evidence before the First-tier Tribunal from the claimant so as to entitle it to rationally conclude that his removal would breach Article 3 ECHR.

14. Mr Kandola also sought to rely upon the following passage from the Secretary of State's 28 page decision letter of 5 June 2014 - (accurately summarised by the FtT in paragraph 31 of its decision):

> "Fitness to travel
>
> 93. While the findings of the previous appeal Tribunal with regard to your returnability by air are noted, recent information provided by staff at the immigration removal centre healthcare department advised, on 22 November 2013, that you 'should be fit to fly'.
>
> 94. Section 6 of the International Air Travel Association (IATA) Medical Manual (6th Edition) provides information on medical conditions, and fitness to fly, to enable airlines to make decisions on the suitability of accepting passengers with medical conditions.
>
> Section 6.1.2. commences:
>
> *'Medical clearance is required by the airline's medical department if the passenger:*
>
> *(a) suffers from any disease which is believed to be actively contagious and communicable;*
>
> *(b) because of the physical or behavioural condition, is likely to be a hazard or cause discomfort to other passengers;*
>
> *(c) is considered to be a potential hazard to the safety or punctuality of the flight including the possibility of diversion of the flight or an unscheduled landing;*
>
> *(d) is incapable of caring for himself and requires special assistance;*
>
> *(e) has a medical condition which may be adversely affected by the flight environment.*
>
> *Passengers not falling into the above categories normally do not need medical clearance, however, if in doubt, medical advice should be obtained."*
>
> 95. While it might be the case that the coronary conditions or chronic obstructive pulmonary disease require assessment by an airline medical officer, there is no indication from the information listed that you would be refused flight. If deemed necessary, oxygen could be provided to you for the duration of the flight.
>
> 96. There is no indication that your diagnosed mental health conditions make you a hazard to other passengers; these conditions appear to be managed effectively by treatment.
>
> 97. There is nothing to suggest that, you would be deemed unfit to fly as a result of any of the other diagnosed conditions."

15. The claimant suffers from the following medical conditions: depression, schizophrenia, alcoholic cardiomyopathy, a myocarditic episode, pulmonary embolism, paroxysmal atrial fibrillation, dilated cardiac myopathy, diabetes, asthma, chronic obstructive pulmonary disease, hypertension and obesity.

16. The FtT carefully considered the evidence and information produced by the Secretary of State, concluding in the following terms:

> "24. The one reference in the Respondent's bundle to a possible change of circumstances is in a letter dated 22 November 2013 from the 'Operational Manager' of West Kent Prisons to the Home Office summarising the medical conditions suffered by the appellant and listing his sixteen different doses of medication then being prescribed. In the letter the Operational Manager refers to a 'physician point of view' that following a review, in the opinion of 'our doctors', the appellant 'should be fit to fly'. No medical report by a named doctor, supporting this opinion that circumstances had changed, formed part of the evidence before me.
>
> 25. The letter incorporating the decision that s.32(5) of the UK Borders Act applies, dated 5 June 2014, adopted that reported medical opinion, describing it as 'recent information prepared by staff at the immigration removal centre healthcare department'. There was no reference to an identified report.
>
> 26. The detention review dated 8 May 2015 handed to me at the hearing also refers to removal directions being cancelled in February 2010 because the appellant was 'deemed medically unfit to fly'.
>
> 27. There is a note in the review that there was a 'medical response' by a Dr Shah at HMP Elmsley in January 2015 stating that 'there is no change in the health of [the appellant] since his last report was done in September 2014'. That report was not part of the Respondent's bundle.
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> 28. It is noted in that review that, following the making of the current deportation order requests for an update on the appellant's current health were sent to healthcare at HMP Elmsley in April and May 2015 and a response was received from Dr Mukhopadhyay on 22 April 2015. His response is noted as recording that 'Mr Hall suffers from the following medical conditions: Ischemic heart disease, Past history of myocardial (sic), Dilated cardiomyopathy with impaired LV function, Atrial fibrillation, Diabetes, Bronchial asthma, Iron deficiency and Depression. He has been referred to cardiologist, general surgeon and genitourinary medicine in the past and is waiting to be seen by them'. The full response by Dr Mukhopadhyay was not made available to me and there was no further evidence that the consultations for which the Appellant was waiting. There is no indication that the question of his fitness to fly was re-assessed."

17. Before turning to a consideration of the specific challenges made by the Secretary of State it is first prudent to set out the binding guidance provided by the Tribunal in the starred determination of Devaseelan [2002] UKIAT 00702; a decision which has been widely approved by the Court of Appeal.

18. Devaseelan concerned a second appeal made on human rights grounds by an asylum seeker whose asylum appeal had previously been dismissed. The IAT gave guidance as to the weight to be attached to the findings of the Adjudicator who had rejected the asylum appeal. It is not in dispute that this guidance is of application in the instant appeal or that it applies equally to a scenario in which an earlier appeal was allowed. Insofar as it is relevant, the IAT said as follows in paragraphs 39 to 42 of its decision:

    (1) The first Adjudicator's determination should always be the starting point. It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.

    (2) Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator.

    (3) Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator.

    (4) Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. An Appellant who seeks, in a later appeal, to add the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility ... for this reason, the adduction of such facts should not usually lead to any reconsideration of the conclusions reached by the first Adjudicator.

    (5) Evidence of other facts – for example country guidance – may not suffer from the same concerns as to credibility, but should be treated with caution.

    (6) If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated ...

    (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be as it were held against him. We think such reasons will be rare."

19. Turning to the Secretary of State's grounds of challenge. It is trite that the burden of proof before the FtT rested with the claimant. That burden is not easily discharged in a medical claim (see for example GS (India) [2015] EWCA Civ 40). Although Judge Stanford failed to direct himself in this regard, such a failure will rarely of itself lead to a determination being set aside absent it being clear from reading the determination as a whole that the First-tier Tribunal failed to lawfully apply the correct burden or standard of proof to its considerations.

20. The fact that there have been findings made in relation to the instant claimant in an earlier determination of the First-tier Tribunal does not lead to a reversal of the burden of proof, or a dilution of the relevant standard of proof to be applied. As made clear in Deveseelan, the findings in the earlier determination are determinative of the situation at the time the earlier determination was promulgated.

21. Judge Stanford was required to treat the findings of the 2011 Panel as the starting point for his consideration of whether the claimant's removal would lead to a breach of Article 3 and, with this in mind, to consider the evidence before him and determine whether such a risk currently exists. The claimant, for reasons which are readily understandable – given his lack of legal representation, his mental health issues and the fact that he has either been in criminal or immigration detention since 2012 - did not produce up-to-date medical evidence before Judge Stanford. This does not mean, however, that the claimant could not be successful in demonstrating an Article 3 risk. That was a matter for the First-tier Tribunal to determine using the 2011 findings as its starting point and considering the evidence that it did have before it.

22. In this regard, I reject the assertion that Judge Stanford failed to pay regard to the assertions and evidence put forward by the Secretary of State. Judge Stanford correctly observed that the Secretary of State had not put any medical evidence before the Tribunal despite, it would appear, having access to such. The Judge took full account of the anecdotal evidence of an 'Operational Manager' in 2013 that a doctor had stated that the claimant 'should be fit to fly', and he, also, correctly identified that there was no medical evidence from this [unnamed] doctor to support such opinion. The weight to be attached to the assertion made by the Operational Manager was a matter for the First-tier Tribunal. It could also have been observed, but did not, that not only was there no medical evidence produced in support of the Operational Manager's assertion, but the Manager's letter of 22 November 2013 did not even identify when the doctor purportedly provided such opinion.

23. Judge Stanford did not, as claimed, direct himself that the Respondent was required to produce a medical report from a named doctor in order to establish that the claimant's removal would not lead to a breach of Article 3, but simply observed the state of the evidence before him.

24. Judge Stanford also took full account of the other assertions and evidence relied on by the Secretary of State and there is nothing irrational in the consideration of such evidence found in paragraphs 26 to 30 of the determination, or indeed elsewhere therein.

25. In my conclusion, although the judge could have expressed himself with greater clarity in paragraph 33 of his determination, he performed the task that was required of him – i.e. to consider the findings made in the 2011 determination as the starting point and, with those findings in mind, to assess the evidence before him to determine whether as of the date of his

determination there was a real risk of the appellant's removal leading to a breach of Article 3. When doing so he did not fail to take into account material matters, nor does his determination display an unlawful inadequacy of reasoning. Judge Stanford's conclusions are clear, cogent and rational, given the evidence before him.

26. The Secretary of State's second ground trespasses to an extent on the first, however, given the way in which the Secretary of State has put her case before me I will deal with it as a discreet issue.

27. It is said that the fact that the claimant will not be returned to Jamaica until he is deemed medically fit to fly by a doctor employed, or engaged, by the airline that it is proposed will fly him there, must lead to his appeal being dismissed. I do not accept that this is so.

28. This submission has parallels to the submissions made by the Secretary of State, and rejected by the Court of Appeal, in both in JI v SSHD [2013] EWCA Civ 279 and CL (Vietnam) v SSHD [2008] EWCA Civ 1551.

29. In JI the Special Immigration Appeal Commission ("SIAC") had concluded the Secretary of State was acting lawfully in deciding that the applicant, who had links with terrorist organisations, should be deported to Ethiopia. The Ethiopian authorities had given assurances to the UK Government which SIAC believed in the main would ensure there would be no risk of Article 3 ill treatment upon return. SIAC nevertheless had concerns as to whether the Ethiopian Human Rights Commission could effectively monitor and report on any ill treatment carried out by junior officials in the Ethiopian administration. There was still work to be done to develop a proper monitoring capability. SIAC left it to the Secretary of State to determine whether and when that had been achieved.

92. The applicant in JI submitted that this was unlawful: SIAC could not leave this issue to be resolved by the Secretary of State at some future date. He claimed that he was entitled to a determination by SIAC itself, at the time of the hearing, whether, if returned to Ethiopia, he would be at risk of Article 3 ill treatment or not. The Court of Appeal agreed, Elias LJ stating at [97]:

> "There are three reasons why it is in principle wrong for the court to allow the Secretary of State to determine any element of the asylum claim. First, it involves an unlawful delegation of the judicial function allowing the Executive to determine matters falling within the jurisdiction of the court. Second, it means that the case will be determined not on the basis of the evidence before the court but on speculation as to what the facts are likely to be at some time in the future. Third, it leaves the asylum seeker in an unacceptable state of limbo pending the future clarification of his status. He is technically illegally in the country and yet he is unable to return to his home State until further steps have been taken sufficient to guarantee his safety. If he is entitled to refugee status or protection from removal on human rights grounds, even if only on the basis that he should be given leave to remain for limited duration, he ought to be given that status or

protection from removal at least for the period when his safety is potentially compromised."

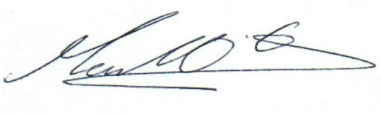
30. In my view this reasoning applies equally in the instant case; although, of course, on the Secretary of State's case it would not be for her to determine the core element of the claimant's human rights claim in the future, but an unnamed doctor engaged by an airline whose conclusion the Secretary of State would accept. For this reason I reject the second limb of the Secretary of State's case before the Upper Tribunal.

31. For the reasons given above I find that the First-tier Tribunal's determination does not contain an error of law capable of affecting the outcome of the appeal and it is to remain standing. It will now be a matter for the Secretary of State as to whether to grant the claimant leave to remain in the UK and, if so, the length of such leave.

Notice of Decision

The Secretary of State's appeal is dismissed. The determination of the First-tier Tribunal is to remain standing.

Signed:



Upper Tribunal Judge O'Connor
Date: 7 September 2015