IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21036/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 7 April 2015	**On 21 April 2015**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

FRANCIS OGHENEDE
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Lee, Counsel instructed by Shaka Services
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of Nigeria born on 22 December 1987, against the decision of First-tier Tribunal Judge M A Khan, who sitting at Hatton Cross on 15 October 2014 and in a determination subsequently promulgated on 14 November 2014 dismissed the appeal of the Appellant against the decision of the Respondent dated 7 May 2014 cancelling his continuing leave to remain in the United Kingdom and refusing him leave to enter the United Kingdom under paragraph 2A(8) of the Immigration Act 1971. Further that in light of the deception employed

by the Appellant upon arrival and following a further interview, that any future applications for entry clearance or leave to enter the United Kingdom would be refused under paragraph 320(7B) of the Immigration Rules for a period of one year from the date on which the Appellant was removed from the United Kingdom following that refusal.

2. The Respondent noted that the Appellant held a current UK entry clearance endorsed Tier 4 (General) Student that conferred leave to enter the United Kingdom between 17 June 2013 and 30 October 2015. The change of circumstance in this case was that despite claiming to be a student at London Corporate College and to have last attended in April 2014 with this information having been confirmed by the college, it was clear at interview, that the Appellant knew nothing of substance about his course of study, specifically that he was unable to tell the interviewing officer what he had learnt from September 2013 to date.

3. Further, when questioned about whether or not he had worked in the United Kingdom, the Appellant initially claimed to have only worked for a three month period, when he first arrived in October 2010. He was questioned on any employment he had in the United Kingdom in excess of three times (separately) throughout his further interview. Checks with other government departments in fact evidenced that he had been employed on a permanent capacity with Chris Carey's Collections since October 2011. They in turn, confirmed that the Appellant had been working on average, a 36 hour week and that he had last worked for them on 17 April, earning at least £1,000 per month, in breach of his student terms and conditions.

4. It is right to say that in granting permission to appeal, First-tier Tribunal Judge Lambert limited such permission to the contention that although Articles 3 and 8 of the ECHR were raised in the Appellant's original grounds of appeal

> "… the Judge's human rights analysis at paragraph 29 was brief and contains no reference to the argument on Article 8 medical grounds. On this ground only the appeal is arguable".

5. It was contended in the grounds of application that the original Judge did not engage with Article 8 at all in the course of his determination and that his treatment of Article 3 was "cursory in the extreme". It was said that the Judge made "the bold assertion that the Appellant would be able to access medical care for his condition in Nigeria" (when there was) no basis for that assertion".

6. Thus the appeal came before me on 7 April 2015 when my first task was to decide whether the determination of the First-tier Judge disclosed an error on a point of law such as may have materially affected the outcome of the appeal. The question for me was not whether the appeal against the decision and the challenge by the Appellant should be allowed or dismissed, but was concerned only with the question of whether the Judge made an error of law of a nature such as to require his decision to be set aside. It would only be if that question returned a positive answer, that it would be open to the Upper Tribunal to disturb the decision of the First-tier Tribunal Judge.

7. It would be as well to note that it follows from the limited grant of permission, that the Judge's findings in all other respects in terms of this appeal were unquestionably open to him and supported by the evidence and were sustainable in law. The Judge had noted that the Respondent had gathered "a great deal of evidence to show that the Appellant was working as a full-time employee in breach of his student visa conditions" and that "the Respondent has established the case of the cancellation of the Appellant's leave to enter…".

8. In the course of the hearing before the First-tier Tribunal Judge, he recorded that the Appellant did not give evidence before him. His Counsel had sought to rely on psychiatric reports of a Dr Alemi that stated that the Appellant did not understand the concept of pleading and that he was a vulnerable adult who did not know the nature of wrongdoing and that he did not understand the meaning of guilty of the charges or not guilty of the charges. Further that the Appellant was not fit to give evidence and needed medical treatment.

9. The Judge made specific reference at page 4 of Dr Alemi's report in that regard.

10. At paragraph 29 of his determination the Judge had this to say:

> "The Appellant will be able to access medical care for his condition in Nigeria. It is a well-established principle of law that member states do not have an obligation for medical treatment of non-member states of the European Union. The Appellant is a Nigerian national. He has family in Nigeria and a sister in the UK. Ifind (sic) that he will have the family support in Nigeria to assist him with his treatment for any mental condition. On the evidence, I find that the Appellant has nt (sic) established his case on the high threshold of Article 3 of the ECHR."

11. In that regard I referred the parties to the decision in GS (India) [2015] EWCA Civ 46, which concerned Appellants who suffered from serious medical conditions that would be effectively treated in the UK, of which five were found to be at risk of a very early death if returned to their home states and thus challenged the removal directions as being repugnant to their rights guaranteed by Articles 3 and 8 of the ECHR.

12. It was held inter alia, that the language of Article 3 showed that the paradigm case of a violation was "an intentional act which constitutes torture or inhuman or degrading treatment or punishment", and that the paradigm of Article 8 was much more diffused in that unlike Article 3, no single paradigm could be obtained from its language. There were two linked paradigms; one was the capacity to form and enjoy relationships and the other was a right to privacy.

13. Laws LJ, who gave the leading judgment, held that where a claimant failed to resist removal to another state on health grounds, failure under Article 3 did not necessarily entail failure under Article 8. However, if the Article 3 claim failed, then Article 8 could not prosper without some separate or additional factual element that brought the case within the Article 8 paradigm, i.e. the capacity to form and enjoy relationships, or a state of affairs having some affinity with the paradigm.

14. Whilst I appreciate that this important decision postdated the determination of the Judge in the present case, the fact remains that Judges interpret existing legal principles, they reveal the law. They do not do so prospectively.

15. It was Mr Lee's submission that the First-tier Judge should have proceeded to consider Article 8. It was important for justice to be seen to be done and for the Appellant to understand why he had lost on the points that he had put forward.

16. Mr Lee submitted that in this case there was a very cursory analysis of Article 3 and no analysis at all of Article 8.

17. Mr Lee accepted that the guidance in GS made an Article 8 claim difficult but it did not make it impossible and he submitted that the Appellant was thus entitled as an absolute minimum, to expect the First-tier Judge to consider all the arguments and to put reasons forward why he accepted or rejected them. Mr Lee continued that the decision was "so bad that it falls into the category of a denial of justice". This was a case where the Appellant could not take part. It was thus not known what evidence the Appellant would have given in this case because he was not capable of giving evidence at the time of the hearing. Mr Lee submitted that the Judge's failure to deal with the appeal of the Appellant's case tainted the whole process and could have been material.

18. Mr Tufan in response submitted that there was no reasoned Article 8 claim before the First-tier Judge apart from the Appellant's medical condition. This was an Appellant who had formed no family or private life. There was no Article 8 case in any event.

19. I reserved my decision.

Assessment

20. I would accept that the analysis by the First-tier Judge of the Appellant's human rights claim is on first reading skimpy. However, I have no power to intervene unless something is shown to be materially wrong. The determination on the point might be brief for the very good reason that there is no merit whatsoever in this case.

21. Having listened to further argument I am persuaded that the determination could certainly have been longer and might have been better as a result, but that the decision would have been the same.

22. The fact is that the evidence did not support a finding that the Appellant's ill health was so severe and advanced that his removal would violate the United Kingdom's obligation under Article 3 and there was no separate or factual element that brought the case within the Article 8 provisions.

23. I must say that the presentation of First-tier Judge Khan's determination is rather concerning as it includes several basic grammatical/spelling errors that might be generously described as typographical faults.

24. I wonder if Judge Khan accordingly signed what was a draft, as I am sure he would be concerned at the poor quality of some of the writing. Nevertheless, as I have earlier pointed out, I have to look for material errors.

25. Mr Lee describes the Judge's analysis of the Appellant's claim with reference to Article 3 of the ECHR as cursory but I find that it can be better put, that there was a very brisk consideration of what was a cursory claim. Judge Khan correctly referred to the high threshold applicable to Article 3 medical cases and the medical evidence

before the Tribunal wholly failed in his opinion to make out any case that the appeal could be allowed properly on Article 3 ECHR grounds.

26. Whatever is said of the Appellant's mental health, it is clear (as Mr Tufan pointed out in his submissions) that he had been well enough to hold down a job in breach of the Immigration Rules and there was no evidence that treatment was not available for him in Nigeria.

27. The case clearly could not be allowed on Article 3 grounds and if the First-tier Judge did not actually say so, I am satisfied that this is what he meant. The determination cannot be read sensibly in any other way.

28. Mr Lee is on firmer ground when he complains that the appeal was not considered at all under Article 8 of the ECHR. It should have been. However, I cannot see from the evidence how it could have been allowed. The fact is that the Appellant has no strong links in the UK and would be returned to a country where medical treatment is available, although it is trite law that it might be right to allow an appeal under Article 8 grounds where it would not be allowed under Article 3 grounds. If such a case actually exists it does not exist on these facts. Mr Lee could not point me to anything to enable me or any other Tribunal directing itself, properly to allow the appeal.

29. I hope that First-tier Judge Khan will note the comments on the poor presentation of his determination on the appeal on this occasion, because it would not make a favourable impression on anyone reading it.

30. However, I see no point in giving the Appellant another opportunity to argue a case which cannot succeed on the available evidence.

Decision

The making of the previous decision involved the making of no error on a point of law and I order that it shall stand.

No anonymity direction is made.

Signed Date 16 April 2015

Upper Tribunal Judge Goldstein