Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07877/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 25 February 2020	**On 9 March 2020**

Before

UPPER TRIBUNAL JUDGE LANE

Between

EMILE BOISSY

Appellant

(ANONYMITY DIRECTION NOT MADE)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Sanders
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 4 March 2019, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons were as follows:

> 1. The appellant is a male citizen of Gambia which was born on 9 July 1947. He first entered the United Kingdom in 2002. By a decision dated 30 June 2017, the Secretary of State refused the appellant's human rights application. The appellant appealed the First-tier Tribunal which, in a decision promulgated on 6 December 2017, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.
>
> 2. I find that the decision of the First-tier Tribunal should be set aside. The appellant in this case is in very ill health. He requires regular kidney dialysis, the availability of which treatment in Gambia is uncertain. The judge wrongly determined that he need consider only the reasonableness of the decision to remove the appellant in the appeal on Article 8 ECHR grounds. He failed to apply the test of 'very significant obstacles' as provided for in paragraph 276ADE of HC 395 (as amended) (see AS [2017] EWCA Civ 1284). I agree with Ms Sanders, who appeared for the appellant at the initial Upper Tribunal hearing, that this error vitiated the judge's subsequent analysis.
>
> 3. It is unfortunate that this appeal is taken some considerable time to reach the Upper Tribunal. Since the First-tier Tribunal hearing, the Court of Appeal has given its judgement in AM (Zimbabwe) [2018] EWCA Civ 64 which, in turn, is now subject to an appeal to the Supreme Court. It is possible that judgement of the Supreme Court will be available by the time I remake the decision following a resumed hearing. I am also concerned that up-to-date evidence concerning the availability of dialysis and other relevant treatment in Gambia should be before the Upper Tribunal when it comes to remake the decision. I therefore direct that there should be a case management review (CMR) before me at Bradford on the first available date after 1 March 2019. The parties may rely upon fresh evidence provided copies of such evidence are sent to the other party and to the Upper Tribunal no less than 10 days prior to the resumed hearing.
>
> Notice of Decision
>
> 4. The decision of the first-tier tribunal is set aside. The Upper Tribunal shall remake the decision following a resumed hearing at Bradford on a date to be fixed (before Upper Tribunal Judge Lane). I direct that there shall be a case management review before me at Bradford on the first available date after 1 March 2019 (20 minutes allowed).

2. At the resumed hearing at Bradford on 25 February 2020, I informed the representatives and the appellant that I intended to remake the decision and to allow the appeal on human rights grounds. I record also that Mr Diwnycz who appeared for the Secretary of State, did not advance by way of submissions any reasons to suggest that the appeal should be dismissed.

3. Ms Sanders, who appeared for the appellant, submitted that the appellant's current circumstances and those pertaining in the country of removal, the Gambia, fall squarely within the definition of an Article 3 ECHR health case as articulated by the Court of Appeal in *AM (Zimbabwe)* [2018] EWCA Civ 64 at [38]:

> So far as the ECtHR and the Convention are concerned, the protection of Article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where "substantial grounds have been shown for believing that [the applicant], although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" (para. [183]). This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the Article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely "rapid" experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state.

4. I am aware that the Supreme Court has heard an appeal against the judgment in *AM* and that the outcome of that appeal is awaited. However, given the very serious medical condition of the appellant in this appeal, I do not consider that there is any reason further to delay a determination of the appeal.

5. The appellant's medical condition is now very serious. He is suffering stage V chronic kidney disease. He cannot urinate at all. In order to survive, he requires haemodialysis three times every week. Each session lasts for four hours. The most recent evidence from the appellant's treating doctor which is dated 27 August 2019 unambiguously states that the appellant would die within several days and almost certainly within one week if he does not receive each and every dialysis treatment which he requires. That requirement is entirely at odds with the availability of the necessary treatment in the Gambia. A haemodialysis centre has been set up there largely through the work of the foundation established by a Ms Flasrud who has provided evidence in the appeal. That evidence shows that there are only 14 beds for dialysis to serve the entire population of the Gambia. Ms Flasrud states that the centre is aware that at least seven patients have died awaiting treatment for kidney failure/disease. I find as a fact that, within a very short period after arrival in the Gambia, there would be a very significant likelihood that, given the nature of facilities for treatment available, this appellant would miss one or more dialysis

treatments. Indeed, I find it very likely that he would miss treatments within days of arriving in the country. The effect of missing any treatment will be that the appellant would die. I find that these facts fall squarely within the 'very modest' extension of the rule in *N* (2005) UKHL 31 which Lord Sales articulates in *AM.* Accordingly, I find it is appeal should be allowed on Article 3 human rights grounds. In addition and by reference to the same findings of fact, it is clear that the appellant would face very significant obstacles to his reintegration in the society of Gambia. In consequence, he meets the requirements of paragraph 276 of HC 395 (as amended).

Notice of Decision

The Upper Tribunal has remade the decision. The appellant's appeal against the decision of the Secretary of State dated 30 June 2017 was allowed on human rights grounds (Article 3 and 8 ECHR)

Signed Date 26 February 2020

Upper Tribunal Judge Lane