UK (Use of N judgment as a benchmark in ill-health cases) Rwanda [2004] UKIAT 00262

IMMIGRATION APPEAL TRIBUNAL
Date of hearing: 2 August 2004

Date Determination notified: 21 September 2004

Before
Dr H H Storey (Vice President)
Mr B D Yates
Mrs W Jordan
Between

**Secretary of State for the Home Department** APPELLANT
**and**
**UK** RESPONDENT

Ms R Brown, Home Office Presenting Officer for the appellant
Mr A Okai of Counsel instructed by Phoenix Nova Solicitors for the respondent
(hereafter the claimant).

DETERMINATION AND REASONS

1. This appeal is reported as an illustration of how the Court of Appeal judgment in N [2004] EWCA Civ 1369 serves as a benchmark for deciding cases said to be similar or more serious on the facts.

2. The appellant, the Secretary of State, appeals against a determination of Adjudicator, Mr F.E.P. Meadows, allowing on Article 3 grounds the appeal of the claimant against a decision of 19 September 2001 giving directions for removal following refusal to grant asylum.

3. The Adjudicator accepted that the claimant is a national of Rwanda. He believed her account that soldiers went to her house in June 2001 looking for her husband. They had raped her. The following day they had abducted her husband. He had been a member of the Interhamve who carried out much of the killing during the 1994 genocide. Despite considering the authorities were justified in taking away her husband, the Adjudicator was satisfied their treatment of her was unlawful.

4. However, he decided to dismiss the asylum grounds of appeal because there was no evidence that she was of continuing adverse interest to the authorities.

5. He took a different view when it came to the human rights grounds of appeal. He noted that her health was extremely poor: she was HIV-positive and "may need more

intense mental health treatment in the future, which she would not receive in Rwanda". He noted that a representative of the UNDP had commented in March 2001 that low income prevented many HIV/AIDS patients in Rwanda from accessing treatment even if prices for anti-retroviral drugs were drastically cut. Accordingly he considered it a "gamble as to whether or not the appellant would be able to receive the drugs necessary to stabilise her health and extend her life".

6. The grounds of appeal contended that having accepted that mental health care does exist in Rwanda, the Adjudicator was not entitled to speculate as to the likely development of the claimant's health and future treatment. He did not give proper weight, they contended, to the Glaxo Smith Kline bulletin of 30 October 2002. Reference was also made to a previous Tribunal determination [2002] UKIAT 06707 and the European Court of Human Rights judgment in 13669/03.

7. In amplifying the grounds of appeal Ms Brown submitted that in the light of the Court of Appeal judgment in N, the Adjudicator's assessment was plainly erroneous. Mr Okai urged the Tribunal to find that the Adjudicator had not erred n law. The claimant faced a combination of serious health problems, an inability to afford necessary drug treatment and a lack of any family support, accommodation or employment.

8. We consider that the grounds of appeal are made out. As the Court of Appeal has clarified in its judgment in N [2004] EWCA Civ 1369, in cases based on a claim of a serious threat to physical and moral integrity posed by serious illness, the threshold set by Article 3 is high and it is necessary to show that one's case is extreme and exceptional. Laws, LJ said:

> 'I intend only to emphasise that an Article 3 case of this kind must be based on facts, which are not only exceptional, but extreme: extreme, that is, judged in the context of cases all or many of which (like this one) demands one's sympathy on pressing grounds' (emphasis added).

Thus the facts of N also furnish a benchmark as to what is necessary to cross the Article 3 threshold.

9. In comparison with the facts in N, it is clear that the claimant's state of health was less serious. The applicant in N had full-blown AIDS by November 1998. The claimant in this case is as yet only HIV positive. In N the applicant's CD4 count prior to treatment was 20 cells/mm; in this case the claimant's CD4 count prior to treatment was 91 (it is now 321). In N life-expectancy was less than twelve months. In this case the prognosis was one to two years. In addition the applicant in N had developed additional serious illnesses: disseminated mycobacterium TB, a form of cancer known as Kaposis sarcoma.

10. It is true that in contrast to the situation of N (who only suffered from clinical depression), there is said to be a mental health dimension to this appeal. However,

there was no medical evidence concerning the extent of the claimant's mental and psychological problems. The Adjudicator's reference to serious mental health problems rested on pure speculation. His substitution of speculation for firm evidence constituted an error of law.

11. The Adjudicator also erred in his approach to the availability of medical treatment in Rwanda. On his own findings, "treatment for severe mental disorders is available at the primary level". Yet without explaining why, he reasoned that the claimant "may need more intense mental health treatment in the future, which she would not receive in Rwanda".

12. Not only was this mere speculation on the part of the Adjudicator, but he effectively treated Article 3 as guaranteeing a right to health. However, as the European Court of Human Rights has clarified in SSC v Sweden [2000] 29 EHRR CD 245, neither Article 3 nor any other provision of the ECHR guarantees a right to health. What the Adjudicator failed to do was explain why he considered the available facilities for treatment of mental health in Rwanda, even if of lesser quality than she would enjoy in the UK, would be so ineffective as to seriously threaten her physical and moral integrity.

13. Compounding the Adjudicator's error about the availability of some level of mental health treatment in Rwanda was his treatment of the issue of the affordability of anti-retroviral (ARV) drugs in Rwanda. In the first place he was wrong to treat want of resources as a decisive factor: see N paragraphs 10-11 and 38. Mr Okai's submission that Article 3 would be breached wherever a person would not have wholly free availability of ARV drugs also wholly overlooks the high threshold set by the Court of Appeal in K [2001] IAR 41. In the second place he overlooked evidence before him relating to cost. He based his assessment that the claimant would not be able to afford ARV drugs on a UNDP comment of March 2001. However, he had before him more recent evidence in the forms of a Glaxo Smith Kline bulletin of 30 October 2002: see paragraph 5.2 , stating that the course of ARV drugs had been brought down to the equivalent of $1 a day.

14. Although at one point Mr Okai sought to argue that upon return the claimant would have no family support, he accepted that her evidence was that she still has a friend and several siblings and mother there. It may be that she did not wish for her mother to have to care for her, but there was no evidence to show the mother would be unwilling or unable.

15. Mr Okai did not raise the issue of whether, even if the claimant could not succeed on Article 3 grounds, she was entitled to succeed on Article 8 grounds. However, we note that in N Mr Justice Laws did not consider that her case could succeed under Article 8 either. We note too that in Razgar [2004] UKHL 27, the House of Lords considered that to succeed in an Article 8 claim a person would need to show not just that the right would be threatened, but that it would be subject to flagrant denial or

nullification. We do not consider the evidence in this case demonstrated either a breach of Article 3 or Article 8.

16. In deciding to allow the appeal under Article 3 the Adjudicator erred in law.

17. For the above reasons the appeal of the Secretary of State is allowed.

H.H. STOREY
VICE PRESIDENT