Neutral Citation Number: [2019] EWHC 1249 (Admin)

Case No: CO/1321/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2019

Before :

THE HONOURABLE MR JUSTICE KERR

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Between :

The Queen on the application of ERA	**Claimant**
- and -	
Basildon And Thurrock Hospitals NHS Foundation Trust	**First Defendant**
-and-	
Southend University Hospitals NHS Foundation Trust	**Second Defendant**
-and-	
Secretary of State for Health and Social Care	**Intervenor**

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Stephen Knafler QC and **Admas Habteslasie** (instructed by **Deighton Pierce Glynn**) for the **Claimant**
David Lawson (instructed by **Bevan Brittan**) for the **Respondent**
Joseph Barrett (instructed by **Government Legal Department** for the **Intervenor**

Hearing date: 14th May 2019

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Judgment

The Honourable Mr Justice Kerr:

Introduction

1. I made an anonymity order in this case at the hearing two days ago for reasons given at the time. The order was made under CPR 39.2(4). A copy will be uploaded to the website of the Judiciary of England and Wales in accordance with rule 39.2(5). The identity of the claimant must not be published; nor must any material that would enable a person to identify the claimant, whom I shall call "ERA", or her young daughter.

2. The National Health Service (NHS) is, famously, free at the point of use – for most of its users, not all. If you are not ordinarily resident in Great Britain, you have to pay for NHS services, unless exempted from charges in the particular circumstances. The question in this case is whether the claimant, ERA, is exempt from charges for her cancer treatment on the ground that she has made an application, not yet determined, for asylum.

3. ERA is a Nigerian national who recently has been living in Ghana but is in England for medical treatment. Unfortunately, she has advanced breast cancer and is very ill. She has been receiving treatment at Basildon and Thurrock University Hospital (BTUH), operated by the first defendant NHS foundation trust. Southend University Hospital has also had some involvement in her treatment. It is operated by the second defendant, also an NHS foundation trust.

4. On 3 April 2019, Martin Spencer J directed that there be an expedited rolled up hearing, to consider permission and, if granted, the substantive judicial review claim at the same hearing, which took place before me two days ago. The Secretary of State for Health and Social Care (the Secretary of State) has been given leave to intervene and appeared by counsel, Mr Barrett. I am grateful to all counsel for the economy and clarity of their submissions.

Relevant Enactments

5. Services provided as part of the health service in England must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under other legislation: National Health Service Act 2006, section 1(4). Regulations may provide for the making and recovery of such charges for providing those services as the Secretary of State may determine, where they are provided to persons not ordinarily resident in Great Britain: section 175(1) and (2).

6. The charging of overseas visitors is governed by the National Health Service (Charges to Overseas Visitors) Regulations 2015 (the 2015 Regulations). Overseas visitors are persons not ordinarily resident in the United Kingdom (regulation 2). NHS bodies must make and recover charges for relevant NHS services to overseas visitors where after such enquiries as it considers reasonable, the charging body determines "that the case is not one in which these Regulations provide for no charge to be made" (regulation 3(1) and (3)).

7. The inelegant double negative formulation is unusual; it might be thought to mean that the default position should be that the overseas visitor is not charged, unless a positive

determination to the contrary is made by the NHS body. The practice, shown by the evidence in this case, was the other way round: invoices for treatment were issued while enquiries were still being made about whether ERA or her treatment was exempt from charges.

8. Some treatments are exempt, but not ERA's cancer treatment. Some overseas visitors are exempt, including one who "has been granted temporary protection, asylum or humanitarian protection under the immigration rules" (regulation 15(a)) and one who "has made an application, which has not yet been determined, to be granted temporary protection, asylum or humanitarian protection under the immigration rules" (regulation 15(b)).

9. I was referred to other statutory provisions during argument. I will return to some of them. Mr Stephen Knafler QC referred me to provisions for giving urgent treatment without obtaining advance payment; and to provisions dealing with payment in advance of an "immigration health charge" at the point of entry into this country. I do not think it is necessary to set out those provisions; they are relevant to the timing of payment rather than to liability.

Outline Facts

10. ERA was diagnosed with breast cancer in Ghana in 2015. She came to this country for treatment in May 2015, with a visa permitting entry on medical grounds. She received privately funded treatment in 2015 and 2016, before returning to Ghana in April 2016. She returned to England in September 2016 for further treatment, again with entry clearance on medical grounds. She underwent surgery in October 2016.

11. On 20 February 2017, ERA applied for further leave to remain because of her medical condition, on "human rights" grounds and for leave to remain "outside the Immigration Rules because of compassionate and compelling circumstances". She stated that she could die if she had to leave the UK because of the treatment she was receiving. If she had to appeal from outside the UK that "will be devastating and it may lead to death".

12. ERA did not expressly mention any article of the European Convention on Human Rights (ECHR). Unfortunately, there was then some unhelpful debate about whether she had used the correct application form. The forms are not particularly flexible and it is not always obvious which one to use, even for a represented party. In August 2017, solicitors for ERA wrote to the Home Office making representations in support of her application for leave to remain and relying specifically on articles 3 and 8 of the ECHR.

13. The case for leave to remain was based almost entirely on ERA's medical condition, though mention was also made of her daughter attending school in this country. It was asserted that there was a lack of adequate medical facilities in Ghana and that refusal to grant a variation of ERA's leave to remain "engages the applicant's article 3 and article 8 rights and further puts the UK in potential breach of the pertinent provisions of the ECHR …".

14. The Secretary of State refused the application for reasons attached to a letter of 12 April 2018. The reasons stated, materially for present purposes, that it was "not considered that this is treatment that is required to be undertaken in the UK and … treatment can reasonably be continued in Nigeria. Furthermore, your medical conditions are not of a

severe enough nature so as to invoke Article 3 ….” Thus, “it has been concluded that suitable medical treatment is available in your country”, i.e. in Nigeria.

15. ERA appealed against that decision to the First-tier Tribunal. Her appeal had to be adjourned at least once due to her ill health. It is now listed for hearing on 25 June 2019. In her grounds of appeal she relies on article 3 and on her medical condition. It is asserted that removal of ERA to Nigeria would place the UK in breach of its obligations under articles 3 and 8 and, consequently, in breach of section 6 of the Human Rights Act 1998.

16. In October 2018, ERA was being treated at BTUH. Ms Kerry Mawhood of the first defendant spoke to her and informed her that the first defendant regarded her treatment as chargeable and that she would be invoiced for the cost of it. Ms Mawhood gave her an “information pack” and a letter dated 18 October 2018, asking for various documents but stating that “until your status has been confirmed you remain liable for the total cost of your treatment and will be invoiced accordingly”.

17. After that, various invoices were sent to ERA. I need not set out the details of the amounts and dates of the invoices. I interject that Mr Lawson, for the defendants, argued that because the claim was not brought until 2 April 2019, it is out of time. Mr Knafler responded that the stance of the NHS bodies was a continuing state of affairs and that ERA’s illness was such that she was in no position to bring her claim earlier than she did. He also pointed out that the last invoice was dated 7 January 2019, less than three months before the claim was made.

18. I do not think the claim should be dismissed on time grounds. If an extension of time is needed, I grant it. I accept that it can be argued that the grounds for claiming first arose when Ms Mawhood’s decision was communicated on 18 October 2018, even though it was not the first defendant’s concluded view of the charging issue. However, ERA was due to attend the First-tier Tribunal on 9 November 2018 and that date was vacated because of her ill health, which must be borne in mind.

19. Furthermore, there is no prejudice to the defendants; none is asserted. I also bear in mind that the point raised in this case is important enough for the Secretary of State to have obtained leave to intervene, which would be a wasted exercise if I dismiss the claim on time grounds. Yet further, ERA could raise the very same point as a defence to a private law claim by the defendants to recover the charges. So I may as well consider it now.

Issues, Reasoning and Conclusions

20. Mr Knafler submitted that ERA is exempt from charging because she is an overseas visitor who has made an as yet undetermined application “to be granted temporary protection, asylum or humanitarian protection under the immigration rules” (regulation 15(b)). Specifically, he submits that the application made on 20 February 2017 is an application for “asylum” within regulation 15(b). He does not submit that her application was for “temporary protection” or “humanitarian protection”.

21. His submission is that the meaning of “asylum” in regulation 15(b) must be its meaning “under the immigration rules”. Paragraph 327 of those rules states, under the heading “Definition of asylum applicant”, as follows:

> 327. Under the Rules an asylum applicant is a person who either;
>
> (a) makes a request to be recognised as a refugee under the Refugee Convention on the basis that it would be contrary to the United Kingdom's obligations under the Refugee Convention for them to be removed from or required to leave the United Kingdom, or
>
> (b) otherwise makes a request for international protection. "Application for asylum" shall be construed accordingly.

22. Mr Knafler submits that ERA is a person falling within (b) because her application for leave to remain, currently under appeal, is a request for "international protection". He submits that the words in (b) broaden the concept of an asylum seeker so as to include within it not just conventional asylum seekers asserting a well founded fear of persecution if returned to their home state but also a person such as ERA who relies on her need for medical treatment and on inadequate medical treatment facilities in her home state.

23. In oral argument, Mr Knafler submitted that ERA is seeking international protection against inhuman and degrading treatment in Nigeria, arising from inadequate medical facilities there. She is therefore, it is argued, an asylum applicant within paragraph 327 of the immigration rules and therefore a person who has applied for asylum under regulation 15(b) who cannot be charged for NHS services, whether life threatening, urgent or merely routine.

24. He accepts that the phrases "temporary protection" and "humanitarian protection", also found in regulation 15(b), are forms of international protection and that those words are, on his construction of regulation 15(b), otiose and unnecessary, since a person applying for temporary or humanitarian protection will necessarily have applied for international protection and therefore for asylum. He suggested that this could be careless drafting but that paragraph 327 of the immigration rules was clear and was incorporated by reference into the definition of "asylum" in regulation 15(b).

25. In support of his argument, Mr Knafler took me to various international instruments, case law and a document from the United Nations High Commission for Refugees (UNHCR) on which he relied to support the recognition of "international protection" as a broad concept apt to include any case where it is asserted that return of a person to her home state would breach article 3 of the ECHR, including cases like ERA's founded on acute medical urgency and inadequate facilities in the home state. In deference to his carefully presented argument, I will mention some of those international instruments.

26. First, he referred me to Directive 2004/83/EC (the Qualification Directive) setting "minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection provided". He pointed out that while it contained in article 2(a) a definition of "international protection" embracing only refugee status and "subsidiary protection" (in this country called "humanitarian protection"), that was for the purposes of the Qualification Directive only.

27. He accepted that *M'Bodj v. Belgium* [2015] 1 WLR 3059 is CJEU authority that the Qualification Directive does not apply to a case such as the present since, in *M'bodj*, the CJEU held that the Qualification Directive "does not cover a situation in which inhuman or degrading treatment … to which an applicant suffering from a serious illness may be subjected if returned to his country of origin, is the result of the fact that appropriate

treatment is not available in that country, unless such an applicant is intentionally deprived of health care" ([41]).

28. He submitted that *M'Bodj* is irrelevant as it merely establishes that, as ERA accepts, she cannot rely on the Qualification Directive; but he argued that the case says nothing about whether ERA has made an application for asylum within regulation 15(b) outside the scope of the Qualification Directive; whether she is exempt from NHS charges, he argued, has nothing to do with the scope of the Qualification Directive as determined by the CJEU. The right to exemption from charging, he submitted, is a purely domestic law right not conferred pursuant to any international law obligation of the UK.

29. Mr Knafler further pointed out by reference to Directive 2005/85/EC on setting minimum standards on procedures for granting and withdrawing refugee status (the Procedures Directive) that the definition therein of "asylum" or an "application for asylum" included any application that "can be understood as a request for international protection … under the Geneva Convention" and that any application for international protection "is presumed to be an application for asylum unless the person concerned explicitly requests another kind of protection that can be applied for separately".

30. As I understood his argument, he relied on this definition as tending to support the existence of a broad public international law concept of international protection, wide enough to embrace the category of medical cases including the present case and that of M. Bodj which are excluded from the scope of the Qualification Directive. In similar vein, he took me to a document published by the UNHCR in June 2017, entitled *Persons in need of international protection*. It starts by stating that the need for international protection arises:

> "when a person is outside their own country and unable to return home because they would be at risk there, and their country is unable or unwilling to protect them."

31. Mr Knafler pointed out that in the document, the risk of harm was not limited to cases of feared persecution or other harm inflicted by humans such as in cases of armed conflict or serious public disorder. Other risks such as from famine, natural disaster or the adverse effects of climate change are also mentioned. By analogy, Mr Knafler suggested that article 3 medical cases such as the present fall within the broad concept of international protection and therefore, via paragraph 327 of the immigration rules, within the scope of "asylum" in regulation 15(b).

32. He also reminded me that article 3 imposes an absolute obligation on the state; no derogation is permitted even in time of war and there is no qualification to the right such as is found in other articles, for example in article 8(2) which permits interferences with the right to respect for private and family life provided they are proportionate. He also contended that the statutory support for asylum seekers who are or are likely to become destitute (see section 95 of the Immigration and Asylum Act 1999) is regularly and uncontroversially applied in medical cases such as the present one.

33. In response to a point made by the defendant and the Secretary of State, described by Mr Lawson as a "floodgates" argument, Mr Knafler accepted the consequence of his construction of regulation 15(b): that a person who decides to make an application for leave to remain based on her medical condition and the inadequacy of facilities in her home state, thereby acquires, until the application is determined, an exemption from the charging regime enacted by the 2015 Regulations and becomes eligible to receive free

NHS services including non-urgent treatment. His answer was that it is open to the Secretary of State to amend regulation 15(b).

34. I need not set out in the same detail the submissions of Mr Lawson for the defendants or of Mr Barrett for the Secretary of State. I am grateful for those submissions and draw heavily on them in stating briefly, as I now do, my reasons for rejecting the arguments advanced on behalf of ERA and preferring the submissions of the defendants and the Secretary of State.

35. First, to determine whether an overseas visitor is a person who has made an application falling within regulation 15(b), it is necessary to consider the nature of any application made as a matter of substance not form. The nature and grounds of the application must be considered, not the labels attached to them. The question is what type of protection is sought and why. Thus, the present case does not turn on which articles of the ECHR were cited by ERA, nor on how the Secretary of State dealt with the application in the decision letter of 8 April 2018.

36. Secondly, I record the common position of all three parties that the present application "has not yet been determined" for the purposes of regulation 15(b). The defendants and the Secretary of State accept this proposition because of the outstanding appeal to the First-tier Tribunal. That appeal was brought within the time limit. I therefore do not need to consider what might be the position if, for example, an appeal were brought out of time and an application to extend time were pending at the time of treatment, or other such issues that may arise in future cases.

37. In my judgment, the policy of the 2015 Regulations is to require overseas visitors to pay for NHS treatment except in defined cases where charging is not considered appropriate. That much is obvious even doing without the aid of admissible *travaux préparatoires*, which might have been deployed had the hearing not been expedited and deadlines for evidence severely truncated.

38. Next, I do not think it plausible to suppose that the Secretary of State would intentionally include within the concept of an "asylum" claim a claim such as this where the barrier to removal said to arise under article 3 of the ECHR is, to borrow Mr Barrett's phrase, differential health care standards.

39. If that is what the language of regulation 15(b) meant, the Secretary of State would have inadvertently enacted a provision contrary to the policy of the 2015 Regulations. That is, of course, possible but a construction which avoids that result is, if linguistically permissible, preferable to one that does not since I do not think it conceivable that government would think it appropriate to exempt cases such as this from the charging regime.

40. In my judgment, the exclusion from the Qualification Directive of cases such as that of M. M'bodj is of far greater contextual weight than the references to "international protection" in the Qualification Directive, the Procedures Directive, the case law and the UNHCR publication referred to on behalf of ERA. The CJEU's judgment in *M'bodj* predated the 2015 Regulations by a few months. It banished medically based article 3 claims such as this from the scope of protection afforded by the Qualification Directive as alien to its rationale, except in cases where medical care is deliberately withheld.

41. I would expect the correct interpretation of regulation 15(b) to be in harmony with that authority and not at odds with it. Moreover, it is bizarre to contemplate the notion of international protection as a sub-species of asylum rather than the other way round, as one would expect. One does not naturally think of ERA as an asylum seeker.

42. Mr Knafler's transformation of asylum into an overarching concept can only be achieved by the most artificial of reasoning. First, you have to treat the words in regulation 15(b) "under the immigration rules" as bearing the meaning "using the definitions of terms in the same way as in the immigration rules". Those definitions and meanings change quite frequently.

43. Thus, the present version of paragraph 327 was substituted in 1 December 2007 to comply with the Procedures Directive. I would expect the changes to reflect the scope of the Procedures Directive and the earlier Qualification Directive which it complements. I think it is more realistic to treat the words "under the immigration rules" as meaning "pursuant to the immigration rules", as Mr Barrett submitted.

44. Secondly, to accept Mr Knafler's construction, you have to overlook the superfluous inclusion within regulation 15(b) of temporary protection and humanitarian protection, which on his interpretation are also asylum claims.

45. Third, you have to attribute to the legislature an intention to bestow a purely domestic law right on a class intended to be clearly defined and circumscribed, by reference to a broad, vague and ill-defined public international law concept not firmly grounded in authority; namely, that of international protection.

46. Thus, Mr Knafler in his skeleton argument submitted that the reference to international protection "is to be understood consistently with the use of the term at international law". That is said to encompass "an application for leave [to remain] on the basis that removal would represent a breach of an applicant's ECHR rights based on events in another territory". I do not accept, on the strength of the citations I have received, the existence of such a principle of public international law.

47. I have been referred to various references in domestic immigration and asylum statutes to the meaning of "asylum", "asylum seeker" and similar phrases. I do not think I need to set them all out. I noted that they did not always give the same precise scope and definition to the concept of asylum; some uses of the word are broader than others. I did not find those references conclusive or particularly helpful.

48. I am satisfied for those brief reasons that importing Mr Knafler's broad notion of international protection into the meaning of asylum in regulation 15(b), via paragraph 327 of the immigration rules, is wholly inappropriate and wrong. I accept the submission of Mr Barrett that regulation 15(b) bears its natural and ordinary meaning and applies to, first, asylum seekers in the classic sense, who rely on the Geneva Convention; second, to applicants for humanitarian protection, or what in the EU jurisprudence is called "subsidiary protection"; and third, to applicants for temporary protection.

49. Having heard full argument, I am just persuaded that the claim crosses the threshold of being arguable. I therefore grant permission but, for the reasons I have given, I dismiss the claim.