Upper Tribunal
(Immigration and Asylum Chamber)

GS (Article 3 – health – exceptionality) India [2011] UKUT 35 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 November 2010	………………………………..

Before

LORD BANNATYNE

SENIOR IMMIGRATION JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GS

Respondent

Representation :

For the Appellant: Mr C Avery, Home Office Presenting Officer

For the Respondent: Mr D O'Callaghan & Miss J Lean

In D v United Kingdom [1997] 24 EHRR 43, the claimant came into the exceptional category because he was beyond the reach of medical treatment, and hence no medical care obligation was placed on the expelling state. A seriously ill claimant who will, if he remains, require continuing medical treatment for the foreseeable future, is not an exceptional case.

DETERMINATION AND REASONS

Introduction

1. The appellant appeals against the decision of Immigration Judge Dove Q.C., of 14 June 2010 reversing the appellant's decision of 12 March 2010 refusing the respondent's application for leave to remain.

Immigration History

2. The respondent is an Indian citizen and was granted entry clearance as a working holiday maker, with such leave valid until 29 October 2006.

3. He entered the United Kingdom on 1 November 2004.

4. He overstayed.

5. On 28 January 2009, the respondent applied for leave to remain in the United Kingdom on compassionate grounds. The basis of his claim was that he suffered from kidney failure and required regular dialysis, all as further detailed below.

6. The application was refused by way of a decision dated 12 March 2010 and directions were given for his removal from the United Kingdom.

7. The respondent appealed to the First Tier Tribunal (Immigration & Asylum Chamber) and his appeal was allowed by Immigration Judge Dove, Q.C. The Immigration Judge allowed the appeal on the basis of a breach of article 3 of the ECHR.

Medical History

8. There was no dispute between the parties as to the respondent's medical history which was as follows:

9. In 2008 the respondent was suffering from high blood pressure and attended for a blood test.

10. On 5 January 2009, the test confirmed that he had medical problems relating to his kidneys. He has advanced chronic kidney disease. This is an irreversible condition.

11. He requires dialysis three times a week for four hours per session.

12. The respondent only has a single kidney, likely due to congenital absence of his right kidney.

13. Doctor James Medcalf, Consultant Nephrologist, University Hospital of Leicester, detailed in his report of 27 May 2010:

"He (the respondent) is dependant on this treatment to remain alive and well, and would expect he would die after a period of one to two weeks if the treatment was discontinued. (The respondent) is a good candidate to receive renal transplant, and we have been discussing with him whether any of his family could offer a live kidney donor for him. However, there are no firm plans to proceed with this at present."

14. The respondent is only able to walk for 10 to 15 mins at a slow pace.

Facts not in dispute

15. The following facts were either accepted or not challenged by the appellant before the Immigration Judge. They were equally accepted or not challenged before us.

16. The respondent has uncles, aunts and cousins settled in the United Kingdom.

17. He has a mother and two brothers resident in India.

18. His mother does not enjoy good health.

19. The nearest hospital to his village which is able to provide dialysis is situated in Chandigar, some 300 kilometres away.

20. Dialysis would cost £10,000 to £12,000 rupees per week (£138 - £166 per week).

21. The respondent could not afford to:

(i) pay for dialysis and

(ii) pay to support himself in Chandigar.

22. The respondent would be unable to work so as to support himself.

23. His mother and brothers are not able to support the respondent so as to secure medical treatment.

The decision of the Immigration Judge

24. The Immigration Judge, having reminded himself of the principles as outlined in D v United Kingdom [1997] 24 EHRR 43; Ben Said v United Kingdom (2001) 33 EHRR 10 and N v SSHD [2005] 2AC 296 decided that the respondent's medical circumstances were such as to bring him into the exceptional category whereby his removal from the United Kingdom would amount to inhuman treatment of the kind prescribed by article 3 of the ECHR. Having found a breach of article 3 he did not turn to consider whether there had been a breach of article 8 which was also argued before him.

25. The Immigration Judge's reasoning for his decision can be summarised by reference to the following section in paragraph 10 of his determination:

"11. Whilst theoretically there may be medical treatment available to him in India, the practical reality is that there would be no opportunity for him to realistically avail himself of the dialysis which is essential to prevent his early death. In these circumstances in my judgement, his return to India would amount to inhuman treatment of the kind prescribed by Article 3 ….."

Submissions

26. Both parties made oral submissions. The appellant provided a detailed skeleton argument. In summary, it was submitted that although the Immigration Judge had referred himself to the correct authorities, he had not properly applied the principles enunciated therein to the circumstances of the instant case. In particular it was submitted that the judge had erred in law by holding that the respondent's inability to access available treatment in India met the exceptional test as set out in the authorities.

27. In development of this argument it was said that the Immigration Judge when considering whether the exceptional test had been met had failed to take proper account of what was stated to be the general position set out by Lord Nicholls of Birkenhead in the N (FC) v SSHD case at paragraph 18:

"No one could fail to be moved by the appellant's situation. But those acting on her behalf are seeking to press the obligations arising under the European Convention too far. The problem derives from the disparity of medical facilities in different countries of the world. Despite this disparity, an AIDS sufferer's need for medical treatment does not, as a matter of Convention right, entitle him to enter a contracting state and remain there in order to obtain the treatment he or she so desperately needs."

28. Moreover, it was submitted that the point which was constantly emphasised in the authorities was that in order to succeed an individual must bring himself into the very exceptional category. In the instant case, the Immigration Judge had allowed the appeal on the basis that although appropriate treatment was available to the respondent in India, the practical reality was that he would not be able to access it. It was submitted that in holding that this factor brought the respondent into the exceptional category the Immigration Judge had failed to have regard to the observations made by Lord Hope of Craighead at paragraph 43 in the N (FC) v SSHD case where he was considering the tensions between the D v UK case where it was held that there was a breach of article 3 and other European decisions on the matter in which it had been held that there was no breach. Lord Hope he argued had distilled the following principle at paragraph 43:

“Two points stand out from this decision. The first is that it was the applicant's present state of health that was subjected to close scrutiny. This is, of course, appropriate where a decision is being taken on grounds of humanity, because it ought to be based on the most up to date information that is available. But there is more in the point than that. It was the applicant's present state of health that was critical to the decision in D v United Kingdom that because of his present state of health his case was exceptional. The second is that the court did not apply the same high standard of scrutiny to the applicant's future prospects were she to be returned to Zambia. The question whether she would be able to afford the treatment that was said to be available there was not addressed, nor was her fate were it to turn out that she could not afford it. It was enough that the treatment was available”.

29. In light of the observations made by Lord Nicholls of Birkenhead and Lord Hope of Craighead, it was submitted that the Immigration Judge had misunderstood the principles as set out above and had misapplied these when considering the circumstances of the present case. It was submitted that had he correctly applied these principles to the circumstances of the instant case, then he would not have allowed the appeal. There was accordingly a material error of law.

30. Lastly we were taken to a recent consideration of these issues in the case of KH (Afghanistan) [2009] EWCA CIV 1354. This case involved an Afghani national who suffered from mental health problems. Lord Justice Longmore made the following observations when applying the exceptionality test to the facts of that case;

“The truth is that the presence of mental illness amongst failed asylum seekers cannot really be regarded as exceptional. Sadly, even asylum seekers with mental illness who have no families can hardly be regarded as “very exceptional”. If this case is to be regarded as a very exceptional one, there will inevitably be cases which will be indistinguishable. A person with no family would have to be equated with the person who has a family but his members are unwilling or unable to look after him or her. I cannot think that Baroness Hale had such a wide category in mind. In order for a case to be “very exceptional” it would have to be exceptional inside the class of person with mental illness without family support. Perhaps a very old or very young person would qualify but hardly an ordinary adult”.

31. It was argued that with respect to the respondent’s case, his position was analogous to that of KH . It was submitted that it could not be said that in India his position would be exceptional.

32. Turning to the article 8 issue, the appellant’s argument can be summarised by reference to the skeleton argument:

“In the case of N , the court’s view was that although it had been argued that N’s right to a private life was engaged, there was in fact no separate issue under article 8. In KH , it was accepted on behalf of

the appellant that it would be a very rare case that could succeed under article 8 if it failed under article 3. This position was endorsed by Lord Justice Longmore".

It is accordingly the appellant's position that the respondent had not demonstrated that there was a separate freestanding article 8 issue.

33. On behalf of the respondent Mr O'Callaghan provided grounds for resisting the appeal. A detailed skeleton argument was provided to us on behalf of the respondent and that was elaborated upon in the course of oral submissions.

34. Mr O'Callaghan began by submitting that it was the task of this tribunal to consider the lawfulness and reasonableness of the Immigration Judge's decision. It was not open to us to replace the decision simply because we would have reached different conclusions; rather it was required of us to consider whether the Immigration Judge was reasonably entitled to reach the decision he did. Said submission was made under reference to CA v the Secretary of State for the Home Department [2004] INLR 453.

35. Turning to his detailed rebuttal of the arguments advanced on behalf of the appellant he began by reminding us of the absolute terms of article 3. Given its absolute nature, it was his position that if the higher threshold was met, and a breach would occur following the removal of a foreign national from this country, the United Kingdom was required under its international obligations to take appropriate steps to prevent such a breach occurring.

36. Under reference to N v United Kingdom at paragraph 29, he set out the nature of ill-treatment when considering article 3:

"According to the courts constant case law, ill-treatment must attain a minimal level of severity if it is to fall within the scope of article 3…The suffering which flows from naturally occurring illness, physical or mental, maybe covered by article 3, where it is, or risk being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible…"

37. Turning to the jurisprudence of the Strasbourg Court, he accepted that, save in exceptionally compelling cases, the humanitarian consequences of returning a person to a country where his or her health is likely to deteriorate terminally do not place the returning state in breach of article 3. This understanding was most recently stated by the Grand Chamber in N v United Kingdom :

"42. Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling state. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the contracting state is not sufficient in itself to give rise to breach of article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the contracting state may raise an issue under article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the D case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in its country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

43. The court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the

high threshold set in D v the United Kingdom and applied in its subsequent case law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-state bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country".

38. Turning to the issue of exceptionality, counsel submitted under reference to speech of Lord Nicholls of Birkenhead at paragraph 15 and Lord Hope of Craighead at paragraph 48 in the N v SSHD case, that the exceptionality test is rooted in the humanitarian grounds against the removal being compelling. However, there was no "medical care" obligation upon contracting states.

39. Having set out the legal context within which the Immigration Judge required to make his decision, he submitted that the Immigration Judge clearly had the issue of exceptionality in mind when considering whether there had been a breach of article 3. He directed our attention to certain parts of the determination in terms of which the Immigration Judge had held that:

(a) The respondent's medical condition was extremely grave given the prospects of survival without the essential treatment that he required.

(b) Without dialysis, he would survive for one to two weeks.

(c) The immediacy of his death upon the withdrawal of treatment brought the case within the category of exceptionality contemplated by the case of N .

40. Counsel went on to say that in considering the issue of exceptionality, the Immigration Judge had given careful scrutiny to the facts of the case both in the United Kingdom and India.

41. He argued that the determination of the Immigration Judge was not speculative, but based upon the evidence presented. The Immigration Judge had carefully considered the notion of "terminal illness". It was reasonably open he submitted to the Immigration Judge to consider circumstances where a person dying within at most two weeks of medical treatment not being provided as being analogous to a terminal illness. The Immigration Judge further determined that whilst theoretically there may be treatment available to the respondent in India, the practical reality was that there would be no opportunity for him to realistically avail himself of the dialysis that is essential to prevent his early death.

42. It was counsel's position that the imminence of death entitled the Immigration Judge to place the respondent in an analogous position of that to Mr D in the D v United Kingdom case rather than the position of Miss N in the N v SSHD case who would live for a year or two without medication.

43. It was his position that financial issues could properly be given weight when considering exceptionality. As the Court of Appeal accepted in DM (Zambia) v Secretary of State for the Home Department [2009] EWCA Civ 474 at paragraph 23:

"…in short the AIT concluded that she would, contrary to her evidence, have familial and financial support and so be considerably better placed than many Zambians to continue with the therapy she undoubtedly needs to sustain her health and prolong her life. Against this the AIT were entitled to weigh, as they did, the absence of any family life here and the relative paucity of her private life…"

44. The heart of the Immigration Judge's determination counsel argued was this: knowledge that in reality, within two weeks of the respondent flying back to India, he would be dead. The accompanying realisation that the withdrawal of medical support, which though unpleasant permits some quality of life, would lead to death within a matter of days, not weeks, counsel submitted was significant and

gave rise to inhumanity. It was his position that in all true senses the respondent was in an analogous position with a terminally ill patient, being deprived of medication, giving some quality of life through its effects.

45. Counsel particularly relied on the observations of Baroness Hale in N v SSHD where in his submission she set out what the proper consideration was in cases such as the instant one:

"69. …whether the applicant's illness has reached such a critical stage (ie is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available to enable him to meet that fact with dignity…"

46. Therefore, for the foregoing reasons, counsel submitted that the Immigration Judge could reasonably and lawfully find that very exceptional circumstances existed in relation to the respondent and accordingly his determination should not be disturbed.

Assessment of whether there is an error of law

47. The issue in the present appeal is a short and sharp one and is this: was the Immigration Judge entitled to hold that the respondent's circumstances placed him in the category of an exceptional case? The answer to that question is in our opinion no.

48. In our view, on a proper understanding of the N and D cases, the position of the respondent was in all real senses the same as Miss N and was materially different from the position of Mr D.

49. The starting point in considering whether a particular case is exceptional is the case of N. In that case each of the judges in the House of Lords reviewed the Strasbourg and domestic jurisprudence and sought to define the particular circumstances which caused the case of D to be exceptional and therefore made it unacceptable for him to be expelled. They sought in their speeches to distinguish the case of D from the many other cases where Strasbourg had held the circumstances were not exceptional.

50. Lord Nicholls of Birkenhead at paragraph 13 thereof asks this question:

"In D's case, there was the additional feature that D was dying. But the appellant's condition in the present case will rapidly become terminal, as soon as her life preserving medication is discontinued. This prompts a further question: why is it unacceptable to expel a person whose illness is irreversible and whose death is near, but acceptable to expel a person whose illness is under control but whose death will occur once treatment ceases (as may well happen on deportation)?"

51. The first thing to be noted from what is said by Lord Nicholls of Birkenhead there is this: it is clear that the respondent (GS) falls into the same category as N in that his illness is not irreversible like D's, rather it is presently controlled by dialysis. In addition like N his death will occur once treatment ceases.

52. Having posed this question, Lord Nicholls of Birkenhead answers it thus at paragraph 15:

"15. Is there, then, some other rationale underlying the decisions in the many immigration cases where the Strasbourg court has distinguished D's case? I believe there is. The essential distinction is not to be found in humanitarian differences. Rather it lies in recognising that article 3 does not require contracting states to undertake the obligation of providing aliens indefinitely with medical treatment lacking in their home countries. In the case of D and in later cases the Strasbourg court has constantly reiterated that in principle aliens subject to expulsion cannot claim any entitlement to

remain in the territory of a contracting state in order to continue to benefit from medical, social and other forms of assistance provided by the expelling state. Article 3 imposes no such ‘medical care’ obligation on contracting states. This is so even where, in the absence of medical treatment, the life of the would-be immigrant will be significantly shortened. But in the case of D , unlike the later cases, there was no question of imposing any such obligation on the United Kingdom. D was dying, and beyond the reach of medical treatment then available”.

53. From the observations of Lord Nicholls of Birkenhead, the circumstance in the case of D which caused it to fall into the exceptional category was this: he was beyond the reach of medical treatment; he was dying and thus by allowing him to remain in this country, no medical care obligation was placed on the expelling state. That is not the position of the respondent, GS. If he continues to be treated in this country by means of dialysis his death will not occur due to his present medical problems in the foreseeable future. He is not beyond the reach of medical treatment in this country. Thus, unlike D he would not be remaining in this country for a short period until his imminent death took place. Rather the respondent would, if allowed to remain, continue to benefit from the medical treatment which he is presently receiving. It is made clear by Lord Nicholls of Birkenhead in the passages in his speech to which we have referred that the Strasbourg jurisprudence does not impose such an obligation of medical care upon the contracting state. It is in failing to recognise this critical distinction that the Immigration Judge has made a fundamental error of law.

54. That the foregoing is a correct understanding of their Lordships decision in N v SSHD is reinforced by reference to the speech of Lord Brown of Eaton-Under-Heywood at paragraphs 86 and 87:

“86. The unmistakable conclusion to be drawn from this series of recent decisions is that the Court has adopted the clear stance that article 3 is not breached by the return of an AIDS sufferer to his or her home country save in circumstances closely comparable to those in D itself.

87. This is not perhaps surprising. D represented, as Laws LJ below observed, "an extension of an extension to the article 3 obligation". The Court in Bensaid (para 40) spoke of "the high threshold set by article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm".

55. His Lordship goes on to say at paragraph 90:

“90. As already indicated, my clear understanding of the subsequent Strasbourg case law is that the Court has now adopted ‘a restrictive line’. It has not been prepared to grant ‘an absolute right for seriously ill persons to remain in the host country to get treatment, provided they had managed to set foot there.’ The ‘very far-reaching’ consequences of such a right would give rise to positive obligations which the Court has not thought it right to impose upon the Contracting States.”

56. Having reviewed the Strasbourg jurisprudence his Lordship goes on to consider what made the case of D exceptional and says at paragraph 93 the following:

“93. The logical distinction between the two very different scenarios presented respectively by D and the later cases is surely this. D appeared to be close to death; paragraph 21 of the Court's judgment there records that at the hearing on 20 February 1997: "according to his counsel, it would appear that the applicant's life was drawing to a close much as the experts had predicted" (a medical report of June 1996 having stated that D's prognosis was limited to 8-12 months). The critical question there was accordingly where and in what circumstances D should die rather than where he should live and

be treated. D really did concern what was principally a negative obligation, not to deport D to an imminent, lonely and distressing end. Not so the more recent cases including the present one. Given the enormous advances in medicine, the focus now is rather on the length and quality of the applicant's life than the particular circumstances of his or her death. In these cases, therefore, the real question is whether the State is under a positive obligation to continue treatment on a long-term basis. It is precisely in this type of case that the Court's statement in D (para 54), that those subject to removal "cannot in principle claim any entitlement to remain on the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state", has particular application.”

57. Thus, in paragraph 93 his Lordship draws the exact same conclusion as Lord Nicholls as to what made the case of D exceptional. In particular we note that he says that the critical question was this: where and in what circumstances D should die rather that where he should live and be treated?

58. Baroness Hale of Richmond, in her speech makes the same point at paragraphs 68 and 69.

59. Having regard to the observations set forth in the case of N v SSHD by the House of Lords as we have above set out, we are clear that the Immigration Judge has erred in law. We are in no doubt that as submitted by Mr O’Callaghan, he had in mind the test of exceptionality when considering the case. However, he has in our judgment misunderstood the case of N v SSHD and the preceding Strasbourg jurisprudence.

60. On a proper understanding of the law, the respondent’s case was not exceptional. He was not in circumstances which were closely comparable to D . Rather his position was analogous to N’s and therefore the test is not satisfied. The Immigration Judge has wrongly held that the circumstances of the respondent were analogous to that of D. He has erred in law by failing to understand that article 3 does not impose a medical care obligation on the contracting state. The clear result of allowing the respondent to remain in this country would be to impose such an obligation on the United Kingdom. The essential difference between the case before him and the case of D which the Immigration Judge has failed to understand is that in the case of D no such care obligation would be imposed upon the contracting state as no matter what medical treatment D was offered he would die within a very short time. Thus, the respondent, GS is not in the same position as D. He accordingly does not on a proper understanding of the law fall into the exceptional category. In these circumstances the Immigration Judge has made a material error of law and we therefore re-make the decision.

Decision

61. No one could fail to be moved by the respondent’s predicament, however, for the reasons we have stated above, there is no breach of article 3.

62. For the reasons advanced on behalf of the appellant, we hold that there was no breach of article 8. In his skeleton argument at paragraph 24, it appears to be broadly accepted on behalf of the respondent that if he failed in relation to his article 3 claim he could not be successful in terms of article 8 and with that concession we agree.

63. For the above reasons the determination of the Immigration Judge cannot stand and we find in favour of the appellant. We accordingly remake the decision and hold that there is no breach of either article 3 or 8 of the ECHR.

Signed Date

Lord Bannatyne