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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 3 July 2008

B e f o r e:

MR JUSTICE BURNETT

Between:
THE QUEEN ON THE APPLICATION OF KHALED HAIDARY
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Mr C Jacobs (instructed by White Ryland) appeared on behalf of the **Claimant**
Ms L Busch (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(Draft for approval)

1. MR JUSTICE BURNETT: This is a claim for judicial review of a decision of the Secretary of State for the Home Department refusing to consider material placed before her by the claimant as a fresh claim for human rights protection purposes.

2. The legal principles that are in play in considering such potential fresh claims are not in doubt. The starting point is paragraph 353 of the Immigration Rules HR 395 as amended by HC 1112 which provides as follows:

> "353. When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision-maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content: (i) had not already been considered; and (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection..."

3. Mr Jacobs, who appears on behalf of the claimant, particularly relied upon observations of Collins J in R on the application of Abrahim Rahimi [2005] EWHC 2838 (Admin) at [12] to the effect that the test found under paragraph 353 of the Immigration Rules was a very low one. The correct approach to be applied in such cases was authoritatively stated by Buxton LJ in the Court of Appeal in the decision of WM (DRC) v Secretary of State for Home Department [2006] EWCA Civ 1495.

4. The principles are drawn together in paragraphs 6, 7, 10 and 11 of that judgment:

> "6. There was broad agreement as to the Secretary of State's task under rule 353. He has to consider the new material together with the old and make two judgments. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353 (i) according to whether the content of the material has already been considered. If the material is not 'significantly different', the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgment will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before

us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.

7. The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in Bugdaykay v SSHD [1987] AC 514 at p 531F.

10. That, however, is by no means the end of the matter. Although the issue was not pursued in detail, the court in Cakabay recognised, at p191, that in any asylum case anxious scrutiny must enter the equation: see § 7 above. Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.

11. First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see § 7 above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

That identifies the test that the Secretary of State was obliged to apply.

5. The question for this court seems to me to be as follows: was the Secretary of State entitled to conclude that there was no reasonable chance that an immigration judge

would allow the claimant's appeal? In other words, was her decision Wednesbury unreasonable?

6. The background facts to this claim can be stated relatively shortly. The claimant was born on 1 January 1980 and so is now 28 years old. He was born in Afghanistan and is an Afghan. As a teenager he left Afghanistan and lived for some years in Iran where it appears he was able to work and accumulate sufficient funds to pay for his eventual trip to the United Kingdom. He returned relatively briefly to Afghanistan in 2002 but he arrived in the United Kingdom on 21 October 2002. He applied for asylum, broadly speaking on the basis of his father's involvement in the Government of Dr Najibullah.

7. His application for asylum was refused by the Secretary of State on 6 February 2003. He appealed and his appeal was dismissed by an adjudicator on 3 June 2003. The detail of the adjudication is not material for the purposes of this claim, save in two respects: first, the application and subsequent appeal were dismissed largely on the basis that the claimant was disbelieved. He does not put forward any new evidence to displace that conclusion concerning his underlying asylum claim. Secondly, there was no mention before the adjudicator of any health, and in particular mental health, problems. That is material because on 23 July 2003 mental health problems were first raised in correspondence from the claimant's solicitors as a basis for allowing the claimant to remain in the United Kingdom.

8. The issue having been raised, a lengthy medical report was produced from the claimant's GP who had a psychiatric qualification, which is dated 12 September 2003. That report set out a good deal of history concerning the claimant. It concluded that he suffered from depression and had some symptoms of post-traumatic stress disorder (PTSD). There was no diagnosis of PTSD. The report noted symptoms that gave rise to a suspicion of epilepsy, and additionally noted that the claimant had self-harmed; and it expressed concerns about a future risk of suicide.

9. In May 2005 there was what is called a "care coordination assessment" which confirmed the diagnosis of depression and also indicated that the claimant had in the past had some suicidal ideation, albeit of a very minor nature.

10. A medical report, dated 20 February 2006, was in due course sent to the Secretary of State. That report was prepared by Dr Bruce Owen, a consultant psychiatrist in whose care the claimant had been. The report, which once again set out a good deal of background information concerning the claimant, diagnosed him as suffering from a recurrent depressive disorder. Additionally, Dr Owen identified symptoms of PTSD but once again did not diagnose it as a condition.

11. The prognosis which is found in that report noted that the claimant had responded only minimally to medication. He was on medication at that time of Fluoxetine and Olanzapine. That medication has been adjusted since 2006. The lack of response, said Dr Owen, was in part the result of the resistant nature of the claimant's illness, but additionally the result of "ongoing stresses which he is under which are inhibiting any recovery."

12. The stresses that Dr Owen went on to identify centred upon the uncertainty surrounding the claimant's future and the inevitable threat of removal, given that his appeal had failed. Dr Owen was concerned that relapses might occur in the event of future stress. He indicated that the effect of stopping treatment would be adverse. He considered the impact of removal to Afghanistan and concluded that such removal would be a highly stressful experience. He then went on to say:

> "... one would anticipate that this high level of stress combined with a loss of support and treatment would lead to a high risk of relapse of his depression and symptoms of post-traumatic stress disorder.
>
> Should his depression deteriorate clearly the risk of self-harm and indeed suicide would escalate, with [the claimant being] at particular risk of suicide in view of his previous self-harm."

13. The self-harm referred to appears to have been a number of instances when the claimant had cut himself. The precise number of those occasions is not revealed by the papers before me, but it was the view of the doctors who have seen and treated the claimant that they were not themselves suicide attempts; rather, they were self-harm for different reasons. Importantly, in the light of the submissions advanced by Mr Jacobs, I should note that the claimant first presented with medical psychiatric difficulties not long after he arrived in the United Kingdom. That much is clear from the report of Dr Matthews.

14. At some time in 2003 (broadly speaking a year after his arrival) the claimant broke off contact with those who were providing him with assistance and ended up living rough, and at least for some of the time in a graveyard. During the time when he was outside the support structure provided by mental health professionals his condition significantly deteriorated.

15. The current position would appear to be little different from that described in Dr Owen's report. The claimant has himself produced a statement which is dated 30 June 2008. It expresses his fear and concerns about returning to Afghanistan. It details the support that he has at the moment. He lives in Newcastle, and in addition to medical support he has support from a mental health social worker, Fran Humphries, who also has produced a short statement. He mentions two other people who provide him with particular help. In short, he describes a situation where he is now well established in Newcastle with a good deal of medical and social service support which enables him to live what appears to be a relatively normal life.

16. The Secretary of State considered the material provided to her on three occasions. There was an initial decision letter in June 2006 which has been superseded.

17. On 21 September 2006 the Secretary of State dealt in detail with the contentions advanced by the claimant. Her consideration of that matter dealt not only with the facts, but also with the appropriate legal principles that apply in circumstances such as these. Following the grant of permission, the Secretary of State reconsidered the case and, in a lengthy letter dated 23 May 2007, she repeated the matters that had been set

out in the earlier correspondence but also dealt comprehensively with all points advanced by the claimant in the context of a discussion of legal principles.

18. The essential submission made on behalf of the claimant is that the Secretary of State, on the material that I have sought briefly to summarise, was simply not entitled to conclude that an immigration judge would necessarily dismiss an appeal advanced under Articles 3 and 8 of the European Convention on Human Rights.

19. Mr Jacobs submits that this is not in truth a medical case, but one which should be viewed as arising from the complete loss of support structures which give rise to the real possibility that the claimant would be thrown adrift in Afghanistan with little or no family or other support in circumstances in which his mental condition would be liable significantly to deteriorate. He submits that as a consequence it is likely that the claimant would be unable to work and would be unable to find somewhere to live.

20. The claimant relies in particular upon the decision of the Strasbourg court in Pretty v United Kingdom 35 EHRR 1 at 52. There the court said:

> "52. As regards the types of 'treatment' which fall within the scope of Article 3 of the Convention the Court's case-law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering (see the above-cited Ireland v the United Kingdom judgment, p 66 §167; V v the United Kingdom [GC] no. 24888/94, ECHR 1999-IX, §71). Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 (see amongst recent authorities, Price v the United Kingdom, no. 33394/96, (Sect. 3), ECHR 2001-VIII, §§ 24-30, and Valasinas v Lithuania, no. 44558/98, (Sect. 3), ECHR 2001-VIII, §117). The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (see the above mentioned D v the United Kingdom and Keenan v the United Kingdom judgments and also Bensaid v the United Kingdom, no. 44599/98, (Sect. 3) ECHR 2000-I)."

It is to be observed that in the course of that paragraph the court made reference to the cases of D and Bensaid v United Kingdom. Both of those cases concerned the question whether it would amount to a breach of Article 3 and Article 8 to remove individuals from the United Kingdom in circumstances where on the one hand the applicant, (D), suffered from AIDS, and on the other the applicant, (Bensaid), suffered from a serious psychiatric illness.

It seems to me that however one may try to categorise this claimant's case, it is clearly a medical case for the purposes of the application of Article 3 and Article 8 in removal cases.

Ms Busch, who appears for the Secretary of State, submits that, in the light of domestic and Strasbourg authority, the facts of the claimant's case are so far removed from those in which Article 3 or Article 8 could provide protection from removal that not only was the Secretary of State's decision correct in legal terms but it was also inevitable. A number of cases have been before the Strasbourg court which have considered the question of the circumstances in which an applicant must find himself before removal on grounds of Article 3 or 8 becomes about impossible consequent upon medical difficulties. The first case in which the court concluded that it would be unlawful to remove an individual on this basis was D v United Kingdom, 2 May 1977 (Reports of Judgments and Decisions 1977-III p794). At paragraph 51 the Strasbourg court said:

> "The Court notes that the applicant is in the advanced states of a terminal and incurable illness. At the date of the hearing, it was observed that there had been a marked decline in his condition and he had to be transferred to a hospital. His condition was giving rise to concern. The limited quality of life he now enjoys results from the availability of sophisticated treatment and medication in the United Kingdom and the care and kindness administered by a charitable organisation. He has been counselled on how to approach death and has formed bonds with his carers."

Then at paragraphs 52 and 53 the court said this:

> "The abrupt withdrawal of these facilities will entail the most dramatic consequences for him. It is not disputed that his removal will hasten his death. There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering. Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts. While he may have a cousin in St Kitts, no evidence has been adduced to show whether this person would be willing or in a position to attend to the needs of a terminally ill man. There is no evidence of any other form of moral or social support. Nor has it been shown whether the applicant would be guaranteed a bed in either of the hospitals on the island which, according to the Government, care for AIDS patients.
>
> ...
>
> 53. In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3."

Many other cases came before the Strasbourg court following its decision in D, but in only one was the application successful and that was a case called BB v France (Reports of Judgments and Decisions 1998-VI p2596). It is to be observed that almost all cases

advanced on medical grounds under Article 3 are also pursued under Article 8. All of the Strasbourg cases were subjected to very detailed analysis in N v Secretary of State for the Home Department (Terrence Higgins Trust intervening) [2005] 2 AC 296. All five of their Lordships provided reasoned speeches but it is sufficient for the purposes of this judgment for me to quote only from the speeches of Lord Hope of Craighead and Baroness Hale of Richmond. At paragraph 44 Lord Hope said this:

> "The fact that the decision in D v United Kingdom is relevant to other serious illnesses was made clear in Bensaid v United Kingdom (2001) 33 EHRR 205. The applicant in that case was a schizophrenic who was suffering from a long-term psychotic illness. He was receiving treatment for his medical condition in this country which helped him to manage his symptoms. The drugs which he was receiving would not be available to him free if he were to be returned to Algeria, and there were other difficulties which gave rise to the risk that his existing mental illness would deteriorate resulting in self-harm and other kinds of suffering which the court said could in principle fall within the scope of article 3. It held nevertheless that his removal to Algeria would not violate that article: p218, para 41. The difficulties of access to medical treatment there were noted, but the court said that none the less medical treatment was 'available' to him there. The fact that his circumstances would be less favourable from that point of view from those enjoyed by him in the United Kingdom was not decisive. The risk that he would suffer a deterioration in his condition and that, if he did, he would not receive adequate support was said to be to a large degree speculative. The court summed the matter up in this way at paragraph 40:
>
> > 'the court accepts the seriousness of the applicant's medical condition. Having regard however to the my threshold set by article 3, particularly where the case does not concern the direct responsibility of the contracting state for the infliction of harm, the court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of article 3. It does not disclose the exceptional circumstances of the D case ... where the applicant was in the final stage of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St Kitts.'"

The reference to Bensaid is important because that case bears striking similarities, although it is not identical, to the claimant's case with which I am concerned. It is to be noted that in Bensaid the court rejected the claim under Article 8 even though it accepted that mental illness or mental condition might well give rise to issues under Article 8.

21. Returning to N, within paragraph 48 Lord Hope said this:

> "... aliens who are 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 or other forms of assistance provided by the expelling state. For an exception to be made where expulsion is resisted on medical grounds the circumstances must be exceptional. In May 2000 Mr Lorezen, a judge of the Strasbourg court, observed at a colloquy in Strasbourg that it was difficult to determine what was meant by 'very exceptional circumstances'. But subsequent cases have shown that D v United Kingdom is taken as the paradigm case as to what is meant by this formula. The question on which the court has to concentrate is whether the present state of the applicant's health is such that, on humanitarian grounds, he ought not to be expelled unless it can [be] shown that the medical and social facilities that he so obviously needs are actually available to him in the receiving state. The only cases where this test has been found to be satisfied are D v United Kingdom, where the fatal illness had reached a critical stage, and BB v France where the infection had already reached an advanced stage necessitating repeated stays in hospital and the care facilities in the receiving country were precarious. I respectfully agree with Laws LJ's observation in the Court of Appeal, para 39, that the Strasbourg court has been at pains in its decisions to avoid any further extension of the exceptional category of case which D v United Kingdom represents."

In the same case Baroness Hale of Richmond said this at paragraph 69:

> "In my view, therefore, the test, in this sort of case, is whether the applicant's illness has reached such a critical stage (ie he 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 there to enable him to meet that fate with dignity. This is to the same effect as the test preposed by my noble and learned friend, Lord Hope of Craighead. It sums up the facts in D. It is not met on the facts of this case."

22. The decision of the House of Lords in N confirms that the hurdle which has to be overcome by a claimant in medical cases of this sort is a very high one indeed. I should note that N went on to Strasbourg where recently, on 27 May 2008, the Grand Chamber has confirmed the approach of the House of Lords as being correct.

23. I should also note what was said by the House of Lords in R (Razgar) v Home Secretary [2004] 2 AC 368. The case was one that concerned Article 8 as well as there being observations about Article 3. In paragraph 20 Lord Bingham said this:

> "20. The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary

> of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. In Secretary of State for the Home Department v Kacaj [2002] Imm AR 213, 228, para 25, the Immigration Appeal Tribunal (Collins J, Mr CMG Ockelton and Mr J Freeman) observed that: 'although the [Convention] rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate.' In the present case, the Court of Appeal had no doubt [2003] Imm AR 529, 539, para 26, that this overstated the position. I respectfully consider the element of overstatement to be small. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

24. Those observations are to be read, in the light of the comments made more recently in the House of Lords in Huang [2007] UKHL11. At paragraph 59 in Razgar Baroness Hale of Richmond said this:

> "59. Although the possibility cannot be excluded, it is not easy to think of a foreign health care case which would fail under article 3 but succeed under article 8. There clearly must be a strong case before the article is even engaged and then a fair balance must be struck under article 8(2). In striking that balance, only the most compelling humanitarian considerations are likely to prevail over the legitimate aims of immigration control or public safety. The expelling state is required to assess the strength of the threat and strike that balance. It is not required to compare the adequacy of the health care available in the two countries. The question is whether removal to the foreign country will have a sufficiently adverse effect upon the applicant. Nor can the expelling state be required to assume a more favourable status in its own territory than the applicant is currently entitled to. The applicant remains to be treated as someone who is liable to expulsion, not as someone who is entitled to remain."

25. It is plain from these decisions that not only is the test under Article 3 an extremely high one in these circumstances, but also that it would be very difficult, although, as Lady Hale recognised, not necessarily impossible, for a claimant who relies on health grounds to resist removal to fail under Article 3 but succeed under Article 8. It is instructive to look a little more at what the Court in Strasbourg said in Bensaid, the facts of which were summarised in Lord Hope's speech in N from which I have quoted. It rejected the Article 3 claim. It might be thought obvious that the circumstances were very far removed indeed from the facts of the case of D.

26. So far as Article 8 is concerned, the Strasbourg court gave its assessment between paragraphs 46 and 49. They accepted -- and this one finds in paragraph 47 -- that

mental health may be regarded as a crucial part of private life associated with the respect of moral integrity. But turning to the facts of the case of Bensaid, they said this:

> "... the Court recalls that it has found above that the risk of damage to the applicant's health from return to his country of origin was based on largely hypothetical factors and that it was not substantiated that he would suffer inhuman and degrading treatment. Nor in the circumstances has it been established that his moral integrity would be substantially affected to a degree falling within the scope of Article 8 of the Convention. Even assuming that the dislocation caused to the applicant by removal from the United Kingdom where he has lived for the last eleven years was to be considered by itself as affecting his private life, in the context of the relationships and support framework which he enjoyed there, the Court considers that such interference may be regarded as complying with the requirements of the second paragraph of Article 8, namely as a measure 'in accordance with the law', pursuing the aims of the protection of the economic well-being of the country and the prevention of disorder and crime, as well as being 'necessary in a democratic society for those aims."

27. The conclusion, therefore, of the court was that even if Article 8 was in play at all, which it doubted, there were perfectly good grounds to justify interference under Article 8(2).

28. With that review of the appropriate legal principles one comes back to the question whether the Secretary of State was entitled to conclude that there was no reasonable chance that an immigration judge would allow the appeal. Of course the facts of each of these cases are different from each other and the facts of the claimant's case are not identical with any of those previously considered by the Strasbourg court. Mr Jacobs submits that the cumulative effect upon the claimant of difficulties with medical treatment, the lack of the support mechanisms which are in place in Newcastle and the difficulties he is likely to face on return to Afghanistan as a result of his mental illness, at least arguably enable him to cross the threshold for Article 3 purposes. Even if he is unable to cross the threshold for Article 3 purposes at the level of arguability, Mr Jacobs suggests that he does so for Article 8. In those circumstances, he submits, it was irrational for the Secretary of State to have concluded that any appeal would be bound to have failed.

29. I am quite unable to accept those submissions. It seems to me that when one places on one side of the scales the facts of the claimant's case taken at their highest, and weigh them against the test on the other side of the scales articulated by the House of Lords through its analysis of the Strasbourg cases, the Secretary of State was plainly entitled to come to the view that any appeal would be hopeless. It seems to me that the submissions advanced by Ms Busch, which I summarised towards the beginning of this judgment, are well made. In those circumstances this claim is dismissed. Are you publicly-funded?

30. MR JACOBS: My Lord I am, yes.

31. MR JUSTICE BURNETT: So you would like some --

32. MR JACOBS: Detailed legal services assessment. My Lord I am instructed to apply for permission to appeal and I can briefly set out the basis.

33. MR JUSTICE BURNETT: Yes, please.

34. MR JACOBS: I think there is an application from my learned friend.

35. MS BUSCH: There is an application for our costs, my Lord, to be assessed if not agreed in light of public funding, not to be enforced without the order of the court.

36. MR JUSTICE BURNETT: The correct order I think is "to be determined under Section 11 of the Administration of Justice Act" and the appropriate regulations, the name of which currently escapes me. But they are the same ones that enable Mr Jacobs to be paid. You cannot really resist that, can you?

37. MR JACOBS: No, my Lord.

38. MR JUSTICE BURNETT: I will deal with costs then. The claimant is to pay the defendant's costs to be determined if not agreed pursuant to Section 11 of the AJA 1991 and the relevant costs regulations. There is to be a detailed assessment of the claimant's publicly-funded costs. We will now deal with permission.

39. MR JACOBS: My Lord, yes. Simply that in my submission this appeal raises areas of law which have not been considered with regard to the test in Pretty, the impact on the case of N in the case where it is asserted that it revolves around the loss of the support network and not strictly the provision of medical treatment. And also, my Lord, the competing low threshold for a fresh claim and the high threshold in these cases and, in my submission, on the facts of this case it is arguable that it ought to be considered further by the Court of Appeal that the door is not closed on the low threshold by N, which in my submission is a different type of case, and the Pretty principle enables the claimant to argue that there would be realistic prospect of success applying that test.

40. My Lord, these are not issues that had been regarded to be fresh applications previously. All the authority on fresh prohibitions involve credibility issues relating to attempts to re-open asylum claims and in my submission when one looks at AK, the mischief here is entirely missing, and on that basis the threshold ought to have been met. Those are my submissions.

41. MR JUSTICE BURNETT: Mr Jacobs applies for permission to appeal. I am not going to grant permission to appeal; it is a matter that Mr Jacobs must raise with the Court of Appeal if he wishes to. In my view this case has involved an utterly orthodox application of the principles articulated by the House of Lords in N v the Home Secretary, in which, I should add, the decision of Pretty in the Strasbourg court was referred to in the course of the speeches. Secondly, I also consider that this has been an entirely orthodox application of the decision of the Court of Appeal in WM and under paragraph 353 of the Immigration Rules.