Neutral Citation Number: [2009] EWCA Civ 1354

Case No: C4/2008/1857

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Burnett
CO/6131/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2009

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE LONGMORE
and
LORD JUSTICE AIKENS

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Between :

KH (AFGHANISTAN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Mr Christopher Jacobs (instructed by **Duncan Lewis & Co**) for the **Appellant**
Ms Lisa Busch (instructed by **The Treasury Solicitors**) for the **Respondent**

Hearing date: Thursday 12 November 2009

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Judgment

Lord Justice Longmore:

1. The question in this appeal is whether the Secretary of State was correct to decide that new material provided by the appellant KH did not constitute a fresh claim for immigration purposes.

The Facts

2. The background facts to this appeal from Burnett J can be stated relatively shortly. The appellant was born on 1 January 1980 and so is now 29 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 an eventual trip to the United Kingdom. He returned briefly to Afghanistan in 2002 but he arrived back in the United Kingdom on 21 October 2002. He then applied for asylum, broadly speaking on the basis of his father's involvement in the Government of Dr Najibullah.

3. 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 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. Accordingly, he has no right to reside in this country. There was no mention before the adjudicator of any health and in particular mental health problems. On 23 July 2003 his solicitors for the first time raised mental health problems as a basis for making a new claim that the appellant should be allowed to remain in the United Kingdom, although it was clear from a lengthy report of his general practitioner of 12 September 2003 that the appellant's mental health problems surfaced shortly after he arrived in October 2002.

4. This report set out a good deal of history concerning the appellant. 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 he had self-harmed; and it expressed concerns about a future risk of suicide.

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

6. 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 appellant had been. The report 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.

7. The prognosis which is found in that report noted that the appellant 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 his illness, but additionally the result of "ongoing stresses which he is under which are inhibiting any recovery".

8. The stresses that Dr Owen went on to identify centred upon the uncertainty surrounding the appellant'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 appellant being] at particular risk of suicide in view of his previous self-harm."

9. The self-harm referred to appears to have been a number of instances when the appellant had cut himself. The precise number of those occasions is not known, but it was the view of the doctors who have seen and treated him that they were not themselves suicide attempts; rather, they were self-harm for different reasons.

10. At some time in 2003 (broadly speaking a year after his arrival) the appellant 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. He was, however, rescued and was able to resume support from the agencies described below.

11. The current position is described in Dr Owen's report. The appellant 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.

12. 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.

13. On 21 September 2006 the Secretary of State dealt in detail with the contentions advanced by the appellant. Her consideration 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 to move for judicial review, 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 appellant in the context of a discussion of legal principles.

<u>The Arguments and the Judgment</u>

14. The essential submission made on behalf of the appellant is that the Secretary of State, on the material that I have sought briefly to summarise, was simply wrong to conclude that an immigration judge would necessarily dismiss an appeal advanced under Articles 3 and 8 of the European Convention on Human Rights.

15. Mr Jacobs on the appellant's behalf submitted that this case was 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 appellant 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 submitted that as a consequence it is likely that the appellant would be unable to work, would be unable to find somewhere to live and would, in effect, be destitute.

16. The appellant relied in particular upon the decision of the Strasbourg court in Pretty v United Kingdom 35 EHRR 1 at para 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 (Ireland v the United Kingdom, p 66 s167; V v the United Kingdom [GC] no.24888/94 ECHR 1999-IX, S71). 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, s24-30, and Valasinas v Lithuania no 44558/98, (sect. 3) ECHR 2001-VIII, s117). 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 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)."

17. The judge 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 or 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.

18. The judge then dealt with the present case on the basis that it was a medical case and he said that the particularly high threshold imposed by Razgar [2004] 2AC 368 and N [2005] 2AC 296 was the background against which it had to be decided whether an immigration judge would come to a different decision from that of the original adjudicator on the basis of the new medical material. He then concluded that the facts

of the present case taken at their highest, when weighed against the test articulated by the House of Lords in those two cases, did not mean that the Secretary of State was not entitled to conclude that any appeal would be hopeless.

19. It is now clear from ZT (Kosovo) v SSHD [2009] 1 WLR 348 decided after Burnett J delivered judgment that the court must make up its own mind on the question whether there is a realistic prospect that an immigration judge, applying the rule of anxious scrutiny, might think that the applicant will be exposed to a breach of Article 3 or 8 if he is returned to Afghanistan. So the question is not whether the Secretary of State was entitled to conclude that an appeal would be hopeless but whether, in the view of the court, there would be a realistic prospect of success before an adjudicator.

20. Essentially Mr Jacobs repeated his arguments before the judge with the added assistance of the decision of ZT (Kosovo).

Medical Case or No?

21. I have no doubt that this case has to be treated as a medical case and, therefore, as the judge said falls to be dealt with in the light of the cases of Razgar and N. This is because the whole argument only arises because KH has mental health problems and it is against that background that any putative breach of Article 3 or Article 8 has to be assessed. Sedley LJ said, in giving permission to appeal, that he could see little prospect of upsetting the judge's conclusion that this is a medical case and, therefore, to be decided in the light of N. I entirely agree.

22. It is, indeed, a little puzzling why Mr Jacobs was so eager to argue that KH fell outside the ambit of the medical cases. If one were to ignore KH's mental illness, he would fall to be treated merely as a failed asylum-seeker who would be returned to the same conditions in Afghanistan as prevailed when he left. If he was not destitute when he left, there would be no reason to suppose he would be destitute on return. If he was destitute when he left but is not entitled to asylum he cannot have a further claim on the international community merely because he is sent back to endure the same conditions he faced when he left.

23. It is only because KH has medical problems that his claim to be relieved by the international community has any chance at all. What is said is that neither Razgar nor N considered (let alone decided) whether sending a sufferer from illness to a country where the absence of family support and an ability to earn a living meant that then he would be destitute could be a reason for affording him the protection of Article 3 or Article 8.

24. The reason why my Lord gave permission to appeal in this case was not because this case was not a medical case but because there is an ostensible divide in relation to Article 3 between the jurisprudence of N and the jurisprudence of Pretty by which he was troubled.

Divide between Pretty and N?

25. I have already set out the passage from Pretty on which Mr Jacobs relies. It must be remembered that the remarks of the Strasbourg Court were made in the context of deciding that the refusal of the DPP to give an undertaking not to prosecute Mr Pretty

if he helped Mrs Pretty to commit suicide was not inhuman and degrading treatment within Article 3. In that context statements about the ambit of Article 3 have to be treated with some reserve since the point being made by the court was that, however wide the ambit of Article 3, the conduct of the DPP did not fall within it.

26. By contrast the case of N specifically dealt with cases of ill-health and decided that, save in very exceptional cases, withdrawal of medical treatment as a result of ordering return of a failed asylum-seeker did not constitute a violation of Article 3. When the case was in the House of Lords Lord Nicholls said (para 15) that:

> "… 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 or other forms of assistance provided by the expelling stated. Article 3 imposes no such "medical case" 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."

All their Lordships were concerned to distinguish the case of D v United Kingdom where the Strasbourg Court had decided that the expulsion of D to St Kitts where the applicant could not be guaranteed nursing or medical care would violate Article 3 and found the distinction in the fact that D was actually dying or close to death, see Lord Nicholls at para 15, Lord Hope at para 50, Baroness Hale at para 69, and Lord Brown at para 94.

27. The Grand Chamber in N v United Kingdom 2008 47 EHRR 885 agreed with this analysis. The court said (paras 42-45):-

> "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 Art. 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 Art. 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 his 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 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.
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> 44 Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the contracting state and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Art.3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Art3 does not place an obligation on the contracting state to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the contracting states.
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> 45 Finally, the Court observes that, although the present application, in common with most of those referred to above, is concerned with the expulsion of a person with an HIV and AIDS-realties condition, the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost. "

28. To the extent that those remarks expose an "ostensible division" from the remarks in Pretty, it is evident not only that the N jurisprudence is the later more considered view of the Strasbourg Court but that it is also the specifically applicable jurisprudence to medical cases including mental illness cases. It is the later jurisprudence which, as it seems to me, the court must apply to the case.

Very Exceptional Case?

29. Mr Jacobs then submitted that it was arguable that the case of KH was very exceptional because the effect of returning him to Afghanistan was not merely that he

would be deprived of the medication and support available to him in this country but that without any family or other support in Afghanistan he would be destitute and that destitution would arguably constitute a breach of Article 3. He cited R (Limbuela) v SSHD [2006] 1 AC 396 for the proposition that failure by the Secretary of State to allow asylum-seekers in this country the opportunity to work or to afford them shelter, so that they were effectively destitute, did constitute a breach of Article 3 and submitted that expelling the appellant to a place where there were inadequate medical facilities and he had no family support would therefore constitute such a violation.

30. The great difficulty with this argument is that, as it seems to me, it is essentially inconsistent with the speeches in N. The thrust of the speeches is that the only "very exceptional" case, of which their Lordships could realistically conceive, was that of an appellant who was actually dying and who would be returned to die in a country without any support and be denied a dignified death, see Lord Brown of Eaton-under-Heywood (para. 94) Baroness Hale did, however, say (para. 70) that there might be other exceptional cases with other extreme facts where the humanitarian considerations are equally compelling. Could an immigration judge decide that this was one of them?

31. It is noteworthy that Baroness Hale proceeds immediately to remark how seriously the European Court of Human Rights took the case of the schizophrenic in Bensaid v UK [2001] 53EHRR 205. As Burnett J said Bensaid has striking similarities to the present case. The diagnosis was of schizophrenia rather than PTSD and depression, but it was said that the facilities for treatment were inadequate and difficult to access much as is suggested in the present case. Nevertheless there were differences. It was clear that the appellant in that case did have family support in Algeria, although they lived 75 kilometres from the nearest hospital where he could obtain treatment. The family did not have a car but alternative arrangements for travel could be made. If, therefore, his treatment ceased, he could at least live and die with the support of his family.

32. In the present case it is said that neither the treatment the appellant has been having in this country nor any support system similar to that which he has been receiving in Newcastle will be available in Afghanistan. It is further said that he has no family there who can support him if subsequent medical facilities are inaccessible and that he is therefore liable to die unassisted as he would have done here while he was subsisting in the English graveyard, if Social Services had not intervened. But even if all those matters were to be proved to the satisfaction of an immigration judge is it really possible that he might hold that this case was indeed one of those "very exceptional cases" envisaged by Baroness Hale in para. 70 of her speech in N, where it would be a breach of Article 3 to return the appellant now to Afghanistan?

33. The truth is that the presence of mental illness among 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 a person who has a family but whose 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.

34. These are, of course, hard cases. The temptation to say that it is possible that an immigration judge would reach a different decision is very strong. But any such decisions would be inconsistent with the Strasbourg cases on which both N in the House of Lords and N v UK in the European Court heavily relied.

35. Although Mr Jacobs relied on Article 8 as well as Article 3, he realistically accepted that it would be a very rare case which could succeed if it failed the Article 3 threshold. In my judgment this is not one of those rare cases. It seems to me that Burnett J came to the correct conclusion and I would dismiss this appeal.

Lord Justice Aikens:

36. I agree.

Lord Justice Sedley:

37. I agree that we are compelled by authority to dismiss this appeal. If the bare prospect of inhuman treatment were enough to secure the protection of Art. 3 this appeal and many like it would succeed. But, as I said in *ZT* [2005] EWCA Civ 1421:

> "The reasoning of the House in *N* accepts, in effect, that the internal logic of the Convention has to give way to the external logic of events when these events are capable of bringing about the collapse of the Convention system. …. [T]he underlying message of *N* and *Razgar*, and of *Ullah* too, is that the ECHR is neither a surrogate system of asylum nor a fallback for those who have otherwise no right to remain here. It is for particular cases which transcend their class in respects which the Convention recognises. None of this could find any place in an originalist reading of the Convention; but just as the Convention has grown through its jurisprudence to meet new assaults on human rights, it is also having to retrench in places to avoid being overwhelmed by its own logic. If what result are rules rather than law, that may be an unavoidable price to be paid for the maintenance of the Convention system. One had much rather it were not so."

That remains my view. It is compounded by the fact that the rule in *N* either does not apply outside the field of healthcare or – as I would prefer to reason - operates differently depending on whether the material treatment is of a person who, albeit on sufferance, will continue to be present in the United Kingdom and to be treated inconsistently with Art. 3 while here, or of a person for whom the potentially inhuman or degrading treatment will be constituted by the act of removal.