Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/07284/2014
AA/07364/2014
IA/28183/2013
IA/42143/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 February 2016	**On 24 February 2016**

Before
UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS S V
MS N V
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Ms N Braganza, Counsel instructed by Camden Community Law Centre

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. On the facts of this case, it is appropriate to continue that anonymity direction.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Secretary of State appeals against a decision of First-Tier Tribunal Judge Miller promulgated on 16 September 2015 ("the Decision") allowing the Appellants' appeals on human rights grounds but dismissing the appeals on protection grounds. Permission to appeal was granted to the Respondent by a decision of First-tier Tribunal Judge Andrew dated 2 October 2015 on the basis that in allowing the Second Appellant's appeal on health grounds under Articles 3 and 8 ECHR, the Judge erred in not applying the guidance in N v SSHD [2005] UKHL 31 and that this error may have infected the allowing of the First Appellant's appeal.

2. At the outset of the hearing, I raised with Ms Braganza whether there is a cross appeal in this case. It is noted in the Appellants' Rule 24 response. There did not though appear to be any formal application for permission to appeal or any grant of permission in relation to that ground. Ms Braganza's solicitors were not present to check the position with them. I therefore checked the Tribunal file and confirmed that there was no application for permission to appeal filed by the Appellants nor any grant of permission other than that of First-tier Tribunal Judge Andrew. Ms Braganza accepted that any application for permission to appeal would now be out of time and the hearing thereafter focussed only on the Decision in relation to the appeals on human rights grounds.

3. The background facts so far as it is necessary to recite them are that the First Appellant is the mother of the Second Appellant. Both are nationals of India. The Appellants arrived in the UK and the First Appellant claimed asylum with the Second Appellant as her dependent. This claim was based on the First Appellant's fear of her husband based on past incidents of domestic violence. Her husband (and the Second Appellant's father) is, it appears, now in India. The Judge accepted the First Appellant's account including of an incident which occurred in the UK in November 2011. The Judge did not accept however that she would any longer be at risk on that account due to the passage of time. It is worth noting at this point that the Second Appellant does maintain contact with her father and he therefore appears to be aware of her and her mother's whereabouts. The Judge found in the alternative that the Appellants could internally relocate in India. As I note at [2] above, there is no valid appeal against the findings on the protection claim and I do not therefore need to dwell on this further.

4. The Second Appellant was born on 27 March 1993. She is the only child of the First Appellant and her husband. In 2003, the Second Appellant was diagnosed with auto-immune haemolytic anaemia. In December 2011, whilst the Second Appellant was in the UK with her mother, her health deteriorated. She was admitted to hospital and diagnosed as having a lymphoma. Following an application on this basis on compassionate grounds, she was granted three months leave from January to April 2013. She applied for an extension to that leave and the appeals against that refusal decision were stayed so that consideration could also be given to the asylum claim which was refused on 5 September 2014. The Second Appellant's current medical condition, prognosis and availability of treatment in India are the focal points of this appeal and I will therefore need to return to those in more depth below.

5. Following the grant of permission in relation to the allowing of the appeal on human rights grounds, this appeal comes before me to determine whether the Decision contains a material error of law and, if so, to either remit the appeals or re-make the Decision insofar as it relates to the human rights claims.

Submissions

6. Mr Avery relied on the Secretary of State's grounds as set out in the application for permission to appeal. The main ground is that the Judge erred in failing to follow the guidance in N v SSHD. Mr Avery accepted that the First Appellant's appeal hangs on the outcome of the Second Appellant's appeal following the dismissal of the asylum claim. He referred to the case of GS (India) and others v Secretary of State for the Home Department [2015] EWCA Civ 40 and to the very high threshold required for a medical claim to succeed under Article 3 ECHR. This is not, he submitted, a so called "death bed" case. It is not permissible to use Article 8 ECHR to circumvent the high threshold in Article 3 and the Court of Appeal made the point in GS that if a case could not succeed under Article 3, it was highly unlikely that it could succeed under Article 8 absent the presence of other factors (see in particular [111] and following in GS).

7. The Judge in this case allowed the appeal on the basis of both Article 3 and Article 8. I queried with Mr Avery whether that would lead to the same result in relation to the leave to be granted. He confirmed that in both cases the period of leave would be the same as the leave in medical cases is essential discretionary on either basis. I also pointed him to the Respondent's internal guidance on what constitutes a medical claim which could succeed and asked if the Respondent's case is that the Second Appellant's claim does not meet the threshold set out in that guidance. He submitted that this guidance is simply an expression of what was said by the Court of Appeal in GS. The

Respondent's position is therefore that the Second Appellant's case does not meet that test.

8. Ms Braganza submitted that the Judge clearly had in mind the high threshold for a medical claim to succeed. She pointed out that N v SSHD was referred to in the Respondent's decision letter to which the Judge has regard at [7] of the Decision. She submitted that the Decision should be read as a whole, particularly in relation to the crucial evidence from the Second Appellant's consultant. The Second Appellant's condition is both extremely severe and rare. The evidence before the Judge was that treatment is not available except in the UK, the US and Germany. She submitted that this is in fact a "death bed" case.

9. Ms Braganza pointed out that the Presenting Officer asked no questions of the consultant [19]. The Presenting Officer also made no submissions about the evidence from the consultant and the medical claim [21]. The Presenting Officer also indicated that she had no questions to put to the Appellants and they were therefore not called to give evidence [5]. Ms Braganza submitted that, by appealing the Decision, the Respondent is seeking to have a second bite of the cherry when no challenge was taken previously to the evidence. She submitted that this does not sit well with what is in essence a perversity challenge (even though that was not the basis for the grant of permission).

10. In relation to Article 8, Ms Braganza submitted that this is on any view an exceptional case. In relation to the First Appellant, the evidence of the Second Appellant's consultant is that the First Appellant attends most appointments with her daughter. She noted in any event the Respondent's acceptance that the First Appellant's case probably stands or falls with the Second Appellant's case.

Discussion and conclusions

11. As I note at [4] above, the focal point of this appeal is the Second Appellant's medical condition. As such, and although that evidence is already set out in some detail at [9] to [17] of the Decision, I set out below a summary of that evidence and the Judge's findings about it as those are crucial to understanding how the Judge approached this issue.

12. The medical evidence in relation to the Second Appellant was presented to the Judge by Dr Seneviratne who is the Second Appellant's lead consultant based at the Royal Free Hospital national referral centre for immune deficiency which is the largest in Europe. The Judge described him at [30] as "one of the most impressive witnesses I have seen in court". In short summary, the consultant's evidence is that the Second Appellant was referred to the centre

following the diagnosis of the lymphoma because her anti-body levels were so low. She was diagnosed with Common Variable Immune Deficiency (CVID). Dr Seneviratne says that his unit is treating about three hundred patients with this disorder of whom fifty have Combined Immune Deficiency (CID).

13. In September 2014, the exact mutation from which the Second Appellant is suffering was diagnosed as CTLA4. The Second Appellant's case is, according to Dr Seneviratne, the only case in the UK and there are less than forty cases in the world. The Second Appellant has been considered for a marrow transplant but a complete match could not be found as the First Appellant also carries the mutation. The Second Appellant is being considered for a transplant on the basis of the best available match. Dr Seneviratne's evidence is that this will improve her prognosis but the evidence before the Judge was that with or without a transplant her prognosis is not good and even a transplant may not improve her chances of survival. Dr Seneviratne says that he was given permission to start the Second Appellant on a trial drug which has had some success in Germany but there are known complications and lack of success in many cases so a transplant remains under consideration. The Judge noted at [30] that the Second Appellant's prospects of survival even with a transplant are no better than 50%.

14. Dr Seneviratne's evidence in relation to treatment in India is that South Asia is not good on immunology. He also works in Sri Lanka so has some experience. He says however that he could not manage the Second Appellant's case there because her treatment requires a team effort.

15. The Judge's findings on the Second Appellant's medical condition and the impact of that on the removal of both Appellants are at [30] to [34] of the Decision and bear repetition. I start the citation however with the Judge's conclusion on the asylum claim at [29] because, as Ms Braganza points out, the juxtaposition of the two is essential to consideration of the Judge's thinking:-

> "[29]It follows from what I have said above that I do not consider that either the first Appellant or the second Appellant, as her dependent, would be at risk of serious ill-treatment such as to engage Article 3, or that the circumstances are such that they are entitled to humanitarian protection.
>
> [30] With regard to the second Appellant's condition, and the problems that this poses the position could hardly be more different. I found Dr Seneviratne one of the most impressive witnesses I have seen in court. He is clearly intelligent and as expert in his field as it is possible to be. I detected no suggestion whatsoever that anything he said was slanted, exaggerated or presented in such a way as to suggest that he was being anything other than objective. It is clear that the second Appellant's condition is extremely severe, and her prospects of

survival, even if she obtains a bone marrow transplant, are no better than 50%.

[31] In the second Appellant's refusal letter, the Respondent has referred to the availability of medical services, and the drugs which the Appellant was taking at the time in India. In most cases, this is, of course, a very reasonable approach for the Respondent to take. However, Dr Seneviratne made clear that the level of expertise required in the second Appellant's case is simply not available outside the UK, the USA and Germany. Indian hospitals would be better than UK hospitals if a patient was suffering from TB or very many other diseases. However, in a world of increasing specialisation, immunology, particularly at the level required for treatment of the second Appellant is simply not available in India.

[32] I am in no doubt that, were the second Appellant to be returned to India, she would be dead within a short period of time. This is not, of course, to say that her life expectancy in the UK is necessarily good. However, the facts are such that I find her circumstances are sufficiently severe to constitute a breach of Article 3, were she to be removed to India.

[33] With regard to Article 8 of ECHR, whilst it would not appear that the second Appellant meets the requirements of paragraph 276ADE or Appendix FM, I also have to consider whether there are any exceptional circumstances which might warrant justification of a grant of leave to remain outside the requirements of the Immigration Rules. For the reasons which I have previously given I do not see that it is a practical option for the second Appellant to travel to India at the present time. It would mean a severance from the course of treatment which she has been undergoing in this country, and it would involve a complete change in the medical team responsible for her health. The circumstances are exceptional indeed, and it would be extraordinarily harsh for her to be removed. I therefore find that her removal would breach Article 8.

[34] Turning to the position of the first Appellant, any course of action which resulted in her and the second Appellant being separated would be inhumane. As the second Appellant's closest relative (along with her father who would appear to have returned to India), the second Appellant clearly needs her mother, even allowing for the fact that she is now 22 years old. Suffering from appalling illnesses, and facing a very uncertain future, the second Appellant will inevitably need somebody close, to whom she can talk and if necessary share her innermost feelings. Equally, as her mother, the first Appellant is clearly anxious about her daughter and it would not be appropriate to take any course which would result in the first Appellant being removed to India whilst her daughter remains in the country undergoing treatment."

16. Mr Avery invited me to read carefully the Court of Appeal's judgment in GS (India) and others as setting out the applicable law in relation to a medical claim such as the Second Appellant's. I of course accept that the Judge did not do this and in spite of Ms Braganza's

submission that the Judge must be taken to have had regard to the guidance in N v SSHD because it was referred to in the Respondent's decision letter, there is nothing on the face of the Decision which indicates that this has been done. There is however, an indication at [32] that the Judge recognised the level of severity required to justify a finding of a breach of Article 3 ECHR. It is of course the case, as N v SSHD makes clear, that medical claims are in a different category to claims against the State for its own actions. However, this is an indication that the Judge recognised that the threshold was a high one. As Ms Braganza also pointed out, the juxtaposition of the Judge's conclusion in relation to the asylum claim and the medical claim also shows that the Judge was aware that the ill treatment required to found a successful Article 3 claim is high. The issue for me is whether the Judge's conclusion that the threshold is reached in this case for the reasons he gives is justified when considered in the light of the judgment in GS (India).

17. The facts of the cases in GS (India) were also extreme. They varied but the main cases concerned individuals who were receiving kidney dialysis in the UK, some of whom it was envisaged may be able to receive transplants in the UK and some of whom would be unable to access dialysis in their home countries due either to the cost of that treatment or the lack of availability of it. I note at once though that for the most part, the lack of treatment in the home country was based not on a complete lack of availability of treatment but on an inability to access it due to cost or lack of resources. In practical terms, that may make little difference if an individual is nonetheless unable to receive treatment but the complete lack of availability of treatment in her home country is a distinguishing feature of the Second Appellant's case.

18. I also note the reference at [70] to GM's case and the fact that GM had by then been accepted by Guy's Hospital for a transplant and a donor had been found. The Second Appellant does not yet have an available donor but her consultant has indicated the intention of his centre to carry out a transplant of the best available match in order to increase her chances of survival. The Court of Appeal observed that on the changed circumstances in GM's case based on the acceptance by the Hospital that he should receive a transplant and having identified a donor, it was possible that removal prior to that transplant would breach Article 3 "on the specific footing that to deprive him of such an imminent and transformative medical recourse amounts to inhuman treatment".

19. I turn then to what the Court of Appeal held to be the essential ratio of N v SSHD in order to consider that against the facts of the Second Appellant's case. That is cited at [65] of GS (India) as follows:-

> "[15]Is there, then, some other rationale [sc. other than the pressing nature of the humanitarian claim] 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 cases 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 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 obligation on the United Kingdom. D was dying and beyond the reach of medical treatment then available" (per Lord Nicholls)
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> "[36]What was it then that made the case exceptional? It is to be found, I think, in the references to D's 'present medical condition' (para 50) and to the fact that he was terminally ill (paras 51: 'the advanced states of a terminal and incurable illness'; para 52: 'a terminally ill man'; para 53: 'the critical stage now reached in the applicant's fatal illness'; Judge Pettiti: 'the final stages of an incurable illness'). It was the fact that he was already terminally ill while still present in the territory of the expelling state that made his case exceptional" (per Lord Hope)
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> "[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." (per Lady Hale)

20. As the Judge observed in relation to the Second Appellant, her condition is extremely severe and even if she receives a transplant her chances of survival are less than evens [30]. The Judge also accepts the proposition as set out in N v SSHD and GS (India) that in most cases it is reasonable to point to availability of care in a person's home country as an answer. However, as the Judge notes, the Second Appellant's condition is extremely rare and the treatment is simply not available in India. This is not a case where the treatment is available but limited by resources in India, of inferior quality to the UK or too costly for the person to access. This is a case where the treatment simply does not exist there. This is also a case where the Judge has found (without challenge) that if the Second Appellant were returned to India she would be dead within a short time (although the Judge accepts that her prognosis may not be good in the UK either). Unlike in the case of D, there is no suggestion that the Second Appellant would be faced with destitution on return to India and would

suffer an inhuman death there by reason of the lack of family to care for her. However, her condition is, by reason of the factors which the Judge has identified and which I set out above, extremely serious. This is also a case where, as I note at [13] above, the Second Appellant's consultant in the UK has accepted that she should receive a transplant. Unlike the cases in GS (India), this might not mark the end of the medical intervention needed to ensure her survival because of the likelihood that her immune system would reject the transplanted marrow. As is noted in the account of the evidence at [14] and [15] of the Decision even a marrow transplant carries a high risk. However, if she does not receive a transplant, the consultant marks her life expectancy in months. The same is said if treatment were withdrawn.

21. Although I accept that the Judge has not carried out the analysis of the case law and guidance when considering whether removal of the Second Appellant would breach Article 3, I am satisfied that, properly understood and on the extreme facts of this case, there is no misdirection as to the threshold and that the finding that there would be a breach of Article 3 is one which was open to the Judge. The issue for me is not whether I would have reached the same conclusion but whether the conclusion reached is one which was open to the Judge on the evidence and taking into account the very high threshold. This is a borderline case but I am satisfied that the factual circumstances of this case are so unusual and extreme that they warrant the finding made.

22. I noted at [7] above that the Home Office guidance on medical claims suggested to me that this may be an appropriate case for a finding of a breach of Article 3. Although this was not something considered by the Judge – perhaps unsurprisingly given that the Presenting Officer made no submissions on the medical claim – it is convenient to set out the guidance since it is said to be a statement of the Home Office policy and also because Mr Avery accepted that it is designed to reflect the guidance in the case law (and indeed it closely reflects the wording of [69] of GS) :-

> "… Home Office policy is to accept that an applicant's article 3 (medical) rights would be breached by removal to their country of origin only if:
>
> - Their illness has reached such a critical stage (the applicant is dying) and the conditions to which they will be returned are such that it would be inhuman or degrading treatment to:
>
> o deprive them of the care they are currently receiving, and

- send them home to an early death (unless there is care available there to allow them to die with dignity)"

On the facts of this case, that test would appear to be met. I make clear that I intend no criticism of the Respondent for not accepting that the Second Appellant's case meets this test. As I have noted, this is a borderline case and in any event, the evidence before the Respondent at the time of her decision appears to have been less detailed than the evidence before the Judge.

23. For the foregoing reasons I am satisfied that, notwithstanding the Judge's failure to make reference to the guidance in the relevant case law, the finding that removal of the Second Appellant would breach her Article 3 rights is not in error. There was ample evidence to support that finding and the Judge did not misdirect himself as to the threshold required to meet that test.

24. In light of that conclusion, I do not, strictly, need to deal with the Judge's finding that the Second Appellant could succeed in any event under Article 8 ECHR. If I had found an error of law in the Judge's consideration of whether Article 3 would be breached by removal in this case, I would agree with the Respondent that the Judge misdirected himself in relation to Article 8. As is made clear at [111] and following in GS (India), Article 8 is not a makeweight for a medical claim which cannot succeed under Article 3. There may in the circumstances of this case be other factors which could be prayed in aid in consideration of the Second Appellant's Article 8 private and family life. However, the only factor relied upon by the Judge at [33] is her medical condition. As I indicate above, the finding that she succeeds on that basis under Article 3 is one which was open to the Judge. However, if the finding had been otherwise in that regard, the reasoning at [33] is an inadequate basis for a finding that her Article 8 rights are breached by removal. There is no doubt that the Second Appellant's medical condition is an exceptional circumstance but if that could not succeed under Article 3 (which is an absolute right), it could not on its own succeed under Article 8 when balanced against the public interest.

25. Mr Avery accepted that the First Appellant's case stands or falls with the Second Appellant's. The challenge in the Respondent's written grounds is to the absence of reasons for finding in the First Appellant's favour. However, as Ms Braganza submits and I accept, the Judge has made findings that the First Appellant provides emotional support to the Second Appellant in the UK so that, notwithstanding the Second Appellant's adulthood, there is clearly an emotional dependency. The Second Appellant's consultant's evidence is that her mother usually accompanies her to appointments. The reasoning at [34] for the Judge's conclusion is

admittedly short. However, once it is accepted that the Second Appellant cannot be removed, the reasoning is adequate on the basis that this renders the First Appellant's case exceptional.

26. For the foregoing reasons, I am satisfied that there is no material error of law in the Decision and I uphold it.

DECISION

The First-tier Tribunal Decision did not involve the making of an error on a point of law. I therefore uphold the First-tier Tribunal Decision promulgated on 16 September 2015 with the consequence that the appeals of the Appellants are allowed on human rights grounds only.

Signed  Date 23 February 2016

Upper Tribunal Judge Smith