Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: AA/01375/2014**

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 4 December 2014	**On 13 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

NP
(ANONYMITY ORDER CONTINUED)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Howarth, Irving & Co Solicitors
For the Respondent: Ms L Kenny, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of the Philippines, appealed to the First-tier Tribunal against the decision of the Secretary of State of 19 February 2014 to refuse her application for leave to remain on the basis of her rights under Articles 3 and 8 of the European Convention on Human Rights. First-tier Tribunal Judge Pears dismissed the appeal and the appellant now appeals with permission to this Tribunal.

2. The background to this appeal is that the appellant is suffering from End Stage Renal Disease. She entered the UK lawfully in December 2008 and was granted leave to enter as a student until 11 December 2010. On 25 November 2010 she applied for leave to remain outside the Immigration Rules which was refused with a limited right of appeal. She subsequently submitted an application for voluntary departure which was withdrawn and resubmitted. On 15 January 2014 her representatives submitted an application for leave to remain under Articles 3 and 8 of the ECHR and that application was refused on 19 February 2014.

3. The First-tier Tribunal Judge's findings, which are not challenged, are set out in paragraphs 42-51 of his determination. The Judge found that the appellant is suffering from renal impairment and requires dialysis three times a week without which she would be expected to fatally relapse within two to three weeks. She has been on NHS funded renal dialysis since May 2009 for part of which she has not been eligible. She suffered from serious issues in relation to her kidneys and TB before she came to the UK but she did not know that she had kidney disease requiring a transplant or dialysis before March 2009 as she did not seek treatment before then, she obtained a job and played sport in the UK. After she started working in the UK her kidney function deteriorated and she started to have dialysis. She is not eligible for a kidney transplant in the UK because of her immigration status. The appellant has a brother and a sister in the Philippines; they each have their own families to support. A transplant in the Philippines is wholly beyond her or her family's means even if a suitable donor could be found and may in any event be unsuccessful because of previous complications. The cost of anything more than a short period of renal dialysis in the Philippines would be beyond her or her family's means because without a transplant it would have to continue indefinitely. The appellant would die within 2-3 weeks of no longer having renal dialysis and in that period health care could not be organised. Insurance cover for renal dialysis in the Philippines would not extend beyond 45 sessions but it could not be organised to cover her before she died because 9 months payment has to be made and in any event it could not be organised swiftly enough. Assistance from government or charitable institutions would not be forthcoming sufficiently and/or would not be enough to sustain the treatment she requires. In conclusion the Judge found that if she returned to the Philippines renal dialysis could not be available to her before three weeks elapsed and in consequence she would die. Alternatively if it could be organised within that time it could only be as an emergency which would not be maintained beyond an emergency period.

4. The Judge went on to apply the facts found to the law as it stands. The Judge applied the decision in the case of GS and EO (Article 3 – health cases) India [2012] UKUT 00397 (IAC) and found that the appellant's removal would not breach Article 3 of the ECHR. He

considered Article 8 outside the Immigration Rules and decided that the appellant has developed a private life in the UK and that her removal would interfere with that private life. He took into account section 117B of the Nationality, Immigration and Asylum Act 2002 and concluded that the removal of the appellant was not disproportionate to her right to private life.

Error of law

Article 3

5. The grounds of appeal to the Upper Tribunal contend that the Judge failed to adequately reason his finding that the appellant's circumstances are incapable of amounting to the highly exceptional case that engages the Article 3 duty [52]. It is contended that it was open to the Judge to consider Article 3 in the light of Lord Justice Kay's decision to grant permission to appeal to the Court of Appeal against the decision of the Upper Tribunal in GS and EO on the basis that the cases of N v Secretary of State for the Home Department [2003] EWCA Civ 1369, N v UK Application number: 26565/05 and D v UK (1997) 24 EHRR 423 should be revisited. Ms Howarth submitted that the Judge did not give adequate consideration to the decisions in N v UK and D v UK.

6. I am satisfied that in considering Article 3 the Judge had regard to all of the relevant case law. He considered all of the evidence in relation to the appellant's medical condition and the circumstances she would face upon return to the Philippines. The Judge's findings of fact are not challenged. The Judge's conclusion at paragraph 52 is a direct application of the decision in GS and EO where, having considered Strasbourg and domestic case law, the Tribunal summarised the relevant principles as follows;

> "85 …
>
> (1) (a) Article 3 imposes an obligation upon a state not to expel a person to a country where there is a real risk that he or she would be subjected to ill-treatment contrary to Art 3 (see, e.g. Soering v UK (1989) 11 EHRR 439 and Chahal v UK).
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> (b) That obligation can arise where the source of the individual's alleged ill-treatment is not directly or indirectly the responsibility of the receiving state but rather arises from a naturally occurring illness, disease or condition where treatment (in particular life-sustaining treatment) is not available in the receiving state.
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> (2) (a) An alien, subject to expulsion, can in principle claim no entitlement to remain in a Contracting State in order to continue to benefit from medical, social or other forms of assistance (including life-sustaining assistance) which would not be available in the receiving state.

(b) Nevertheless, in D v UK and N v UK the Court recognised that in "exceptional" or "very exceptional" circumstances an infringement of Article 3 could arise where a Contracting State returns an individual to another state in which they would be unable to obtain medical treatment or care for their condition in circumstances where the absence of that treatment or care could result in the individual's death.
(c) The Strasbourg Court's approach has been cautious in such cases and its extension of Art 3 has been incremental and limited.

(3) (a) In determining what amounts to "exceptional" or "very exceptional" circumstances, the focus is upon the circumstances in which the individual will find him or herself in the country to which they are to be returned.
(b) An "exceptional" case does not require the circumstances to be unique or even circumstances in which only a few or not many individuals might find themselves. The Strasbourg Court's description of a case as "exceptional" is no more than a pointer to the extreme or compassionately demanding nature of the individual's circumstances in the receiving country.
(c) The mere fact that the individual faces the prospect of death because medical treatment and care is not available does not, in itself, bring the circumstances within the "exceptional" category.
(d) … The fact, therefore, that the sending state may be required to provide medical care or treatment does not, in itself, exclude the case from being an "exceptional" one.

(4) (a) The decision maker must make a holistic assessment of the individual's circumstances in the receiving country.
(b) The threshold is a high one.
(c) No one factor is necessarily crucial or determinative in the dispassionate judicial assessment of those circumstances.
(d) There is no difference in principle between a case where the individual came to the UK knowingly suffering from a medical condition and where that was only discovered (or arose) after arrival. The individual cannot invoke any continuing obligation on the UK to provide that treatment.
(e) It will be for the individual to prove that medical treatment and care will not be available to them in the receiving country. That may arise because it is simply not available or, if available in theory, it is not accessible in practice because the individual does not have the financial resources to pay for that treatment or care, or, alternatively, it is as a practical matter beyond their reach for example because they would have to travel a long distance which is prohibited by their health or personal circumstances. As Baroness Hale noted in N v SSHD it is the practical availability of the treatment rather than its theoretical availability which is important. We emphasise,

however, this is a matter which a claimant must establish on the evidence.

(5) (a) The touch-stone identified in the case law of the "exceptional" case is the notion identified in Pretty v UK (2002) 35 EHRR 1 at [65]:

> "The very essence of the Convention is respect for human dignity and human freedom."

As Baroness Hale stated in N v SSHD at [68]:

> "It would appear inhuman to send [an individual] home to die unless the conditions there will be such that he can do so with dignity."

It is this central notion that lies at the heart of the Court's decision in N v UK and its understanding of its earlier decision in D v UK. At [40] the Court said that:

> "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."

(b) In N's case, both the House of Lords and the Strasbourg Court considered D v UK to be the paradigm of a situation of "exceptional" circumstances.

(c) The case law provides a guide as to the extremity of the individual's circumstances which are required to engage Art 3.

(d) The House of Lords "set the test" in part by reference to whether the individual's illness had reached a "critical stage" such that it would be inhuman to deprive him of the care which he is currently receiving so that he would suffer an early death without care available to "meet that fate with dignity" (see Baroness Hale at [69] and Lord Hope at [50]). We do not understand that to limit the "exceptional" category to the facts of D v UK itself, in particular to an individual who is terminally ill in the sense that treatment is not available even in the UK to prevent his or her death from the underlying illness or disease. That is, in our view, made plain by the recognition that there "may, of course, be other exceptional cases, with other extreme factors, where the humanitarian considerations are equally compelling" (per Baroness Hale at [70]). Likewise, the Court in N v UK also recognised that there maybe other "very exceptional cases where the humanitarian considerations are equally compelling" (at [43]).

(e) No such case has yet been identified in the case law either in Strasbourg or the UK. We recognise, however, the potential for other "compelling humanitarian" circumstances to engage Art 3 of the ECHR.

(6) (a) In D v UK it was the cumulative impact upon the individual of his circumstances in St Kitts that made D's case "exceptional". In the absence of medical care or family or social support he would be left to die without dignity. That

factor contrasts with the situation in N where, although unable to access treatment for her HIV condition, N had the prospects of some medical care (albeit not the life sustaining treatment she received in the UK) and family support. It could not, as a consequence, be said that her death would occur in circumstances of indignity such as to reach the high threshold for "inhuman or degrading treatment" under Art 3.

(b) Just as it may not be necessary for the individual to be terminally ill and in the end stages of his or her life regardless of medical treatment, likewise the length of time that the individual will survive in their own country without treatment is not determinative of whether the high threshold in Art 3 has been reached. In that respect, we agree with the view of Toulson LJ in BC (India) (at [4]) that applying the current case law binding on us "[t]he certainty of death in a short period without treatment" does not in itself brings an individual's circumstances within Art 3. In our judgment, that is not a determinative factor identified in the Strasbourg cases or by the House of Lords in N's case. As Toulson LJ pointed out:

> "to try to introduce some legal test which differentiated between someone who is currently alive and will be kept well on treatment but who on a discontinuance of treatment would die within two or three weeks, or on the other hand within twelve months, would lead to the question: Where would the cut off be? Would it be at three weeks, or at three months, or at six months, or at what figure? I do not see that there can be a workable legal rule which said that proximity of death within X weeks engages Article 3, but in X plus 1 week does not."

(c) the rapidity of decline will, however, be relevant in assessing all the circumstances of their death and whether, therefore, any indignity an individual faces (whether for a short or longer period of time) engages the protection from expulsion provided by Art 3.

(7) (a) Although not raised in these appeals, we anticipate that there may be circumstances which enhance an individual's claim that the circumstances on return will be "exceptional" and more likely pass the high threshold of Art 3 to establish a real risk of inhuman or degrading treatment.

(b) Relevant factors might include, for example, where the non-availability of the treatment in the home country is due to a discriminatory policy of the State for example, on racial, ethnic or other prohibitive grounds. In such cases, it may be that taking into account all the circumstances Art 3 is engaged or, at least, a breach of Art 14 read with Art 8 could be established (see, East African Asians cases (1973) 3 EHRR 76, E Com HR). In RS and others (Zimbabwe-AIDS) [2010] UKUT 623 (IAC) the Upper Tribunal considered such an issue albeit found that the evidence fell short of demonstrating a real risk of such treatment.

> (c) A further potential factor may be where the individual to be returned is a young child. There may be a potentially greater effect upon that child of enduring the dying process and may as a consequence elevate the indignity of those circumstances sufficiently to reach the high threshold under Art 3. Likewise, a parent forced to witness the dying process of their young child may amount to a level of suffering greater than that confronted by an adult dying in such circumstances and amount to inhuman and degrading treatment (see, CA v SSHD [2004] EWCA Civ 1165 *per* Laws LJ at [26]).”

7. The Tribunal concluded that it must follow N v SSHD and advised Judges of the Immigration and Asylum Chambers as follows;

> “87. ... Unless and until there are developments at this level in the case law judges of the Immigration and Asylum Chambers must proceed on the basis that the rapidity of decline caused by the withdrawal of medical treatment cannot of itself amount to the kind of exceptional circumstance that makes removal a breach of Article 3.”

8. That is what the Judge did in this case. The Judge analysed the appellant's circumstances upon return to the Philippines including the availability of treatment and family support and came to a decision which took account of all of the facts and applied the relevant case law.

Article 8

9. The grounds of appeal to the Upper Tribunal contend that the Judge did not engage with the legal issues including an assessment as to whether the case come within the ‘very rare cases’ where a claim could succeed under Article 8 (GS and EO paragraph 85(8)-(10)). It is contended that the Judge’s conclusion that ‘statute had tied [his] hand’ [63] and his failure to consider the material case law led to an error in the proportionality assessment.

10. Ms Howarth submitted that the Judge erred in failing to find that the appellant has established a private life in the UK. However the Judge did so find at paragraph 55 of the determination.

11. In conducting the proportionality assessment the Judge considered the proportion of the appellant's stay in the UK which was lawful and during which she had properly received NHS care, the appellant's role in the community in the UK and the fact that the appellant will have the emotional support of her family upon return to he Philippines.

12. The Judge took account of the factors set out in section 117B in assessing the public interest including the fact that the appellant is not currently financially independent, and that she established a private life and received the benefit of treatment in the UK whilst her

immigration status was precarious. Ms Howarth accepted that section 117B applies in this case. She submitted however that the Judge did not attach any weight to the appellant's period of lawful residence in the UK. I am satisfied that the Judge did take account of the period of lawful residence at paragraph 56 where the Judge took account of the fact that the appellant was lawfully present in the UK when she fell ill and that she initially received NHS treatment to which she was entitled [56].

13. In considering Article 8 the Judge considered all of the evidence and all of his findings as well as the relevant case law and statutory provisions in weighing the proportionality of the decision. I am satisfied that the Judge reached a decision open to him on the basis of the evidence and the case law.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

Signed Date: 9 January 2015

A Grimes
Deputy Judge of the Upper Tribunal

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed Date: 9 January 2015

A Grimes
Deputy Judge of the Upper Tribunal