Upper Tribunal
(Immigration and Asylum Chamber)

EA & Ors (Article 3 medical cases – *Paposhvili* not applicable) [2017] UKUT 00445 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 August 2017	

Before

UPPER TRIBUNAL JUDGE JORDAN
UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

(1) EA
(2) MO

Respondents

And

Between

(3) ASHRIFIN AND RASHID

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For EA:	Ms R Chapman, instructed by Wilson Solicitors LLP
For MO:	Miss C Fletcher, instructed by Immigration Advice Service
For Ashrifin and Rashid:	Mr Z Malik, instructed by SG Law
For the Secretary of State:	Mr W Hansen instructed by GLD

The test in Paposhvili v Belgium, 13 December 2016, ECtHR (Application No 41738/10) is not a test that it is open to the Tribunal to apply by reason of its being contrary to judicial precedent.

DECISION AND REASONS

1. (i) EA (whom we refer to as an appellant although the appeal to the Upper Tribunal is brought by the Secretary of State) is a citizen of Afghanistan who was born on 1 January 1993. Differing opinions have been provided as to his mental illness, one describing it as a schizoaffective disorder and a mixed personality disorder; another, that it is paranoid schizophrenia. The difference is immaterial for our purposes. He is under a regime of anti-psychotic medication. It is a chronic ailment of a relapsing and remitting nature. He is currently housed in a secure accommodation under the MHA and has been since 2012.

   (ii) MO (whom we also refer to as an appellant although there are cross-appeals) is a citizen of Nigeria who suffers from HIV/AIDS. He has been receiving medical treatment in the form of a drug, Stribild, which appears to have been most effective at relieving his symptoms. His wife has also been diagnosed as HIV-positive and receives treatment. Neither has a right to remain under the Immigration Rules.

   (iii) Mrs Ashrifin and her husband, Mr Rashid, are citizens of Bangladesh. Mrs Ashrifin's appeal was dismissed for what was said to be her failure to provide specified documents to meet the requirements to establish her proficiency in English in accordance with paragraph 10 of Appendix B of the Immigration Rules. In addition Mr Rashid suffers from ankylosing spondylitis, a long-term, chronic condition in which the spine and other areas of the body become inflamed causing back pain and stiffness and pain and swelling in other parts of the body caused by inflammation of the joints or where a tendon joins the bone. It can cause extreme tiredness and fatigue. He is receiving treatment for it in the form of medication, brand-named Humira, an anti-inflammatory medication. Etanercept is available in Bangladesh but was not said to be effective.

2. There is no suggestion that the conditions of these appellants (or their dependants) has reached the stage where any of them are dying. Indeed with treatment provided by the NHS, their condition could not reasonably be bettered.

3. In each case, the appellants sought leave to remain on the basis that their removal would violate their rights under Article 3 of the ECtHR. It is sometimes as well to remind ourselves of the scope of Article 3:

   > No one shall be subjected to torture or inhuman or degrading treatment or punishment.

4. Shorn away from those elements that it has now become almost redundant to make out, such as torture or punishment (both of which suggest an intentional infliction of

suffering), we are almost invariably focussed on that protean concept of inhuman or degrading treatment. The enquiry moves from the *motivation* of the actor behind the suffering to the *effect* of the relevant circumstances upon the individual.

5. That said, there is nothing untoward in seeing the progressive decisions of the United Kingdom Courts and the ECtHR as extending the ambit of the Convention which has been described by Lord Hope as a 'living instrument', (paragraph 21, *N v SSHD* [2005] 2 AC 296).

6. The claims before us centred upon a violation of their Article 3 rights. The centrepiece of their arguments was directed towards the effect of the Strasbourg decision in *Paposhvili v Belgium*, 13 December 2016, ECtHR (Application No 41738/10) and the seminal restatement of Article 3 set out in paragraph 183 of the Grand Chamber of ECtHR's judgment:

> 183. The Court considers that the "other very exceptional cases" within the meaning of the judgment in *N. v. the United Kingdom* (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.

7. At this stage we are not concerned with whether the three appellants' claims have established that they are seriously ill or whether they face a real risk of a serious, rapid and irreversible decline in their health resulting in intense suffering or a reduction in their life expectancy. In the cases of these three appellants, there is a significant range in the seriousness of their conditions.

8. The Tribunal required the application of the *Paposhvili* test to be decided as a preliminary issue because it is only by determining the correct approach to be adopted by the Tribunal to the decision in *Paposhvili* that the Tribunal might assess how the three appeals might proceed.

The status of a decision made by the ECtHR

9. Lord Neuberger giving the judgment of the Court in *Manchester City Council v Pinnock* [2011] UKSC 6 stated in paragraph 47 that decisions of the House of Lords and the Supreme Court have to be seen against the '*backdrop*' of the evolving Strasbourg jurisprudence. He continued in paragraph 48:

> This Court is not bound to follow every decision of the ECtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the ECtHR which is of

> value to the development of Convention law (see e g *R v Horncastle* [2009] UKSC 14; [2010] 2 WLR 47). Of course, we should usually follow a clear and constant line of decisions by the ECtHR: *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty v Birmingham* [2009] 1 AC 367, para 126, section 2 of the HRA requires our courts to "take into account" ECtHR decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.

10. From this passage it emerges that

    (i) The Supreme Court is not bound to follow a decision of the ECtHR.

    (ii) The decisions of the ECtHR are of persuasive effect because they come from an authoritative source and from a Court whose rulings are acknowledged by statute. Indeed, s. 2(1) of the Human Rights Act 1998 expressly provides that a court or tribunal determining a question which has arisen in connection with a Convention right '*must take into account*' a judgment or decision of the ECtHR. The obligation is absolute, '*must*', but the nature of the obligation is to take it '*into account*', not necessarily to apply it.

    (iii) However, a different approach is called for on the part of the Supreme Court when there has been a clear and constant line of authority but only if it is consistent with United Kingdom law (or at least some '*fundamental substantive or procedural aspect*' of it) or the decision of the ECtHR is not flawed in a material way.

11. It is, therefore, a somewhat limited duty to comply with the ECtHR at least on the part of the Supreme Court. It suggests that the ECtHR must be followed ('*would be wrong not to follow*') but only if it is consistent with United Kingdom law. It raises the question of whether there is the need to follow the ECtHR, if the principle is already enshrined in the United Kingdom's domestic law.

12. The ECtHR's own statements as to its role speak of a subsidiary one, at least when it comes to implementation. For example, in paragraph 184 of *Paposhvili* we find:

> As to whether the above conditions are satisfied in a given situation, the Court observes that in cases involving the expulsion of aliens, the Court does not itself examine the applications for international protection or verify how States control the entry, residence and expulsion of aliens. By virtue of Article 1 of the Convention the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities, who are thus required to examine the applicants' fears and to assess the risks they would face if removed to the receiving country, from the standpoint of Article 3. The machinery of complaint to the Court is subsidiary to national systems safeguarding human rights.

13. Whilst the statements of principle set out in *Manchester City Council v Pinnock* are directed towards the Supreme Court's own approach to decisions of the ECtHR, they shed light on how the Tribunal is to approach such decisions. They say, nothing, of course, to the effect that the Tribunal is to apply decisions of the ECtHR which are *not* consistent with United Kingdom domestic law, including decisions of the Court of Appeal.

A clear and constant line of authority consistent with United Kingdom law

14. For the reasons that have emerged from the foregoing, if the decision in *Paposhvili* is part of a continuum of developing jurisdiction on the part of the ECtHR consistent with the United Kingdom's domestic law, it should be followed. In order to determine this, it is necessary to look at the decision of *Paposhvili* itself.

15. The ECtHR identified a clear and consistent line of authority in paragraph 179 of *Paposhvili*:

> The Court has applied the case-law established in *N. v. the United Kingdom* in declaring inadmissible, as being manifestly ill-founded, numerous applications raising similar issues, concerning aliens who were HIV positive (see, among other authorities, *E.O. v. Italy* (dec.), no. 34724/10, 10 May 2012) or who suffered from other serious physical illnesses (see, among other authorities, *V.S. and Others v. France* (dec.), no. 35226/11, 25 November 2014) or mental illnesses (see, among other authorities, *Kochieva and Others v. Sweden* (dec.), no. 75203/12, 30 April 2013, and *Khachatryan v. Belgium* (dec.), no. 72597/10, 7 April 2015). Several judgments have applied this case-law to the removal of seriously ill persons whose condition was under control as the result of medication administered in the Contracting State concerned, and who were fit to travel (see *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10, 20 December 2011; *S.H.H. v. the United Kingdom*, no. 60367/10, 29 January 2013; *Tatar*, cited above; and *A.S. v. Switzerland*, no. 39350/13, 30 June 2015).

16. The only decision identified by the ECtHR as running counter to these decisions is the decision in *Aswat v United Kingdom* (2014) 58 EHRR 1. This was a case that, on its facts, was highly unusual, not to say exceptional. It was an extradition case in which the United Kingdom authorities intended to comply with the US government's request to extradite him to stand trial for terrorist offences. There was inadequate information about the pre-trial period, the length of time the applicant would be detained pending trial, the consequences for the applicant if he was found to be unfit to stand trial. The applicant himself was suffering from paranoid schizophrenia and was detained in the United Kingdom in Broadmoor. It was argued that he would face a sentence of up to 35 years imprisonment. Although this, in itself, would not be grossly disproportionate in view of the nature of the alleged offences, there was a real risk that his extradition and detention would include a move to a different and more hostile prison environment resulting in a serious deterioration in his mental and physical health capable of reaching the Article 3 threshold. He could be detained in a maximum security facility and subject to special administrative measures including solitary confinement. The Court determined that whether or not the applicant's extradition to the United States would breach Article 3 of the Convention very much depended upon the conditions in which he would be detained and the medical services that would be available to him. There was much uncertainty and the

US Department of Justice had given no indication of what conditions would be like. It is perhaps unsurprising that these circumstances amounted to an Article 3 violation, not on health grounds alone (although these featured to a significant extent), but arising from conditions in US detention facilities which were largely unascertained.

17. The ECtHR's intention in the case of *Paposhvili* is revealed in paragraph 181:

> The Court concludes from this recapitulation of the case-law that the application of Article 3 of the Convention only in cases where the person facing expulsion is close to death, which has been its practice since the judgment in *N. v. the United Kingdom*, has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of that provision.

18. What then follows, therefore, is a departure from the clear and constant case law identified by the Court in paragraph 179. This is performed according to paragraph 182, by the Court using its interpretative powers to render the Convention rights in a way that is '*practical and effective and not theoretical and illusory*'. Whilst this was, of course, an entirely proper approach to be adopted by the ECtHR, there is no doubt that it was an extension of earlier jurisprudence and a departure from it. Furthermore, in seeking to depart from the decision in *N v UK* [2008] EHRR 39 it extended the principle in a way we have already identified so as to include situations involving the removal of a seriously ill person in respect of whom '*substantial grounds had been shown to believe in that he or she, although not at imminent risk of dying, would face a real risk on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment of being exposed to serious rapid and irreversible decline to his or her state of health resulting in intense suffering or a significant reduction in life expectancy*', ('the *Paposhvili* test'). As is made plain by the reference to the earlier case law in paragraph 179, the ECtHR was departing from its own case law as established in *N v UK* that such claims were inadmissible, as being manifestly ill founded.

19. *Paposhvili* is an example of the ECtHR departing from the clear and constant line of authority and, as we shall later observe, resulted in a decision that is not consistent with United Kingdom domestic law. This is most clearly seen from the analysis that is provided by the Court of Appeal in *GS (India)* [2015] 1 WLR 3312 to which we will return later. It is at this stage that we turn to consider the effect of the decision on the jurisprudence affecting health cases in England and Wales.

The role of precedent

20. In *Kay & Anor v. London Borough of Lambeth & Ors* [2006] UKHL 10 the House of Lords considered the case of a group of gypsies whose caravans who occupied land without a licence permitting them to do so but alleged that the claim for possession against them violated their human rights. The House of Lords had no doubt, although domestic courts were not strictly required to follow the rulings of the European Court of Human Rights that they were obliged to give practical recognition to Article 8 which necessitated a constructive collaboration between the Strasbourg Court and the national authorities. In doing so, it was for the domestic courts to determine initially how the principles were laid down. It was here that the

role of precedent came into play. It was a cornerstone of the domestic legal system by which a degree of certainty in legal matters was best achieved. Judges could give leave to appeal where they considered binding precedent was inconsistent with Strasbourg authority. The question arose whether the United Kingdom domestic rules of precedent should be modified and whether a Court should no longer be bound to follow a decision of a higher Court if it appeared to be inconsistent with the ruling in the court in Strasbourg. This question is set out in paragraph 40 of the opinion of Lord Bingham of Cornhill. In paragraph 43, he determined that issue by reference to established case law that a degree of certainty was best achieved by adhering, even in the context of an inconsistency with the Convention to the United Kingdom's rules of precedent. Whilst the duty to comply with the proper application of an individual's Convention rights was not derogable, that duty would be discharged if, in an appropriate case, the grant of permission to appeal were made. Lord Bingham, however, concluded by saying:

> But they should follow the binding precedent …

GS (India) as binding precedent?

21. Hence, the determination of this preliminary issue depends upon whether the decision of the Court of Appeal in *GS (India)* [2015] 1 WLR 3312 operates as a binding precedent upon the Tribunal. Inevitably, this requires us to give consideration to the reasons that the Court of Appeal provided based upon its understanding of the relevant decisions in the House of Lords in *D v United Kingdom* [1997] ECHR 30240/96; *N v Secretary of State for the Home Department* [2005] 2 AC 296 and *N v United Kingdom* (2008) EHRR 39.

22. The starting point in this part of the analysis is found in paragraph 50 of the decision of Laws LJ to which Sullivan LJ gave his agreement. Although both Underhill and Sullivan declined to consider the Article 8 claims in respect of the three appellants as a matter of discretion rather than on the basis of a lack of jurisdiction, this difference of opinion has no bearing on the judgment of Laws LJ on the matter relevant to our consideration.

23. The six appellants, all foreign nationals, were being treated in the United Kingdom for serious medical conditions. The Court of Appeal approached Article 3 by reference to the paradigm case of a breach of Article 3 being an intentional act by the state which constituted torture or inhumane or degrading treatment or punishment. Accordingly, the case of a person whose life would be foreshortened by the progress of natural disease if removed to his home state did not fall within the paradigm unless justified by a pressing reason to hold the state responsible for the claimant's plight. Such an exception was justified in deathbed cases where the person's illness had reached such a critical stage that it would constitute inhuman treatment to deprive him of the care he was currently receiving. In essence, the exception, referred to as the 'D exception' arising from *D v United Kingdom* [1997] 24 EHRR 423 arose from what is surely the repellent prospect of a dying man forced onto an aircraft with the prospect of his death inevitable unless adequate care was in hand to enable him to die with dignity. It would be truly shocking if a state felt itself able to behave in such a way.

24. Such a circumstance was an extension of, or an exception to, the Article 3 paradigm of a person being subjected to an intentional act by the state which constituted torture or in human or degrading treatment or punishment. Hence, Laws LJ asked the question, in paragraph 50 of his judgment:

> Is the exception to the Article 3 paradigm vouched by *D*'s case limited to a state of affairs in which the applicant is, in effect, on his death bed whether or not he is removed from the host state?

25. Laws LJ then set out paragraphs 42 to 45 of *N v United Kingdom* (2008) 47 EHRR 39 which is the section in the judgment entitled '*The principles to be derived from the case law*' which we repeat here:

> 42. In summary, the Court observes that since *D v the United Kingdom* it has consistently applied the following principles.
>
> Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D* case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in 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 the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.
>
> 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… While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 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.

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-related 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."

26. Laws LJ then went on to consider the associated case law as set out in *MSS v Belgium & Greece* (2011) 53 EHRR 2, *Sufi & Elmi v UK* (2012) 54 EHRR 9, *SHH v UK* (2013) 57 EHRR 18 *and Tarakhel v Switzerland* (Application No. 29217/12). Having examined these cases, he concluded in paragraph 62 that the jurisprudence upon Article 3 to be derived from them did not extend the reach of the departure permitted in *D*'s case. Accordingly, he concluded in paragraph 63 that these cases cast no significant light on the approach to be taken by the Court of Appeal to the binding authority of *N v Secretary of State for the Home Department (Terence Higgins Trust intervening)* [2005] 2 AC 296 to which he then turned.

27. Laws LJ then recorded the crucial opinions of Lord Nicholls, Lord Hope and Baroness Hale. Once again, these passages must be set out in full:

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 case of *D* and in later cases the Strasbourg court has constantly reiterated that in principle aliens subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social and other forms of assistance provided by the expelling state. Article 3 imposes no such 'medical care' obligation on contracting states. This is so even where, in the absence of medical treatment, the life of the would-be immigrant will be significantly shortened. But in the case of *D*, unlike the later cases, there was no question of imposing any such obligation on the United Kingdom. *D* was dying, and beyond the reach of medical treatment then available." (*per* Lord Nicholls)

…

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 that fact that he was terminally ill (paras 51: 'the advanced stages 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)

…

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)

28. These citations represent the authoritative statement of United Kingdom domestic law. They are also consistent with, and an application of, the clear and constant line of authority of the ECtHR prior to *Paposhvili*. The words of Baroness Hale, set out above, permit no departure from the '*D* exception', that is, the deathbed threshold.

29. More importantly, for our purposes, they underpin the reasons for the Court of Appeal's decision in paragraph 66 in answer to the question Laws LJ had earlier asked himself in paragraph 50:

> These citations demonstrate that in the view of the House of Lords the *D* exception is confined to deathbed cases.

30. This is a binding precedent and the Tribunal is bound to follow it. It is not, as Ms Chapman suggested, a careless slip of the pen on the part of Laws LJ which the other judges overlooked and what he meant to say was that the *D* exception contained within it another category of cases that a decision maker might find exceptional. Indeed, there would be very little purpose in mentioning '*deathbed cases*' if what he meant to say was '*exceptional cases*' of which, of course, a deathbed case would undoubtedly be one.

31. It is not permissible for the Tribunal to depart from this authority and, in particular, cannot do so by reliance upon the *Paposhvili* enlargement set out in paragraph 183 of the ECtHR's judgment (see paragraph 6 above). Hence, the recasting of Article 3 to include '*situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy'* is not part of United Kingdom domestic law.

32. Furthermore, there is an internal logic in setting the threshold very high. Ms Chapman took forensic offence to the emotive language contained in paragraph 20 of Mr Hansen's skeleton argument in which he quoted the expression that the parties to the Convention, including the United Kingdom, cannot be turned into '*hospitals for the world*'. However, avoiding any emotive language, if the effect of a lowered threshold is to impose a burden that is disproportionate upon the receiving state such that it damages its own efforts to provide healthcare, accommodation and services then that disproportionate effect can properly be taken into account in construing what is meant by the humanitarian obligation not to cause suffering. Ms Chapman submitted that if this is what is the nature of the obligation imposed by Article 3, then it matters not whether the effect is a burden too great to bear. We agree. But this begs the question as to what *is* the nature of the obligation. If the invaluable scheme of humanitarian protection is to operate, it must be made to *work*. It can and does work if a high threshold is maintained. Conversely, if the demands upon it cannot be met, it will not work. Further, it runs the risk of becoming arbitrary if the threshold is over-elastic and ill-defined. That is precisely why the

Supreme Court and the Court of Appeal set the threshold at a level which is both high, intelligible and ascertainable, thereby avoiding the injustice of a test which is as long as the judge's sleeve.

33. Whilst, for the reasons we have given, the *Paposhvili* test is not a test that it is open to the Tribunal to apply by reason of its being contrary to judicial precedent, it may in the event add very little to the debate, useful as it is in enlarging our understanding of these complex humanitarian issues. After all, the ECtHR concluded that the threshold was a high one with no suggestion it might become a routine argument based on disparities between healthcare – and access to it -across the world.

34. Our decision is consistent with the decision of Lavender J in *Ismailov v Secretary of State for the Home Department* (JR/3660/2016) to which we were referred by Mr Malik in fulfilment of his duty to the Tribunal to refer us to other relevant cases. In *Ismailov*, Lavender J accepted Mr Malik's submissions made on behalf of the Secretary of State that *GS (India)* operated as a binding precedent permitting the Secretary of State to certify the claim as 'clearly unfounded'.

The disposal of EA's appeal

35. In EA's case, from paragraphs 30 to 36, the First-tier Tribunal Judge considered the case law in Article 3 cases solely by reference to *Paposhvili* and concluded that the case law contained within the decisions of the Supreme Court deprived aliens who were seriously ill but whose condition was less than critical of the benefit of the provisions of Article 3. That suggests that the First-tier Tribunal considered the UK jurisprudence including decisions of the Supreme Court and concluded these decisions were wrong in law as potentially violating the human rights of those concerned by limiting the application of Article 3. In paragraph 36 he went on to find that, as a result of *Paposhvili*, the application of *D* and *N* principles

> 'are not perhaps correctly expressed now'.

36. There are two matters that are immediately apparent. First, the determination contains no discussion as to the approach that has to be adopted to decisions of the ECtHR in cases which appear to run counter to decisions of the House of Lords or the Supreme Court. Second, the decision which was made on 31 March 2017 makes no reference to the decision in the Court of Appeal in *GS (India)* and its potential effect as a matter of judicial precedent.

37. This has inevitably skewed the Article 3 assessment, the sole ground on which the appeal was allowed by the First-tier Tribunal Judge.

38. In the course of the hearing, we invited Ms Chapman to consider whether, on the basis of our findings on the preliminary issue, we should list the appeal for further hearing to consider whether the determination contained a material error of law. She was content that we go on to consider that issue on the basis of the findings made by the judge and her submissions. We are satisfied that, as a result of our decision on the preliminary issue, there is no arguable case that the appellant can put forward in

support of the First-tier Tribunal's approach both as to error and the materiality of the error. In these circumstances, we allow the appeal of the Secretary of State and set aside the decision of the First-tier Tribunal.

39. In the course of the hearing we raised the practical effect of a remittal to the First-tier Tribunal. Such an order ends the Upper Tribunal's jurisdiction in the appeal. In accordance with the decision of *AA (Iraq) v Secretary of State for the Home Department* [2017] EWCA Civ 944 (11 July 2017) the appellant is permitted, if so advised, to appeal the Upper Tribunal's decision without having to await the outcome of the remaking of the decision by the First-tier Tribunal. This distinguishes the case of *VOM (Error of law when appealable) Nigeria* [2016] UKUT 410 (IAC) where the Upper Tribunal decides to re-make the decision itself. A successful application to the Court of Appeal would operate as a stay on the appeal before the First-tier Tribunal. Such a remaking would, in accordance with our findings and as things presently stand, be conducted on the basis that the *Paposhvili* principle has no application in light of the Court of Appeal's decision in *GS (India).* Were we to be wrong on this issue, the remaking of the decision would then have become a wasteful exercise. Were an application to be made for permission to appeal to the Court of Appeal, we would be minded to grant permission to appeal.

The disposal of MO's appeal

40. The Upper Tribunal has already found an error on a point of law in the First-tier Tribunal's determination in MO's appeal and set aside the First-tier Tribunal Judge's decision dismissing the appeal on Article 3 grounds and allowing the appeal on Article 8 grounds. The further disposal of the appeal was adjourned. We remit the case to the First-tier Tribunal for it to be re-made. Once again, the effect of this direction is to permit the appellant to appeal to the Court of Appeal without having to await the outcome of the re-making of the decision. Suffice it to say that, without a viable Article 3 claim based on health grounds, the appellant's claim to remain on the basis of Article 8 as found by the First-tier Tribunal is not adequately reasoned. It fails to take into account the limitations in the operation of Article 8 in health cases identified by Underhill LJ in paragraph 111 of *GS (India)*:

> It is that question which this Court addressed in *MM (Zimbabwe)*. Moses LJ, with whom the other members of the Court agreed, held that the "no obligation to treat" principle must apply equally in the context of Article 8: see paras. 17-18 of his judgment, which Laws LJ sets out at paragraph 89 above. He then sought to identify what role that left for Article 8. He acknowledged that "despite that clear-cut principle, the courts in the United Kingdom have declined to say that Article 8 can never be engaged by the health consequences of removal from the United Kingdom", referring to *Razgar* and also to *AJ (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1736 (another mental health case); but he drew attention to statements in both cases emphasising how exceptional the circumstances would have to be before a breach were established. In particular, he set out, at paragraph 20, a passage to that effect from the opinion of Lady Hale in *Razgar* which starts with the observation that "it is not easy to think of a foreign health care case which would fail under Article 3 but succeed under Article 8". He concluded, at paragraph 23 with a passage which Laws LJ has already quoted but which for ease of reference I will set out again:

> The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8.

41. We see no material that the First-tier Tribunal Judge identified in paragraphs 47 to 57 as amounting to additional factors that weighed in the balance of the sort envisaged by the Court of Appeal.

The disposal of Rashid's appeal

42. The Secretary of State has agreed – and we place that agreement on record - that the appellant should have been granted leave under paragraph 10 of Appendix B. If this has resulted in the grant of further leave to remain, this may already have operated to require the appeal to be treated as abandoned by operation of law, s.104 of the 2002 Act. However, we dismiss the appellant's appeal against the finding that Mr Rashid's circumstances were not such as to meet the high threshold set in *D* and *N*. As the First-tier Tribunal Judge properly found, absent a successful Article 3 health claim, there was no room for the appeal to succeed under Article 8.

DECISION

(i) EA: The determination of the First-tier Tribunal revealed an error on a point of law and we remit the appeal to the First-tier Tribunal for it to be re-made.

(ii) O: The determination of the First-tier Tribunal revealed an error on a point of law and we remit the appeal to the First-tier Tribunal for it to be re-made.

(iii) Rashid and Ashrifin: By concession, the appeal is allowed under the Immigration Rules.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
7 August 2017