



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: AA/11077/2014

THE IMMIGRATION ACTS

At **Field House**
On **06.08.2015**

Decision signed: **09.08.2015**
sent out: **17.08.2015**

Before:

Upper Tribunal Judges
John FREEMAN and Kate MARKUS QC

Between:

HONG Yongkang

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: *Valerie Easty* (counsel instructed by Simman)
For the respondent: Mr Steven Walker

DETERMINATION & REASONS

1. This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Sue Lenier), sitting at Taylor House on 11 March, to allow a human rights appeal by a citizen of China, born 22 October 1957. The judge had first to establish the right test for deciding whether someone like this appellant, with end-stage kidney disease, but whose condition is well met by free dialysis, so long as he remains in this country, should be required to return to his country of origin, or whether in the circumstances that would amount to 'inhuman or degrading treatment', contrary to article 3 of the European Convention on Human Rights.

NOTE: no anonymity direction made at first instance will continue, unless extended by me.

2. These cases are never easy; but there is a good deal of authority on the point. No doubt the leading cases on returning someone in need of life-saving medical treatment, both involving AIDS, are *D. v. United Kingdom* [1997] ECHR 25 and *N v United Kingdom* [2008] ECHR 453, but the most important decisions of the domestic courts are *N* [2005] UKHL 31 (the decision of the House of Lords in the European Court of Human Rights case), and *GS (India) & others* [2015] EWCA Civ 40.
3. The judge referred to all these decisions, and more, and set out their effect, but needed to reconcile the various statements of principle set out in them into clear guidelines to apply to the facts of the present case, which is what we shall try to do now, in terms of the decisions of the House of Lords in *N* and the Court of Appeal in *GS*, which respectively considered *D* and the decision of the European Court of Human Rights in *N* in a much more authoritative form than we could.
4. First the judge, at paragraph 26, set out the test in *N* as follows, at paragraph 26:

“The test to be applied was again considered in [*N*]. It was, according to Lady Hale at paragraph 69, “whether the appellant’s illness had 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”. At paragraph 68, Lady Hale said “Where the illness is at an advanced or terminal stage, then conditions in the receiving country should be crucial”.”
5. Before we go on to deal with the judge’s treatment of *GS*, we need to set out what Lady Hale actually said:

“68 I have found helpful the concurring opinion of Judge Pettiti in *D v United Kingdom*, p 455:

"The inequality of medical treatment was not the criterion adopted by the Court as medical equipment in the Member States of the United Nations is, alas, not all of the same technological standard; the case of *D*, however, is concerned not with hospital treatment in general, but only with the deportation of a patient in the final stages of an incurable disease."

As Lord Hope's analysis shows, the later cases have made it clear that it is the patient's present medical condition which is the crucial factor. The difficulty is in understanding where conditions in the receiving country fit into the analysis. Even in those cases where the illness is not in an advanced or terminal stage, the Court does refer to the medical care and family support available there. But it does so in terms of there being "no prospect" of such care or support, rather than in terms of its being likely to be available. It is difficult to see, therefore, whether this consideration adds anything in those cases. Where the illness is in an advanced or terminal stage, then conditions in the receiving country should be crucial. It is not yet clear whether the applicant has to show that appropriate care and support during those final stages was unlikely to be available or whether again the "no prospect" test applies. That was undoubtedly the situation in *D v United Kingdom* and the Court has made it clear that the "compelling humanitarian considerations" are those which arise in a case where the facts come close to those in *D*. But if it is indeed the case that this class of case is limited to those where the applicant is in the advanced stages of a life-

threatening illness, it would appear inhuman to send him home to die unless the conditions there will be such that he can do so with dignity. As the European Court said in *Pretty v United Kingdom* (2002) 35 EHRR 1, para 65, "The very essence of the Convention is respect for human dignity and human freedom."

69. In my view, therefore, the test, in this sort of case, is whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity. This is to the same effect as the text prepared by my noble and learned friend, Lord Hope of Craighead. It sums up the facts in *D*. It is not met on the facts of this case."

6. We are sorry to set this all out at length, when the judge had done his or her¹ level best to summarize it for everyone's benefit; but the fact is that they had left themselves with a misleading impression of what Lady Hale had actually said. As has been seen, the judge ended paragraph 26 by citing, with added emphasis in italics, the words "... at an *advanced or terminal* stage, then conditions in the receiving country should be crucial". However, the judge failed to refer to paragraph 69 where Lady Hale herself set out the actual test, in very clear terms, beginning "... whether the applicant's illness has reached such a critical stage (i.e. he is dying) ...". It is in that context that Lady Hale's reference to "advanced or terminal stage" is to be understood.

7. That takes us on to *GS*; unlike *D* and *N*, this involved, in five out of six cases, the very same problem as in the present case, end-stage kidney disease, which the Court of Appeal referred to as 'ESKD'. This is what Laws LJ said, immediately after setting out the same passage as we have done from Lady Hale's speech in *N*:

"66 These citations demonstrate that in the view of the House of Lords the *D* exception is confined to deathbed cases. Miss Lieven submitted that the focus of their Lordships' reasoning (at least that of Lord Nicholls) was upon those with AIDS, a condition much more often suffered than ESKD; so that the strictures in *N* should not be taken to apply to the latter class of case. But that would be merely adventitious, and therefore unprincipled; and I can find nothing to support it in their Lordships' speeches.

67. This result is all of a piece with the repeated statements in the Strasbourg court that "[a]liens 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" (*N v UK* paragraph 42; cf paragraph 44, and paragraph 54 in *D v UK*).

68. In my judgment none of these appellants fall within the kind of exceptional case addressed in *D* and *N*."

8. The judge correctly summarized the effect of this decision at paragraph 28, confining the rule to deathbed cases; but she evidently had some difficulty in reconciling the mass of authority, and returned at paragraph 42 to the misleading citation from Lady

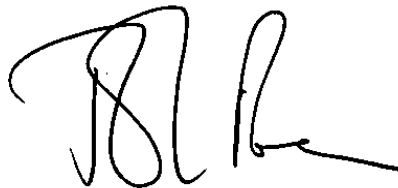
Hale's paragraph 68 in *N*, as we have already set it out at 4. That was what led the judge into error, since she ended that paragraph by saying

"In my view there was a tension between the *advanced* stages, or the *dying* stage, that led onto but preceded the *deathbed* stage of GS. The appellant potentially fell within this gap."

9. What the judge did was to introduce an unnecessary complication into the recent straightforward test set by high authority in *GS*. We now have to consider what the result should be. The judge set out their conclusions at 41 (*bis; there had evidently been some difficulties with the electronic numbering*), first on the basis of the test set out at 9, and then on the additional ground that "... if he survived removal, death would inevitably take place in appalling circumstances".
10. This additional reason was based on the judge's findings at paragraph 40, about the appellant's prospects on return to China without friends or family, or resources of his own. Those were graphically expressed, and may turn out to be justifiable in the end; but the reason we cannot uphold them at this stage is that they are unsupported by any background evidence about whether or not social care, as distinct from medical treatment, is available free of charge in China. There may also be an open question as to whether the appellant's £1500 grant on return from the Home Office would last him as long as he needed for the ordinary comforts of life, even if it would not pay for more than a few months' dialysis?
11. These questions will have to be the subject of a further hearing, which can very well take place before Judge Lenier. Miss Easty was also anxious to introduce evidence of other medical conditions she said the appellant suffered from, though here we have to add a warning note. All the members of the court in *GS* refused to accept leading counsel for the appellants' submission that there was any difference in principle between AIDS, the disease concerned in *D* and *N*, and ESKD. We do not see why there should be any difference made between any disease with a likely fatal outcome and another. On the other hand, another disease might possibly be relevant if it led to greater distress for the appellant while dying of HKSD.

Home Office appeal allowed

Direction for further first-tier hearing before Judge Lenier



(a judge of the Upper Tribunal)