



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/16689/2015

THE IMMIGRATION ACTS

Heard at Field House
On 18 January 2018

Decision & Reasons Promulgated
On 23 January 2018

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[U A]

Respondent

Representation:

For the Appellant:

Mr. P. Duffy, Home Office Presenting Officer

For the Respondent:

Mr. P. Turner of counsel, instructed by Burnley Legal
Solicitors

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent, who was born on [] 1986, is a national of Pakistan. He suffers from memory loss but believes that he was brought to the United Kingdom in 2005. He has poor self-care skills and is largely dependent upon a friend from his local mosque, [YA], who he met in 2007 and who provides him with accommodation and support. Other members of the mosque also contribute money towards his support.
2. An application was made on his behalf for leave to remain outside the Immigration Rules on 5 August 2014. His application was refused on 29 October 2014. The Respondent's solicitors wrote to the Appellant on 25 November 2014, providing further details about the Respondent's circumstances. The Appellant did reconsider her decision but then made a further decision refusing him leave to remain on 14 April 2015. The Respondent appealed against this decision on 29 April 2015 and his appeal was granted by First-tier Tribunal Judge James in a decision, promulgated on 27 February 2017.
3. The Appellant appealed on 12 October 2017 and Upper Tribunal Judge Coker granted her permission to appeal on 27 October 2017 on a limited basis.

ERROR OF LAW HEARING

4. Both the Home Office Presenting Officer and counsel for the Respondent made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

5. At the hearing before the First-tier Tribunal, it was accepted that the Respondent was not fit to give evidence. [YA] had submitted a witness statement and also attended the appeal hearing and his evidence was not challenged by the Home Office Presenting Officer. In his witness statement he confirmed that the Respondent found it very difficult to recall anything such as names, dates or places and could not read or write.
6. The Respondent has had no leave to remain in the United Kingdom and has no identity documents and has, therefore, not been able to access NHS treatment. But Dr. Ascione from

the Private Therapy Clinic had examined the Respondent and in a report, dated 3 November 2014, he concluded that the Respondent presented with severe confusion and memory difficulties and was suffering from a major depressive disorder which was recurrent and severe with psychotic symptoms. He also found that he was suffering from moderate anxiety and memory loss and that he did not have the mental capacity to recall certain events. The Respondent was also noted to be unkempt with a lack of basis grooming and hygiene. His responses to questions were said to be circumstantial and tangential and that he was not orientated to person and situation. This was in circumstances where the Respondent had the support of [YA] and other members of his local mosque.

7. Dr. Bedi, a consultant psychiatrist, also provided a report, dated 16 January 2017, in which he concluded that there was evidence of the Respondent having cognitive impairment including disorientation, reduced attention span, memory impairment as well as limited reading and writing abilities. He added that the Respondent's history and presentation was suggestive of an underlying learning disability with possible psychotic episodes under stress. In addition, he found that there was evidence of longstanding impairment of functioning and that it was likely that the Respondent was going to need ongoing help in the future, He also found that in the absence of appropriate support the Respondent's mental state and functioning could further deteriorate resulting in an increased risk to his health and self-neglect.
8. In her grounds of appeal, the Appellant submitted that the First-tier Tribunal Judge had materially erred in finding that the Respondent met the requirements of paragraph 276ADE(1) (vi) of the Immigration Rules. However, both First-tier Tribunal Judge Grimmatt and Upper Tribunal Judge Coker refused the Appellant permission to appeal on this basis and, therefore, this decision stands.
9. However, Upper Tribunal Judge Coker did grant permission to appeal on the basis that First-tier Tribunal Judge James had misdirected himself in relation to *GS (India) v Secretary of State for the Home Department* [2015] EWCA Civ 40 and *N v Secretary of State for the Home Department* [2005] UJHL 31.
10. It is clear from the First-tier Tribunal Judge's decision that he did not refer to this case law or consider whether the facts in the Respondent's case met the very high threshold required by *N v United Kingdom*.

11. Instead, the First-tier Tribunal Judge found in paragraph 24 of his decision, that, in the alternative, it was arguable that removing the Respondent to Pakistan would amount to a breach of Article 3 of the European Convention on Human Rights following the decision in *Paposhvili v Belgium* (Application No. 41738/10)

12. In paragraph 182 of that decision the Grand Chamber of the European Court of Human Rights held that:

“... it is essential that the Convention is interpreted and applied in a manner which renders its rights practical and effective and not theoretical and illusory”.

13. In paragraph 183 it also found that:

“... the other “very exceptional cases” within the meaning of the judgment in *N v United Kingdom* which may raise an issue under Article 3 should be understood to refer to situations involving the removal of 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”.

14. However, this is not the test which was applied by the House of Lords in *N v Secretary of State for the Home Department* and., although I am obliged to take into account decisions of the Grand Chamber, I must follow a precedent established by the House of Lords/Supreme Court and the evidence does not establish that the Respondent’s case was of the type of exceptional cases protected by *N*.

15. Counsel for the Respondent submitted that the Respondent’s situation could be equated with that of *D v United Kingdom* (1997) 24 EHRR 423. However, as the Home Office Presenting Officer submitted the Upper Tribunal was bound by the decision in *N v Secretary of State for the Home Department* and the circumstances in that case were similar to that potentially facing the Respondent.

16. In paragraph 184 of *Paposhvili* the Grand Chamber went on to find that “the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on 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”.
17. Again, this part of the judgment imposes a test which went further than that established in *N v United Kingdom* and should not have been followed by the First-tier Tribunal Judge.
18. However, any error made by the First-tier Tribunal Judge James in relation to Article 3 or 8 of the European Convention on Human Rights outside the Immigration Rules was not material, as he had not erred in law when he allowed the appeal under paragraph 276ADE(1)(vi) of the Immigration Rules.

DECISION

- (1) The Appellant’s appeal is dismissed.
- (2) For the avoidance of doubt, First-tier Tribunal Judge James’ decision is upheld in relation to paragraph 276ADE(1)(vi) of the Immigration Rules, as permission had not been granted to challenge this part of First-tier Tribunal Judge James’ decision.

Nadine Finch

Signed

Date 18 January 2018

Upper Tribunal Judge Finch