EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 2654/18
Turyalai KHAKSAR
against the United Kingdom

The European Court of Human Rights (First Section), sitting on 3 April 2018 as a Committee composed of:
Kristina Pardalos, *President*,
Ksenija Turković,
Tim Eicke, *judges*,
and Renata Degener, *Deputy Section Registrar*,
Having regard to the above application lodged on 9 January 2018,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Turyalai Khaksar, is an Afghan national, who was born in 1990 and lives in Uxbridge. He was represented before the Court by Ms Yasmeen Ali of Haris Ali Solicitors, based in London.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. The applicant was injured in a bomb blast in Kunar province, Afghanistan, in 2004 when a grenade was thrown into his family home. As a result of the bomb, his mother, father, and younger brother died. He suffered life-threatening injuries including structural ear damage, burns, skull fractures and, most significantly, the development of large venous arterial malformations in the area of his neck and back.

4. The applicant received limited medical treatment in Afghanistan before being transferred to Pakistan, where medical staff had no experience

in treating such injuries. After some time, the applicant was asked to leave and when he returned several months later, he was told that the doctors could not do anything further to help him, and that if they operated on him, he might die.

5. The applicant returned to Afghanistan where he lived with a surviving sister and her family. He continued to suffer continuous pain and bleeding due to the eruption of sutures on the malformations on his neck and back. Aged 18 years old, the applicant decided to leave Afghanistan and to seek medical care in the United Kingdom.

6. The applicant entered the United Kingdom in January 2009 and claimed asylum, however, he failed to attend the asylum interview and the claim was consequently refused. In early 2013 the applicant's legal representatives wrote to the Home Office, although the correspondence was not treated as an application for asylum.

7. The applicant's current legal representatives were instructed in late 2014 and made further submissions to the Home Office on his behalf for leave to remain, based on his medical conditions and his need for treatment in the United Kingdom which is not available in Afghanistan with reference to Articles 3 and 8 of the Convention.

8. The Secretary of State for the Home Department refused the applicant's asylum application in a decision dated 27 October 2015. The Secretary of State considered that the applicant did not have a well-founded fear of persecution for a reason within the scope of the 1951 Refugee Convention and as such did not qualify for asylum. Further, it was considered that his removal would not breach his right to a private life pursuant to Article 8 of the Convention.

9. In respect of his medical conditions, the Secretary of State had regard to medical evidence submitted by way of letter from a Consultant Interventional Radiologist at the specialist Vascular Malformation Clinic at the Royal Free Hospital in London, which indicated that the applicant had been receiving treatment since 2014 for *"an enormous [...] complex, high flow arteriovenous malformation"* by way of "*sclerotherapy*". The letter also set out that the condition is rare, and that the applicant's case could be included *"in the top 10% in terms of complexity and difficulty to treat*". The aim of treatment was described as to stop the symptoms of pain and bleeding, and to reduce the size of the malformation. Without treatment (which was envisaged to last for several years), the applicant was described to be at risk of *"catastrophic bleeding"* which could potentially cause death. The letter noted that treatment would also be available in Birmingham, the United States and Geneva.

10. The Secretary of State nonetheless noted that the improvement or stabilisation of the applicant's condition resulting from treatment in the United Kingdom, and the prospect of serious or fatal relapse on expulsion *"will not in itself render expulsion inhumane treatment contrary to*

Article 3" of the Convention. The Secretary of State did not consider that the applicant's case met the high threshold of severity to breach Article 3 of the Convention set out in *N v. Secretary of State for the Home Department* [2005] UKHL 31 (and endorsed by this Court in *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008) as it was not accepted that his condition was at such a critical stage that it would be inhumane to remove him to Afghanistan. In this regard, the Secretary of State considered that suitable medical treatment was available and accessible in Afghanistan, notwithstanding that it may not be of the same standard as that which is currently available in the United Kingdom.

11. The applicant appealed the decision before the First-tier Tribunal. The Tribunal found that the applicant had travelled to the United Kingdom in order to obtain medical treatment and not for asylum reasons. In respect of Article 3 of the Convention, the First-tier Tribunal judge considered the test set out in *N v. Secretary of State for the Home Department* [2005] UKHL 31 and found that the medical evidence did not show that:

> "as at the date of the hearing without treatment the appellant would face a certain death or that it would leave him to be exposed to a real risk of dying under the most distressing circumstances. Whilst I note the medical report's reference to the fact that a catastrophic bleed, were it to occur, could potentially kill the appellant, there is no clarification as to the likelihood of this happening [...] I find that there is no reason any catastrophic bleed should it occur could not be addressed by any hospital in Afghanistan."

12. The Tribunal accordingly found that there was no real risk of the applicant being subjected to treatment contrary to Article 3 of the Convention upon return to Afghanistan.

13. Upon consideration of Article 8 of the Convention, the First-tier Tribunal found that no claim to a private life, independent from his medical condition, had been shown. The applicant would not be returning to Afghanistan in the same state of health but an improved one, and would be able to avail of the support of his sister in dealing with any further medical treatment he may need. The appeal was dismissed by way of decision promulgated on 29 March 2016.

14. An application for permission to appeal the decision was refused by the First-tier Tribunal on 21 April 2016 and by the Upper Tribunal on 13 June 2016.

15. The applicant sought permission to apply for judicial review of the decision of the First-tier Tribunal before the High Court. The High Court considered that the question of whether the applicant's medical condition was sufficiently exceptional for return to Afghanistan to amount to a breach of Article 3 of the Convention was a matter of judgment for the First-tier Tribunal, which had carefully analysed the relevant authorities and applied the correct test. The application was dismissed in a decision dated 29 September 2016.

16. Following the decision of this Court in *Paposhvili v. Belgium* [GC], no. 41738/10, ECHR 2016 the applicant made further submissions to the Home Office in April 2017 on the basis of his medical conditions, his private life in the United Kingdom and the current security and human rights situation in Afghanistan. He argued that, following *Paposhvili*, his Article 3 and 8 rights were engaged and breached by return to Afghanistan. He included updated medical evidence from the Royal Free Hospital (dated March 2017) which indicated that:

> "Catastrophic bleeding is a real possibility. Should this occur it could end his life prematurely and it is unlikely to be successfully treated in Afghanistan ... Without the current treatment, Mr Khaksar could be exposed to the risk of dying in the most catastrophic terms."

17. The Secretary of State considered the further submissions and decided that they did not amount to a fresh claim on 13 July 2017. In respect of the applicant's claim that the risk of violation of Article 3 due to his medical condition now fell to be assessed in light of *Paposhvili*, the decision stated:

> "The Secretary of State is aware of the findings of the case of *Paposhvili* however it is considered that the case of *N v. SSHD [2005] UKHL 31* remains authoritative in establishing the threshold to be met in Article 3 (medical) cases."

18. The decision examined the applicant's case under those principles which had been applied throughout the previous domestic proceedings in respect of the threshold applicable to a breach of Article 3 in medical cases, arriving at a conclusion that:

> "there is no evidence that your claimed medical condition would fall within the extreme and exceptional category which would engage Article 3 of the ECHR."

19. While no appeal of the decision dated 13 July 2017 was possible, it was open to the applicant to seek permission to apply for judicial review of the decision before the High Court. However, the applicant did not make this application.

B. Relevant domestic law and practice

1. Asylum appeals

20. Section 82(1) of the Nationality, Immigration and Asylum Act 2002, provides a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) against an immigration decision made by the Secretary of State for the Home Department, *inter alia*, on the grounds that the decision is incompatible with the Convention. Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides a further right of appeal to the Upper Tribunal, with the permission of the First-tier Tribunal or the Upper Tribunal, on a point of law.

21. Paragraph 353 of the Immigration Rules provides that further submissions made after an asylum claim has been determined will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

> "(i) has not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

22. The Secretary of State for the Home Department's decision not to treat further submissions as a fresh claim is open to challenge by way of judicial review, *inter alia*, on the basis that it is incompatible with a Convention right. This is by virtue of section 6(1) of the Human Rights Act 1998, which makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.

2. Domestic case-law concerning Article 3 and 'medical cases'

23. The position in domestic law regarding the application of Article 3 of the Convention to 'medical cases' is set out in *N v. Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 AC 296 where the relevant test to be applied was described by Baroness Hale of Richmond as

> "... 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..."

24. The Grand Chamber endorsed this approach in *N. v. the United Kingdom* [GC], no. 26565/05, §42, ECHR 2008.

25. In its judgment in *AM (Zimbabwe) & Anor v The Secretary of State for the Home Department [2018] EWCA Civ 64 (30 January 2018)*, the Court of Appeal has recently considered the current position in domestic law in the light of *Paposhvili v. Belgium* [GC], no. 41738/10, ECHR 2016. The Court of Appeal noted that the appellants sought to rely on the guidance given by the Grand Chamber in *Paposhvili*, not before the Court of Appeal, but on a further appeal to the Supreme Court. The Court of Appeal set out the following at paragraphs [30] – [34]:

> "30. As noted above, the parties in the present appeals are agreed that on the facts of their particular cases neither AM nor Mr Nowar can satisfy the test for breach of Article 3 set out in *N v Secretary of State for the Home Department* and *N v United Kingdom*. The parties are also in agreement that the decision of the House of Lords in *N v Secretary of State for the Home Department* is binding authority so far as this court is concerned regarding the test to be applied in domestic law in this type of case, with the consequence that both appeals to this court have to be dismissed. It is common ground that this is so even though it appears that the ECtHR has more recently, in *Paposhvili*, decided to clarify or qualify to some degree the test previously laid down in *N v United Kingdom*, which corresponds with that set out by the House

of Lords in *N v Secretary of State for the Home Department*. This is a result of application of the usual rules of precedent in this jurisdiction: see *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465, at [43].

31. However, the appeals have been brought with a view to seeking to rely on the new guidance given by the ECtHR in *Paposhvili* not in this court, but on a further appeal to the Supreme Court. It is clear that the appellants will seek to extend existing orders preventing their removal from the UK until the final determination of their cases in the court and tribunal system, on the basis that their appeals will or should be going to the Supreme Court. Ordinarily, permission would only be granted for an appeal to the Supreme Court in a case in which there was a real prospect of success on the facts of that case.

32. There is also a significant number of other cases involving claims by foreign nationals to resist removal from the UK by invoking Article 3 on medical grounds which are already in the system, in which again reliance is sought to be placed on *Paposhvili* even though the claims have been dismissed by application of *N v Secretary of State for the Home Department* and *N v United Kingdom*. In those cases, orders have been made in a similar way to prevent the removal of the appellants from the UK until final determination of their cases, which are on hold until the position in relation to the adoption of the guidance in *Paposhvili* into domestic law has been clarified.

33. In addition, similar new claims based on application of Article 3 on medical grounds may be brought forward at any time. In relation to those claims, all courts below the Supreme Court will be bound by the decision in *N v Secretary of State for the Home Department*, but claimants may contend that they have grounds for saying that their cases are covered by the new guidance in *Paposhvili* (in particular at para. [183]) and that any question of their removal from the UK should be stayed until the Supreme Court has decided to modify domestic law (potentially decisively in their favour) by reference to that guidance.

34. In all of these situations, where an appellant or other claimant has no good claim to resist removal from the UK other than on the footing that the Supreme Court might adopt the guidance in *Paposhvili*, a stay of removal would usually only be justified pending a new decision by the Supreme Court if their case would satisfy the test set out in *Paposhvili* at para. [183]. If a court or tribunal at a full hearing can determine that it does, a stay is likely to be justified; and if not, not. If a court or tribunal is for some reason having to make a decision regarding a stay without a full examination of the Article 3 case with reference to the test in *Paposhvili*, then it might be sufficient if the claimant has a good arguable case that his claim would satisfy that test."

26. The Court of Appeal went on to consider the meaning and effect of the test set out in paragraph [183] of *Paposhvili* in order to provide formally binding guidance to all courts below the level of the Supreme Court.

COMPLAINTS

27. The applicant complained under Article 8 of the Convention about his removal to Afghanistan. He also made reference to Article 3 of the Convention in the medical context.

THE LAW

28. The applicant relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

29. The applicant also made reference to Article 3 of the Convention, which reads as follows:

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

30. The applicant noted in respect of Article 3 of the Convention that the domestic courts had found that although his condition was *"serious"*, it did not reach the level of severity that would engage or breach Article 3, and further that the Secretary of State had concluded in July 2017 that:

> "*N v. SSHD* [2005] UKHL 31 remains authoritative in establishing the threshold to be met in Article 3 (medical) cases."

31. The applicant went on to ground his complaint on Article 8 of the Convention, arguing that return to Afghanistan would violate his right to a private life based on his medical condition and necessity for treatment in the United Kingdom, his integration into life in the United Kingdom and the security situation in Afghanistan.

32. Notwithstanding the refusal of the Secretary of State to reconsider the applicant's case in light of the *Paposhvili* test, the Court notes that the Court of Appeal, in its decision in *AM (Zimbabwe) & Anor v The Secretary of State for the Home Department* (see paragraph 25), has recently applied that test and provided formally binding guidance, based on the test set out by the Grand Chamber in *Paposhvili*, to all courts and tribunals below the level of the Supreme Court in respect of decisions taken regarding a stay on removal, pending consideration by the Supreme Court of the impact of that case for the purposes of domestic law. The Court also notes the view expressed in paragraph [46] of that judgment that it is:

> "highly desirable that the Supreme Court should consider the impact of *Paposhvili* ... at an early stage."

33. In this regard, the Court recalls that the applicant did not seek permission for judicial review of the decision of the Secretary of 13 July 2017 before the High Court, in order that the domestic courts could consider the matter in accordance with the domestic law (see paragraph 19).

34. Accordingly, the Court considers that the applicant has failed to exhaust all domestic remedies available to him and that the application must be rejected pursuant to Article 35 § 1 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 26 April 2018.

Renata Degener
Deputy Registrar

Kristina Pardalos
President