**IN THE SUPREME COURT**

**ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)**

**BETWEEN:**

1. **BJ (LALA LAND)**
2. **DR (ATLANTIS)**

**Appellants**

**-and-**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**SKELETON ARGUMENT ON BEHALF OF THE APPELLANTS**

**1. Introduction**

1.1 The Appellants (“A”) appeal the decision made by the Court of Appeal. “A” ask that the Supreme Court find in favour of their applications in that their removal would be in breach of Article 3 of the European Convention of Human Rights (“ECHR”) respectively.

1.2 The documents relied on in this appeal are:

**Judgment:**  The Court of Appeal (Civil Division)

**Proof of evidence:** Moot problem

**List of Authorities:**

***Paposhvili v Belgium [2016] (Application no. 41738/10 – Grand Chamber Judgment) ECHR 1113*** *(Provided the test for “other very exceptional” circumstances).*

***AM (Zimbabwe) and Another v Secretary of State for the Home Department [2018] EWCA Civ 64*** *(Considered and applied the test in Paposhvili v Belgium – the applicants’ conditions were found to fail to meet the test).*

***Tatar v Switzerland [2015] (Application no. 65692/12 – Second Section Judgment)*** *(Removing the applicant, whom suffered a mental illness of which he was receiving treatment for, did not breach Article 3. Assurances obtained by the returning State were considered).*

***N v Secretary of State for the Home Department [2005] 2 AC 296*** *(Affirmed the test for “very exceptional” medical cases as presented in D v United Kingdom).*

***S.J. v Belgium [2015] (Application no. 70055/10 – Grand Chamber Judgment Striking Out)*** *(Struck out case of applicant whom had HIV to remain in Belgium on medical grounds under Article 3. Judge Pinto presented a dissenting judgment addressing N v United Kingdom).*

**Legislation**

**European Convention on Human Rights 1950,** Article 3.

**Human Rights Act 1998,** section 2 (1) and section 6.

**2. Facts**

2.1 Boris (“BJ”) and Dominic (“DR”) are asylum seekers who have had their applications for leave to remain refused by the Secretary of State.

2.2 BJ and DR have serious illnesses. BJ suffers from Hodgkin’s Lymphoma and DR from HIV. Both parties have been receiving treatment in the UK and their illnesses are currently well managed and stable.

2.3 While neither party is currently ill, they contend that if they were to be removed to their home countries, their conditions will deteriorate in absence of the necessary treatments and their life expectancies will be reduced.

2.4 The Parties appeals were dismissed both at first instance and by the Court of Appeal.

2.5 The Supreme Court has granted the parties permissions to appeal on the basis that their return home would breach Article 3 of the European Convention of Human Rights.

3. **Issues**

3.1 The Supreme Court is asked to determine:

1. Whether the clinical conditions meet the test(s) for Article 3 in *Paposhvili v Belgium* *(Application no. 41738/10).*
2. Whether the Supreme Court should refuse to follow the decision of the House of Lords in *N v Secretary of State for the Home Department [2005] 2 AC 296* and should follow *Paposhvili v Belgium*, notwithstanding the doctrine of precedent.

4**.**  **Have the clinical conditions of “A” met the test(s) for Article 3 in *Paposhvili v Belgium*?**

4.1 The test for Article 3 in *Paposhvili v Beligium*

4.2 The test for Article 3 was established by the Grand Chamber of the European Court of Human Rights (“ECtHR”) in *Paposhvili v Belgium* and is as follows: -

***“Court considers*** *that the* ***“other very exceptional cases”*** *… 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.”***

*[per Grand Chamber Judgment at para 183].*

4.3 *“Substantial grounds”* does not require that the applicant provide “*clear proof”* - there is *“a certain degree of speculation…inherent in the preventative purpose of Article 3” [per Grand Chamber Judgment at para 186].* Furthermore, it is incumbent on the returning State to dispel doubts concerning the evidence *[per Grand Chamber Judgment at para 186-7]*.

4.4 The assessment of risk is subject to *“close scrutiny”.* The returning state must consider the *“foreseeable consequences”* of removal of “A” in *both* the general and personal circumstances *[per Grand Chamber Judgment at para 187].* They must also assess whether the treatment generally available is *“sufficient and appropriate”* to prevent a violation of Article 3 *[per Grand Chamber Judgment at para 189].*

4.5 The returning State has a *“negative obligation”* not to expel “A” where the assessment reveals a substantial risk of a violation of Article 3 *[per Grand Chamber Judgment at para 188].*

4.6 (i) “A” face a *real risk* of being exposed to serious, rapid and irreversible decline resulting in *intense suffering.*

4.7 It is submitted that the clinical conditions of “A” have met the test(s) for Article 3 in *Paposhvili v Belgium - both* cases constitute *“other very exceptional cases”*, as demonstrated in the following sections.

4.8 Boris’ (BJ) clinical conditions

4.9 There is a *real risk* that, in the absence of appropriate treatment or lack of access to it, BJ will be exposed to a *serious, rapid and irreversible decline* resulting in his intense suffering, if he is forced to return to LaLa Land.

1. BJ is in remission though unaware of the extent and nonetheless, not cured – he requires careful monitoring due to his risk of relapse.
2. BJ would most likely require a stem cell transplant if his illness returns.
3. There is *no certainty* that the stem cell treatment that he requires will be available in Lala Land, or that he would have access to it. *[compare AM (Zimbabwe) v Secretary of State for the Home Department, per Lord Justice Sales at para 45].*
4. Contrastingly, there is greater accessibility and indeed greater certainty of access to stem cell treatment, without cost, in the UK.
5. Without the stem cell treatment BJ would experience *intense suffering* due to his illness – both physically *and* mentally.
6. Accordingly, there would be a rapid and irreversible decline in BJ’s health causing intense suffering if he is removed from the UK.

4.10 Dominic’s (DR) clinical conditions

4.11 There is also a *real risk* that, in the absence of appropriate treatment or lack of access to it, DR will be exposed to a *serious, rapid and irreversible decline* resulting in his intense suffering, if he is forced to return to Atlantis.

1. DR has been a long sufferer of HIV, though his condition has been *‘well-controlled’* by the latest medication in the UK.
2. DR has suffered ‘*extremely unpleasant and life-threatening’* side effects from all other medication he has previously tried, thus requires the latest medication.
3. The latest medication is of significant cost in Atlantis, contrary to the UK. There is uncertainty about whether DR can afford this medication in Atlantis.
4. There is no evidence that DR has any other means of support in order to access the latest medication. [*Paposhvili v Belgium, per Grand Chamber Judgment at para 190*].
5. If DR cannot access the latest medication and instead has to rely on alternatives, he would likely suffer the side-effects he previously experienced, thus causing *intense suffering*, both physically and mentally. *[compare AM (Zimbabwe) v Home Secretary (CA), per Lord Justice Sales at para 44].*
6. Furthermore, DR may cease taking alternative medication altogether due to the side-effects, causing his condition to rapidly deteriorate and resulting in *intense* and *irreversible suffering.*

4.12 It is evident that “A” satisfy the first part of the test, as they would suffer a decline in their health, causing intense suffering to meet the severity threshold of Article 3.

4.13 (ii) “A” face a *real risk* of being exposed to serious, rapid and irreversible decline resulting in a *significant reduction* in their life expectancy.

4.14 Both BJ and DR face a real risk of there being a *significant reduction* in their life expectancies if they are sent back to their home countries.

a) BJ faces a reduction in his life expectancy by 12 years.

b) DR faces a reduction in his life expectancy of 8 years.

4.15 The reduction in life expectancy is not speculative – it is based on ‘*unchallenged’* medical evidence which therefore has credibility and should be regarded with a high degree of certainty. *[compare AM (Zimbabwe) v Secretary of State for the Home Department, per Lord Justice Sales at para 45].*

4.16 The reduction in the life expectancies of “A” is notwithstanding any intervening factors connected to a decline in their conditions, which could further shorten their lives.

4.17 Accordingly, “A” satisfy the second part of the test, as they would suffer a significant reduction in their life expectancy if they are returned to their home countries, thus meeting the severity under Article 3.

4.18 The responsibility of the State in accordance with the test for Article 3 in *Paposhvili v Belgium*

4.19 It is acknowledged that the responsibility of the State is not to *“alleviate”* disparities in treatment between states *[Paposhvili v Belgium, see Grand Chamber Judgment at para 190].* Accordingly, it is submitted “A” cases concern access to treatment, not the mere standard of it.

4.20 The *act* of expulsion without credible assessment or evidence “A” will receive treatment and in the absence of sufficient assurances to the contrary, presents too great a risk which is contrary to Article 3. *[Paposhvili v Belgium, per Grand Chamber Judgment at para 187, 191 and 205] and [compare Tatar v Switzerland, per Second Section Chamber Judgment at para 49 and per Judge Lemmens dissenting, at para 4].*

5. **The Supreme Court should refuse to follow the decision of the House of Lords in *N v Secretary of State for the Home Department [2005] 2 AC 296* and should follow *Paposhvili v Belgium.***

5.1 It is acknowledged that the current leading authority in the United Kingdom for expelling persons with serious illnesses is *N v Secretary of State for the Home Department.*

5.2 Prior to *N v Home Secretary,* the leading case on this matter was *D V United Kingdom.*

5.3Lord Hope, considering *D v United Kingdom,* stated that there would be “*very exceptional circumstances*” which would prevent the State from expelling such persons. The test for *“very exceptional circumstances”* is as follows: -

*“…it would need to be shown that the applicant’s medical condition had reached such a critical stage that there were compelling humanitarian grounds for not removing him to a place which lacked medical and social services which he would need to prevent acute suffering while he is dying…”.*

*[N v Secretary of State for the Home Department, per Lord Hope at para 50].*

5.4 It is submitted that this test should not be followed by the Court as it is overly restrictive in that:

1. The test is arbitrarily confined only to individuals who are *“terminally ill”* or *“dying”,* within thereasoning of *D v United Kingdom.*

[*see* *S.J. v Belgium [2015] (Application no. 70055/10) per Judge Pinto De Albuquerque dissenting at paras 8-10*]

1. The test does not provide for persons who are seriously ill, but whose conditions are less critical, therefore depriving them of the benefit of the Article 3 Convention. *[Paposhvili v Belgium, per Grand Chamber Judgment at para 181].*
2. This creates an injustice as seriously ill persons have no reprieve, which is not in keeping with the Convention, to be applied in a manner rendering rights *“practical and effective”.*

*[Paposhvili v Belgium, per Grand Chamber Judgment at para 182].*

5.5 Indeed, acknowledging the restrictive approach, Baroness Hale in *N v Home Secretary* stated that: -

*“There may, of course, be other exceptional cases, with other extreme facts, where the humanitarian considerations are equally compelling”.*

*[N v Secretary of State for the Home Department, per Baroness Hale at para 70].*

5.6 Notwithstanding this, no definition or criteria for what *“other exceptional cases”* meant was provided in *N v Home Secretary*, therefore creating inherent difficulties in applying this concept.

5.7 *Paposhvili v Belgium* provided guidance and a test for which matters constitute *“other exceptional circumstances”*, as outlined at paragraphs 4.2-4.5 of this skeleton argument. By doing so, the test in *N v Home Secretary* was relaxed.

5.8 Accordingly, it is submitted that the approach in *Paposhvili v Belgium* should be adopted by the Court instead of *N v Home Secretary.*

a) The Court is able to take “*all the circumstances”* into consideration in their assessment as opposed to a narrow view. *[Paposhvili v Belgium, per Grand Chamber Judgment at para 174].*

b) It bridges the “*gap*” created by *N v Home Secretary*, whilst still maintaining the high threshold for the application of Article 3. *[Paposhvili v Belgium, per Judge Lemmens dissenting at para 3].*

c) It allows for clarity and consistency in the Court’s assessment of similar cases in the future.

d) It acknowledges the Convention as part of a “*living*” and evolving instrument.

*[N v Secretary of State for the Home Department, per Lord Hope at para 21].*

5.9 Moreover, it is submitted that by following *Paposhvili v Belgium* the Court would be complying with their obligation under Section 2(1)(a) of the Human Rights Act (HRA) 1998 in that:-

“*A court or tribunal determining a question which has arisen in connection with a Convention right* ***must take into account*** *any-*

1. *judgment, decision, declaration or advisory opinion of the European Court of Human Rights…*

*whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.*”

5.10 Indeed, notwithstanding that the Court is *not* obliged to follow the decisions of the ECtHR, there *is* an obligation to take their decisions into account, meaning to give them due weight and consideration - not simply ignore them.

5.11 Furthermore, by following *Paposhvili v Belgium*, the Court ensures the domestic approach is compatible the ECtHR jurisprudence.

i. The Court must not act in a way that is “*incompatible with a Convention right*”. *[Section 6(1) HRA 1998].*

ii. The ECtHR determine *“what further extensions…are needed to the rights guaranteed by the Convention. We must take the case law as we find it”.*

*[N v Secretary of State for the Home Department, per Lord Hope at para 25].*

5.12 The Supreme Court has the discretion to deviate from previous decisions and considering the present circumstances, *Paposhvili v Belgium* would be the correct alternative decision to follow.

6. **Conclusion**

6.1 “A” meet the test for Article 3 in *Paposhvili v Belgium* and therefore their rights would be violated if returned to their countries. Furthermore, the Court should apply *Paposhvili v Belgium* to ensure that the absolute and unequivocal right enshrined in Article 3 is not diminished and maintains its integrity.

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