IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

B E T W E E N : –

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

Appellants

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

SKELETON ARGUMENT OF THE RESPONDENT

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1. This is the skeleton argument of the Respondent, the Secretary of State for the Home Department, in the appeals of the Appellants, BJ and DR, against the refusal of their applications for leave to remain in the United Kingdom.

2. The Appellants appeal on the basis that the state of their health is such that return to their respective home countries would amount to a breach of Article 3 of the European Convention on Human Rights, incorporated into domestic law by virtue of the Human Rights Act 1998. Article 3 provides:

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

3. The leading domestic authority on such cases is *N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296, which restricts Article 3 challenges to "deathbed" cases. At the Strasbourg level, guidance on the application of Article 3 to non-deathbed cases was given by the European Court of Human Rights in *Paposhvili v Belgium* [2017] INLR 497.

4. The Appellants' cases are not deathbed cases, and they must therefore establish that:

   i. Their cases are such as to satisfy *Paposhvili v Belgium* [2017] INLR 497; and

   ii. The Supreme Court ought to follow *Paposhvili v Belgium* rather than *N v Secretary of State for the Home Department* [2005] 2 AC 296.

Issue I – The Strasbourg jurisprudence and the present appeals.

5. The decision of the Grand Chamber in *Paposhvili v Belgium* [2017] INLR 497 discusses both the substantive and the procedural principles of non-deathbed Article 3 cases. When its articulation of these principles is properly understood in its context, it is apparent that in neither of the present appeals do the facts amount to a breach of Article 3.

The correct approach to *Paposhvili v Belgium*.

6. Health-based Article 3 removal cases had been considered by the European Court of Human Rights before *Paposhvili v Belgium* [2017] INLR 497, most importantly by the Grand Chamber in *N v United Kingdom* (2008) 47 EHRR 39, and *Paposhvili v Belgium* must be understood in this context.

7. In *N v United Kingdom* 47 EHRR 39, 900, [42] and [43], the Grand Chamber held that for Article 3 to apply on medical grounds in a removal case would require "a very exceptional case". The paradigm example was a serious deathbed case, but the door was left open for "other very exceptional cases".

8. In *Paposhvili v Belgium* [2017] INLR 497, 536, [181], the Grand Chamber identified that neither *N v United Kingdom* 47 EHRR 39 nor subsequent cases had provided detailed guidance on the proper interpretation of the phrase "other very exceptional cases", and set out at paragraph 183 to give such guidance. *Paposhvili v Belgium* must therefore be approached as an explanation and not an overruling of *N v United Kingdom*.

9. It follows that very clear language on the point would be required for *Paposhvili v Belgium* [2017] INLR 497 to have overruled *N v United Kingdom* 47 EHRR 39 in any respect, or to have decided anything which would change the actual decision in *N v United Kingdom*.

Interpreting and applying *Paposhvili v Belgium*.

10. The guidance as to non-deathbed Article 3 health-based removal challenges in *Paposhvili v Belgium* [2017] INLR 497, 536, [183] is in the following terms:

> The court considers that the 'other very exceptional cases' within the meaning of the judgment in *N v United Kingdom* (para 43) which may raise an issue under Art 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.

11. The burden rests initially upon the Appellants, who must adduce evidence which if uncontradicted would satisfy the "substantial grounds for believing" threshold. Only once this burden has been discharged does the responsibility shift to the Respondent to "dispel any doubts raised": *Paposhvili v Belgium* [2017] INLR 497, 537, [186] and [187].

12. There are four points to be made about this passage in the context of the present appeals.

13. First, in order for the case to be exceptional, the subject in question must be seriously ill at the time the matter is being considered. The mere prospect of future deterioration in health is not sufficient. BJ and DR are both asymptomatic and, consequently, not seriously ill within the meaning of paragraph 183.

14. Second, the healthcare which the applicant would receive in the receiving state must be inadequate, and this inadequacy must be the cause of any subsequent deterioration. Neither Appellant has adduced any or any sufficient evidence on this point, and the Respondent's duty to dispel doubts therefore does not arise.

15. Third, the apprehended health consequences must have a high degree of immediacy, and so a "significant reduction in life expectancy" in the context of paragraph 183 must be one which renders death imminent. This is consistent with the need for rapid deterioration when the health consequence is intense suffering: *AM (Zimbabwe) v Secretary of State for the Home Department* [2018] EWCA Civ 64, [2018] 1 WLR 2933, 2953, [40]. It is also consistent with the need to apply a high threshold and restrict such challenges to truly very exceptional cases where removal would be not merely ill-treatment but inhuman: *Paposhvili v Belgium* [2017] INLR 497, 534, [174] and 536, [183]; *N v United Kingdom* 47 EHRR 39, 900, [43]. Moreover, in *N v United Kingdom* 47 EHRR 39, 900, [42], it was held that significant reduction in life expectancy alone does not make removal inhuman, calling for a narrow construction of this part of paragraph 183.

16. Reductions in life expectancy of twelve and eight years respectively may be significant in absolute terms, but they would not make death an immediate prospect for either Appellant.

17. Finally, *N v United Kingdom* 47 EHRR 39, 895, [29], explicitly approved on this point by *Paposhvili v Belgium* [2017] INLR 497, 534, [174], requires consideration of all the circumstances of the case, whereas paragraph 183 addresses only medical circumstances. Paragraph 183 must therefore be treated as establishing a clinical threshold for the application of Article 3, not a complete test, and even if the threshold is met, the court must consider whether in all the circumstances removal would be inhuman or degrading.

18. The bare fact of a reduction in life expectancy does not suffice to make removal inhuman or degrading: *N v United Kingdom* 47 EHRR 39, 900, [42]. No additional circumstances have been alleged or evidenced in either of the present appeals. Removal therefore cannot amount to inhuman or degrading treatment even if the paragraph 183 threshold is passed.

Conclusion.

19. *Paposhvili v Belgium* [2017] INLR 497, 536, [183] lays down criteria which are necessary but not sufficient for resisting expulsion on health-based Article 3 grounds in non-deathbed cases. Properly understood in their context and in accordance with principle and precedent, these criteria are not satisfied in the present appeals. Even if they were, the circumstances as a whole are not such as to render removal of the Appellants inhuman or degrading.

20. The court is therefore asked to dismiss these appeals, on the basis that even if *Paposhvili v Belgium* [2017] INLR 496 is to be adopted into English law, neither Appellant's case falls within its ambit.

Issue II – Whether the court should follow Paposhvili v Belgium *or* N v Secretary of State.

21. It is submitted that, in the event that the court favours the Appellant's interpretation of *Paposhvili v Belgium* [2017] INLR 497, it should refuse to follow Strasbourg and should instead hold that *N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296 puts forward the correct test in cases such as these.

How closely should this court align itself with Strasbourg jurisprudence?

22. It is first submitted that this court should not feel itself obliged to follow Strasbourg jurisprudence as a matter of principle, and should feel itself bound only to consider Strasbourg rulings when determining questions arising from the Convention.

23. Section 2(1) of the Human Rights Act 1998 reads:

> A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
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> (a) 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.

24. Lord Neuberger, in *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, 125, [48], set out this court's stance with relation to section 2:

> 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.

25. However, it is submitted that this court should adopt a less constrained approach, and feel itself obliged to consider Strasbourg jurisprudence, but no more. The nature of the Human Rights Act 1998, the language used by Parliament, and the practical difficulties that ensue from too closely aligning this court to Strasbourg all support such a position.

26. Therefore, unless there are particularly compelling reasons to do so, in the interests of certainty and predictability in the law, the doctrine of precedent should apply and this court should not depart from its judgment in *N v Secretary of State for the Home Department* [2005] 2 AC 296.

Should this court decline to follow *Paposhvili* in any event?

27. It is submitted that, even under Lord Neuberger's formulation, *Paposhvili* is a case in which his Lordship's criteria for divergence are met, and so this court should decline to follow it.

28. Both the Strasbourg court and this court have consistently held that a high threshold of severity is necessary to trigger Article 3. Reflecting this, the test adopted in *N v Secretary of State for the Home Department* [2005] 2 AC 296, 322, [69] was a strict one:

> 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.

29. It is submitted that under the Appellants' construction, *Paposhvili* misunderstands several important arguments of principle. It does this first by overextending Article 3 beyond what the contracting states would ever have agreed to, by holding that there is a continuing duty on states to provide medical or social assistance to aliens: *N v Secretary of State for the Home Department* [2005] 2 AC 296, 303, [15], 304, [16] and 317, [53].

30. It further:

    i. Offers an inconsistent definition of what constitutes an "exceptional circumstance"; and

    ii. Insufficiently justifies the use of a "reduction in life expectancy" as a threshold for triggering Article 3.

31. Because Article 3 is an absolute right, it is submitted that such serious inconsistencies in the application of principle should be avoided.

32. Finally, is submitted that the Strasbourg case law on this subject is, after *Paposhvili*, unclear. As discussed in relation to the first ground of appeal, *Paposhvili* explicitly does not overrule *N v United Kingdom*, and yet for the Appellants to succeed would have to do exactly that.

Conclusion.

33. In *N v Secretary of State for the Home Department* [2005] 2 AC 296 this court gave a well-reasoned and principled judgment as to why Article 3 should not be extended to cases such as that in *Paposhvili v Belgium* 47 EHRR 39. It is submitted that the court should not feel itself bound to follow Strasbourg, and should in the interests of consistency and predictability of the law adhere to its own precedent.

34. Even if this court is not minded to change its basic position on Strasbourg jurisprudence, *Paposhvili* is firmly in the category of judgments to which Lord Neuberger's exception applies. To follow Strasbourg and admit the Appellants' construction of *Paposhvili* into the law of this country would constitute an overextension of Article 3 and incorporate significant irregularities of principle. It is submitted that the appeals should therefore be dismissed.

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