

Article 3 ECHR Health Cases - How To Run The Appeal



DGLEGAL

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Presenter

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Agenda

- Welcome and Introduction
- Article 3
- Case law – Historical position
- AM (Zimbabwe) [2020] UKSC 17
- Practical approach to cases
- Other things to think about

ECHR - Article 3

- The Convention for the Protection of Human Rights and Fundamental Freedoms (commonly referred to as the European Convention on Human Rights (ECHR)) seeks to secure a fair balance between the general interests of society and protection of the claimant's fundamental rights.
- ARTICLE 3: provides protection against torture or inhuman or degrading treatment or punishment
- Article 3 is an absolute / unqualified right
- An Art 3 claim brought on medical grounds is likely to be brought on the basis that the individual's return would amount to inhuman or degrading treatment, in light of the disparity between medical treatment being received in the UK and that available in the country of proposed return

Historical position - D v UK

- In **D v United Kingdom (1997) 24 EHRR 423** the ECtHR held that the deportation of D would violate article 3. The court referred to:
 - (i) the advanced state of his terminal illness;
 - (ii) the dramatic consequences which would attend the abrupt withdrawal of the regime of medication and care for him in the UK and
 - (iii) his removal to an island where apparently no care was available for him;
 - (iv) the exceptional circumstances and the compelling humanitarian considerations in his case.

In summary the applicant in the D case was about to die; and the essence of the decision was not the absence of treatment on St Kitts but the inhumanity of, in effect, pulling a man off his deathbed.

N v Secretary of State for the Home Department [2005] UKHL 31

- In N v Secretary of State for the Home Department [2005] UKHL 31, the House of Lords had held that in order to succeed in a claim under Art 3 ECHR based on ill-health,

‘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 the medical and social services which he would need to prevent acute suffering while he is dying’

N v SSHD (House of Lords)

- The appellant in the N case contended for an interpretation of article 3 which would cast upon the UK a positive obligation, namely to continue to treat her indefinitely; whereas, in the light of his imminent death, the applicant in the D case had secured an interpretation which had cast upon the UK only a negative obligation, namely not to deport him.
- Lord Brown referred to the far-reaching consequences for contracting states if they were unable to remove foreign citizens with no other right to remain there just because treatment for their life-threatening conditions in their country of origin would be far less effective than that currently administered.

N v UK (2008) 47 EHRR 39

- ❖ N appealed to the ECtHR - **N v United Kingdom (2008) 47 EHRR 39**
- ❖ She again relied on article 3. But, by a majority, her application was rejected.
- ❖ The Grand Chamber observed that since the judgment in the D case 11 years previously, the court had never held that removal of an alien would violate the article on grounds of ill-health
- ❖ In D the applicant had appeared to be close to death and that a reduction in life expectancy in the event of removal had never in itself been held to amount to a violation of article 3
- ❖ although there might be “other very exceptional cases in which the humanitarian considerations are equally compelling”, the high threshold for violation set in the D case should be maintained;
- ❖ An obligation to provide free and unlimited treatment for a serious condition, if of a standard unmet in the applicant’s country of origin, would place too great a burden on contracting states.

Yoh-Ekale Mwanje v Belgium (2013) 56 EHRR 35

- The applicant was a citizen of Cameroon. Belgium sought to return her there. But she was HIV-positive. The administration to her in Belgium of ART had stabilised her condition.
- Court held that her return to Cameroon would not violate her rights under article 3, it was indistinguishable from the decision of the Grand Chamber in the N case; it was improbable that the applicant would obtain the necessary medication in Cameroon and that, without it, her survival in the short or medium term (later described as for more than a year) was in doubt
- The chief consideration was the applicant's condition prior to removal, which was stable.
- Six of the seven judges added a concurring opinion which, concluded as follows:

“We believe however that such an extreme threshold of seriousness - to be nearing death - is hardly consistent with the letter and spirit of article 3, an absolute right which is among the most fundamental rights of the Convention and which concerns an individual's integrity and dignity. In this regard, the difference between a person on his or her deathbed and a person who everyone acknowledges will die very shortly would appear to us to be minimal in terms of humanity. We hope that the Court may one day review its case law in this respect.”

Paposhvili

- The Grand Chamber in the Paposhvili case expressed the view in para 182 that the approach should be “clarified”, The court proceeded as follows:

“183. The Court considers that the ‘other very exceptional cases’ within the meaning of the judgment in N v The United Kingdom (para 43) which may raise an issue under article 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. The Court points out that these situations correspond to a high threshold for the application of article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness”

Application of Paposhvili in the UK

- Court of appeal in AM (Zimbabwe) said:
- At para 39 - that the decision reflected only a “very modest” extension of the protection against return given by article 3 in cases of ill-health. The Court of Appeal fastened in para 39(iv) upon the Grand Chamber’s questionable choice of language that the previous approach to such cases needed only to be “clarified”. And it buttressed its restrictive view of the effect of the decision by claiming in para 39(ii) that the Grand Chamber had noted that there had been no violation of article 3 in the N case and in para 40 that the Grand Chamber had “plainly regarded that case as rightly decided”.
- The Court of Appeal interpreted the new criterion in para 183 of the judgment in the Paposhvili case, at para 38 as follows:

“This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (ie to the article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (ie likely ‘rapid’ experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state.” **SC - TOO MUCH OF A LEAP**

AM (Zimbabwe) v SSHD [2020] UKSC 17

• FOUR key points to take from the decision:

- (i) changes the test that domestic court and tribunals apply when they consider claims made by foreign nationals under Art 3 ECHR on the grounds of ill-health;
- (ii) clarified the correct interpretation of what is meant in Paposhvili by ‘a significant reduction in life expectancy’ (i.e. CoA got it wrong!)
- (iii) The new test is an alternative (only need to establish one NOT both)
- (iv) SC gives helpful guidance as to the procedural requirements of Art 3 ECHR

AM (Zim) – Test (Para 22)

- A person will succeed in a claim under Art 3 ECHR if ‘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 (i) a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to (ii) a significant reduction in life expectancy
- Significant reduction - Giving an example, the Supreme Court explained that if the life expectancy of a person who was 74 years old was reduced to two years, it might not be significant, in comparison with a person aged 24 with an expectancy of normal life. If the latter’s life expectancy was reduced to two years, it might well be significant. IMPORTANTLY - A person may succeed even if there is no risk of imminent death.

SC Guidance

• To succeed...

- (i) must present evidence 'capable of demonstrating that there are substantial grounds for believing' that Art 3 ECHR would be violated (see para [32]).
- (ii) 'raise a prima facie case of potential infringement'.

However, if they present evidence that meets this standard, 'the returning state is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state'. It will be for the returning state to dispel any serious doubts raised by an applicant's evidence. Applicants are not required to prove their case either beyond reasonable doubt or even on a balance of probabilities.

Practicalities in Art 3 cases

- HO Guidance - Medical claims under Articles 3 and 8 of the European Convention on Human Rights (ECHR), Version 8.0, October 2020
- Medical evidence - is there an Art 3 claim!
 - their medical condition (*diagnosis*)
 - their current treatment for their medical condition (*treatment*)
 - the likely suitability of any alternate treatment for their medical condition (*alternative treatment*)
 - the effect that an inability to obtain effective treatment would have on their health (*prognosis*)

Practicalities in Art 3 cases

• HO Step 2

- Look at it on a case by case basis, using evidence about the availability and accessibility of treatment in the receiving state to decide:
 - whether the care and treatment which is generally available in the receiving state is in practice sufficient to prevent a breach of Article 3, and
 - whether care and treatment is accessible, taking into consideration:
 - o cost
 - o the existence of a family/support network, and
 - o geographical location

Practicalities in Art 3 cases

❁ HO Step 3

- ❁ If serious doubts persist, the UK needs to obtain individual assurances from the receiving state that appropriate treatment would be available and accessible to the claimant.
- ❁ Individual assurances need only be sought where serious doubts remain about whether they can be safely removed from the UK without breaching Article 3 on medical grounds

Practicalities in Art 3 health appeals – mental illness

In RA (Sri Lanka) v SSHD [2008] EWCA Civ 1210 (paragraph 49), the Court of Appeal held that in Article 3 cases, the same principles apply to mental illness and suicide cases as they do to physical illness cases.

Neither the European Court of Human Rights in Paposhvili, nor the Supreme Court in AM (Zimbabwe) considered Article 3 mental health medical claims and so did not comment on whether RA (Sri Lanka) was still correct.

The principles in AM (Zimbabwe) therefore apply to cases of mental illness and/or suicide risk. It is necessary to consider whether appropriate treatment to reduce the risk of suicide is available and accessible in the receiving country. Treatment may not be accessible if the person is too traumatised by previous hostile actions of the receiving state to be able to access it and has no family support to help them to do so (see Y and Z v Secretary of State for the Home Department [2009] EWCA Civ 362).

Practicalities in Art 3 health appeals - suicide

- The key case on the approach to be taken in the context of suicide claims is J v SSHD [2005] EWCA Civ 629. In that case, the Court confirmed that an Article 3 claim can in principle succeed in a suicide case.
- The case also emphasised the importance of identifying the facilities that the removing and receiving states have to reduce the risk of suicide.
- 6 point test to be applied (see also Y and Z v SSHD [2009] EWCA Civ 362)

Approach to appeals

• Medical report in response to HO decision

“There is no requirement to show that the claimant will receive equivalent treatment to that which they are receiving in the UK and that which is likely to be available and accessible in their country of return. Instead the relevant consideration is whether, despite the treatment that is available and accessible in the receiving country, the claimant is likely to suffer either a serious, rapid and irreversible decline in their state of health resulting in intense suffering or a substantial reduction in their life expectancy”

Approach to appeals

- Medical report:
- Whose preparing the report – Consultant?
- Prognosis – with and without treatment
- In looking at alternative treatments – what are differences?
- Consider impact of treatment – can they travel after? Do they need to be monitored for period of time after? What support do they need?

Practicalities in Art 3 appeals

Expert report

- Accessibility of treatment in terms of costs and location (in relation to where they live) in the country of return
- Cost of treatment - from the state, from domestic and international nongovernmental organisations as well as assistance in obtaining treatment from state and private healthcare providers;
- any physical obstacles that the claimant may need to overcome to obtain treatment. (eg distance to travel)

Other things to consider...

- Can client give evidence?
- Evidence about family / friends / support
- Child?
- Refugee / Humanitarian protection grounds
 - DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 223 (IAC) (03 June 2020) (24 August 2020)
- Article 8 arguments?

Any Questions?

Thanks for watching!

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