
GARDEN COURT
CHAMBERS

Article 3 ECHR claims after AM (Zimbabwe): where are we now?

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Healthcare claims under Article 3 and Article 8 of ECHR

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Brief history of the caselaw

In *D v UK* (1997) ECHR 25 the Court noted noted the Appellant's argument at [40] that:
"The applicant maintained that his removal to St Kitts would condemn him to spend his remaining days in pain and suffering in conditions of isolation, squalor and destitution. He had no close relatives or friends in St Kitts to attend to him as he approached death. He had no accommodation, no financial resources and no access to any means of social support."

At [53] the ECtHR held:

"In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3...Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3 (art. 3), his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment."

N (HL)

N v SSHD (2005) UKHL 31 took place after the advent of anti-retroviral therapy, which N was being treated with. The House of Lords, per Lord Nicholls, distinguished N's case from that of D on the basis that D was dying [13] & [15] refer]; see also Lord Hope at [36]. Lord Nicholls found the question that it is unacceptable to expel a person whose illness is irreversible and whose death is near but acceptable to expel a person whose illness is under control but whose death will occur once treatment ceases not to be capable of satisfactory humanitarian answers [13-14 refer]. Lord Hope held at [48] that the reason the Strasbourg Court held that exceptional circumstances were required in the *D* case was because of a departure from the principle at [54] in *D*. Lord Hope went on to hold at [50] that:

"… 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 (HL) continued

Lady Hale went on to hold as follows at [68] and [70]:

“ …if it is indeed the case that this class of case is limited to those where the applicant is in the advanced stages of a life-threatening illness, it would appear inhuman to send him home to die unless the conditions there will be such that he can do so with dignity … There may of course be other exceptional cases with other extreme facts, where the humanitarian considerations are equally compelling. The law must be sufficiently flexible to accommodate them.”

Lord Brown, adopting Lord Hope’s test, held at [94]:

“It must be shown that the applicant’s medical conditions has reached such a critical state, that there are compelling humanitarian grounds for not removing him or her to a place which lacks the medical and social services which he or she would need to prevent acute suffering.”

N v UK

In *N v United Kingdom* [2008] ECHR 453, the ECtHR upheld the judgment of the HL, holding at [42]:

"Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D.* case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support…

N [UK]

43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling…"

Judges Tulkens, Bonello & Spielman issued a strong dissenting opinion, holding that the principle set out in *Pretty v UK* should "*equally apply where the harm stems from a naturally occurring illness and a lack of adequate resources to deal with it in the receiving country, if the minimum level of severity, in the given circumstances, is attained. Where a rigorous examination reveals substantial grounds for believing that expulsion will expose the person to a real risk of suffering inhuman or degrading treatment, removal would engage the removing State's responsibility under Article 3 of the Convention*."

The dissenting Judges also criticised the majority in N for taking account of impermissible considerations (the burden on States is obliged to provide free healthcare for aliens without the right to remain) as this was contrary to the absolute nature of Article 3.

Summary of the Article 3 caselaw pre Paposhvili

-Removing a non-national suffering from a serious illness to "*a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a* ***very exceptional case***"

- N's circumstances were not exceptional, as found in D v UK (D was a 'deathbed case': he was critically ill, close to death, and had no prospect of medical care and family support in his home country).

-It was acknowledged that "***there may be other very exceptional cases where the humanitarian considerations are equally compelling***" [43 of D]

The strong dissenting opinion given in N was noted in **Mwanje v Belgium** (2013) 56 EHRR 1140, and it was said that the high threshold was "*hardly consistent with the letter and spirit of article 3*" and hope was expressed that the court "*may one day review its case law in this respect*".

Article 8

In *Bensaid* (2001) 33 EHRR 10, the ECtHR held as follows:

"Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity (see *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, pp. 60-61, § 36)."

In *MM (Zimbabwe)* (2012) EWCA Civ 279, Moses LJ held as follows:

"23. The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8.

Article 8: MM (Zimbabwe) continued

That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

In ***JA (Ivory Coast) & ES (Tanzania) v Secretary of State for the Home Department*** **[2009] EWCA Civ 1353** the CA emphasized that in contrasting claims made in health cases under article 3 and article 8 it is not simply a matter of the threshold of engagement being lower in bringing an article 8 claim, because the outcome is subject to a test of proportionality unlike the absolute and unqualified nature of article 3 in the protection it provides for, in respect of that which it excludes as a permissible consequence. Sedley LJ held at [16]:

"Here the prescribed purposes are, or include, the economic wellbeing of the country, which cannot afford to be the world's hospital, and the prior right of a settled population to the benefit of its inevitably finite health resources. Against these may legitimately be weighed both the moral duty to help others in need and the fact that the United Kingdom has until recently found it both morally compelling and economically possible to extend such help to the appellants and others like them, alongside and not evidently to the detriment of the settled population."

JA continued

On the facts, that JA had been in the UK as **"a continuously lawful entrant places her in a different legal class from N, so that she is not called upon to demonstrate exceptional circumstances as compelling as those in D v United Kingdom. There is no finding by the AIT that she has much if any hope of securing treatment if returned to Ivory Coast, or therefore as to the severity and consequences of removal (see Razgar [2004] UKHL 27). Depending on these, the potential discontinuance of years of life-saving NHS treatment, albeit made available out of compassion and not out of obligation, is in our judgment capable of tipping the balance of proportionality in her favour.**" [25]

ES's case was distinguished at [24] on the basis that:

"Once it was shown to the immigration judge's satisfaction that the appellant had the skills and experience to obtain work which could pay, or help to pay, for treatment in Tanzania, and familial support to turn to as well, the history of lawful entry and compassionate grants of leave to remain could not have staved off removal. ES's case is thus on a par with DM (Zambia) *[2009] EWCA Civ 474*."

Kidney failure cases

Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC)

This was an appeal by the SSHD against a decision by a FtTJ to allow the Claimant's appeal on Article 8 grounds. The C suffered from kidney failure and had had a transplant. It was accepted that she would be unable to afford the treatment she required in Nigeria and would die. Of note is the fact that "*the appellant has been considered to be someone in respect of whom the United Kingdom should be providing heath care without charge, even after her period of leave to remain had expired: see Regulations 4(1)(iii) and (3) of the National Health Service (Charges to Overseas Visitors) Regulations 1989 (SI 1989/306) as amended.*"

The UT held:

47. Returning to the circumstances of this claimant we accept that it was open to the judge to find that this was one falling within what he had correctly recognised to be a very small number of cases that could succeed. In doing so he was not limiting his assessment to a comparison of medical treatment available here as compared with in Nigeria. On the evidence before the judge, these were the factors that spoke in favour of the claimant's case:

Akhalu principles

a. this was a claimant who had been lawfully present when she fell ill;
b. she had been provided with medical treatment which she was recognised to be entitled to receive, without charge, from the NHS;
c. it had been decided to treat her condition by providing a transplanted kidney which would require forever thereafter continued access to treatment of a different kind than she had needed before that, and that she live in a manner that could not be achieved should she be returned to Nigeria;
d. that despite her illness and the demands of her treatment she had played an active part in community life and had thus established a level of private life that she could never hope to replicate in Nigeria;
e. that the concession made before the judge meant that a major aspect of the reasoning leading to refusal of further leave had fallen away;
f. that there was nothing in any way hypothetical or speculative about the inevitable difficult, early and unpleasant death that would follow return to Nigeria;
g. contrary to the position as the respondent thought it was, the evidence established clearly that the claimant would meet that early death alone, and not with the support of her family."

GS India (2015) EWCA Civ 40

The Applicants in these linked cases were from India, Ghana and Jamaica and all were suffering from kidney disease (ESKD). The CA held that the scope of Article 3 as set out by the House of Lords in *D* and *N* should not be extended as a consequence of the certainty and imminence of death on return to the country of origin. Laws LJ held at [62]:

"62. **The circumstances in which a departure from the Article 3 paradigm is justified are variable; the common factor is that there exist very pressing reasons to hold the impugned State responsible for the claimant's plight. But the fact that there are other exceptions unlike *D* or *N* does not touch cases – such as these – where the claimant's appeal is to the very considerations which D and N address…**

66. … in the view of the House of Lords the *D* exception is confined to deathbed cases.'

Paposhvili v Belgium [2017] Imm AR 867, App. No 41738/10, 13.12.16

The Grand Chamber held at [181]-[183]:

"181. The Court concludes from this recapitulation of the case-law that the application of Article 3 of the Convention only in cases where the person facing expulsion is close to death, which has been its practice since the judgment in *N. v. the United Kingdom*, has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of that provision. As a corollary to this, the case-law subsequent to *N. v. the United Kingdom* has not provided more detailed guidance regarding the "very exceptional cases" referred to in *N. v. the United Kingdom*, other than the case contemplated in *D. v. the United Kingdom*.

182. In the light of the foregoing, and reiterating 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 (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I; and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 175, ECHR 2012), the Court is of the view that the approach adopted hitherto should be clarified.

Paposhvili v Belgium [2017] Imm AR 867, App. No 41738/10, 13.12.16 Cont.

183. The Court considers that the "other very exceptional cases" within the meaning of the judgment in *N. v. the United Kingdom* (§ 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…

186. …it is for the Applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3. In this connection, it should be observed that a certain degree of speculation is inherent in the preventative purpose of Article 3 and that it is not a matter of requiring persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment.

187. Where such evidence is adduced, it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it (see Saadi, cited above, § 129, and F.G. v. Sweden, cited above, § 120)."

AM (Zimbabwe) [2020] UKHL 17

In their judgment of 29.4.20, the Supreme Court held that the proper approach to article 3 ECHR was modified by the European Court of Human Rights in Paposhvili v Belgium [2017] Imm AR 867. The relevant test now is whether removal would give rise to a real risk of a serious, rapid and irreversible decline in the person's state of health resulting in intense suffering, or to a substantial reduction in life expectancy. There is no longer a requirement that death be imminent in the event of removal. The Court held that:

323. … the threshold …is for the applicant to adduce evidence "capable of demonstrating that there are substantial grounds for believing" that article 3 would be violated…

33. In the event that the applicant presents evidence to the standard addressed above, the returning state can seek to challenge or counter it in the manner helpfully outlined in the *Paposhvili* case at paras 187-191."

AM Zimbabwe principles

The applicant must first adduce evidence 'capable of demonstrating that there are substantial grounds for believing' that removal would give rise to a real risk of a breach of article 3, i.e. raise a *prima facie* case.

If such evidence is provided, the Home Office must '*dispel any serious doubts raised by it' ie*. the State is not required to dispel a *prima facie* case beyond all doubt as this is a concept unknown to the Convention [*AM (Zimbabwe)*, at [33]. This requires the Home Office to scrutinise the alleged risk and provide evidence relevant to the particular facts as to whether the care available in the country of origin is sufficient to prevent exposure to inhuman or degrading treatment. Importantly, this requires a consideration as to the accessibility of the treatment for the applicant, including reference to cost, the existence of a family network and to its geographical location.

If serious doubts remain, the Home Office then has a further opportunity to address the applicant's case by obtaining individual assurances from the country of origin that appropriate treatment would be (a) available and (b) accessible to the applicant.

Savran v Denmark App. No. 57467/15

This application was heard by the Grand Chamber remotely on 24 June 2020 and judgment is awaited. It is expected to address the scope of *Paposhvili* as to the return of the mentally ill to their country of origin. The A, a Turkish national, has resided lawfully in Denmark since the age of 6 and following a conviction for aggravated assault, which led to the victim's death, he was in 2008 placed in the secure unit of a residential institution for the severely mentally impaired for an indefinite period and ordered to be expelled. In a judgment dated 1 October 2019, the Fourth Section of the Strasbourg Court held (4:3) that there would be a violation of article 3 if the A was removed to Turkey and in so doing applied the *Paposhvili* test. Reliance was placed upon psychiatric reports recommending that the A receive close monitoring and follow-up in order to make his treatment effective and allow for his reintegration into society after committing a serious offence. The majority of the Court had doubts about the A receiving such care in Turkey, where he had no family network and would need a regular and personal contact person to help him. Given such doubts, the Danish authorities needed to obtain sufficient and individual assurances on his care, otherwise removing him would violate article 3.

See also *AXB (Art 3 health: obligations: suicide) Jamaica* [2019] UKUT 397

Healthcare claims toolkit

-Identify if A has an arguable case: has the A raised a prima facie case that there are substantial grounds for believing that removal would give rise to an article 3 breach – is s/he seriously physically or mentally unwell and is there 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**”

-Gather evidence, including expert evidence relating to the A’s medical condition and the treatment available in the proposed country of return, bearing in mind the standard of proof

-Prepare article 8 arguments in the alternative – *Akhalu* criteria and see *JA* and sections 117A-D of the NIAA 2002

-Check Home Office guidance [currently not updated since 20.5.14]

- Insist on strict deadlines for the Home Office to obtain assurances from the receiving State (if necessary) in the form of directions during case management hearings

Article 3 ECHR
Claims based on suicide

Miranda Butler, Garden Court Chambers

4 August 2020

Before *AM*: *J* (i)

- *J v SSHD* [2005] EWCA Civ 629

1) How **severe** would the claimant's **treatment** be if removed?

   i. "*Minimum level of severity*" –a high threshold: "*an affront to fundamental humanitarian principles*": *Ullah* at [38-39]

2) **Causal link** between removal and inhuman treatment: *Soering* at [91]

   i. Focus on the *"foreseeable consequences of the removal"*

3) Threshold is ***"particularly high simply because it is a foreign case"***

Before *AM*: *J* (ii)

4) An Article 3 claim can **in principle** succeed in a suicide case: *Bensaid*

5) Whether the claimant has a **well-founded fear of ill-treatment with an objective foundation** in the receiving state is *"a question of importance"*. If there is no well-founded fear, that will tend to weigh against a risk that removal will breach Article 3 ECHR.

6) A further relevant question is whether the removing and / or receiving states have **effective mechanisms to reduce the risk of suicide**.

Before *AM*: *Y and Z*

- *Y and Z v SSHD* [2009] EWCA Civ 362
  1) There may be *"some independent basis"* for the claimant's fear on return, notwithstanding the lack of an objective risk
     i. Any genuine fear, even without an objective basis, may fall within the fifth principle in *J*.
     ii. Anticipated self-harm as a result of domestic authorities' acts requires a lower threshold than *'naturally occurring illness'* cases: *AXB (Article 3 health: obligations; suicide) Jamaica* [2019] UKUT 397 (IAC)

  2) The local health service would not be able to materially attenuate the risk of suicide which was *"subjective, immediate, and acute"*.

AM (Zimbabwe) v SSHD

- *AM (Zimbabwe)* [2020] UKSC 17

1) No discussion of suicide claims but approved *AXB*, which applied the *N* threshold in the Article 3 context, albeit on different grounds
2) SSHD's position?
   i. *"The decision of the Supreme Court makes no difference [...] Paposhvili v Belgium did not require any departure from the guidance given by the Court of Appeal in J and X and Y"*
3) The Tribunal's position?
   i. Recent FTTJ: *"I thought it wasn't in dispute that AM applied to suicide claims under Article 3 ECHR"*

AM (Zimbabwe) v SSHD

- Is the threshold for a breach is now lower in suicide cases?

  - **No principled distinction** between healthcare and suicide risk
    - *J* at [42]: health and suicide cases *'not precisely analogous'*
    - *Tozlukaya v SSHD* [2006] EWCA Civ 629: *"the similarities are […] more important than the differences"* [5]
    - *RA (Sri Lanka) v SSHD* [2008] EWCA Civ 1210: *"the same principles are to be applied"* in physical and mental health cases [49]

AM (Zimbabwe) v SSHD

- Language of *"serious, rapid and irreversible decline"* may be relevant
  - **Substantial decrease in life expectancy** is equivalent to a **substantial increase in the risk of suicide?**
    - Rejected in *J*: time to revisit?

  - *AM* also treats deterioration leading to *"intense suffering"* as capable of breaching the Article 3 ECHR threshold; no proper basis to differentiate intense physical and psychological suffering in this context.

AM (Zimbabwe) v SSHD: a way forward?

Focus on **risk mitigation** creating **new procedural obligations** for the SSHD (*AM* at [23])

1) Applicant must adduce *'evidence capable of demonstrating substantial grounds for believing'* there will be a breach of Article 3;
2) Raising an obligation for the SSHD to *"dispel any doubts raised"*, applying anxious scrutiny; and
3) SSHD must ensure that the care available in the receiving state would be sufficient to prevent an Article 3 breach *for this particular applicant*.

Practical tips for suicide claims

1) Evidence of **suicidal ideation** alone will be **insufficient**
    1) How **severe** is the risk? Genuine subjective fear? **What causes it**?
    2) How will it be affected before, during and after removal?

2) Country evidence will be essential
    1) Barriers to / shortcomings of local health service

3) Likewise, evidence about the applicant's individual circumstances during and after return is crucial
    1) Personal ability to access support

Article 3 ECHR & Fitness to Fly JRs

Mark Symes, Garden Court Chambers

4 August 2020

Fitness to Fly JRs

- What is the relevance of *AM (Zimbabwe)* [2020] UKSC 17 to these cases?

We know

- Detainees facing removal often have significant health problems
- There is a public law duty to conduct appropriate enquiries into a person's health condition
- There are doctors in immigration removal centres who are often called upon to assess fitness to fly

Policy and Guidelines

1) **Returns Preparation** Guidance states SSHD should assume fitness to fly unless advised otherwise: if there is significant doubt confirmation should be sought from the relevant healthcare provider
2) **Enforcement Instructions and Guidance** state that if a person's medical condition is advanced as a reason for delaying or discontinuing removal, full medical details must be sought, and treatment options investigated via the “relevant country officer in COIS”
3) **Civil Aviation Guidelines:** The main areas for concern are people whose behaviour may be unpredictable, aggressive, dis-organised or disruptive. In these circumstances, air travel would be contra-indicated. Patients with well-managed psychotic conditions may require an escort to ensure regular medication and to assist in case of problems.

The Issue: non-disclosure

- Query: can it lawful to be subject to an ongoing procedure whereby SSHD assesses a person's fitness to fly based on undisclosed medical opinion evidence?

- Particularly if that opinion risks contradicting historic or present evidence from qualified doctors with experience in assessing vulnerable victims of torture and detained adults

- *ASK* [2019] EWCA Civ 1239 §220 holds that SSHD is entitled to make a conscientious choice between competing pieces of medical opinion evidence. Should the conclusion be challengeable on public law principles? Which demands that any opinion evidence contrary to the Claimant's be disclosed and SSHD's reasoning be revealed

Inspiration: Article 8 and EU Charter

- **ECHR Art 8:** As stated in *Ciubotaru v Moldova* (27138/04; 27 April 2010), in order "*to afford due respect to the interests safeguarded*" by Article 8 ECHR the investigative "*process may require the existence of an effective procedural framework whereby an applicant can assert his or her rights under Article 8 under conditions of fairness including as regards matters of proof and evidence.*"

- ***EU law Charter of Fundamental Rights:*** *CK and Others* [2017] EUECJ C-578/16 holds it is "*for the authorities of the Member State having to carry out the transfer and,* ***if necessary, its courts*** *to eliminate any serious doubts concerning the impact of the transfer on the state of health of the person concerned [and] to ensure that his transfer does not result in a real risk of a significant and permanent worsening of his state of health*" (note *Paposhvili* has always been the controlling authority in EU law: for EU law takes ECHR and thus ECtHR rulings as its starting point Art 52(3) CFR

The latest step: AM (Zimbabwe)

- *AM (Zimbabwe)* refers to the "*obligation on an applicant to raise a "prima facie case" of potential infringement of article 3. This means a case which, if not challenged or countered, would establish the infringement*" – in which case the burden of proof switches to the SSHD to explain by evidence how it is that Article 3 ECHR would not be infringed by the proposed expulsion

- In short, the developing line of authority from national, international and EU courts combines to demonstrate that an important point of principle arises here.

Getting the case off the ground

- **Challenges are often rendered academic**: Removals are either deferred or proceed: either way it is hard to maintain the argument as a live one as the SSHD asserts the matter is now academic (or applicant no longer pursuing the claim) – but cf *Omar* [2012] EWHC 3448 (Admin): "Is it right that issues raising important points of principle which are in dispute between the defendant and those whose position in this country is regulated by the defendant … should not be resolved because they are continuously kicked into touch by individual decisions made after proceedings are instituted."

- **Important to obtain (& provide to SSHD) client's consent** to approach medical community for access to their medical records (which may go beyond the general consent for legal representation)

- **Is this simply a "fitness to fly" challenge (ie don't remove us until we are recovered) or is there an inchoate human rights application afoot?** Given that only a prima facie Article 3 violation can enliven the *AM Zimbabwe* duty, presumably most of these cases will in fact involve the latter

Article 3 ECHR claims relying on destitution / humanitarian conditions

David Sellwood, Garden Court Chambers

4 August 2020

Context

- Art 3 ECHR brief but clear, ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment”
- Inevitably requires interpretation over time
- Consider
  - Express and implied terms
  - ECHR is a constitutional ‘living instrument’; and
  - Based on humanitarian principles

The paradigm case

- ***GS (India) v SSHD*** at [§39]: *"..an international act which constitutes torture or inhuman or degrading treatment or punishment"*
- Ill treatment must reach minimum level of severity, the assessment being relative and depending on all the circumstances (***Hilal v UK***)
- Assessment rigorous with focus on foreseeable consequences in light of general situation and individual circumstances (***Vilvarajah & Ors v UK***)

Non-paradigm cases (1)

- Art 3 ECHR sufficiently flexible to address other contexts that might arise…
- ***D v UK***, [§49], [§51]-[§54].
  - Advanced stages of terminal and incurable illness
  - Further reduction of already limited life expectancy with acute mental and physical suffering
  - 'Exceptional circumstances'

Non-paradigm cases (2)

- ***N v UK*** [§42]-[§45]
  - Reduction in life expectancy and inferior treatment in country of removal
  - May be other *very exceptional circumstances* where *humanitarian considerations are equally compelling*
  - BUT high threshold set in D remains where harm does not arise from intentional acts / omissions of State or non-State actors

Non paradigm cases? (1)

- ***MSS v Belgium & Greece*** [§249]-[§254], [§253]
  - Extreme material poverty can raise an issue under Art 3
  - State under legal obligation to provide accommodation and decent material conditions to asylum seekers
  - Particularly vulnerable group, in need of 'special protection'

Non paradigm cases ? (2)

- ***Sufi & Elmi v UK*** [§279]-[§283]
  - Dire humanitarian conditions in refugee camps predominantly due to direct & indirect actions of the parties to the conflict.
  - MSS not N applied *"..which requires it [the Court] to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill treatment and the prospect of his situation improving within a reasonable timeframe."*

Destitution / adverse humanitarian conditions before *AM (Zimbabwe)*

- ***SHH v UK*** [§88]-[§95]
  - Future harm emanating from lack of sufficient resources to provide medical treatment / welfare provision
  - Alleged future harm did not arise from international acts / omission of public authorities on non-State actors.
  - N principles therefore applied.
  - Unsuccessful on the facts

Destitution / adverse humanitarian conditions before *AM (Zimbabwe)*

- ***SSHD v Said*** [§12]-[§18],
  - ***D*** and ***N*** approach required to show poverty or deprivation on return breaches Art 3 where it does not arise through responsibility of State / non-State actors.
  - Failure to apply ***D*** and ***N*** in Somali country guidance case of ***MOJ***
  - IDP camps not per se violation of Art 3: "*…such a stark proposition of cause and effect would be inconsistent with the article 3 jurisprudence of the Strasbourg Court and binding authority of the domestic courts*" [§31]
  - Need to look at individual circumstances (see [§32]).

Destitution / adverse humanitarian conditions before *AM (Zimbabwe)*

- ***Sufi & Elmi v UK*** [§259]
  - *"Insofar as the applicants were relying on the "dire" humanitarian conditions in Somalia as creating the risk of ill-treatment contrary to Article 3 of the Convention, the Government submitted that the principles established in N. v. the United Kingdom [GC], no. 26565/05, §§ 42 – 45, 27 May 2008 were applicable. Therefore, humanitarian conditions would only reach the threshold of Article 3 if the circumstances obtaining in the receiving State were "very exceptional", it was "highly probable" that the applicant would not have access to the basic necessities of life, and that these deficiencies would result in an immediate threat to life or the impossibility of maintaining human dignity."*

AM (Zimbabwe) substantive principles

- Other 'very exceptional circumstances' clarified in ***Paposhvili*** (at [§182]-[§183]) cited at [§22]

    - *"..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 of life expectancy"*

AM (Zimbabwe) procedural principles

- Procedural obligations [§23], [§32], [§33]:
  - For the returning state to 'dispel any doubts' raised by applicant's evidence capable of demonstrating substantial grounds showing real risk
  - Returning state to verify on a case by case basis whether care generally available in the receiving state
  - Returning state to consider accessibility of treatment to the particular applicant, including cost, existence of family network and geographical location; and
  - Obtain assurances if serious doubts continue to surround the impact of removal.

What next?

- Compare ***Sufi & Elmi*** with ***AM (Zimbabwe)***
- Principled basis to exclude destitution / humanitarian conditions from ***AM (Zimbabwe)?***
- What will it mean in practice?
- Evidence?
- Developments?
  - ***ASN v Netherlands*** (App No 68377/17 & 530/18) (25 February 2020), at [§126]

Thank you

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