Upper Tribunal
(Immigration and Asylum Chamber)

GS and EO (Article 3 – health cases) India [2012] UKUT 00397(IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 18 July 2012

Determination Promulgated

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Before

MR JUSTICE BLAKE, PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB
UPPER TRIBUNAL JUDGE KEBEDE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GS

Respondent

And Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EO

Respondent

Representation:

For the Appellant:	Mr C Bourne instructed by the Treasury Solicitor
For GS:	Ms N Lieven QC, Mr D O'Callaghan and Ms J Lean instructed by Jasvir Jutla & Co Solicitors
For EO:	Miss N Benitez instructed by Irving & Co Solicitors

(i) The fact that life expectancy is dramatically shortened by withdrawal of medical treatment in the host state is in itself incapable of amounting to the highly exceptional case that engages the Article 3 duty.

(ii) There are recognised departures from the high threshold approach in cases concerning children, discriminatory denial of treatment, absence of resources through civil war or similar human agency.

(iii) Article 8 cases may also require a different approach and will do so where health questions arise in the context of obstacles to relocation.

(iv) Any extension of the principles set out in N v SSHD [2005] UKHL 31 and N v United Kingdom (2008) 47 EHRR 39 will be for the higher courts.

DETERMINATION AND REASONS

1. This judgment is one to which all members of the panel have contributed. These appeals raise the common question of whether and if so, in what circumstances, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome 1950) ("ECHR") is infringed by the removal of an individual from the UK to a country where he or she will be unable to receive life-sustaining medical treatment which is being provided in the UK and which, in its absence, will lead to the death of the individual in a short time. Both appeals are subject to anonymity orders.

2. Both GS and EO (whom we shall refer to as the "claimants") suffer from chronic advanced kidney disease which is irreversible and requires dialysis three times a week. Without dialysis, the medical evidence is that GS would die within one to two weeks and EO would die within two to three weeks. Although kidney dialysis is available in their respective countries, namely India and Ghana, that treatment would not be available to them because of the cost and practical difficulty of accessing it.

3. Central to both appeals is the scope of Art 3 of the ECHR as interpreted in the leading cases of D v United Kingdom (1997) 24 EHRR 423 (ECtHR); N v SSHD [2005] UKHL 31 (HL) and N v United Kingdom (2008) 47 EHRR 39 (ECtHR).

The Appeals

4. The facts in relation to both appeals are not now in dispute.

GS

5. GS was born on 1 March 1981. He is a citizen of India. He entered the United Kingdom on 1 November 2004 with entry clearance as a working-holidaymaker. His leave was valid until 29 October 2006 but thereafter he overstayed.

6. On 5 January 2009, medical tests confirmed that he had problems with his kidneys. He has been diagnosed with advance chronic kidney disease which is an irreversible

condition. He requires dialysis three times per week, each session lasting for four hours. He only has one kidney probably due to a genetic absence of his right kidney. He requires the dialysis in order to remain alive. The medical evidence is that he would die within one to two weeks if the treatment was discontinued.

7. On 5 February 2009, GS applied for leave to remain in the United Kingdom on compassionate grounds relying on Arts 3 and 8 of the ECHR. On 12 March 2010, the Secretary of State refused his application and made a decision to remove him by way of directions to India under s.10 of the Immigration and Asylum Act 1999.

8. GS appealed to the First-tier Tribunal ("F-tT"). In a determination sent on 14 June 2010, Judge Ian Dove QC allowed GS's appeal.

9. The Judge accepted that the appellant had close contact with uncles, aunts and cousins in the UK. He accepted that he had a mother and two brothers in India but that his mother was in poor health. He accepted that his family were not in a position to provide him with financial support and that, while kidney dialysis was available in India, due to GS's circumstances that would not be available to him and that he would die within one to two weeks of returning to India.

10. Having referred to the decision of the Strasbourg Court in D v UK and of the House of Lords in N v SSHD, Judge Dove QC concluded that a breach of Art 3 had been established. He held that GS's circumstances fell within the "category of exceptionality" recognised in the case law because of the "immediacy of his death" upon the withdrawal of treatment on his return to India.

11. The Secretary of State appealed to the Upper Tribunal ("UT") and, following the grant of permission (SIJ Freeman), the UT allowed the Secretary of State's appeal and dismissed GS's appeal on the basis that no breach of Art 3 (or indeed Art 8) of the ECHR had been established (see GS (Article 3 – Health – Exceptionality) India [2011] UKUT 35 (IAC) (Lord Bannatyne and SIJ Allen). The UT concluded that the F-tT had erred in law in finding that GS's circumstances fell within the "exceptional" category recognised in N v SSHD and D v UK. The UT went on to remake the decision and dismissed the appeal.

12. GS then appealed to the Court of Appeal and, following the grant of permission to appeal by Toulson LJ, the appeal was remitted by consent to the UT in order to determine whether "the consequences of lack of funds are capable of making a case exceptional in terms of N". In fact, this ground was not specifically relied upon before us by the Secretary of State. Rather, the appeal was argued both by Mr Bourne (on behalf of the Secretary of State) and Ms Lieven QC (on behalf of GS) more generally on the basis of whether GS's circumstances fell within the exceptional category in D v UK on the premise that dialysis treatment was not, for whatever reason, available to him in India.

EO

13. EO was born on 24 January 1970 and is a citizen of Ghana. He has a wife and son, now aged 7 in Ghana. On 26 March 2005, he arrived in the United Kingdom on a

short term work permit valid until 1 April 2005 in order to work as a musician. EO overstayed.

14. In 2006 he became ill and was diagnosed with end-stage renal failure. He requires dialysis three times a week and the prognosis is that without dialysis he will probably die within two to three weeks. He also suffers from hyper-tension.

15. On 1 March 2010, EO was arrested. He claimed asylum. Following an interview, on 5 May 2010, the Secretary of State refused his application for asylum under para 336 of HC 395 (as amended) and refused to grant him leave to remain under Arts 3 and 8 on the basis of his medical condition. EO appealed to the F-tT. In a determination dated 14 July 2010, Judge Hedworth allowed the appellant's appeal under Art 3 of the ECHR. The Judge accepted that dialysis was available in Ghana but the cost was such that EO and his family would not be able to afford the treatment which would cost around £3,000 every three months. The Judge accepted that without dialysis treatment EO would die within two to three weeks on return to Ghana. Having referred to the case law, Judge Hedworth concluded that EO's case was "an exceptional one" because the high cost of the treatment (which was available) meant that it was a "certainty" that EO could not afford it.

16. The Secretary of State appealed with permission (granted by SIJ Freeman) to the UT. The Upper Tribunal (SIJ McGeachy) concluded that the F-tT had erred in law in finding that EO's case was an "exceptional" one and remade the decision dismissing his appeal under Art 3 (and Art 8) of the ECHR.

17. EO appealed to the Court of Appeal and, following the grant of permission by Hooper LJ, the appeal was allowed by consent and remitted to the UT. Following remittal, the UT (Coulson J and UTJ Latter) again found that the F-tT had erred in law in allowing the appeal and adjourned the hearing in order for the decision to be remade. The re-making of the decision fell to us at the adjourned hearing.

The Issues

18. In relation to GS we must decide whether Judge Dove QC erred in law in allowing the appellant's appeal and, if he did, we must remake the decision. In relation to EO, the error of law in Judge Hedworth's decision has already been identified by the UT and it falls to us to remake the decision.

19. In both appeals, the appellants rely exclusively upon Art 3 of the ECHR. No reliance is placed upon Art 8. Although we invited them to do so, neither Counsel for the Secretary of State nor for the appellants sought to address us on Art 8 and, indeed, Mr Bourne invited us not to deal with Art 8 as we had not heard submissions in relation to it.

20. We are grateful for the assistance given by Counsel in their helpful written submissions and also in their oral submissions before us. Subsequent to the hearing, at our request, by letter dated 31 July 2012 the Secretary of State provided us with information (including the relevant Enforcement Instructions and Guidance (ch 53))

dealing with the practicalities of removing a person with a medical problem from the UK. The essence of the parties' submissions may be encapsulated as follows.

21. Miss Lieven QC, on behalf of GS submitted that Judge Dove QC had not erred in law in allowing GS's appeal under Art 3. She submitted that the Judge was entitled to take the view that GS's case was "exceptional" as recognised by the Strasbourg Court in D v UK and N v UK. The category of "exceptional" case was not limited to the factual situation in D v UK where the individual was dying and would die in the UK from his underlying condition in any event. The fact that an individual's continued presence in the UK would impose an obligation (indefinite or otherwise) on the UK to provide treatment was not the crucial issue and N v UK was not to be understood to the contrary. The proper focus was on the individual's circumstances in his own country on return. Treatment would not be available to GS on return because he could not afford it and it was not practically available to him. It did not matter that the unavailability of the treatment was only because GS could not afford it or because it could not be accessed in practice. Judge Dove QC had taken into account all the circumstances of GS. Although Art 3 imposed a "high threshold" in cases where the individual's claim was that necessary life-sustaining medical treatment would not be available in their own country, Judge Dove QC was entitled to take the view that the certainty of GS's death on return in a very short period of time, namely one to two weeks made his circumstances "exceptional". The contrary view of Toulson LJ expressed when refusing permission in BC (India) [2007] EWCA Civ 1438 should not be followed. N v UK was distinguishable because N could survive in her own country for a number of years without treatment.

22. Miss Benitez invited us to allow EO's appeal on the same basis. She adopted Ms Lieven QC's submissions on the law. Treatment would not be available to EO in Ghana because he could not afford that treatment. Given the circumstances that he would face in Ghana, namely an unpleasant and imminent death within two to three weeks, EO's case also fell within the "exceptional category" recognised by the Strasbourg Court.

23. Mr Bourne on behalf of the Secretary of State submitted that neither appellant's circumstances were "exceptional". Mr Bourne submitted that it was not sufficient for an individual to establish that treatment will not be available in their own country and that without it the individual would die. Mr Bourne did not seek to draw any distinction between the situations where treatment was simply not available and where it was available but could not be afforded or access was impracticable for the particular individual.

24. Mr Bourne submitted that on the basis of D v UK and N v UK the correct approach was to look at the individual's circumstances in their own country and to determine whether (1) the individual's illness had reached a critical stage (i.e. he or she was dying) and (2) on return the individual would encounter a lack of medical and social services (including family and other support) which would prevent acute suffering such that they could not die with dignity. Mr Bourne submitted that the fact that an individual would die within a short period of time was not sufficient to make a case "exceptional". He placed reliance upon the decision of Toulson LJ refusing permission to appeal to the Court of Appeal in BC (India).

25. On this basis, Mr Bourne submitted that Judge Dove QC had erred in law by focussing on the immediacy of GS's death on return to conclude the case was "exceptional". In relation to both GS and EO, neither appellant would face a situation where, given the support available to them, they would die without dignity and so both their appeals should be dismissed.

The Cases

26. We begin with the decision of the Strasbourg Court in D v UK (Application 30240/96) (1997) 24 EHRR 423

D v UK

27. D was a national of St Kitts. He was convicted in the UK of possession of prohibited drugs and imprisoned. Whilst in prison, he was diagnosed as suffering from AIDS. Shortly before his release on licence, the Secretary of State issued directions for his removal to St Kitts. D applied for leave to remain in the UK on the basis that his removal would entail the loss of vital medical treatment he was receiving for his condition and that his life expectancy would be shortened. It was accepted that D was in the advanced stages of a terminal and incurable illness. It was accepted that the limited quality of life that he enjoyed was due to the treatment and medication he received in the UK and the support he received from his carers. By contrast, the evidence was that D had no family in St Kitts to provide him support and he had no prospect of medical care in St Kitts of the sort that he benefited from in the UK. It was accepted that D's prognosis was very poor and, even with the treatment in the UK, his life expectancy was limited to eight to twelve months. The circumstances on his return to St Kitts were such that his life expectancy would be shortened. The European Court of Human Rights concluded (at [54]) that in the "very exceptional circumstances" of D's case and "given the compelling humanitarian considerations" his removal would amount to inhuman treatment falling within Art 3 of the ECHR.

28. The Court began by recognising the well-established principle of international law that States, subject to their international obligations including under the European Convention, had a right to control the entry and residence and expulsion of aliens, particularly in the context of criminal offenders involved in drug trafficking or who were drug couriers such as D (see [46]). At [47], the Court recognised that a state's right to expel aliens was subject to, *inter alia*, the obligation under Art 3 of the Convention which prohibited in absolute terms "torture or inhuman or degrading treatment or punishment".

29. The Court noted, however, that the situation in D's case was somewhat different from the usual. The court recognised that usually the prohibited form of treatment under Art 3 to which an individual would be exposed on return emanated from the state itself or non-state bodies against which the state was unable to afford appropriate protection. Here, however, D was not claiming that the source of any risk to him arose directly or indirectly as a result of the responsibility of the receiving state. Nevertheless, at [49] the Court recognised that in principle Art 3 could be engaged in such a situation. The Court said this.

> "49. .... Aside from these situations and given the fundamental importance of Article 3 in the convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State."

30. The Court, having recognised what was undoubtedly an extension of the existing case law, then went on to assess D's "personal situation" in St Kitts. At [50]-[52] the Court set out its assessment of D's circumstances as follows:

> "50. Against this background the Court will determine whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3 (art. 3) in view of his present medical condition. In so doing the Court will assess the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on his state of health (see the Ahmed judgment, loc. cit., p. 2207, para. 43).
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> 51. The Court notes that the applicant is in the advanced stages of a terminal and incurable illness. At the date of the hearing, it was observed that there had been a marked decline in his condition and he had to be transferred to a hospital. His condition was giving rise to concern (see paragraph 21 above). The limited quality of life he now enjoys results from the availability of sophisticated treatment and medication in the United Kingdom and the care and kindness administered by a charitable organisation. He has been counselled on how to approach death and has formed bonds with his carers (see paragraph 19 above).
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> 52. The abrupt withdrawal of these facilities will entail the most dramatic consequences for him. It is not disputed that his removal will hasten his death. There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering. Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts (see paragraph 32 above). While he may have a cousin in St Kitts (see paragraph 18 above), no evidence has been adduced to show whether this person would be willing or in a position to attend to the needs of a terminally ill man. There is no evidence of any other form of moral or social support. Nor has it been shown whether the applicant would be guaranteed a bed in either of the hospitals on the island which, according to the Government, care for AIDS patients."

31. The Court assessed the situation in St Kitts and, describing them as being "exceptional circumstances" ([53]) and "very exceptional circumstances" ([54]), found that D's removal would be a violation of Art 3:

> "53. 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.
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> The Court also notes in this respect that the respondent State has assumed responsibility for treating the applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. 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.
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> Without calling into question the good faith of the undertaking given to the Court by the Government (see paragraph 44 above), it is to be noted that the above considerations must be seen as wider in scope than the question whether or not the applicant is fit to travel back to St Kitts.
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> 54. Against this background the Court emphasises that aliens who have served their prison sentences and 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 provided by the expelling State during their stay in prison.
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> However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3."

32. Clearly, the facts of D v UK were, on any view, stark. D was terminally ill, being in the advanced stages of AIDS, and it was assessed that he would die in the UK even with treatment and support in less than twelve months. His circumstances on return to St Kitts were bleak. There was an absence of medical facilities and support from family or others such that he would inevitably die (with an even shorter life expectancy than in the UK) in circumstances of extreme hardship. By that, of course, the Court did not mean numerically exceptional – there may be a significant number of such cases. Rather, it was the extreme nature of those circumstances which led the Court to conclude that there were "compelling humanitarian considerations" and which made D's case an "exceptional" one.

33. By way of post-script to this case, we are aware that the applicant D in fact survived for considerably longer than medical science had assessed at the time of the court hearing. It is likely that the prolongation of his life was due to the appropriate palliative and social care he continued to receive following the judgment of the Court combined with the developments in anti retro viral medical treatment that enabled his immune system to resist fatal opportunistic disease for longer than had previously been the case.

34. The Court's characterisation flowed from its recognition that cases such as D v UK had two distinct features differing from the original sequence of cases where the host state is responsible for the foreseeable consequences of the expulsion decision in the state of origin. First, the individual is not alleging that the risk to him or her flows from the actions of the receiving state or any non-state actors against which that state

is unable to provide protection. Secondly, the Court recognises that the lack of medical or social resources in the receiving state, in itself, does not breach the standards of Art 3 or any equivalent Convention to which the state may be party.

35. Cases such as D v UK (and other cases concerned with the consequences to a claimant in a host state of the absence of medical treatment being available in a receiving state) have therefore been described by Laws LJ referred to in N v SSHD [2003] EWCA Civ 1369 at [37] as an "extension of an extension" to the Art 3 obligation, namely imposing a liability upon the sending state (here the UK) for a risk arising in the receiving country which, itself, could not breach Art 3. This may be the reason why a very cautious approach to the scope of Art 3 is demonstrated in the case law, in particular in N, both in the House of Lords and the Strasbourg Court itself.

36. One matter not directly addressed in the Court's decision in D v UK is the extent to which the Convention can be invoked when the essence of an individual's claim is the inequality of medical treatment provided in the sending state and the receiving state. On one view, D could be seen as a case where there was no question of imposing upon the UK any obligation to provide treatment (not available in St Kitts) to D. It might be said as he was beyond the reach of treatment even in the UK, the issue was simply the circumstances in which he would die. However, that does not sit easily with the factual situation that D was in fact receiving medical treatment in the UK both whilst he was serving his sentence in prison when there was an obligation to provide it, and while his case was considered by the court. The obligation would continue for a short period of time as D's life expectancy at the time of the hearing was less than twelve months. However, as D could not be removed, the UK was required to provide that treatment. Perhaps reflecting this Judge Pettiti, in his concurring opinion, having noted that D's case arose in "exceptional circumstances" namely that he suffered from AIDS in its final stages, went on to state that, in his view, the Court's decision was not based upon the criterion of "inequality of medical treatment". He said this:

> "The inequality of medical treatment was not the criterion adopted by the Court as medical treatment in the Member States of the United Nations is, alas, not all of the same technological standard. The case of D, however, is concerned not with hospital treatment in general, but only with the deportation of a patient in the final stages of an incurable disease."

37. The issue of a state's responsibility (if any) to continue to provide medical treatment rather than remove an individual to a country where that treatment will not be available features large in the reasoning of the House of Lords and the Strasbourg Court in N v SSHD and N v UK respectively.

N v SSHD [2005] UKHL 31; [2005] 2 AC 296

38. N was a Ugandan citizen who came to the United Kingdom and unsuccessfully claimed asylum. After her arrival, she was diagnosed as HIV positive (a condition of which she had been unaware). She developed AIDS-related illnesses and received treatment in the UK including antiretroviral medication. Although this treatment could not cure her disease, her condition was stable and if she continued to have access to the drugs and medical facilities in the UK she had a life expectancy of

"decades". Here the advances in medical science since the earlier stages of the D case were taken note of. The Court was no longer dealing with people who would die reasonably soon in whichever country they lived. Effective medication could now give a high level of protection against naturally occurring disease. However, without those drugs and facilities, her prognosis was poor, she would suffer ill-health, discomfort, pain and death within a year or two. Although some treatment for HIV and AIDS was available in Uganda, N was not able to afford the treatment and so it would not in practice be available to her.

39. The House of Lords held that N's removal would not breach Art 3 of the ECHR. Individual opinions were given by Lords Nicholls of Birkenhead, Hope of Craighead and Brown of Eaton-under-Heywood and Baroness Hale of Richmond. Lord Walker of Gestingthorpe expressed agreement with the speeches of all the other Law Lords.

40. At [8], Lord Nicholls recognised that N's claim derived from the lack of medical treatment in Uganda. Lord Nicholls acknowledged that the risk to N did not, as in the usual case, arise from intentional ill-treatment in her home country. Instead, he said (at [8]):

> "The adverse prospect confronting the appellant in Uganda is of a different character. It derives from Uganda's lack of medical resources compared with those available in the United Kingdom. Thus the all-important question is whether expelling the appellant would be inhuman treatment within Article 3 given the uncertainties confronting her in Uganda through shortage of the necessary drugs and medical facilities there."

41. Having identified the "pressing humanitarian considerations" of N's case (at [9]), Lord Nicholls nevertheless went on to conclude that her case did not fall within the class of "exceptional" case recognised in D v UK. At [10]-[13] Lord Nicholls identified difficulties in applying the "extended" reach of Art 3 recognised by the court in D on the basis that N's case was any less pressing in its "humanitarian considerations" than was D's. In particular, Lord Nicholls was unimpressed with a distinction based upon the fact that D's condition was terminal (namely he was dying) and that of N since her condition would "rapidly become terminal" if treatment was discontinued. At [14] he recognised that the "humanitarian considerations in the present case are of a very high order" and that a "difference of degree in *humanitarian* appeal" did not call for a different result from that in D's case. Nevertheless, at [15]-[18], Lord Nicholls firmly rested his decision to dismiss N's appeal upon the fact that her claim was, in essence, seeking to impose an obligation upon the UK to provide medical treatment. In his judgment, Art 3 of the ECHR imposed no such obligation upon a contracting state. He said this:

> "15. Is there, then, some other rationale underlying the decisions in the many immigration cases where the Strasbourg court has distinguished *D's* case? I believe there is. The essential distinction is not to be found in humanitarian differences. Rather it lies in recognising that article 3 does not require contracting states to undertake the obligation of providing aliens indefinitely with medical treatment lacking in their home countries. In the case of *D* and in later cases the Strasbourg court has constantly reiterated that in principle aliens subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social and other forms of assistance provided by the expelling state. Article 3

imposes no such 'medical care' obligation on contracting states. This is so even where, in the absence of medical treatment, the life of the would-be immigrant will be significantly shortened. But in the case of *D*, unlike the later cases, there was no question of imposing any such obligation on the United Kingdom. *D* was dying, and beyond the reach of medical treatment then available.

16. I express the obligation in terms of provision of medical care because that is what cases of this type are all about. The appellant, and others in her position, seek admission to this country for the purpose of obtaining the advantages of the medical care readily available to all who are here. What the appellant seeks in this case is the right to remain here so that she may continue to receive this medical treatment.

17. That the appellant should seek to do so is, of course, eminently understandable. But, as the Strasbourg jurisprudence confirms, article 3 cannot be interpreted as requiring contracting states to admit and treat AIDS sufferers from all over the world for the rest of their lives. Nor, by the like token, is article 3 to be interpreted as requiring contracting states to give an extended right to remain to would-be immigrants who have received medical treatment while their applications are being considered. If their applications are refused, the improvement in their medical condition brought about by this interim medical treatment, and the prospect of serious or fatal relapse on expulsion, cannot make expulsion inhuman treatment for the purposes of article 3. It would be strange if the humane treatment of a would-be immigrant while his immigration application is being considered were to place him in a better position for the purposes of article 3 than a person who never reached this country at all. True it is that a person who comes here and receives treatment while his application is being considered will have his hopes raised. But it is difficult to see why this should subject this country to a greater obligation than it would to someone who is turned away at the port of entry and never receives any treatment.

18. No one could fail to be moved by the appellant's situation. But those acting on her behalf are seeking to press the obligations arising under the European Convention too far. The problem derives from the disparity of medical facilities in different countries of the world. Despite this disparity, an AIDS sufferer's need for medical treatment does not, as a matter of Convention right, entitle him to enter a contracting state and remain there in order to obtain the treatment he or she so desperately needs."

42. Lord Nicholls' view was, therefore, that Art 3 is not breached even where the individual's claim is that their removal would result in the discontinuance of treatment, including life sustaining treatment in the receiving country, where otherwise the sending state would be required to provide treatment. In Lord Nicholls' view (as he points out at [15]), D v UK was a case where there was "no question of imposing any such obligation on the United Kingdom". As we noted above, it is not clear to us that that was in fact the case in D v UK. There was a continuing obligation upon the UK to provide treatment, palliative or otherwise, albeit for a relatively short time until D inevitably died within a twelve month period. That was an obligation to provide medical treatment, even though it was not open-ended in time

43. The remaining opinions do not rest so clearly on this feature of the case.

44. Lord Hope acknowledged that N's case concerned an "extension of an extension" to the obligation upon a contracting state under Art 3 ([23]). He acknowledged that the House of Lords' task was to determine the limits of the extension recognised by the European Court of Human Rights in D v UK.

45. At [31], Lord Hope noted that the court in D had required "rigorous scrutiny" of "all the circumstances" of the individual's personal situation. At [32]-[35], Lord Hope identified the relevant circumstances in D's case that made his circumstances "exceptional" so as to engage Art 3. Lord Hope said this:

> "32. Here the court concentrated on the advanced state of his illness, on the availability of sophisticated treatment and medication in this country, on the care and kindness administered by the charitable organisation and on what the abrupt withdrawal of these facilities would mean for him. It was not just that his removal would hasten his death. There was a serious danger that the conditions in St Kitts would further reduce his limited life expectancy and subject him to acute mental and physical suffering. There was no evidence that any person was available to attend to the needs of what the court described in para 52 as "a terminally ill man" or of any other form of moral or social support. The court concluded in para 53 that in view of these exceptional circumstances and bearing in mind what it described as "the critical stage reached the applicant's fatal illness" it would be a breach of article 3 for him to be removed to St Kitts. In para 54 it explained that, although it could not be said that the conditions in the receiving country were themselves a breach of the standard of article, his removal would expose him to a real risk of dying under the most distressing circumstances and that this would amount to inhuman treatment.
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> 33. The court concluded its assessment in para 54 by emphasising that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain on the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state during their stay in prison. While this statement was directed to applicants whose stay in the contracting state has been prolonged by a prison sentence during which they have become accustomed to receiving the benefit of various forms of assistance, it must be understood as applying more generally. This is because a comparison between the health benefits and other forms of assistance which are available in the expelling state with those in the receiving country does not in itself give rise to an entitlement to remain in the territory of the expelling state. It was only because of the exceptional circumstances that were identified in D's case that he was found to be entitled to the absolute protection of article 3.
>
> 34. In a concurring opinion Judge Pettiti observed that the humanitarian considerations arose in exceptional circumstances, which he described as "the AIDS disease in its final stages". He stressed that the inequality of medical treatment was not the criterion adopted by the court, as medical equipment in the member states of the United Nations was not all of the same technological standard. The case was not concerned with hospital treatment in general, but only with the deportation of a patient in the final stages of an incurable disease. He noted that the earlier case law concerned only cases where there was direct state responsibility. This decision was intended to afford additional protection to individuals confronted with an affliction that affects thousands of victims.

> 35. It has to be said that it would have been helpful if the court had done more to identify the criterion by which such cases were to be identified. The phrase "exceptional circumstances" does not provide that kind of guidance. It treats the issue as one of fact. But the judgment does not lack statements of principle. In para 54 it is stated that aliens cannot in principle claim any entitlement to remain on the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state. Without qualification, the application of this principle to D's case would have led to the conclusion that the decision to remove him would not be a violation of article 3. The court was clearly anxious not to say anything that would undermine this principle. As Judge Pettiti said, a comparison between the medical and social benefits available in the respective states was not the criterion adopted. "

46. As [34]-[35] of Lord Hope's opinion make clear, the difference in medical treatment and health benefits available in the expelling and receiving states did not in itself make a case "exceptional". Likewise, Lord Hope did not see cases such as N being determined by a "trump card" against an individual merely because the essence of their claim was a differential in medical treatment. To that extent, Lord Hope differed from the view of Lord Nicholls.

47. At [36], Lord Hope set out the circumstances which in his view made D's case "exceptional":

> "36. What was it then that made the case exceptional? It is to be found, I think in the references to D's 'present medical condition' (para 50) and to that fact that he was terminally ill (para 51: 'the advanced states of a terminal and incurable illness'; para 52: 'a terminally ill man'; para 53: 'the critical stage now reached in the applicant's fatal illness'; Judge Pettiti (p 455): 'the final stages of an incurable disease'). It was the fact that he was already terminally ill while still present in the territory of the expelling state that made his case exceptional."

48. Having then considered cases decided by the Strasbourg Court subsequent to D v UK, at [48], he again stated that an individual "cannot 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 provided by the expelling state".

49. Lord Hope went on to state that the exception from expulsion "on medical grounds" arose only in "very exceptional circumstances" and that D v UK was the "paradigm case as to what is meant by this formula". He noted that the Strasbourg Court had been "at pains in its decisions to avoid any further extension of the exceptional category of case which *D v United Kingdom* represents" (at [48]).

50. At [50], Lord Hope observed that the Strasbourg Court appears, despite advances in medical science, to have continued:

> "... its adherence to the principle that aliens who are subject to expulsion cannot 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 provided by the expelling state."

51. At [50] Lord Hope expressed the proper approach to be as follows:

> "50. ... What the court is in effect saying is that the fact that the treatment may be beyond the reach of the applicant in the receiving state is not to be treated as an

> exceptional circumstance. It might be different if it could be said that it was not available there at all and that the applicant was exposed to an inevitable risk due to its complete absence. But that is increasingly unlikely to be the case in view of the amount of medical aid that is now reaching countries in the third world, especially those in sub-Saharan Africa. For the circumstances to be, as it was put in *Amegnigan v The Netherlands*, 'very exceptional' 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."

52. In his judgment, the facts of N v SSHD would amount to an extension of the exceptional category in D v UK, which it was not appropriate for a national court to make but must be left to the Strasbourg Court. That was an extension which the Strasbourg Court subsequently was unwilling to make.

53. At [50], in setting out his proper approach, Lord Hope stated that this was the same test as was proposed by Baroness Hale in her opinion.

54. At [67] Baroness Hale commented that she did not find "at all helpful" the notion of "compelling humanitarian considerations" as delineating the "exceptional" case contemplated by the Court in D v UK. At [68], Baroness Hale, quoting the concurring opinion of Judge Pettiti in D v UK, stated that the "inequality of medical treatment" was not the defining criterion of the court's "exceptional" case in D v UK. At [68], Baroness Hale went on to set out her understanding of the reach of the Strasbourg Court's jurisprudence as follows:

> "68. As Lord Hope's analysis shows, the later cases have made it clear that it is the patient's present medical condition which is the crucial factor. The difficulty is in understanding where conditions in the receiving country fit into the analysis. Even in those cases where the illness is not in an advanced or terminal stage, the Court does refer to the medical care and family support available there. But it does so in terms of there being "no prospect" of such care or support, rather than in terms of its being likely to be available. It is difficult to see, therefore, whether this consideration adds anything in those cases. Where the illness is in an advanced or terminal stage, then conditions in the receiving country should be crucial. It is not yet clear whether the applicant has to show that appropriate care and support during those final stages was unlikely to be available or whether again the "no prospect" test applies. That was undoubtedly the situation in *D v United Kingdom* and the Court has made it clear that the "compelling humanitarian considerations" are those which arise in a case where the facts come close to those in *D*. But 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. As the European Court said in *Pretty v United Kingdom* (2002) 35 EHRR 1, para 65, "The very essence of the Convention is respect for human dignity and human freedom."

55. At [69], Baroness Hale set out the test applicable as follows:

> "69. In my view, therefore, 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. This is to the same effect as the test preposed by my

> noble and learned friend, Lord Hope of Craighead. It sums up the facts in *D*. It is not met on the facts of this case."

56. In her opinion, therefore, Baroness Hale in [68] and [69] saw the reach of the "exceptional" case in D v UK as defined by the elements of the individual's illness as having reached a "critical stage" which Baroness Hale equated to "dying" in circumstances where in the absence of treatment and/or care that death would not be met "with dignity". Given the mutual agreement in their opinions, Lord Hope and Baroness Hale appear to limit the D v UK category of "exceptional" cases to situations where the patient's "present medical condition" had reached a "critical stage" of dying.

57. That said, however, at [70] Baroness Hale accepted that the category of "exceptional case" remained open, stating that:

> "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."

58. However, on the facts of N v SSHD, Baroness Hale agreed that the individual's circumstances did not fall within the "exceptional" category engaging Art 3.

59. Lord Brown acknowledged that the case of D v UK was the starting point for determining the scope of Art 3 in cases of this sort. He observed (at [78]) that the facts of D v UK were "very extreme". At [81], Lord Brown set out the basis upon which, in his view, the Strasbourg Court in D had considered the facts of that case to be "highly exceptional" as follows:

> "81. Nothing could be plainer than that the court itself regarded *D* as a highly exceptional case. Para 53 of its judgment speaks of 'these exceptional circumstances', para 54 of 'the very exceptional circumstances of this case'. These circumstances included that the applicant was 'in the advanced states of a terminal and incurable illness' (para 51); that 'The abrupt withdrawal of these [medical, caring and counselling] facilities will entail the most dramatic consequences for him' (para 52); that he was 'psychologically compassionate' (para 53), and that there were 'compelling humanitarian considerations at stake' (para 54)."

60. At [86], Lord Brown observed that the "unmistakeable conclusion" was that the Strasbourg Court had, in all subsequent cases, declined to find a breach of Art 3 where an AIDS sufferer was returned to his or her home country "save in circumstances closely comparable to those in D itself." (We would interpolate that the exception is the Commission's decision in BB v France (Application No 30930/96) March 9, 1998).)

61. At [91], Lord Brown expressed some difficulty with the Strasbourg Court's reasoning in restricting the scope of Art 3 to cases where the individual's illness "had attained its terminal stage" and the individual "had no prospect of medical care or family support on return home." Lord Brown said this:

> "91. .... It is perhaps not, however, self-evidently more inhuman to deport someone who is facing imminent death than someone whose life expectancy would thereby be reduced from decades to a year or so. Nor, as already suggested, has there generally been a sound evidential basis for supposing that much if

> anything in the way of medical care of family support would be available to the applicants on return."

62. At [93], Lord Brown nevertheless emphasised that D was terminally ill and would die regardless of any treatment and, therefore, in that case unlike others such as N, the expelling state was not being required to provide the individual with beneficial medical, social, or other forms of assistance.

63. At [94], Lord Brown expressed agreement with the test stated by Lord Hope in his opinion as follows:

> "It must be shown that the applicant's medical condition has reached such a critical stage 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 while he or she is dying."

64. That test was not, for Lord Brown, satisfied on the facts.

N v UK

65. Subsequently, the Strasbourg Court considered N's case in Case 26565/05; N v UK (2008) 47 EHRR 885. That court also found that N's return to Uganda did not breach Art 3.

66. At [42], the Strasbourg Court in N v UK set out a number of principles which it had consistently applied since D v UK.

67. First:

> "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."

68. Secondly:

> "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."

69. Thirdly:

> "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."

70. The Court then went on to set out the circumstances in D v UK which it considered were "exceptional":

> "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."

71. The Court (at [43]) went on to state that other "exceptional" cases could arise:

> "The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D. v. the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country."

72. At [44] the Court reminded us that:

> "Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States."

73. At [45] the Court observed that the principles applied:

> " ... in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduce life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost."

74. Consequently, in summary the Court recognised that:

> (1) a Contracting State was not obliged to continue to provide medical, social or other forms of assistance, including where the effect of removal would significantly reduce the life expectancy of the individual in their own country;
>
> (2) the obligation under Art 3 only arose in a "very exceptional" case, where "the humanitarian grounds against the removal are compelling";
>
> (3) D v UK involved "very exceptional circumstances" as the individual was "critically ill and appeared to be close to death" and there was an "absence of care or support including from his family" and of a "basic level of food, shelter or other social support" in his own country;
>
> (4) there may be "other very exceptional cases where the humanitarian considerations are equally compelling"; and
>
> (5) those principles were applicable in every case where a person was afflicted with a "serious, naturally occurring physical or mental illness" which required medical treatment which was not readily available or not available except at substantial cost in an individual's own country.

75. In relation to the facts of N v UK itself, the Court at [49]-[51], concluded that they did not fall within the "very exceptional" category in D v UK for the following reasons:

> "49. The United Kingdom authorities have provided the applicant with medical and social assistance at public expense during the nine-year period it has taken for asylum application and claims under Arts 3 and 8 of the Convention to be determined by the domestic courts and this Court. However, this does not in itself entail a duty on the part of the respondent State to continue so to provide for her.
>
> "50. The Court accepts that the quality of the applicant's life, and her life expectancy, would be affected if she were returned to Uganda. The applicant is not, however, at the present time critically ill. The rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, must involve a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV and AIDS worldwide.
>
> 51. In the Court's view, the applicant's case cannot be distinguished from those cited in [36]-[41] above. It does not disclose very exceptional circumstances, such as in *D v United Kingdom*, and the implementation of the decision to remove the applicant to Uganda would not give rise to a violation of Art.3 of the Convention."

76. It might be said that the above reasoning did not rise to the challenge set by the House of Lords to decide with more detail what class of circumstance could be regarded as very exceptional, or why it is was appropriate to limit violations to cases where the claimant was close to death where in all AIDs cases in the United Kingdom and countries with similar health resources, relevant medical treatment can prevent relapse in fatality as long as the treatment continues to be administered.

77. We note that three of the judges dissented in the case of N v UK. For the dissentients the majority erred in rigidly distinguishing between civil and political and social and economic rights; in introducing a policy balance into the application of an Article where other case law made it clear that the prohibition was an absolute one and in seeking to distinguish the outcome from that in D v United Kingdom.

78. The minority concluded:

> "23. There is no doubt that in the event of removal to Uganda the applicant will face an early death after a period of acute physical and mental suffering. In this case we are satisfied of the existence of such extreme facts with equally compelling humanitarian considerations. After all, the highest judicial authorities in the United Kingdom were almost unanimous in holding that the applicant, if returned to Uganda, would have to face an early death. The expelling State's responsibility, because substantial grounds are thus shown for believing that the applicant almost certainly faces a risk of prohibited treatment in Uganda, is engaged."

Other Cases

79. Whilst we were referred to a number of other authorities both in Strasbourg and domestically, it was common ground between the parties that it was the application of the principles derived from D v UK, N v SSHD and N v UK which were crucial to the outcome of these appeals.

80. One other case to which we must make reference is BC (India) v SSHD [2007] EWCA Civ 1438. That was an application for permission to appeal to the Court of Appeal

decided by Toulson LJ. In that case, where the facts were materially identical to those in these appeals, Toulson LJ refused permission to appeal on the basis that the certainty of death within a two to three week period faced by an individual with end-stage renal failure in his own country where treatment was not available did not bring the circumstances within the "exceptional" category recognised in D v UK and N v SSHD.

81. Having cited the opinion of Baroness Hale in N v SSHD at [69] and [70] (which we set out above), Toulson LJ said this at [4]:

> "Now, I do not read paragraph 70 as intending to undermine the test stated by her in the immediately preceding sentences; and if that is the correct interpretation, then I have to say that on my reading it does not fall in line with the speeches of the other members of the House. What she was recognising was that there might be a different type of case altogether, where other exceptional considerations might possibly give rise to an Article 3 claim. When it comes to the facts, Mr Samuel points to a number of features which he says distinguish this from the types of case considered in N and D. In particular, he emphasises the certainty of death in a short period without treatment. He says that there is a difference between, for example, somebody with HIV AIDS, where the risk of death would be (as mentioned in previous authorities) within 12 to 24 months, and death within two to three weeks. He stresses also that on the facts of this case, the appellant is unlikely to be able to pay for treatment, and that although treatment for kidney disease sufferers is available in some parts of India, it is the big cities, and not in the rural area from which the appellant comes. I, regrettably, am unable to see that the points which he identifies as compelling facts create a legal distinction. In terms of an exercise of the Secretary of State's discretion, the plea that particular consideration should be given to him because of the early proximity of death may have a real attraction; but to try to introduce some legal test which differentiated between somebody who is currently alive and will be kept well on treatment but who on discontinuation of treatment would die within two to three weeks, or on the other hand within 12 months, would lead to the question: where would the cutoff be? Would it be at three weeks, or at three months, or at six months, or at what figure? I do not see that there can be a workable legal rule which said that proximity of death within X weeks engages Article 3, but in X plus one week does not."

82. Mr Bourne placed reliance upon this case whilst recognising that, as a permission decision, it had no precedential authority. The reasoning was, nevertheless, he submitted, persuasive. Ms Lieven QC contended that the decision was wrong and should not be followed.

Discussion and Analysis

83. We begin with the relevant Convention provision. Art 3 of the ECHR states that:

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

84. In cases of this sort the focus is upon the claim that the individual will be subject to "inhuman" or "degrading" treatment by the absence of (life-sustaining) treatment on his or her return to the receiving country. We remind ourselves of the Strasbourg Court's approach to Article 3 in general. The Court requires a "minimum level of severity" to engage Article 3. 'Inhuman' treatment is conduct that causes sufficient mental and/or physical suffering to attain the minimum standard of severity (e.g. Ireland v UK (1978) 2 EHRR 25 at [162]). 'Degrading' treatment is conduct which

arouses feelings of fear, anguish and inferiority such as to humiliate or debase the individual (Ireland at [167]). Again that must reach a minimum level of severity to engage Art 3. The assessment is relative and depends upon an assessment of all factors including the duration of the treatment, its physical or mental effects, and the age, sex, vulnerability and state of health of the individual (Ireland at [162]). Once established, the obligation under Art 3 is absolute (e.g. Chahal v UK (1996) 23 EHRR 413 and Saadi v Italy (2009) 49 EHRR 30).

85. Having set out at some length extracts from the trilogy of central decisions to these appeals, we derive the following principles and approach:

(1) (a) Article 3 imposes an obligation upon a state not to expel a person to a country where there is a real risk that he or she would be subjected to ill-treatment contrary to Art 3 (see, e.g. Soering v UK (1989) 11 EHRR 439 and Chahal v UK).

(b) That obligation can arise where the source of the individual's alleged ill-treatment is not directly or indirectly the responsibility of the receiving state but rather arises from a naturally occurring illness, disease or condition where treatment (in particular life-sustaining treatment) is not available in the receiving state.

(2) (a) An alien, subject to expulsion, can in principle claim no entitlement to remain in a Contracting State in order to continue to benefit from medical, social or other forms of assistance (including life-sustaining assistance) which would not be available in the receiving state.

(b) Nevertheless, in D v UK and N v UK the Court recognised that in "exceptional" or "very exceptional" circumstances an infringement of Article 3 could arise where a Contracting State returns an individual to another state in which they would be unable to obtain medical treatment or care for their condition in circumstances where the absence of that treatment or care could result in the individual's death.

(c) The Strasbourg Court's approach has been cautious in such cases and its extension of Art 3 has been incremental and limited.

(3) (a) In determining what amounts to "exceptional" or "very exceptional" circumstances, the focus is upon the circumstances in which the individual will find him or herself in the country to which they are to be returned.

(b) An "exceptional" case does not require the circumstances to be unique or even circumstances in which only a few or not many individuals might find themselves. The Strasbourg Court's description of a case as "exceptional" is no more than a pointer to the extreme or compassionately demanding nature of the individual's circumstances in the receiving country.

(c) The mere fact that the individual faces the prospect of death because medical treatment and care is not available does not, in itself, bring the circumstances within the "exceptional" category.

(d) Although Lord Nicholls in N v SSHD appears to have understood D v UK to be a case in which the individual was beyond medical treatment in the UK and thus his continued presence in the UK did not impose any obligation on the UK to provide treatment that does not seem to us to have been the situation. He was receiving treatment and care albeit that the treatment was palliative and would only be required for a relatively short period, less than 12 months. The outcome in D v UK cannot be explained on that basis. Indeed, the other Law Lords in N v SSHD and the Strasbourg Court itself in N v UK did not justify the outcome in D's case on that basis. The fact, therefore, that the sending state may be required to provide medical care or treatment does not, in itself, exclude the case from being an "exceptional" one.

(4) (a) The decision maker must make a holistic assessment of the individual's circumstances in the receiving country.

(b) The threshold is a high one.

(c) No one factor is necessarily crucial or determinative in the dispassionate judicial assessment of those circumstances.

(d) There is no difference in principle between a case where the individual came to the UK knowingly suffering from a medical condition and where that was only discovered (or arose) after arrival. The individual cannot invoke any continuing obligation on the UK to provide that treatment.

(e) It will be for the individual to prove that medical treatment and care will not be available to them in the receiving country. That may arise because it is simply not available or, if available in theory, it is not accessible in practice because the individual does not have the financial resources to pay for that treatment or care, or, alternatively, it is as a practical matter beyond their reach for example because they would have to travel a long distance which is prohibited by their health or personal circumstances. As Baroness Hale noted in N v SSHD it is the practical availability of the treatment rather than its theoretical availability which is important. We emphasise, however, this is a matter which a claimant must establish on the evidence.

(5) (a) The touch-stone identified in the case law of the "exceptional" case is the notion identified in Pretty v UK (2002) 35 EHRR 1 at [65]:

> "The very essence of the Convention is respect for human dignity and human freedom."

As Baroness Hale stated in N v SSHD at [68]:

> "It would appear inhuman to send [an individual] home to die unless the conditions there will be such that he can do so with dignity."

It is this central notion that lies at the heart of the Court's decision in N v UK and its understanding of its earlier decision in D v UK. At [40] the Court said that:

> "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."

(b) In N's case, both the House of Lords and the Strasbourg Court considered D v UK to be the paradigm of a situation of "exceptional" circumstances.

(c) The case law provides a guide as to the extremity of the individual's circumstances which are required to engage Art 3.

(d) The House of Lords "set the test" in part by reference to whether the individual's illness had reached a "critical stage" such that it would be inhuman to deprive him of the care which he is currently receiving so that he would suffer an early death without care available to "meet that fate with dignity" (see Baroness Hale at [69] and Lord Hope at [50]). We do not understand that to limit the "exceptional" category to the facts of D v UK itself, in particular to an individual who is terminally ill in the sense that treatment is not available even in the UK to prevent his or her death from the underlying illness or disease. That is, in our view, made plain by the recognition that there "may, of course, be other exceptional cases, with other extreme factors, where the humanitarian considerations are equally compelling" (*per* Baroness Hale at [70]). Likewise, the Court in N v UK also recognised that there maybe other "very exceptional cases where the humanitarian considerations are equally compelling" (at [43]).

(e) No such case has yet been identified in the case law either in Strasbourg or the UK. We recognise, however, the potential for other "compelling humanitarian" circumstances to engage Art 3 of the ECHR.

(6) (a) In D v UK it was the cumulative impact upon the individual of his circumstances in St Kitts that made D's case "exceptional". In the absence of medical care or family or social support he would be left to die without dignity. That factor contrasts with the situation in N where, although unable to access treatment for her HIV condition, N had the prospects of some medical care (albeit not the life sustaining treatment she received in the UK) and family support. It could not, as a consequence, be said that her death would occur in circumstances of indignity such as to reach the high threshold for "inhuman or degrading treatment" under Art 3.

(b) Just as it may not be necessary for the individual to be terminally ill and in the end stages of his or her life regardless of medical treatment, likewise

the length of time that the individual will survive in their own country without treatment is not determinative of whether the high threshold in Art 3 has been reached. In that respect, we agree with the view of Toulson LJ in BC (India) (at [4]) that applying the current case law binding on us "[t]he certainty of death in a short period without treatment" does not in itself brings an individual's circumstances within Art 3. In our judgment, that is not a determinative factor identified in the Strasbourg cases or by the House of Lords in N's case. As Toulson LJ pointed out:

> "to try to introduce some legal test which differentiated between someone who is currently alive and will be kept well on treatment but who on a discontinuance of treatment would die within two or three weeks, or on the other hand within twelve months, would lead to the question: Where would the cut off be? Would it be at three weeks, or at three months, or at six months, or at what figure? I do not see that there can be a workable legal rule which said that proximity of death within X weeks engages Article 3, but in X plus 1 week does not."

(c) the rapidity of decline will, however, be relevant in assessing all the circumstances of their death and whether, therefore, any indignity an individual faces (whether for a short or longer period of time) engages the protection from expulsion provided by Art 3.

(7) (a) Although not raised in these appeals, we anticipate that there may be circumstances which enhance an individual's claim that the circumstances on return will be "exceptional" and more likely pass the high threshold of Art 3 to establish a real risk of inhuman or degrading treatment.

(b) Relevant factors might include, for example, where the non-availability of the treatment in the home country is due to a discriminatory policy of the State for example, on racial, ethnic or other prohibitive grounds. In such cases, it may be that taking into account all the circumstances Art 3 is engaged or, at least, a breach of Art 14 read with Art 8 could be established (see, East African Asians cases (1973) 3 EHRR 76, E Com HR). In RS and others (Zimbabwe-AIDS) [2010] UKUT 623 (IAC) the Upper Tribunal considered such an issue albeit found that the evidence fell short of demonstrating a real risk of such treatment.

(c) A further potential factor may be where the individual to be returned is a young child. There may be a potentially greater effect upon that child of enduring the dying process and may as a consequence elevate the indignity of those circumstances sufficiently to reach the high threshold under Art 3. Likewise, a parent forced to witness the dying process of their young child may amount to a level of suffering greater than that confronted by an adult dying in such circumstances and amount to inhuman and degrading treatment (see, CA v SSHD [2004] EWCA Civ 1165 *per* Laws LJ at [26]).

(8) (a) We were invited not to consider the application of Art 8 in cases of this sort. Neither appellant before us relied upon Art 8. In those circumstances, we do not express any conclusions on the issue.

(b) However, in principle Art 8 can be relied on in cases of this sort. The removal of the individual would, on the face of it, engage Art 8(1) on the basis of an interference with his or her private life as an aspect of that individual's 'physical and moral integrity' (see Bensaid v UK (2001) 33 EHRR 10). Unlike Art 3, however, Art 8 is not absolute and the legitimate aim of the economic well-being of the country would be relevant in determining whether a breach of Art 8 could be established given any financial implications that continued treatment in the UK would entail (see also R (on the application of Razgar) v SSHD [2004] UKHL 27; [2004] 2 AC 368).

(c) It may be that although, in principle, the scope of Art 8 is wider than that of Art 3, in practical terms that in a case like this where the claimant has no right to remain it will be a "very rare case" indeed where such a claim could succeed (see KH (Afghanistan) v SSHD [2009] EWCA Civ 1354 and MM (Zimbabwe) v SSHD [2012] EWCA Civ 279).[1] That reality may lay at the heart of the majority's view of the Strasbourg Court in N v UK when, having rejected the individual's claim under Art 3, stated that no "separate issue" arose under Art 8 (compare the dissenting Judge's opinion at 1 to 6).

(d) Again we note that in N v UK the minority disagreed with the failure to address Article 8. We see some force in this. If it be the case that the Article 3 threshold is an exceptionally high one because of the absolute character of the prohibition and concerns that Contracting States could be swamped by health tourism claims by people with no prior connection to the state in question seeking to enter or remain to gain access to expensive medical treatment, an Article 8 proportionality analysis might yield a different outcome in other cases, possibly where the claimant had a lawful permission to reside in the host state before the disease was diagnosed.

(e) In the medical evidence in the present cases, for example, there was some indication that if the claimants were given leave to remain for an appropriate period of time, one or other of then might be eligible for a kidney transplant, the result of which would mean that they were no longer dependent on dialysis. However, in the light of the case law to date and the clear submissions of both parties to us, we have not explored the case from this perspective.

(9) Neither party referred us to the line of cases in which Art 3 has been relied upon where the individual claims that as a result of his removal to his or her home country there is a real risk that he will commit suicide (see, e.g. J v SSHD [2006] EWCA Civ 1238). Those cases may also involve a claim that medical treatment and support in the home country would not be available to obviate the risk of suicide. To that extent, those cases have a common feature with the cases with which we are concerned in these appeals. Those

[1] Different issues may arise where a person has been lawfully admitted and now faces deportation or family life enjoyed in the United Kingdom is being interfered with, where health difficulties in the country of origin may be relevant to whether there are obstacles to the family unit relocating there.

cases do not, however, seem to be treated in the same way requiring "exceptional" circumstances in the home country in order to establish a breach of Art 3. A difference may well be that in those cases the removal of the individual creates or enhances the risk of suicide and so they are not concerned solely with a natural underlying disease or illness which, although treatable in the UK, would not be treated in the individual's home country. That distinction may well justify a different approach in applying Art 3 than in cases such as these appeals. As we have said, we were not referred to the suicide cases which, in any event, have not been considered by the Strasbourg Court and formed no part of its reasoning in D v UK and N v UK.

(10) We note that in its decision in Sufi and Elmi v UK (Applications nos. 8319/07 and 11449/07) (2012) 54 EHRR 9 the Strasbourg Court did not apply the approach in N v UK:

> "281. The Court recalls that *N. v. the United Kingdom* concerned the removal of an HIV-positive applicant to Uganda, where her lifespan was likely to be reduced on account of the fact that the treatment facilities there were inferior to those available in the United Kingdom. In reaching its conclusions, the Court noted that the alleged future harm would emanate not from the intentional acts or omission of public authorities or non-State bodies but from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country. The Court therefore relied on the fact that neither the applicant's illness nor the inferior medical facilities were caused by any act or omission of the receiving State or of any non-State actors within the receiving State.
>
> 282. If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in *N. v. the United Kingdom* may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict. The reports indicate that all parties to the conflict have employed indiscriminate methods of warfare in densely populated urban areas with no regard to the safety of the civilian population (see paragraphs 82, 123, 127, 132, 137, 139-140 and 160, above). This fact alone has resulted in widespread displacement and the breakdown of social, political and economic infrastructures. Moreover, the situation has been greatly exacerbated by al-Shabaab's refusal to permit international aid agencies to operate in the areas under its control, despite the fact that between a third and a half of all Somalis are living in a situation of serious deprivation (see paragraphs 125, 131, 169, 187 and 193, above).
>
> 283. Consequently, the Court does not consider the approach adopted in *N. v. the United Kingdom* to be appropriate in the circumstances of the present case. Rather, it prefers the approach adopted in *M.S.S. v. Belgium and Greece*, which requires it 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 time-frame (see *M.S.S. v. Belgium and Greece*, cited above, § 254)."

86. We confess that having surveyed the jurisprudence we do not find the state of the case law to be altogether satisfactory. We anticipate that we are not alone in puzzling at the ethical reach of the Article 3 jurisprudence where on the one hand suspected terrorists, war criminals otherwise excluded from refugee protection or others considered to be a source of risk to the host community are protected from expulsion because of the real risk of being exposed to inhuman or degrading treatment on return, and on the other where people in a similar position as these claimants, who may have entered the United Kingdom regularly and are guilty of no anti-social conduct, cannot claim human rights protection from return even though they face the certainty of imminent death following their removal and the loss of access to the life saving facilities they enjoy whilst they remain here.

87. We cannot assess whether the observations in Sufi and Elmi suggest that the time is ripe for reconsideration by Strasbourg of the principles behind N v UK.[2] We observe that there is surely a case for distinguishing between those who have never had access to a health facility to prolong life and those who have such access but will lose it on removal. Equally a simple causation test as favoured by the minority in N v UK, risks casting the net of Article 3 protection too wide in contracting states facing rising demand for health resources and serious financial constraints on an ability to provide it. We are however completely satisfied that it is not for this Tribunal to conduct such an analysis. We are bound by the conclusion of the House of Lords in N v SSHD and have had due regard to the decision of the majority in the Strasbourg Court in N v UK. We have no doubt for both reasons we must follow N v SSHD. Any development in the applicable principles will not be for us. Unless and until there are developments at this level in the case law judges of the Immigration and Asylum Chambers must proceed on the basis that the rapidity of decline caused by the withdrawal of medical treatment cannot of itself amount to the kind of exceptional circumstance that makes removal a breach of Article 3.

These Appeals

88. We turn now to the determination of these appeals.

GS

89. The facts are not in dispute. GS came to the UK in 2004 and overstayed his working holiday visa. In January 2009 he was diagnosed with kidney problems and now requires dialysis three times per week, each session lasting for about four hours. He only has one kidney. With that treatment, GS has a good life expectancy. However,

[2] We note that such a call has been made in a concurring opinion in Mwanje v Belgium (Requête no. 10486/10) 20 December 2011 (French text only available):

> "6. Nous pensons cependant qu'un seuil de gravité aussi extrême – être quasi-mourant – est difficilement compatible avec la lettre et l'esprit de l'article 3, un droit absolu qui fait partie des droits les plus fondamentaux de la Convention et qui concerne l'intégrité et la dignité de la personne. A cet égard, la différence entre une personne qui est sur son lit de mort ou dont on sait qu'elle est condamnée à bref délai nous paraît infime en termes d'humanité. Nous espérons que la Cour puisse un jour revoir sa jurisprudence sur ce point."

without the treatment he would die within one to two weeks. GS has family in the UK including uncles, aunts and cousins. In India, he has a mother and two brothers but his mother suffers from poor health. The Judge accepted that GS would not be able to access dialysis treatment in India which was available in Chandigarh which is about 300 kilometres from his village. However, the cost would be 10,000-12,000 rupees per week which the Judge accepted GS and his family could not afford. At para 10 of his determination, Judge Dove QC found that the certainty and immediacy of GS's death upon the withdrawal of treatment on return to India brought his case within the "exceptional" category contemplated in D v UK and N v UK. The Judge found that GS's return to India would, therefore, breach Art 3. The Judge reasoned as follows at para 10:

> "In my view, whilst it is right that the Appellant in the present case is not suffering from a condition which would conventionally be described as a terminal illness in the sense that with the treatment his otherwise immediate demise is being staved off, nevertheless in my view in effect his medical condition is extremely grave given the prospects of survival without the essential treatment which he requires. It is plain from the medical evidence that without dialysis he would very quickly decline and die. The immediacy of his death upon the withdrawal of treatment brings his case, in my judgement, within the category of exceptionality contemplated by, for instance, the case of **N**. He is not a person who has come to the UK with a medical condition for which he has then been able to obtain treatment in the UK the withdrawal of which might upon his return to his home country lead over the course of a protracted period to a significant deterioration in his condition. He is a person who came to the UK fit and well, but who has unfortunately succumbed to kidney failure, a condition which without treatment would lead to immediate and certain death. Whilst theoretically there may be treatment available to him in India, the practical reality is that there would be no opportunity for him to realistically avail himself of the dialysis which is essential to prevent his early death. In those circumstances, in my judgement, his return to India would amount to inhuman treatment of the kind prescribed by Article 3, given the particular and exceptional circumstances of this case. In those circumstances, in my judgement, the appeal under Article 3 must be allowed.

90. Ms Lieven QC submitted that the Judge was entitled to find that GS's circumstances were "exceptional". She submitted that there was no merit in the ground upon which permission had been granted, namely that it was an arguable error to conclude that GS's case was exceptional because the unavailability of the medical treatment was only due to GS and his family not being able to pay for it. Ms Lieven QC submitted that it was not the theoretical possibility of treatment that engaged the "exceptional" case but rather its practical availability and she relied upon a passage in Baroness Hale's opinion in N v SSHD at [69]. We agree with that submission. Mr Bourne did not seek to rely upon the ground upon which permission to appeal was granted. As we have set out above, it is the reality of the availability of the treatment which is important rather than its theoretical availability at a cost which the individual cannot afford. Providing the latter is factually established, and Judge Dove QC found this fact in GS's favour, then the individual circumstances have to be assessed against the Art 3 threshold on the basis that the life sustaining treatment is not available to them.

91. Ms Lieven QC further submitted that GS's case was closer to D's than N's. Both D and GS faced imminent death on return. She submitted that although GS's condition is not currently "critical", unlike that of D when he was in the UK, it would become so immediately following removal. She submitted that the immediacy and certainty of

death which would face GS on return with its attendant suffering and no hope of alleviation entitled Judge Dove to conclude that this was an "exceptional" case and defined in GS's favour under Art 3.

92. We do not accept Ms Lieven's submission. The certainty and immediacy of death did not, in our judgement, in itself bring GS's circumstances within the "exceptional" case contemplated in D v UK and N v UK. That assessment required a dispassionate consideration of all the circumstances facing GS on his return to India. That included a consideration of the circumstances in which he would die including any care and support available to him from family and others. We agree with Toulson LJ's view in BC (India), that in itself the shortening of an individual's life expectancy to one to two weeks because of the absence of medical treatment does not, in itself, bring the case within Art 3. It is clear to us that Judge Dove QC considered that it did and in that respect he erred in law and his decision cannot stand. It, therefore, falls to us to remake the decision.

93. Would GS's circumstances in India fall within the "exceptional" category that by virtue of compelling humanitarian considerations engage Art 3? As Judges before us have noted, these are difficult cases to decide involving life threatening conditions and, if unsuccessful, inevitable death. The latter, however, is not determinative in leading inevitably to a breach of Art 3. That is clear from the Strasbourg cases. If the "exceptional" category of case contemplated in D v UK and N v UK were limited to those where the individual had already reached a critical stage in the dying process in the UK, then GS could not establish a breach of Art 3. However, we do not consider that the "exceptional" category is so restricted. We must reach a dispassionate judgement based on all the circumstances which will face GS on return to India. His inevitable death within one to two weeks is one factor. Another is his family circumstances in India. He has two brothers and a mother, albeit that she is in poor health. There is no suggestion in the evidence that during the period leading up to his death he would not have the support and comfort of his family. Beyond speculation, there is no evidence of the impact his dying and death will have on his family beyond what would ordinarily be expected in such a situation. Equally, there is nothing to suggest that he would not be able to obtain at least palliative care to alleviate, so far as possible, any suffering during that time. Those facts differ from the situation faced by D on return to St Kitts where he would have no family or social support or medical care.

94. Ms Lieven QC did not rely upon an argument that GS would suffer a heightened intensity of suffering and anguish knowing his fate on return to India by way of analogy to the 'death row' case of Soering v UK (1989) 11 EHRR 439. Ms Benitez did place reliance on this argument in the case of EO. It is appropriate that we also deal with it in respect of GS's appeal. We are not satisfied that the evidence establishes any such aggravation of mental suffering of the intensity seen in Soering where the 'death row phenomenon' resulted in convicts awaiting execution in US prisons for many years. Here, GS will return to his family. He will have time to prepare and his removal will be in accordance with the Respondent's Guidelines, to which our attention has been drawn, only in carefully controlled circumstances where it is appropriate and safe to do so having regard to his medical condition. GS's case does

not, in our judgment, reach even the level of concern identified by the Strasbourg Court in Soering where, in any event, the applicant was unsuccessful in establishing a breach of Art 3.

95. In our judgment, GS's circumstances do not fall within the "exceptional" category. GS's circumstances do not reach the high threshold to establish a real risk of "inhuman or degrading treatment" as a result of suffering an undignified death. For these reasons, we dismiss this appellant's appeal under Art 3 of the ECHR.

EO

96. The facts are, again, not in dispute. EO is 42 years of age. He arrived in the UK in March 2005 on a short term work permit which he overstayed. EO worked in this country as a full-time cleaner until he was arrested. He sent money home. In early 2006 he fell ill and was diagnosed with end stage renal failure. He requires dialysis three times per week and although his life is currently not at risk if dialysis was stopped he would probably die within two to three weeks. He also suffers from hypertension. EO and his family would not be able to afford dialysis at around £3,000 per three month period. EO's wife and son (now aged 9) live in Ghana. Their home is in Tehma, a suburb of Accra which is a three hour journey from the hospital. His wife sells water for a living and lives in a rented one room property with a toilet and bathroom but no running water.

97. Ms Benitez adopted Ms Lieven's submissions in relation to the law. She told us that EO had been on a transplant list in the UK until 2006 but was taken off it because of other health factors to do with a heart condition. He was now eligible again. As regards EO's condition on return to Ghana, Ms Benitez submitted that he would die an unpleasant and imminent death as treatment would not be available to him. She reminded us that EO had a young son who had not seen him since 2005 and who was unaware of his father's condition. EO would be unable to work on return. Ms Benitez submitted that EO would not have time to prepare for his death and this would aggravate the intensity of his suffering and mental anguish. She relied upon the 'death row' case of Soering v UK and submitted that Art 3 was engaged.

98. We must reach a dispassionate judgement based on all the circumstances which will face EO on return to Ghana. His inevitable death within two to three weeks is one factor. Another is his family circumstances in Ghana. He has a wife and nine year old son. There is no suggestion in the evidence that during the period leading up to his death he would not have the support and comfort of his family. He has a home (albeit a modest one) in which he can live. No doubt his family will be affected by his dying and death but it is pure speculation as to the precise impact it will have upon them beyond what would ordinarily be expected in such a situation. Equally, there is nothing to suggest that he would not be able to obtain at least palliative care to alleviate, so far as possible, any suffering during that time. Those facts differ from the situation faced by D on return to St Kitts where he would have no family or social support or medical care.

99. As regards Ms Benitez's reliance on Soering, we would repeat what we said in respect of GS at para 94 above which is, in our view, equally applicable to EO's return to Ghana.

100. In our judgment, EO's circumstances do not fall within the "exceptional" category. EO's circumstances do not reach the high threshold to establish a real risk of "inhuman or degrading treatment" as a result of suffering an undignified death. For these reasons, we also dismiss this appellant's appeal under Art 3 of the ECHR.

101. Whilst we have concluded that neither GS nor EO can establish a human right to remain in the UK, we would repeat as applicable to these appellants the words of Lord Brown of Eaton-under-Heywood in N v SSHD at [99] where, speaking of the claimant in that case, he said:

> "Whilst, for the reasons given, I would not regard the return of this appellant to Uganda as a violation of article 3, it by no means follows that the Secretary of State is bound to deport her. Plainly he has the widest discretion in the matter. The likely impact upon immigration control (and, doubtless, National Health Service resources) of an adverse article 3 ruling in the case would be one thing; the favourable exercise of an administrative discretion in this individual case quite another. I am not saying that the Secretary of State *should* now exercise his discretion in the appellant's favour, still less that a refusal to do so would be challengeable; only that the appellant's return would not inevitably follow from the failure of her appeal."

Decisions

GS

102. The First-tier Tribunal's decision to allow GS's appeal under Art 3 of the ECHR involved the making of an error of law and we set it aside.

103. We remake the decision dismissing GS's appeal.

EO

104. The First-tier Tribunal's decision to allow EO's appeal under Art 3 of the ECHR involved the making of an error of law and it is set aside.

105. We re-make the decision dismissing EO's appeal.

Signed

Upper Tribunal Judge Grubb
Immigration and Asylum Chamber