In the case of D. v. the United Kingdom (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr C. Russo,
Mr A. Spielmann,
Mr J. De Meyer,
Sir John Freeland,
Mr A.B. Baka,
Mr P. Kuris,
Mr U. Lohmus,
Mr J. Casadevall,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 20 February and 21 April 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

1. The case is numbered 146/1996/767/964. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") on 28 October 1996 and 14 November 1996 respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 30240/96) against the United Kingdom lodged with the Commission under Article 25 (art. 25) by a national of St Kitts, D., on 15 February 1996. In the proceedings before

the Commission the applicant was identified only as "D.". At the wish of the applicant this practice was maintained in the proceedings before the Court.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 3, 8 and 13 of the Convention (art. 2, art. 3, art. 8, art. 13).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 29 October 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr C. Russo, Mr A. Spielmann, Mr J. De Meyer, Mr A.B. Baka, Mr P. Kuris, Mr U. Lohmus, and Mr J. Casadevall (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

Pursuant to Rule 36 of its Rules of Procedure, the Commission had requested the Government not to deport the applicant and the Government provided assurances to that effect. The Government was informed by the Registrar on 29 October 1996 that under Rule 36 of Rules of Court A the interim measure indicated by the Commission remained recommended.

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 9 January and 10 January 1997 respectively.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 February 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr M. Eaton, Deputy Legal Adviser, Foreign and Commonwealth Office, Agent, Mr D. Pannick QC, Mr N. Garnham, Counsel, Ms S. McClelland, Mr S. Hewett, Advisers;

(b) for the Commission

Mr J.-C. Geus, Delegate;

(c) for the applicant

Mr N. Blake QC,
Mr L. Daniel, Counsel,
Mr A. Simmons,
Ms R. Francis, Solicitors,
Mrs N. Mole, Adviser.

The Court heard addresses by Mr Geus, Mr Blake and Mr Pannick and also replies to questions put by two of its members.

AS TO THE FACTS

I. Particular circumstances of the case

A. The applicant

6. The applicant was born in St Kitts and appears to have lived there most of his life. He is one of seven children. One sister and one brother moved to the United States in the 1970s and the rest of the family appears to have followed at unspecified dates. The applicant visited the United States in 1989 to try to join his family. During his stay there he was arrested on 5 September 1991 for possession of cocaine and subsequently sentenced to a three-year term of imprisonment. After one year, he was paroled for good behaviour and deported on 8 January 1993 to St Kitts.

B. The applicant's arrival in the United Kingdom and subsequent imprisonment

7. The applicant arrived at Gatwick Airport, London, on 21 January 1993 and sought leave to enter the United Kingdom for two weeks as a visitor. He was found at the airport terminal to be in possession of a substantial quantity of cocaine with a street value of about 120,000 pounds sterling (GBP). The immigration officer refused him leave to enter on the ground that his exclusion was conducive to the public good and gave him notice that he would be removed to St Kitts within a matter of days.

However, after being arrested and charged, the applicant was remanded in custody and subsequently prosecuted for being knowingly involved in the fraudulent evasion of the prohibition on the importation of controlled drugs of class A. He pleaded guilty at Croydon Crown Court on 19 April 1993 and was sentenced on 10 May 1993 to six years' imprisonment. He apparently behaved well while in H.M. Prison Wayland and was released on licence on 24 January 1996. He was placed in immigration detention pending his removal to St Kitts. Bail was granted by an adjudicator on 31 October 1996 after the Commission's report had been made public.

C. Diagnosis of AIDS

8. In August 1994, while serving his prison sentence, the applicant suffered an attack of pneumocystis carinii pneumonia ("PCP") and was diagnosed as HIV (human immunodeficiency virus)-positive and as suffering from acquired immunodeficiency

syndrome (AIDS). The infection appears to have occurred some time before his arrival in the United Kingdom.

9. On 3 March 1995, the applicant was granted a period of compassionate leave to be with his mother whose air fare to the United Kingdom to visit him had been covered by charitable donations.

10. On 20 January 1996, immediately prior to his release on licence, the immigration authorities gave directions for the applicant's removal to St Kitts.

D. The applicant's request to remain in the United Kingdom

11. By letter dated 23 January 1996, the applicant's solicitors requested that the Secretary of State grant the applicant leave to remain on compassionate grounds since his removal to St Kitts would entail the loss of the medical treatment which he was currently receiving, thereby shortening his life expectancy (see paragraphs 13 and 14 below). This request was refused on 25 January 1996 by the Chief Immigration Officer. In his letter of refusal addressed to the applicant's solicitors the Chief Immigration Officer stated:

"In reaching this decision full account was taken of paragraph 4 of the Immigration and Nationality Department B Division Instructions regarding AIDS and HIV-positive cases. You will be aware that paragraph 4 of this instruction which relates to persons whose applications are for leave to enter the United Kingdom states [see paragraph 27 of the judgment below] ... While we are saddened to learn of Mr D[...]'s medical circumstances we do not accept, in line with Departmental Policy, that it is right generally or in the individual circumstances of this case, to allow an AIDS sufferer to remain here exceptionally when, as here, treatment in this country is carried out at public expense, under the National Health Service. Nor would it be fair to treat AIDS sufferers any differently from others suffering medical conditions ..."

E. Judicial review proceedings

12. On 2 February 1996, the applicant applied unsuccessfully to the High Court for leave to apply for judicial review of the decision to refuse him leave to enter. On 15 February 1996, the Court of Appeal dismissed his renewed application. It found that section 3 of the Immigration Act 1971 drew a distinction between leave to enter and leave to remain. It held that the Chief Immigration Officer had correctly treated Mr D.'s application as an application for leave to enter and was not required to take into account paragraph 5 of the Home Office guidelines which applied to applications for leave to remain (see paragraphs 27 and 28 below). As to the applicant's argument that the Home Office acted unreasonably or irrationally in not acceding to the compassionate circumstances of his plea, Sir Iain Glidewell stated in his judgment:

"Nobody can but have great sympathy for this applicant in the plight in which he finds himself. If he is to return to St Kitts it seems that he will be unable to work because of his illness. His expectation of life, if the medical evidence is correct, may well be shorter than it would be if he remained under the treatment that he is receiving in the United Kingdom, and in many ways his plight will be great. On the other hand he would not be here if he had not come on a cocaine smuggling expedition in 1993; and

if he had not been imprisoned he would have gone back to St Kitts, if he had ever come here at all, long before his AIDS was diagnosed. Taking account of the fact that the Court must give most anxious scrutiny to a decision which involves questions particularly of life expectancy, as this one apparently does, nevertheless I cannot find that an argument in this case that the decision of the Chief Immigration Officer was irrational is one that has any hope of success at all. Putting it the opposite way, it seems to me to be one which was well within the bounds of his discretion, and thus is not one with which the Court can properly interfere."

F. Reports on the applicant's medical condition, treatment and prognosis

13. Since August 1995, the applicant's "CD4" cell count has been below 10. He has been in the advanced stages of the illness, suffering from recurrent anaemia, bacterial chest infections, malaise, skin rashes, weight loss and periods of extreme fatigue.

14. By letter dated 15 January 1996, Dr Evans, a consultant doctor, stated:

"His current treatment is AZT 250 mgs. b.d. and monthly nebulised pentamidine, he occasionally takes mystatin pastilles and skin emollients.
In view of the fact that [the applicant] has now had AIDS for over 18 months and because this is a relentlessly progressive disease his prognosis is extremely poor.
In my professional opinion [the applicant's] life expectancy would be substantially shortened if he were to return to St Kitts where there is no medication; it is important that he receives pentamidine treatment against PCP and that he receives prompt anti-microbial therapy for any further infections which he is likely to develop ..."

15. In a medical report provided on 13 June 1996, Professor Pinching, a professor of immunology at a London hospital, stated that the applicant had suffered severe and irreparable damage to his immune system and was extremely vulnerable to a wide range of specific infections and to the development of tumours. The applicant was reaching the end of the average durability of effectiveness of the drug therapy which he was receiving. It was stated that the applicant's prognosis was very poor and limited to eight to twelve months on present therapy. It was estimated that withdrawal of the proven effective therapies and of proper medical care would reduce that prognosis to less than half of what would be otherwise expected.

G. Medical facilities in St Kitts

16. By letter dated 20 April 1995, the High Commission for the Eastern Caribbean States informed the doctor treating the applicant in prison that the medical facilities in St Kitts did not have the capacity to provide the medical treatment that he would require. This was in response to a faxed enquiry of the same date by Dr Hewitt, the managing medical officer at H.M. Prison Wayland. By letter of 24 October 1995, Dr Hewitt informed the Home Office of the contents of the letter from the High Commission, which had also been sent to the Parole Unit on 1 May 1995. He stated that the necessary treatment was not available in St Kitts but was widely and freely available in the United Kingdom and requested that due consideration be given to lifting the deportation order in respect of the applicant. By letter dated 1 August 1996, the High Commission for the Eastern Caribbean States confirmed that the position in St Kitts had not changed.

17. By letter dated 5 February 1996, the Antigua and Barbuda Red Cross informed the applicant's representatives that they had consulted their officer on St Kitts who stated that there was no health care providing for drugs treatment of AIDS.

Results of enquiries made by the Government of the authorities in St Kitts suggest that there are two hospitals in St Kitts which care for AIDS patients by treating them for opportunistic infections until they are well enough to be discharged, and that an increasing number of AIDS sufferers there live with relatives.

H. The applicant's family situation in St Kitts

18. The applicant has no family home or close family in St Kitts other than, according to information provided by the Government, a cousin. His mother, who currently lives in the United States, has declared that her age, bad health and lack of resources prevent her from returning to St Kitts to look after her son if he were to be returned there. She has also stated that she knew of no relatives who would be able to care for him in St Kitts.

I. The applicant's situation since the adoption of the Commission's report

19. When granted bail on 31 October 1996 (see paragraph 7 above) the applicant was released to reside in special sheltered accommodation for AIDS patients provided by a charitable organisation working with homeless persons. Accommodation, food and services are provided free of charge to the applicant. He also has the emotional support and assistance of a trained volunteer provided by the Terrence Higgins Trust, the leading charity in the United Kingdom providing practical support, help, counselling and legal and other advice for persons concerned about or having AIDS or HIV infection.

20. In a medical report dated 9 December 1996 Dr J.M. Parkin, a consultant in clinical immunology treating the applicant at a London hospital, noted that he was at an advanced stage of HIV infection and was severely immunosuppressed. His prognosis was poor. The applicant was being given antiretroviral therapy with "D4T" and "3TC" to reduce the risk of opportunistic infection and was continuing to be prescribed pentamidine nebulisers to prevent a recurrence of PCP. Preventative treatment for other opportunistic infections was also foreseen. Dr Parkin noted that the lack of treatment with anti-HIV therapy and preventative measures for opportunistic disease would hasten his death if he were to be returned to St Kitts.

21. The applicant was transferred to an AIDS hospice around the middle of January 1997 for a period of respite care. At the beginning of February there was a sudden deterioration in his condition and he had to be admitted to a hospital on 7 February for examination. At the hearing before the Court on 20 February 1997, it was stated that the applicant's condition was causing concern and that the prognosis was uncertain. According to his counsel, it would appear that the applicant's life was drawing to a close much as the experts had predicted (see paragraph 15 above).

II. Relevant domestic law and practice

22. The regulation of entry into and stay in the United Kingdom is governed by Part 1 of the Immigration Act 1971. The practice to be followed in the administration of the Act for regulating entry and stay is contained in statements of the rules laid by the Secretary of State before Parliament ("the Immigration Rules").

23. Section 3 (1) provides that a person who is not a British citizen shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of the Act. Leave to enter may be granted for a limited or for an indefinite period.

24. Under section 4 (1) of the Act the power to grant or refuse leave to enter is exercised by immigration officers whereas the power to grant leave to remain in the United Kingdom is exercised by the Secretary of State. These powers are exercisable by notice in writing given to the person affected.

25. A person, such as the applicant, who has been refused leave to enter but is physically in the United Kingdom pending his removal and seeks to be allowed to stay there does not fall to be treated as applying for leave to remain. Since no leave to enter had been granted to the applicant, it was right according to the judgment of Sir Iain Glidewell in R. v. Secretary of State for the Home Department, ex parte D. (Court of Appeal, 15 February 1996) for the immigration officer to treat his application as an application for leave to enter rather than for leave to remain.

A. Policy guidelines on how to proceed in cases in which persons seeking to enter or remain in the United Kingdom are suffering from AIDS or are HIV-positive

26. The Immigration and Nationality Department of the Home Office issued a policy document (BDI 3/95) on this subject in August 1995. Paragraph 2 of the guidelines specifies that the fact that a person is suffering from AIDS or is HIV-positive is not a ground for refusing leave to enter or leave to remain if the person concerned otherwise qualifies under the Immigration Rules. Equally, this fact is not in itself a sufficient ground to justify the exercise of discretion where the person concerned has not met the requirements of the Rules.

The policy guidelines distinguish between applications for leave to enter and applications for leave to remain.

27. On applications for leave to enter (paragraph 4 of the guidelines), where the person is suffering from AIDS, the policy and practice is to adhere to the provisions of the Immigration Rules in the normal way. Where such a person does not qualify under the Rules, entry is refused.

28. On applications for leave to remain (paragraph 5 of the guidelines), the application should be dealt with normally on its merits under the applicable Rules. However, there is a discretion outside the Rules which can be exercised in strong compassionate circumstances. Paragraph 5.4 states that: "... there may be cases where it is apparent that there are no facilities for treatment available in the applicant's own country. Where evidence suggests that this absence of treatment significantly shortens the life expectancy of the applicant it will normally be appropriate to grant leave to remain."

B. Other relevant materials

29. Among the documentary materials submitted by the applicant, are the following.

1. International policy statements on human rights and AIDS

30. International concern about AIDS has resulted in the adoption of several international texts which have addressed, inter alia, the protection of the human rights of the victims of the disease. Thus, the United Nations Commission on Human Rights adopted a resolution on 9 March 1993 on the protection of human rights in the context of human immunodeficiency virus or acquired immunodeficiency syndrome in which it called upon

"all States to ensure that their laws, policies and practices introduced in the context of AIDS respect human rights standards".

31. At a Summit of Heads of Government or Representatives of forty-two States meeting in Paris on 1 December 1994, a declaration was adopted in which the participating States solemnly declared their obligation

"to act with compassion for and in solidarity with those with HIV or at risk of becoming infected, both within [their] societies and internationally".

2. Extract of the WHO report on "Health conditions in the Americas", 1994, Volume II, concerning St Kitts and Nevis

32. "Health and living conditions

... there are a number of serious environmental problems, such as inadequate disposal of solid and liquid waste - especially untreated sewage - into coastal lands and waters, resulting in coastal zone degradation, fish depletion and health problems (gastro-enteritis) ..."

33. According to this publication, there are two general hospitals in St Kitts, one with 174 beds and the other with 38. There is also a "cottage" hospital with 10 beds. There are two homes providing geriatric care.

3. "Treatment issues - a basic guide to medical treatment options for people with HIV and AIDS" produced in April 1996 by the Terrence Higgins Trust

34. This guide describes the three medical strategies available for treating HIV infection and AIDS: using anti-HIV drugs which attack HIV itself to delay or prevent damage to the immune system, treating or preventing opportunistic infections which take advantage of damage to the immune system and strengthening and restoring the immune system. Amongst the first category, several drugs can be used, including AZT (also known as Zidovudine or its tradename Retrovir). This belongs to a family of drugs called nucleoside analogues which inhibit an enzyme produced by HIV called reverse transcriptase (RT). If RT is inhibited, HIV cannot infect new cells and the build-up of virus in the body is slowed down. However, the existing drugs are only partially effective and at best can only delay the worsening of HIV-related disease rather than prevent it.

35. As regards the second category, persons whose immune systems have been significantly damaged are vulnerable to a range of infections and tumours known as opportunistic infections. These commonly include cytomegalovirus (herpes virus), Kaposi's sarcoma, anaemia, tuberculosis, toxoplasmosis and PCP. PCP is a form of pneumonia which in people infected with HIV may affect the lymph nodes, bone marrow, spleen and liver as well as the lungs. Steps to avoid such infections include taking care with food and drink and prophylactic treatment by drugs. In the case of PCP, which was a common cause of death during the first years of the epidemic and is still one of the commonest AIDS illnesses, options include the long-term taking of antibiotics such as cotrimoxazole and the use of nebulised pentamidine which is intended to protect the lungs.

36. In relation to the third category, treatment which strengthens or restores the immune system, research has yet to produce any clear results.

PROCEEDINGS BEFORE THE COMMISSION

37. The applicant lodged his application (no. 30240/96) with the Commission on 15 February 1996. He alleged that his proposed removal to St Kitts would be in violation of Articles 2, 3 and 8 of the Convention (art. 2, art. 3, art. 8) and that he had been denied an effective remedy to challenge the removal order in breach of Article 13 (art. 13).

The Commission declared the application admissible on 26 June 1996. In its report of 15 October 1996 (Article 31) (art. 31), it expressed the opinion that Article 3 (art. 3) would be violated if the applicant were to be removed to St Kitts (eleven votes to seven); that it was unnecessary to examine the complaint under Article 2 (art. 2) (unanimously); that no separate issue arose under Article 8 (art. 8) (unanimously); and that there had been no violation of Article 13 (art. 13) (thirteen votes to five). The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-III), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT

38. In their memorial and at the oral hearing the Government requested the Court to decide and declare that the facts disclose no breach of the applicant's rights under Articles 2, 3, 8 or 13 of the Convention (art. 2, art. 3, art. 8, art. 13).

The applicant requested the Court in his memorial and at the oral hearing to find that his proposed removal from the United Kingdom would, if implemented, constitute a

breach of Articles 2, 3 and 8 of the Convention (art. 2, art. 3, art. 8) and that he had no effective remedy in respect of those complaints in breach of Article 13 (art. 13).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION (art. 3)

39. The applicant maintained that his removal to St Kitts would expose him to inhuman and degrading treatment in breach of Article 3 of the Convention (art. 3), which provides:

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

A. Arguments of those appearing before the Court

1. The applicant

40. The applicant maintained that his removal to St Kitts would condemn him to spend his remaining days in pain and suffering in conditions of isolation, squalor and destitution. He had no close relatives or friends in St Kitts to attend to him as he approached death. He had no accommodation, no financial resources and no access to any means of social support. It was an established fact that the withdrawal of his current medical treatment would hasten his death on account of the unavailability of similar treatment in St Kitts. His already weakened immune system would not be able to resist the many opportunistic infections to which he would be exposed on account of his homelessness, lack of proper diet and the poor sanitation on the island. The hospital facilities were extremely limited and certainly not capable of arresting the development of infections provoked by the harsh physical environment in which he would be obliged to fend for himself. His death would thus not only be further accelerated, it would also come about in conditions which would be inhuman and degrading.

41. In June 1996, his life expectancy was stated to be in the region of eight to twelve months even if he continued to receive treatment in the United Kingdom. His health had declined since then. As he was now clearly weak and close to death, his removal by the respondent State at this late stage would certainly exacerbate his fate.

2. The Government

42. The Government requested the Court to find that the applicant had no valid claim under Article 3 (art. 3) in the circumstances of the case since he would not be exposed in the receiving country to any form of treatment which breached the standards of Article 3 (art. 3). His hardship and reduced life expectancy would stem from his terminal and incurable illness coupled with the deficiencies in the health and social-welfare system of a poor, developing country. He would find himself in the same situation as other AIDS victims in St Kitts. In fact he would have been returned in January 1993 to St Kitts, where he had spent most of his life, had it not been for his prosecution and conviction.

43. The Government also disputed the applicant's claim that he would be left alone and without access to treatment for his condition. They maintained that he had at least one cousin living in St Kitts and that there were hospitals caring for AIDS patients, including those suffering from opportunistic infections (see paragraph 17 above). Even if the treatment and medication fell short of that currently administered to the applicant in the United Kingdom, this in itself did not amount to a breach of Article 3 standards (art. 3).

44. Before the Court the Government observed that it was their policy not to remove a person who was unfit to travel. They gave an undertaking to the Court not to remove the applicant unless, in the light of an assessment of his medical condition after the Court gives judgment, he is fit to travel.

3. The Commission

45. The Commission concluded that the removal of the applicant to St Kitts would engage the responsibility of the respondent State under Article 3 (art. 3) even though the risk of being subjected to inhuman and degrading treatment stemmed from factors for which the authorities in that country could not be held responsible. The risk was substantiated and real. If returned, he would be deprived of his current medical treatment and his already weakened immune system would be exposed to untreatable opportunistic infections which would reduce further his limited life expectancy and cause him severe pain and mental suffering. He would be homeless and without any form of moral, social or family support in the final stages of his deadly illness.

B. The Court's assessment

46. The Court recalls at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. It also notes the gravity of the offence which was committed by the applicant and is acutely aware of the problems confronting Contracting States in their efforts to combat the harm caused to their societies through the supply of drugs from abroad. The administration of severe sanctions to persons involved in drug trafficking, including expulsion of alien drug couriers like the applicant, is a justified response to this scourge.

47. However, in exercising their right to expel such aliens Contracting States must have regard to Article 3 of the Convention (art. 3), which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 (art. 3) prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question (see, most recently, the Ahmed v. Austria judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, p. 2206, para. 38; and the Chahal v. the United Kingdom judgment of 15 November 1996, Reports 1996-V, p. 1853, paras. 73-74).

48. The Court observes that the above principle is applicable to the applicant's removal under the Immigration Act 1971. Regardless of whether or not he ever

entered the United Kingdom in the technical sense (see paragraph 25 above) it is to be noted that he has been physically present there and thus within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention (art. 1) since 21 January 1993. It is for the respondent State therefore to secure to the applicant the rights guaranteed under Article 3 (art. 3) irrespective of the gravity of the offence which he committed.

49. It is true that this principle has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection (see, for example, the Ahmed judgment, loc. cit., p. 2207, para. 44).

Aside from these situations and given the fundamental importance of Article 3 (art. 3) in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article (art. 3) in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 (art. 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 (art. 3). To limit the application of Article 3 (art. 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.

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).

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).

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 (see paragraph 17 above).

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 (art. 3).

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.

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.

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.

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 (art. 3).

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION (art. 2)

55. The applicant further maintained that the implementation by the United Kingdom authorities of the decision to remove him to St Kitts would be in breach of Article 2 of the Convention (art. 2), which provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article (art. 2) when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

56. The applicant contended that his removal to St Kitts would engage the responsibility of the respondent State under Article 2 (art. 2). He is terminally ill, and the medical evidence submitted to the Court (see paragraphs 14-15 and 20-21 above) confirmed that his already reduced life expectancy would be further shortened if he were to be suddenly deprived of his current medical treatment and sent back to St Kitts. There would, he argued, be a direct causal link between his expulsion and his accelerated death such as to give rise to a violation of the right to life. He submitted that Article 2 (art. 2) denoted a positive obligation to safeguard life which in the circumstances in issue required the Government not to take a measure which would further reduce his limited life expectancy.

57. The Government did not dispute the fact that the removal of the applicant to St Kitts and the consequential loss of the current medical treatment would hasten his death. However, the threat to his life expectancy stemmed not from factors for which the Government could be held responsible but from his own fatal illness in conjunction with the lack of adequate medical treatment in the receiving country. Article 2 (art. 2) was therefore not applicable to the circumstances in issue. In any event the substance of the applicant's complaints could not be separated from the arguments he advanced in furtherance of his allegation under Article 3 (art. 3) and for that reason were best dealt with under the latter provision (art. 3).

58. The Commission did not find it necessary to decide whether the risk to the applicant's life expectancy created by his removal disclosed a breach of Article 2 (art. 2). It considered that it would be more appropriate to deal globally with this allegation when examining his related complaints under Article 3 (art. 3).

59. The Court for its part shares the views of the Government and the Commission that the complaints raised by the applicant under Article 2 (art. 2) are indissociable from the substance of his complaint under Article 3 (art. 3) in respect of the consequences of the impugned decision for his life, health and welfare. It notes in this respect that the applicant stated before the Court that he was content to base his case under Article 3 (art. 3).

Having regard to its finding that the removal of the applicant to St Kitts would give rise to a violation of Article 3 (art. 3) (see paragraph 54 above), the Court considers that it is not necessary to examine his complaint under Article 2 (art. 2).

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (art. 8)

60. The applicant also alleged that his proposed removal to St Kitts would violate his right to respect for his private life, as guaranteed by Article 8 of the Convention (art. 8). Article 8 (art. 8) provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

61. In support of this argument the applicant maintained that his removal would amount to a disproportionate interference with his right to respect for his private life, and in particular his right to respect for his physical integrity. While readily accepting that the offence he had committed was a very serious one, he requested the Court to consider the impact which his removal to St Kitts would entail for him, a terminally ill person with no family or close relatives in the receiving country, no moral or social support and no adequate medical treatment to stave off infection to his already weakened immune system. His continued presence in the United Kingdom could not be considered a burden on the domestic health resources and, furthermore, there were no indications that he would reoffend.

62. The Government maintained that the applicant could not rely on Article 8 (art. 8) to challenge the impact of the impugned decision on his right to private life since his private life was constituted in the receiving country where he had lived most of his life. Any links which the applicant had with the United Kingdom were the direct result of the offence for which he had been sentenced. Even if Article 8 (art. 8) were to be regarded as applicable, the interference with his medical interests by removing him to St Kitts was justified, given the seriousness of the offence he had committed, for reasons of the prevention of crime and in the interests of the economic well-being of the United Kingdom.

63. Although the Commission found that no separate issue arose under Article 8 (art. 8) in view of its findings under Article 3 (art. 3), the Delegate invited the Court to find a violation of Article 8 (art. 8) in the event of a conclusion that the applicant's removal to St Kitts would not violate Article 3 (art. 3).

64. Having regard to its finding under Article 3 (art. 3) (see paragraph 54 above), the Court concludes that the applicant's complaints under Article 8 (art. 8) raise no separate issue.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION (art. 13)

65. The applicant complained that he had no effective remedy in English law in respect of his complaints under Articles 2, 3 and 8 of the Convention (art. 2, art. 3, art. 8). He contended that this gave rise to a breach of Article 13 of the Convention (art. 13), which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

66. The applicant pointed to the limitations which circumscribed an effective review by courts in the United Kingdom of the decisions reached by the authorities in

expulsion cases. When reviewing the legality of administrative decisions the courts did not treat the Convention and the principles developed by the Court as a relevant consideration; nor was the decision-maker obliged to take account of the Convention and the case-law of the Convention institutions when exercising the powers conferred by legislation such as the Immigration Act 1971. Admittedly, the domestic courts will review decisions with a greater rigour when they have an impact on human rights, but even in such cases they do not take a Convention-based approach. Thus, in the case in issue, the Court of Appeal did not seek to satisfy itself whether the removal of the applicant would expose him to inhuman and degrading treatment but merely examined whether the decision-maker had taken this factor into account. This, he maintained, fell short of the test of "independent scrutiny" of a claim that there exist substantial grounds for fearing a real risk of treatment proscribed by Article 3 (art. 3) which the Court in its Chahal judgment (loc. cit., p. 1871, para. 151) had considered to be a crucial aspect of an effective remedy. Furthermore, the Court of Appeal had regarded the seriousness of the applicant's offence as a paramount consideration in deciding that the impugned decision was not an irrational one and had failed also to take adequate account of the Convention's requirements when dealing with his complaints under Articles 2 and 8 (art. 2, art. 8). For these reasons it could not be said that the judicial review proceedings afforded him an effective remedy within the meaning of Article 13 (art. 13).

67. The Government disputed this argument and invited the Court to confirm the conclusion which it had reached in certain earlier judgments that judicial review proceedings afforded an effective remedy to challenge the legality of a decision to expel or deport an individual. The courts in the United Kingdom applied a "most anxious scrutiny" test when reviewing administrative decisions which affect the fundamental rights of individuals. The Court of Appeal applied such a test in this case when assessing the merits of the decision to remove the applicant and took due account of the hardship which the implementation of the decision would cause the applicant. The applicant cannot therefore argue that he was denied an effective remedy.

68. The Commission agreed with the Government. The Court of Appeal examined the substance of the applicant's complaint, including the hardship which would result from his removal. Although the Court of Appeal did not quash the decision to remove him, it had the power to do so. The remedy afforded by judicial review was therefore an effective one.

69. The Court observes that Article 13 of the Convention (art. 13) guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article (art. 13) is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (art. 13) (see, among other authorities, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 47, para. 120; and the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 39, para. 122).

70. In its Vilvarajah and Others judgment (loc. cit., p. 39, para. 123) and its Soering judgment (loc. cit., pp. 47-48, paras. 121-24) the Court considered judicial review proceedings to be an effective remedy in relation to the complaints raised under Article 3 (art. 3) in the contexts of deportation and extradition. It was satisfied that English courts could effectively control the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate. It was also accepted that a court in the exercise of its powers of judicial review would have power to quash a decision to expel or deport an individual to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take.

71. While it is true that the source of the risk of the prohibited treatment to which the applicant will be exposed and the impugned measure are different from those in the above cases there is no reason to depart from the conclusion reached in those cases in respect of the effectiveness of judicial review proceedings for the purposes of Article 13 (art. 13). Indeed the Court of Appeal had regard to domestic case-law which required it to submit the applicant's plight to the most anxious scrutiny on account of the established risk to his life expectancy. It did so against the background of the criteria which need to be satisfied before an administrative decision can be challenged on the grounds of its irrationality. The substance of the applicant's complaint was therefore examined by the Court of Appeal. That court had the power to afford him the relief he sought. The fact that it did not do so is not a material consideration since the effectiveness of a remedy for the purposes of Article 13 (art. 13) does not depend on the certainty of a favourable outcome for an applicant (see the Vilvarajah and Others judgment, loc. cit., p. 39, para. 122).

72. The applicant maintained that the effectiveness of the remedy invoked first before the High Court and subsequently before the Court of Appeal was undermined on account of their failure to conduct an independent scrutiny of the facts in order to determine whether they disclosed a real risk that he would be exposed to inhuman and degrading treatment. He relied on the reasoning in the Chahal judgment (loc. cit., p. 1871, para. 151). However the Court notes that in that case the domestic courts were precluded from reviewing the factual basis underlying the national-security considerations invoked by the Home Secretary to justify the expulsion of Mr Chahal. No such considerations arise in the case in issue.

73. The applicant thus had available to him an effective remedy in relation to his complaints under Articles 2, 3 and 8 of the Convention (art. 2, art. 3, art. 8). Accordingly there has been no breach of Article 13 (art. 13).

V. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

74. Article 50 of the Convention (art. 50) provides:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or

measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Costs and expenses

75. The applicant did not seek damages. He claimed reimbursement of GBP 49,443 and 13,811 French francs (FRF) incurred by way of costs and expenses in respect of the proceedings brought before the Convention institutions.

76. The Government requested the Court to reduce the amount, mainly because the time billed in respect of the preparation of certain parts of the case was excessive and the number of lawyers engaged to work on the case unreasonable. They proposed the sum of GBP 29,313.16 and FRF 9,194.

77. The applicant defended the amount claimed on account of, inter alia, the complexity of the issues involved and the speed with which the case had been treated by both the Commission and the Court.

78. Making an assessment on an equitable basis, the Court awards the applicant GBP 35,000 plus any value-added tax that may be chargeable under this head, less the FRF 33,216 already paid in legal aid by the Council of Europe.

B. Default interest

79. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that the implementation of the decision to remove the applicant to St Kitts would violate Article 3 of the Convention (art. 3);

2. Holds that having regard to its conclusion under Article 3 (art. 3) it is not necessary to examine the applicant's complaint under Article 2 of the Convention (art. 2);

3. Holds that the applicant's complaint under Article 8 of the Convention (art. 8) gives rise to no separate issue;

4. Holds that there has been no violation of Article 13 of the Convention (art. 13);

5. Holds

(a) that the respondent State is to pay the applicant, within three months, 35,000 (thirty-five thousand) pounds sterling in respect of costs and expenses less 33,216 (thirty-three thousand two hundred and sixteen) French francs to be converted into pounds sterling at the rate applicable at the date of delivery of the present judgment;
(b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 2 May 1997.

For the President Signed: Jan De Meyer Judge

For the Registrar Signed: Michael O'Boyle Head of Division in the registry of the Court