Neutral Citation Number: [2008] EWCA Civ 839

Case No: C5/2007/2488

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM IMMIGRATION APPEAL TRIBUNAL
JUDGE GLEESON
HR/00707/2004

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2008

Before :

LORD JUSTICE PILL
LADY JUSTICE ARDEN
and
LORD JUSTICE LONGMORE

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Between :

RS (Zimbabwe)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

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- -

Mr Stephen Knafler and Ms Abigail Smith (instructed by **Messrs Luqmani Thompson & Partners**) for the **Appellant**
Mr Parishil Patel (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date : 15 April 2008
Written submissions 20 June 2008

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Judgment

Lord Justice Pill :

1. This is an appeal by RS (Zimbabwe) against a decision of the Immigration Appeal Tribunal dated 17 July 2007 whereby the Tribunal dismissed an appeal by RS against a decision of the Secretary of State for the Home Department's ("The Secretary of State") refusal on 5 January 2004 to allow RS to remain in the United Kingdom on human rights grounds.

2. An appeal against the Secretary of State's refusal had been allowed by an Adjudicator on human rights grounds on 29 October 2004 but that appeal was subsequently held to have been allowed in excess of jurisdiction. The matter reached this court which, by consent, remitted RS's appeal to the Tribunal. In the decision complained of, the Tribunal found that the Adjudicator had made a material error of law and substituted its own decision that the human rights appeal should be dismissed.

3. RS was born in Zimbabwe on 10 June 1977. On 21 February 2001, she arrived in the United Kingdom with six months leave as a visitor. In August 2001 she was diagnosed with HIV. She was granted leave to remain as a student until 30 September 2002 but an extension of that leave was refused.

4. The Adjudicator held that "in the peculiar circumstances of this case it would be contrary to the obligations of the United Kingdom under article 3 of the European Convention on Human Rights ("the Convention") to remove the appellant to Zimbabwe". The Adjudicator considered the decision of this court in *N v Secretary of State* [2003] EWCA Civ 1369. The court held, by a majority, that the decision of the European Court of Human Rights ("ECtHR") in *D v United Kingdom* [1997] 23 EHRR 423, where the extent of the article 3 duty towards sick people was considered, did not cover the case of *N*. The House of Lords unanimously dismissed the applicant's appeal against that finding ([2005] UKHL 31).

5. The Tribunal considered the appeal on the basis of the judgments in the Court of Appeal in *N* and the House of Lords decision does not appear to have been cited at the hearing, where both parties were represented. (The House of Lords decision post-dated that of the Adjudicator, but not the Tribunal).

6. The Tribunal held, at paragraph 13:

> "On that point, the appellant's evidence is that her husband is still alive and reasonably well and that, with his family's help he has been able to find at least some money for treatment. There is not total denial of treatment as in *D v UK* . . . on that basis, the Zanu-PF angle is merely an aspect of the difficulty in accessing treatment. It is not sufficiently different from the facts considered in *N* to amount to a special factor and to entitle the Immigration Judge to allow the appeal"

7. In a careful determination, the Adjudicator had set out, at paragraph 3, the personal circumstances of the appellant and her husband. He had returned to Zimbabwe in August 2002:

> "The area in which they live is impoverished and has suffered violence at the hands of Zanu-PF supporters because it was an area of MDC support. There is no source of treatment available there for HIV and the appellant's husband is not receiving treatment . . . The appellant's husband, in common with other non Zanu-PF supporters, finds it difficult to purchase food or even to obtain general medical assistance."

The appellant is stated presently to be in "fair health", having responded favourably to anti-retroviral treatment. It was likely that she had been infected for seven or eight years.

8. The Adjudicator summarised the decision in *D* and that of the Court of Appeal in *N*, along with background material about conditions in Zimbabwe. He concluded, at paragraph 12:

> "Because of lack of availability of drugs and general decline in the healthcare situation there is no practical availability to the ordinary person, that is other than the affluent or influential, of treatment in Zimbabwe for opportunist infections attacking the HIV positive and much less so for anti-retroviral treatment."

9. The Adjudicator found, at paragraph 13:

> "In the result I find that it is likely that the appellant on return to Zimbabwe would live in circumstances of privation. . . . I find that the appellant, even with help from her sisters, could not be expected to access private anti-retroviral treatment even if it were available. The effect of lack of access to anti-retroviral therapy and to appropriate treatment for opportunistic infections is likely to be a rapid decline in the appellant's health . . . I find that the rapid decline in the appellant's health will be attended by considerable mental and physical suffering. . . . I therefore find, in accordance with the estimate given by the appellant's own physician, Dr Evans, that the life expectancy of the appellant on a removal to Zimbabwe is likely to be no more than one or two years at most, as against a possible life expectancy of a possible ten years on her present regime."

10. Notwithstanding those findings, the Adjudicator concluded, at paragraph 14:

> "For all the force of the foregoing, I acknowledge that this seems to bring one only to the point described by Dyson LJ in *N* above as tragic but by no means exceptional or very exceptional and not raising humanitarian considerations so exceptional as to engage article 3. The appellant must, if she is to win protection, show that something more referred to by the Court of Appeal in *N*."

11. The Adjudicator then set out further factors which, in his view, entitled him to reach the conclusion on article 3 already cited. The first factor was the evidence of the

circumstances of the appellant's husband. The Adjudicator stated that he lives in poverty and in circumstances of continued threat of political intimidation. He is afraid of the continued deprivations of "these brutal guys" who had caused his brother's abhorrent death. The objective evidence, the Adjudicator said, including a report by Professor Barnett, showed attempts by the government of Zimbabwe "to use as a means of further suppression of political opposition the deprivation of food; the deprivation of medical care; and the tight regulation of non-governmental organisations". The appellant would be obliged to return to "an area already oppressed by the intolerant and totalitarian methods of the Mugabe Zanu-PF government to a state of poverty and deprivation of food and healthcare in order to suppress any expression of dissent to his rule".

12. The Adjudicator stated, at paragraph 16:

> "To my mind, this is an extraordinary situation that provides the further relevant factors, referred to in *N*, that elevate the totality of circumstances in this case to that degree where, even applying with the greatest of circumspection the principle exemplified in *D*, it would be properly seen that the protection of article 3 is engaged. Among the added factors to be borne in mind in this particular case are that the appellant entered the country lawfully and has abided by immigration laws, as did her husband before her; that her husband has not sought to advance any false claim for protection but he, despite his condition, has returned to his home, while still enjoying a right to remain in the United Kingdom, upon the death of his father; that the appellant herself, although her sisters-in-law are able to show an acknowledged claim for asylum, has not sought falsely so to claim but has placed her situation frankly and honestly before the respondent; that the United Kingdom has already assumed a burden of medical care towards the appellant over the past two years and has in so doing so given her some hope. The particular reason for holding the strict requirements of *N* to be met, however, is that on top of all this remains the added factor of the malign contribution of the Zimbabwean government to the individual circumstances of hardship and want that the appellant will face."

13. In the following paragraph, the Adjudicator expanded on the "malign contribution" factor. Having re-stated the circumstances, he added, eloquently, at paragraph 17:

> "Not only that but, perhaps the most telling circumstance of all, that shows the protection of article 3 to be engaged, is that the appellant is reasonably likely to face not merely an absence of continued health but the very denial, as a result of perverted policies by the ruling party, of medication and even nutrition. It is in no respect whatever exaggerated or colourable to hold it reasonably likely that the appellant will rapidly decline to a condition stripped of her human dignity, reduced, by government oppression afflicting the family area where she will have to live, to subsistence gardening, meagrely vested in

> tattered clothes and barefoot, just as is her husband today, who barely two years ago was a student in London receiving medical treatment that would have prolonged his life had he not felt the duty to return to his home and his children upon his father's death."

The Adjudicator then referred again to the contribution of "the abhorrent policies of the government" and its likely effect on the appellant's prospects.

14. When granting permission to appeal against his decision, a Vice President of the Tribunal stated that the Adjudicator was "particularly familiar with the problems of Zimbabwe". The Tribunal's determination is succinct. The findings of the Adjudicator are summarised, including the special factors on which the Adjudicator relied to find that the return of the appellant to Zimbabwe would involve a breach of article 3. The submission on behalf of the appellant that the Adjudicator's finding was neither irrational nor perverse was recited and, rightly or wrongly, the appellant's confirmation that her husband's condition had not deteriorated further since 2004. The brief conclusion at paragraph 13, already cited at paragraph 6, followed.

15. On behalf of the appellant, Mr Knafler submits that the Adjudicator did not err in law and, further, neither the Secretary of State nor the Tribunal has sufficiently identified a legal error. Article 3 protection was not, in medical treatment cases, limited to cases where the applicant is dying. In his analysis of the applicability of article 3, the Adjudicator was entitled to take into account the behaviour of the Authorities in the receiving State. The dominant factor in the article 3 finding was the question of medical treatment but the effect of non-availability of treatment could be viewed more seriously if the government of the receiving State was conducting policies which added to the degradation. The Adjudicator was entitled to take into account that the appellant would be returning to very adverse conditions. It was accepted that economic mismanagement in the receiving State would not generally create a situation in which reliance can be placed on article 3 but an appellant's likely treatment by the government of the receiving State is a relevant factor.

16. After the hearing before this court, it became known to the court that the judgment of the Grand Chamber of the ECtHR in the case of *N* was likely to be delivered in the near future and the court decided to await its delivery. Judgment was given on 27 May 2008 (Application No. 26565/05) and the parties were given an opportunity to make further written submissions. These were received by 20 June 2008. The Grand Chamber was, in effect, hearing an appeal from the approach of the House of Lords in *N* to the applicability of article 3. The Grand Chamber held, by 14 votes to 3, that there would be no violation of article 3 of the Convention in the event of *N* being removed to Uganda.

17. From a health and medical treatment point of view, the present case has much in common with *N*. Lord Nicholls of Birkenhead summarised the position in *N* in a passage recited by the Grand Chamber at paragraph 17:

> "...In August 1998 [the applicant] developed a second AIDS defining illness, Kaposi's sarcoma. The CD4 cell count of a normal healthy person is over 500. Hers was down to 10.

> As a result of modern drugs and skilled medical treatment over a lengthy period, including a prolonged course of systematic chemotherapy, the [applicant] is now much better. Her CD4 count has risen to 414. Her condition is stable. Her doctors say that if she continues to have access to the drugs and medical facilities available in the United Kingdom she should remain well for 'decades'. But without these drugs and facilities the prognosis is 'appalling": she will suffer ill-health, discomfort, pain and death within a year or two. This is because the highly active antiretroviral medication she is currently receiving does not cure her disease. It does not restore her to her pre-disease state. The medication replicates the functions of her compromised immune system and protects her from the consequences of her immune deficiency while, and only while, she continues to receive it.
>
> The cruel reality is that if the [applicant] returns to Uganda her ability to obtain the necessary medication is problematic. So if she returns to Uganda and cannot obtain the medical assistance she needs to keep her illness under control, her position will be similar to having a life-support machine turned off."

18. The Grand Chamber also cited, at paragraph 17, a long extract from the speech of Lord Hope of Craighead, with whom Lord Nicholls, Lord Brown of Eaton-under-Heywood and Lord Walker of Gestingthorpe, agreed. Lord Hope, having considered the jurisprudence of the ECtHR, stated:

> "... So long as [the applicant] continues to take the treatment she will remain healthy and she will have several decades of good health to look forward to. Her present condition cannot be said to be critical. She is fit to travel, and will remain fit if and so long as she can obtain the treatment that she needs when she returns to Uganda. The evidence is that the treatment that she needs is available there, albeit at considerable cost. She also still has relatives there, although her position is that none of them would be willing and able to accommodate and take care of her. In my opinion her case falls into the same category as *SCC. v Sweden*, *Henao v the Netherlands*, *Ndangoya v. Sweden* and *Amegnigan v. the Netherlands*, where the court has consistently held that the test of exceptional circumstances has not been satisfied. In my opinion the court's jurisprudence leads inevitably to the conclusion that her removal to Uganda would not violate the guarantees of Article 3 of the Convention. ..."

19. Lord Hope's conclusion was recited:

> "[Any extension of the *D.* principles] would have the effect of affording all those in the [applicant's] condition a right of asylum in this country until such time as the standard of medical facilities available in their home countries for the treatment of HIV/AIDS had reached that which is available in

> Europe. It would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country. This would result in a very great and no doubt unquantifiable commitment of resources which it is, to say the least, highly questionable the states parties to the convention would ever have agreed to. The better course, one might have thought, would be for states to continue to concentrate their efforts on the steps which are currently being taken, with the assistance of the drugs companies, to make the necessary medical care universally and freely available in the countries of the third world which are still suffering so much from the relentless scourge of HIV/AIDS."

The Grand Chamber also cited, at paragraph 17, the test indicated by Baroness Hale of Richmond:

> "...whether the applicant's illness has reached such a critical stage (ie 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. ...[The test] is not met on the facts of this case."

20. In its assessment, the Grand Chamber referred to the case of *D* where the applicant was in the advanced stages of AIDS and was close to death in circumstances where the medical facilities in the receiving State did not have the capacity to provide the applicant with the treatment he needed and he had no family home or close relatives able to look after him there. The court in *D* had held, at paragraph 53:

> "[i]n 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."

21. The Grand Chamber in *N* noted that the court had never subsequently found a proposed removal of an alien from a contracting State to give rise to a violation of article 3 on grounds of the applicant's ill-health, and reviewed the jurisprudence. The Grand Chamber, at paragraph 43, stated that "it considers that it should maintain the high threshold set in *D*". The level of treatment available in the contracting State and the country of origin may vary considerably. A fair balance must be struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. Article 3 does not place an obligation on the contracting State to alleviate disparities in the level of treatment available through the provision of free and unlimited healthcare to all aliens without a right to stay within its jurisdiction.

22. Applying those principles to the facts in *N*, the Grand Chamber noted, at paragraph 46, that the claim was "based solely on [the applicant's] serious medical condition and

the lack of sufficient treatment available for it in her home country. . . . She is fit to travel and will remain fit as long as she continues to receive the basic treatment she needs" (paragraph 47). The court noted that the evidence before the domestic courts indicated that if the applicant were to be deprived of her present medication her condition would rapidly deteriorate and she would suffer ill-health, discomfort, pain and death within a few years.

23. The Grand Chamber concluded, at paragraph 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."

24. The three dissenting judges also considered the jurisprudence of the ECtHR and concluded, at paragraph 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."

25. The majority judgment of the ECtHR has essentially affirmed the approach taken in *N*, by the domestic courts, to article 3 in a case of medical treatment. Disparity between facilities available in the United Kingdom and those in the receiving State do not attract the operation of article 3. Further, the ECtHR has resolved the "cruel reality" identified by Lord Nicholls in *N* in the same way as did the House of Lords. Given the medical treatment available in the United Kingdom, the condition of the appellant in the present case, like the appellant in *N*, is stable. With the benefit of that treatment, the appellant is likely to remain healthy for some years. The appellant is not at the present time critically ill and is fit to travel. That being so, and following *N*, the likely consequences of return to Zimbabwe, lack of medical treatment leading to ill-health, and followed by an early death, do not normally impose an article 3 duty on the authorities of the United Kingdom.

26. Succinct though it is, paragraph 13 of the Tribunal's determination does, in my view, sufficiently identify an error of law by the Adjudicator. The case on article 3 had been put to the Adjudicator on health grounds and the availability or otherwise of medical care for the appellant in Zimbabwe. The Adjudicator's analysis of the

evidence is devoted almost entirely to the availability of medical treatment in Zimbabwe (paragraphs 10 to 13). Reference to other objective evidence of oppression is brief and, save as to the husband, unparticularised. Mr Knafler accepted that the dominant feature at that stage had been the issue of medical treatment. While mentioning other factors, which I consider later, the Adjudicator's decision was based mainly on that ground, the conduct of the Government making access to treatment more difficult. The Tribunal was entitled to conclude that the "Zanu-PF angle is merely an aspect of the difficulty in accessing treatment" and to conclude that the Adjudicator had erred in law in failing correctly to apply the approach in *N*, confirmed on appeal.

27. Moreover, other factors said to constitute an "extraordinary situation", the appellant's lawful entry, compliance with the law and frankness, her husband's similar conduct, and the United Kingdom's assumption of the burden of medical care for two years (paragraph 16) do not contribute significantly to an article 3 claim and should not have been relied on.

28. Having reached that conclusion, it is necessary to consider in more detail the impact of the decision in *N* on the findings and conclusions below. In *N*, the Grand Chamber set out, at paragraph 29, the "general principles regarding article 3". It depends on "all the circumstances of the case . . . The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible." They stated at paragraph 31:

> "Article 3 principally applies to prevent a deportation or expulsion where the risk of ill-treatment in the receiving country emanates from intentionally inflicted acts of the public authorities there or from non-State bodies when the authorities are unable to afford the applicant appropriate protection"

29. I have cited the Grand Chamber's finding, at paragraph 43, that it should maintain the "high threshold set in *D*". However, the court added:

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

30. Thus the Grand Chamber recognised that a broader approach may be taken to article 3 in cases such as the present, though the humanitarian considerations must make the case "very exceptional". Not surprisingly, in view of the way the case had been presented both to the Adjudicator and to the Tribunal, the Tribunal confined its analysis of the Adjudicator's decision to the health issues and to the approach to them in *D* and in *N*.

31. For the Secretary of State, Mr Patel submits that whether the harm reaches the threshold required to violate article 3 cannot depend on whether the "lack of sufficient resources" in the receiving State occurs as a consequence of some malign influence by that State or because of benign matters. The effect on the individual is the same in either case and it either reaches the threshold set by the ECtHR or it does not.

32. I have referred earlier to the Adjudicator's strong condemnation of the general policies of the Zimbabwean Government. The Adjudicator described what he saw as the "malign contribution of the Zimbabwean Government" with its "perverted" and "abhorrent" policies, its "intolerant and totalitarian methods", and to "government oppression". He referred, at paragraph 15, to the deprivation of food as well as health care and that the appellant was likely to be deprived not only of medication but "even nutrition". Save as to the husband's letter mentioned at paragraph 15(a), though the Tribunal found that his health had not deteriorated, the support for that strong general condemnation comes only in the single sentence in the determination, at paragraph 15(b), that "there is credible material in this objective evidence, including in the report of Professor Barnett, showing the attempts by the government of Zimbabwe to use as a means of further suppression of political opposition the deprivation of food; the deprivation of medical care; and the tight regulation of non-governmental organisations". Even there, the emphasis is on deprivation of food and medical care.

33. Adjudicators can be assumed to have knowledge of conditions in receiving states, and there is no obligation to set out background material in detail in a determination, but, in the context of this case, a more substantial factual analysis was required to justify the strong, and with respect somewhat intemperate, language referred to in paragraph 13 of this judgment. If the general conduct of a Government is to be condemned in this way, a cogent statement of the factual basis for condemnation is required. The language may be a true reflection of the situation in Zimbabwe in 2004 (it would not be appropriate for this court to comment) but to justify a decision on article 3, with its high threshold, a sufficient factual basis is required. That is particularly so where the more general issues were considered only obliquely in a case put on the lack of medical care.

34. However, in the light of the statements of the Grand Chamber at paragraphs 29 and 31 of *N*, already cited, accepting a broader approach to "humanitarian considerations", the approach of the Tribunal, supported by the Secretary of State, cannot be justified. There was material which required analysis.

35. A fresh consideration by the Tribunal of this article 3 case is in my judgment required. I would allow the appeal and direct a fresh consideration of the article 3 issue by a differently constituted Tribunal. The need for such further remittal is unfortunate but in my view necessary to do justice between the parties; on the one hand, to ensure that, if policies of a Government are to be generally condemned, the approach must be cogent, and, on the other hand, to ensure that the article 3 claim is given the consideration it deserves. I understand that the Tribunal is to consider, in the near future and in a guideline case, the current situation in Zimbabwe.

Lady Justice Arden:

36. The decision of the Grand Chamber in *N v United Kingdom* (Application no 26565/05) was handed down after the hearing of this appeal, and this may be the first opportunity which any constitution of this court has had to consider it.

37. The circumstances in *N* were very different from those that may emerge in the present case after the evidence is reheard and proper findings of fact made. In *N*, the evidence was that the medication that the applicant needed was available in Uganda, but only at considerable expense. In addition, there were limited facilities for blood

monitoring, basic nursing care, social security, food or housing. It is clear that the court was dealing with a case where 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." (see [43] of the decision of the Grand Chamber).

38. The decision in *N* means that the obligations resulting from article 3, with regard to aliens who suffer from a serious illness for which treatment may not be available in the country to which they are to be deported, will arise only in very exceptional cases. This limitation is founded on policy grounds. Thus the Grand Chamber of the Strasbourg court specifically states in its judgment at [44] that:

> "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 impose an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without the right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States. "

39. Where there is a risk of intentional harm to a person being deported, other jurisprudence of the Strasbourg court establishes that the protection guaranteed by article 3 is absolute and thus not subject to the national interest of the contracting state (for a recent example, see *Saadi v Italy* (Application no. 37201/06)). There would thus appear to be a bifurcation in the jurisprudence under article 3 between cases such as *N* and cases such as *Saadi v Italy.*

40. This distinction in the jurisprudence creates no theoretical difficulty in the normal situation where the case involves either one line of authority or the other. However, this case shows that in some cases an appellant will seek to invoke the *Saadi* line of jurisprudence in a situation where there is an absence of resources for medical care and ancillary services in the receiving state. It will have to be determined on another occasion whether there is any difficulty in a case such as the present in reconciling the two lines of authority. It would suggest at minimum that great care would have to be taken to determine whether the lack of medical facilities or food is due to the infliction of deliberate harm on the appellant (or whether there is an appropriate level of risk of that) or whether the lack of medical facilities is due to a lack of national resources for this purpose. The tribunal will also need to determine the level of seriousness of any actual or threatened harm and the cause of such harm. It may also need to determine whether any actual or threatened harm would be as serious if it were not for the appellant's medical condition.

41. I agree with Pill LJ that both lines of authority can arise in the same case. To take another example, a person may suffer from a serious disease. The receiving state may not only have no resources available for treating this disease but have a policy under which the deportee may be vulnerable to being put in a concentration camp and subjected to forced labour or other inhuman and degrading treatment. He would not be able to invoke article 3 on health grounds but he would be able to do so on the grounds that he would be subjected to inhuman and degrading maltreatment by the

receiving state. Our conclusion is supported by the decision of the Strasbourg court in *Pretty v United Kingdom* (2002) 35 EHRR 1,33 at [52]. Our conclusion is also the same as that of Buxton LJ, with whom Jonathan Parker LJ agreed, in *ZT v SSHD* [2006] Imm A.R. 57 at [18] and [39]. In that case, which also concerned a Zimbabwean who was HIV-positive, the claim that article 3 was involved because of inhuman and degrading treatment, as well as lack of medical resources, failed on evidential grounds.

42. We are not prevented from taking the view by the decision of the Appellate Committee of the House of Lords in *N v SSHD* ([2005] 2 AC 296). There is no question of this court extending the application of article 3 beyond that established by the Strasbourg court.

43. For the reasons that Pill LJ gives, the appeal should be allowed and the whole of the article 3 issue remitted to be heard by a differently constituted tribunal.

Lord Justice Longmore :

44. I agree with both judgments.