IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)

Neutral Citation No.: 2003]EWCACiv1369
Case Number: C1/2003/0915

Date: 16/10/2003

Before:
LORD JUSTICE LAWS
LORD JUSTICE DYSON
LORD JUSTICE CARNWATH

"N" (AppellantN)
Appellant

The Secretary of State for the Home Department
Respondents

JUDGEMENT

Representation:

Mr R Scannell (instructed by Lawrence & Co) for the Appellant

Ms L Giovannetti (instructed by the Treasury Solicitor) for the Secretary of State for the Home Department

Ms F Webber (Intervenor) (instructed by The Terrence Higgins Trust)

**Lord Justice Laws:**

**INTRODUCTORY**

1. This is an appeal against a decision of the Immigration Appeal Tribunal ("the IAT") given on 20 February 2003 when it allowed the Secretary of State's appeal against the determination of the Adjudicator promulgated on 10 July 2002. The Adjudicator had allowed the appellant's appeal against the decision of the Secretary of State, made on 26 April 2001, by which he refused the appellant leave to enter the United Kingdom. Permission to appeal to this court was granted by Pill LJ and Maurice Kay J on 26 June 2003, following earlier refusal by Kennedy LJ on 2 June 2003 on consideration of the papers only. I should add that shortly before the substantive hearing in this court the Terrence Higgins Trust ("the THT") applied to intervene in the appeal. I directed that while the court would take account of the skeleton argument submitted by the THT, we would decide at the substantive hearing of the appeal whether or to what extent we wished to hear oral submissions on its behalf. In the event we received without objection certain further documentation from the THT but declined to hear oral argument from its counsel Ms Webber. We are grateful for the documentary materials which the THT has provided.

**THE FACTS**

2. The appellant was born on 24 December 1974 and is a citizen of Uganda. She entered the United Kingdom on 28 March 1998 under an assumed name with a passport to which she was not entitled. At the time of her arrival she was seriously ill, and was admitted to Guys Hospital on the same day or within a day or two. She was diagnosed HIV positive. She was to say (and it is not I think disputed) that she had no idea that she had this condition when she left Uganda, and did not come to this country in order to obtain medical treatment.

3. On the 31 March 1998, when she was already in hospital, an asylum application was lodged by solicitors on her behalf. Her claim was based on allegations of ill treatment, including rape, by the National Resistance Movement in Uganda, and she asserted that she was in fear for her life and safety if she were returned. By 23 November 1998 she had developed what is sometimes called full blown AIDS. That appears from a medical report of that date provided to her solicitors by Dr Larbalestier. He stated that the appellant had been found to be suffering from disseminated mycobacterium TB, and also a form of cancer known as Kaposi's sarcoma. These are "AIDS defining" illnesses. The appellant was treated with chemotherapy for both conditions. During 1998 she was also clinically depressed, for which appropriate medication was prescribed. In his report of 23 November 1998 Dr Labalestier said this:

"From an HIV point of view, 'M' is extremely advanced. Her CD4 count at presentation was just 20 cells/mm3, reflecting considerable immunosuppression. Her viral load was around 50,000 copies/ml at baseline. Anti-retroviral therapy has been problematic, with recurrent episodes of abnormal liver function, associated with fever, but she has recently tolerated a combination of stavudine, nevirapine and lamivudine.

Without active treatment 'M's' prognosis is appalling. I would anticipate her life expectancy to be under twelve months if she were forced to return to Uganda, where there is no prospect of her getting adequate therapy.

From a mental health point of view, 'M' is now stable…"

4. It is convenient at this stage to give some account of HIV/AIDS, so that the expert material may be properly understood and the issues in this appeal in due course brought into focus. What follows is taken from the notes put in by the THT described as a "summary of evidence on HIV/AIDS and treatment". HIV (Human Immunodeficiency Virus) attacks the immune system. As the immune system weakens, the sufferer develops AIDS (Acquired Immune Deficiency Syndrome). He or she is thereby rendered vulnerable to various diseases and in particular what are called opportunistic infections. Eventually one or more of these proves fatal. The progress of AIDS is monitored by what is called the CD4 cell count, which decreases as the immune system weakens, and by the viral load (VL) which increases. The CD4 cell count in a normal healthy individual is over 500. Many infections which may attack an AIDS sufferer are more prevalent in Uganda than in the United Kingdom. They include various bacterial infections, such as typhoid and salmonella, and also viral infections, including two kinds of herpes, and fungal infections. While HIV/AIDS cannot be cured, the progression of the virus can be halted or reversed by means of what is called anti-retroviral therapy. Since the mid-1990s this treatment has taken the form of triple combination therapy: that is, the use of three different types of anti-retroviral drugs in combination. The value of the use of multiple drugs in this way arises because the HIV virus is inclined to mutate, so as rapidly to become resistant to any particular anti-retroviral drug. The use of triple combination therapy in the UK has had a dramatic effect on the life expectancy of persons infected with HIV and those suffering from AIDS. Material produced by the THT shows that deaths in the UK associated with HIV infection have fallen to about 400 per year in 2003; the equivalent death rate figure in Uganda is stated to be about 100,000.

5. As I have indicated the Secretary of State refused the appellant's asylum claim in April 2001. By her appeal to the Adjudicator, before whom unaccountably the Secretary of State was not represented, the appellant again canvassed the merits of that claim, but also sought the

protection of Articles 3 and 8 of the European Convention on Human Rights ("ECHR"). The adjudicator dismissed the asylum appeal, but allowed the appeal based on Article 3. Accordingly he did not find it necessary to determine the case put forward under Article 8.

6. As is well known Article 3 ECHR provides:

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

7. A major element in Mr Scannell's submissions on this appeal has been that the IAT failed to confront unimpeachable findings of fact made by the Adjudicator in the appellant's favour, or implicitly departed from those findings without giving proper reasons for doing so. That being so, it is important to scrutinise the Adjudicator's determination, as well of course as that of the IAT, with some care.

**THE ADJUDICATOR**

8. The Adjudicator accepted that on arrival in the UK the appellant did not know that she was suffering from a life threatening illness. He then stated (paragraph 10):

"I find that the condition from which she now suffers is indeed AIDS and that without the sophisticated treatment which she is now receiving she would die within a matter of months. I find that the treatment she needs would not be available to her in Uganda."

In reaching that conclusion the Adjudicator referred to three reports prepared by Dr Jeanette Meadway, which he found to be "particularly impressive", and saw "no reason why [he] should not accept the opinions of Dr Meadway in their entirety". Dr Meadway is the Medical Director Mildmay Hospital UK.

9. In her first report Dr Meadway stated that without treatment to improve the appellant's CD4 count her life expectancy would be less than one year, and the CD4 count would only improve if there were regular supplies of medication at the full dose. She stated that the appellant's then current treatment regime would cost $246 per month in Uganda, but if it had to change (presumably because of the mutation of the virus) that could increase to something like $397. There was no question, she stated, of "the ordinary person" suffering HIV in Uganda getting any combination therapy. She set out other detailed contentions, and then in her second report sought to "reinforce" her earlier comments, stating that the appellant's outlook without combination therapy would be "particularly poor"; her Kaposi's sarcoma would be likely to reactivate. The form of triple combination therapy provided for her in the UK would be completely out of her reach; so would a dual therapy regime, which in any event would be unlikely to maintain her existing state of health. She would also be unlikely to benefit from medication available under a particular United Nations programme, since it had reached "only 905 Ugandans out of 820,000".

10. The Adjudicator also indicated that he had "drawn heavily" on the appellant's own statement of 5 April 2002, and her oral evidence. She had stated that five of her six siblings died of HIV-related conditions, as did other close relatives. Her parents are dead. She was separated from her former partner, who had the care or custody of her two children. If she were returned to Uganda it would be to her home village of Masaka in the south of Uganda, some eighty miles from Kampala. There is only a small hospital at Masaka which, she stated, would not be able to deal with AIDS-related illnesses, and she would have to live in overcrowded conditions. She would not be able to work; she is not strong enough to work here, in the UK's more favourable

environment. She has a boyfriend in the UK and became pregnant in October 2001, but unhappily miscarried on 25 February 2002.

11. The Adjudicator concluded (paragraph 13):

"In my view the appellant's case for protection under Article 3 is, on the evidence, overwhelming. As I have indicated above the appellant asked me to take into account the case of D v United Kingdom where it was held in the circumstances of that case that to implement a decision by the respondent to remove the appellant to the West Indies would be a violation of his rights under Article 3. There is no need for me to recite the facts in that case, but I can see no difference in principle between the case cited and the present case. Moreover the stated policy of the Home Office in relation to these matters clearly reflects the ratio in D's case… In paragraph 2.1 [of the Asylum Directorate Instructions issued in July 1998] it is stated that exceptional leave to remain in or enter the UK must be granted to asylum applicants if they fall under the following criteria, namely:

'Where there is credible medical evidence that return, due to the medical facilities in the country concerned, would reduce the applicant's life expectancy and subject him to acute physical and mental suffering, in circumstances where the UK can be regarded as having assumed responsibility for his care. In cases of doubt, a second opinion should be sought from a credible source'.

I have no doubt that all the requirements of this paragraph have been met in this case. Accordingly I find that the implementation of the respondent's decision to return the appellant to Uganda would be a breach of her Article 3 rights."

12. *D v UK (1997) 24 EHRR 423* is a decision of the European Court of Human Rights given in Strasbourg in 1997. It will be necessary to pay close attention to the court's reasoning in that case, upon which Mr Scannell places great reliance. I shall return to it in due course.

**EVIDENCE BEFORE THE IAT**

13. The Secretary of State obtained leave to appeal to the IAT against the determination of the Adjudicator. The only issue before the IAT was as to the appellant's claim under ECHR Article 3. There was up-to-date medical evidence relating to her condition, including a further report of 18 October 2002 from Dr Larbalestier and a further report from Dr Meadway of 29 October 2002. There was also a CIPU report on Uganda dated April 2002.

14. Having carefully considered all these materials, I consider that there was really no dispute as to the facts of the appellant's medical condition, the nature and efficacy of the treatment she had been receiving in the UK, or what was required to maintain her in the stable condition that she had achieved by April 2002. In her report of 29 October 2002, Dr Meadway records without dissent Dr Larbalestier's stated view that the appellant was well and "stable and free of any significant illness".

15. So far as there was any substantive factual dispute before the IAT, it went, as it seems to me, primarily to the availability of effective treatment in Uganda in the circumstances in which the appellant would find herself. There was some, I think lesser, dispute as to what those circumstances might involve. As regards the primary question, in her latest report before the IAT (that of 29 October 2002) Dr Meadway (relying to no small extent on what she had been told by Dr Veronica Moss, previously director of the Mildmay Center in Uganda, and a continuing frequent visitor to that country as Chief Executive of Mildmay International) took issue in vigorous fashion with a series of assertions contained in the CIPU Report of April 2002; although I do not

understand her to contest the general statement there put forward, that "Uganda is at the forefront of African countries in the treatment and prevention of AIDS".

16. The first assertion set out in the CIPU report contested by Dr Meadway was: "AIDS can be and is treated locally in Uganda". Dr Meadway's response, supplied by Dr Moss, was to the effect that this is only substantially true for people with significant financial resources; most AIDS sufferers are very poor; and although patients admitted to government hospitals receive free treatment, there is usually a significant lack of drugs and resources. Dr Meadway then took issue with the assertion in the CIPU Report that "all the drugs available under the NHS in the UK are also available locally". She said this was simply untrue. She stated, "the older drugs are mostly available in Uganda". Newer formulations of drugs such as the ddI EC which the appellant was taking are not to be had in Uganda: only the older ddI in large chalky tablets is available. Other newer drugs in use in the UK are not available in Uganda. Dr Meadway proceeded to refer specifically to a new drug called tenofovir, which in the UK is widely used within a combination therapy regime: there was no access to it in Uganda. Dr Meadway had other points to make in the report of 29 October 2002. I think it enough to set out her summary conclusions, which were also set out by the IAT at paragraph 42 of their determination:

"1 Ms N is alive only because she is taking anti-retroviral therapy for HIV. If she returned to Uganda although antiretrovirals are available in parts of the country she would not have the full treatment required and would suffer ill health, pain, discomfort and an early death as a result.

2 If she remains in the UK Ms N is likely to remain well for decades.

3 The formulation of antiretroviral drugs Ms N is currently taking are not available in Uganda.

4 Ms N's HIV virus already has some resistance and in the future she will require a change of antiretrovirals which is likely to include other drugs not available in Uganda.

5 To return a healthy person requiring no medication to Uganda where there is no extensive health care might be acceptable. To return Ms N to Uganda where she would have suffering and an early death would constitute inhuman and degrading treatment."

17. In order to understand the basis of the IAT's conclusions, which I will of course set out, it is convenient at this stage to consider the three cases which figured in the determination: *D v UK*, *I v Secretary of State [1997] IAR 172*, and *K v The Secretary of State [2001] IAR 41*.

*D v UK*

18. The facts of D were very stark in indeed. D came from St Kitts. He served a term of imprisonment for a drugs offence in the United States. After he was paroled he was deported on 8 January 1993 to St Kitts. He arrived in the UK about two weeks later. He was found at Gatwick Airport to be in possession of a substantial quantity of cocaine. He was refused leave to enter and given notice of removal to St Kitts. However before the removal directions were executed he was prosecuted for an offence of importing class A drugs, and on his plea of guilty was sentenced on 10 May 1993 to six years imprisonment. He was released on licence on 24 January 1996 and placed in immigration detention pending removal to St Kitts. While he was still serving his term of imprisonment he had been diagnosed as HIV positive and suffering from AIDS. Immediately after his release an application made on his behalf for leave to remain on compassionate grounds was refused, and subsequent judicial review proceedings where unsuccessful. By December 1996 his HIV infection was at an advanced stage. He was severely immunosuppressed. He was receiving anti-retroviral therapy, but his prognosis was very poor. He was transferred to an AIDS hospice in January 1997. There was a sudden deterioration in his condition at the beginning of February, and he had to be transferred to hospital. At the time of the hearing of his application before the

European Court of Human Rights on 20 February 1997, it was said that his life was drawing to a close. He had received counselling and was psychologically prepared for death in the UK environment in which he was being looked after. If he were returned to St Kitts, where the population was beset with health and sanitation problems, there was nothing to show that he would receive any moral or social support nor even that he would be guaranteed a bed in either of the hospitals on the island which the UK government had stated cared for AIDS patients.

19. The conclusions of the court at Strasbourg first emphasise the absolute nature of the Article 3 prohibition. Thus the applicant's previous grave criminal offences were of no relevance to the question whether he was entitled to the protection of the Article.

Then the court continued as follows:

"49 It is true that this principle [that is, the absolute nature of the Article 3 prohibition] 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….

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 scrutinizing 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.
…
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… 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…

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…

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.

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 his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment…

54… [I]n 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."

***I v SECRETARY OF STATE; K v SECRETARY OF STATE***

20. The IAT also considered two decisions of this court, *I v Secretary of State* and *K v Secretary of State*. Both were decided before the Human Rights Act came into force. Both, moreover, were decisions on renewed applications for permission to apply for judicial review, and in her skeleton argument for the THT Ms Webber submits that in consequence they possess no binding force as precedent. Both, again, involve citizens of Uganda who were HIV positive (I) or suffering from full blown AIDS (K). They were also decided before the advent in the UK of triple combination therapy. The essential basis of both is apparent from the following passage in the judgment of Sir Christopher Staughton in *K*, at 14-15:

"9… [W]e have been referred to the case of I …, where this court was asked to prevent a lady and her daughter from being sent back to Uganda on the ground that they were both HIV positive. It was held:

'1 Albeit appropriate medical facilities in Uganda were inferior to those in the United Kingdom, they were available and not only in the capital. It was not unreasonable for the Secretary of State, in those circumstances, to require the applicants to return to Uganda: obiter the position might be different if there were no appropriate medical facilities at all.

2 That the applicant's lifespan and that of her daughter might (but not necessarily would) be reduced was not a reason for her not returning to Uganda.

3 The position of the applicant and her daughter was no different from many in Uganda, and there were not exceptional circumstances in the case.

4 To require her to return to Uganda was not contrary to Article 3 of the European Convention.'

10 There was no question canvassed in that case about the cost of medical treatment in Uganda. In the present case there is a good deal of evidence on this topic but eventually it is now agreed… that medical facilities are available in Uganda. The problem is their cost. It is said that they would not be within the reach of Mr K.

11 What it comes to is this. Would it be inhuman or degrading treatment to send Mr K back to Uganda on the grounds that he may or may not be able to afford all the treatment that he requires? It does seem to me that, if we were to accede to that argument, we would be in effect adopting a rule that any country which did not have a health service which was available free to all people within it bounds, would be a place to which it would be inhuman and degrading to send someone. I do not consider that the European Court of Human Rights would reach that conclusion. It seems to me that one has to weight up all the circumstances of the case, as was done in the case of D and decide whether that test is fulfilled. In those circumstances, I am unable to say that the Secretary of State's decision was illegal or irrational or procedurally improper or ought to be revisited by the courts. I would dismiss the application."

**THE IAT**

21. Now I may come to the conclusions of the IAT. Since one of Mr Scannell's criticisms is that they dealt with the appeal in unacceptably general terms, it is only fair to the IAT to point out that the determination includes a very detailed account of the submissions made on the parties' behalf which contains copious references to the evidence in the case. That said, I may go to the essence of their conclusions:

"47 Expert medical experience shows that regular monitoring and delicate adjustment of drugs is likely to be needed to meet changes in drug resistance. When such changes are likely to occur and the specific drug therapy required will not be known until changes occur, and accordingly must be a matter for speculation. The Tribunal is all too mindful of the scenario suggested by the doctors of a dramatic reduction in her life expectancy.
…
49 The Tribunal finds that the general approach to be found in the cases of *I v United Kingdom* (albeit a case which in immigration terms is of relative antiquity) and *K v United Kingdom* (albeit specifically directed at cost) is correct. Medical treatment is available in Uganda for the respondent's condition, even though the Tribunal accepts that the level of medical provision in Uganda falls below that in the United Kingdom and will continue to lag behind the advance of continuing drug advances which inevitably first become available in highly developed countries. Nonetheless, extensive efforts are being made in Uganda to tackle the AIDS situation - AIDS treating drugs are available, refined forms of drug are being supplied (albeit with time lags) and it would not be until the respondent's specific and varying needs became known that her needs could be assessed and the then availability of appropriate treatment decided.

50 *D* was an extreme case. The facts in the present case are quite different both as regard to the availability of treatment and, we find, the availability of some family structure.

51 Accordingly, we find that for the respondent to be returned to Uganda would not be a breach of Article 3."

22. At this stage I should note in passing that a substantial quantity of further evidence coming into existence since the determination of the IAT has been put before us. In my judgment there is no basis upon which we should take this material into account, and in fairness counsel did not press the matter. If there is new evidence which is said to furnish the applicant with a stronger case than she had before the IAT, it is open to her to put it before the Secretary of State who of course is the primary decision maker. Indeed that course seems to have been taken in parallel to the present appeal: on 10 September 2003 the Secretary of State issued a further decision letter maintaining his original decision.

23. I have already foreshadowed the first front on which Mr Scannell opened his assault upon the determination of the IAT: It was to the effect that they addressed the case only in a generalised fashion, not least in paragraph 49 which is a central part of their reasoning. In so approaching the matter, says Mr Scannell, the IAT failed to grapple with critical details of the appellant's case and the findings of the Adjudicator.

24. Although, as I have indicated, in passages before the concluding paragraphs the IAT indeed referred to much of the detailed evidence in the case, this aspect of Mr Scannell's argument seems to me to be well founded. The IAT's conclusions betray a want of legally sufficient reasons. The defect is essentially to be found in paragraph 49. It is not clear from the assertion 'medical treatment is available in Uganda for the [appellant's] condition…' whether the reference is for treatment for the underlying immunosuppression caused by the virus, or for the opportunistic infections which are likely to follow the withdrawal of triple combination therapy. The paragraph read as a whole suggests to my mind that the former is intended; but if that is right, then the IAT has in my judgment failed to confront the contention, powerfully advanced in Dr Meadway's evidence which was accepted by the Adjudicator, that even if appropriate medication may be available in Uganda to patients who can pay for it, it would not be available to this

appellant. If the IAT meant to prefer, over Dr Meadway's evidence, the much rosier picture of medical resources in Uganda painted in the CIPU report, they have by no means made that clear and have given no reasons for taking such a position; and they should certainly have done so, given not least the force and authority of the material put forward by Dr Meadway and its unqualified acceptance by the Adjudicator. The reference, moreover, in paragraph 50 to "the availability of some family structure" does scant justice to the fact that there was a considerable question mark over the extent of any family back-up that might be available.

25. Accordingly in my judgment the decision of the IAT is flawed by the want of legally sufficient reasons. That conclusion (were my Lords to concur) would ordinarily require that the appeal be allowed and the matter redetermined by the IAT.

**THE DECISIVE ISSUE IDENTIFIED**

26. That, however, is an outcome which necessarily implies that the proceedings before the IAT might on a proper application of the relevant law be resolved in the appellant's favour. Ms Giovannetti for the Secretary of State has submitted that the appellant is not entitled to the protection of Article 3, even taking the evidence in the case at its highest in her favour. If that submission is correct, the appeal must be dismissed. It would plainly be wrong to send the matter back to the IAT who upon a re-determination would be obliged in any event to uphold the Secretary of State's appeal and reject the Article 3 claim.

27. Put broadly Ms Giovannetti's case is that the facts of *D v UK* were so extreme as to bear no sensible comparison with those of the present case, and the Adjudicator was quite wrong to see "no difference in principle" between them. In my judgment the conclusions to be drawn as a matter of law from any comparison between this case and D involve a deeper consideration: that is, the extent to which as a matter of principle the signatory States to ECHR have undertaken to protect individuals from what may be done to them, or what they may suffer, in other jurisdictions. The issue has to be examined against an assumed context in which the individual has no relevant rights arising under the 1951 Refugee Convention.

***ULLAH v SPECIAL ADJUDICATOR; SOERING v UK***

28. The starting-point for the court's consideration of this issue is to be found, in my judgment, in what has been called the "territoriality" principle. That is derived from the ECHR Article 1, which requires the signatory States to secure to everyone "within their jurisdiction" the Convention rights and freedoms. In *Ullah v Special Adjudicator [2003] 1 WLR 770, [2002] EWCA Civ 1856* the question was whether by force of ECHR Article 9 the UK was prohibited from removing the appellants because they would be prevented from preaching or teaching their religion in their home countries. Lord Phillips MR giving the judgment of this court stated:

"21 We do not believe that the signatories to the Human Rights Convention conceived that it would impact on their rights under international law to refuse entry to or to remove aliens from their territory.

22 Our belief receives support from the terms of the Human Rights Convention itself. The right of immigration control is recognised by article 5(1)(f), which qualifies the right to liberty by permitting arrest or detention of a person "to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition". Nowhere else in the qualifications to those Convention rights which are not absolute is there any reference to the right of a state to control immigration. We do not believe that this was because this right would, or would arguably, be covered by express limitations, such as 'the interests of national security, public safety or the economic well-being of the country', which justify derogation from article 8 rights. We believe that it was because the contracting states had no intention of

restricting their rights of immigration control. The Convention was not designed to impact on the rights of states to refuse entry to aliens or to remove them. The Convention was designed to govern the treatment of those living within the territorial jurisdiction of the contracting states.

23 The Convention is, however, a living instrument. If, initially, it was not designed to impact on the right to control immigration it has, to a degree, been interpreted by the European Court of Human Rights… in a manner which does have that effect. The task of identifying the principles which govern the application of the Convention in this context is not an easy one.

24 In cases involving expulsion or refusal of entry the Strasbourg court has repeatedly emphasised the following principle: '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': see, for instance, *Bensaid v United Kingdom (2001) 33 EHRR 205, 216*, para 32. As we consider the authorities, it will become apparent that the Strasbourg court does not consider that the Convention will be engaged simply because the effect of the exercise of immigration control will be to remove an individual to a country where the Convention rights are not fully respected. Equally, where the Strasbourg court finds that removal or refusal of entry engages the Convention, the court will often treat the right to control immigration as one that outweighs, or trumps, the Convention right."

29. The court then proceeded to examine the case of *Soering v United Kingdom (1989) 11 EHRR 439*. This was, I think, the first case in which the Strasbourg court gave what is sometimes (though not entirely accurately: see *Ullah* paragraph 29) called "extra-territorial effect" to a Convention provision. The court held that Article 3 would be violated were the UK to comply with a request to extradite the applicant, a German national, to the United States to face charges of murder in Virginia because he would be held on "death row" facing the death penalty. The essence of the court's reasoning, cited in *Ullah* at paragraph 28, was as follows:

"88. Article 3 makes no provision for exceptions and no derogation from it is permissible under article 15 in time of war or other national emergency. This absolute prohibition on torture and on inhuman or degrading treatment or punishment under the terms of the Convention shows that article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard. The question remains whether the extradition of a fugitive to another state where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a contracting state under article 3 ... It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the preamble refers, were a contracting state knowingly to surrender a fugitive to another state where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of article 3, would plainly be contrary to the spirit and intendment of the article, and in the court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving state by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that article.

91. In sum, the decision by a contracting state to extradite a fugitive may give rise to an issue under article 3, and hence engage the responsibility of that state under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country…"

30. The court in *Ullah* accepted (paragraph 30) a submission by counsel for the Secretary of State to the effect that the approach of the Strasbourg court in *Soering* was exceptional; and after citing other Strasbourg authority, in particular *Chahal v United Kingdom (1996) 23 EHRR 413* (also an "extra-territorial" Article 3 case), the Master of the Rolls said this:

"38 … In *Tyrer v United Kingdom (1978) 2 EHRR 1* the Strasbourg court held that three strokes with a birch constituted degrading punishment for a 15-year-old boy, which violated article 3 having regard to the particular circumstances in which it was administered. We find it hard to accept that the risk of such treatment could suffice to override the right of a state to deport an alien guilty of a serious crime. It seems to us that the Strasbourg court had reason in Soering… for concluding that the interest in an effective system of extradition was a relevant factor when considering the severity of ill-treatment in the receiving state that would preclude the extradition of a suspected criminal.

39 As we read *Soering*… and *Chahal*…, the underlying rationale for the application of the Convention to the act of expulsion is that it is an affront to fundamental humanitarian principles to remove an individual to a country where there is a real risk of serious ill-treatment, even though such ill-treatment may not satisfy the criteria of persecution under the Refugee Convention. Article 3 provides the test of such treatment. The issue then arises of whether this rationale extends to preventing removal of aliens where there is a real risk that the receiving country will treat them in a way that infringes other articles, and in particular article 9."

The court proceeded to discuss certain Strasbourg authority relating to the ECHR Article 8 (including *Bensaid (2001) 33 EHRR 205* to which I will have to return), and a number of cases decided here, and held that neither the Human Rights Act (paragraph 47) nor domestic authority (paragraph 58) required that "extra-territorial" effect be given to Article 9. The court concluded as follows:

"62 Mr Blake… submitted… that this court should take the lead in recognising that removal in the interests of immigration control can engage article 9. In our judgment there are compelling reasons why this court should not do so. The Refugee Convention and article 3 of the Human Rights Convention already cater for the more severe categories of ill-treatment on the ground of religion. The extension of grounds for asylum that Mr Blake and Mr Gill seek to establish would open the door to claims to enter this country by a potentially very large new category of asylum seeker. It is not for the court to take such a step. It is for the executive, or for Parliament, to decide whether to offer refuge in this country to persons who are not in a position to claim this under the Refugee Convention, or the Human Rights Convention as currently applied by the Strasbourg court. There may be strong humanitarian grounds for offering refuge in this country to individuals whose human rights are not respected in their own country, and it is open to the Secretary of State to grant exceptional leave to remain where he concludes that the facts justify this course. There are, however, practical and political considerations which weigh against any general extension of the grounds upon which refuge may be sought in this country. It is not for the courts to make that extension.

63 For these reasons we hold that a removal decision to a country that does not respect article 9 rights will not infringe the 1998 Act where the nature of the interference with the right to practise religion that is anticipated in the receiving state falls short of article 3 ill-treatment. It may be that this does not differ greatly, in effect, from holding that interference with the right to practise religion in such circumstances will not result in the engagement of the Convention unless the interference is 'flagrant'."

31. We understand that there is an extant appeal to their Lordships' House in *Ullah*. At present it goes without saying that the decision of this court states the law and is to be followed where it applies. In my judgment it establishes these following propositions, relevant to the case before us:

a) ECHR was not intended by its signatories to constrain "their rights under international law to refuse entry to or to remove aliens from their territory" (paragraph 21).

b) But that position has been qualified over time, ECHR being a "living instrument" (paragraph 23).

c) Notably, it was qualified in relation to Article 3 by *Soering*, which vouchsafed a significant extension of the Convention's scope (paragraph 29, which I have not set out); but the extension is justified by the "affront to fundamental humanitarian principles" involved in removing someone to a country where there is a real risk of serious ill-treatment, and Article 3 provides the test of such treatment (paragraph 39).

d) If a like extension of other Convention rights would open the door to "a potentially very large new category of asylum seeker", it is a step to be taken, if at all, by Parliament or the executive (paragraph 62, whose context, of course, was Article 9 only).

**OTHER STRASBOURG CASES**

32. There is some further Strasbourg jurisprudence to which I should refer. In *Bensaid* the applicant, an Algerian national, had come to the UK in 1989 and later married a UK citizen. From 1994 he had received treatment in the UK for schizophrenia. The Secretary of State decided to remove him on the footing that his marriage was one of convenience. At Strasbourg he relied inter alia on Article 3. The claim failed. The court considered that the relapse "into hallucinations and psychotic delusions involving self-harm and harm to others" which might be associated with his return to Algeria "could, in principle, fall within the scope of Article 3" (paragraph 37); but it observed that the applicant faced the risk of relapse even if he remained in the UK. It concluded (paragraph 40):

"The Court accepts the seriousness of the applicant's medical condition. Having regard however to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal… would be contrary to the standards of Article 3. It does not disclose the exceptional circumstances of the D case… where the applicant was in the final stage of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St. Kitts."

It is right that I should notice the separate opinion of Judge Sir Nicolas Bratza who, while concurring with the majority judgment in the result, expressed himself guardedly (paragraph 0-16):

"As is pointed out in the Court's judgment, the present case does not disclose the same exceptional circumstances of the D case, the risk that the applicant would if returned to Algeria suffer treatment reaching the threshold of Article 3 being less certain and more speculative than in that case. For this reason, I have on balance arrived at a different conclusion from that reached by the court in D."

33. Mr Scannell places some reliance on *BB v France (Application 30930/96).* The applicant came from the Congo. He came to France, where he was a failed asylum seeker and a convicted drug smuggler. He was diagnosed suffering from Aids, with Kaposi's syndrome. Before the Commission he sought the protection of Article 3 on the footing that deportation to the Congo "would reduce his life expectancy because he would not receive the medical treatment his condition demanded" (paragraph 32 of the Strasbourg court's judgment). The Commission declared the application admissible, and expressed the opinion that there would be a breach of Article 3 were the applicant deported. However by the time the matter reached the court the

French government had given an undertaking not to remove the applicant to his country of origin, and so the court struck the case out of the list. In paragraph 39, however, the court indicated that it had explained in D the nature and extent of the Article 3 obligation in a case based on want of medical care in an applicant's home State. In those circumstances, while certainly Mr Scannell can point to the Commission's decision, BB cannot sensibly be regarded as persuasive authority to the effect that in this kind of case the door is wider than it was in D itself.

34. I should lastly refer to the Strasbourg court's admissibility decision in *Henao (Application 13669/03)*. The applicant was a national of Colombia. While serving a prison sentence in Holland for a drugs offence he was diagnosed HIV-positive. He sought to resist expulsion to Columbia on Article 3 grounds. The court said (p. 8):

"… the Court considers that, unlike the situation in… *D*… or *BB*…, it does not appear that the applicant's illness has attained an advanced or terminal stage, or that he has no prospect of medical care or family support in his country of origin. The fact that the applicant's circumstances in Colombia would be less favourable than those he enjoys in the Netherlands cannot be regarded as decisive from the point of view of Article 3…"

**CONCLUSIONS**

35. Although *D v UK* was decided in Strasbourg well before *Ullah* was decided here, there is no reference to *D* in the judgment in *Ullah*, and (so far as one can see from the Weekly Law report of the case) no reference to it in counsel's submissions. There are, to my mind, factors of no little importance which distinguish the circumstances with which the Strasbourg court was faced in D from those of Soering, upon which the Court of Appeal passed in *Ullah*. First, it is clear that both this court and the European Court of Human Rights regarded *Soering* as a case in which the fate which might befall the applicant were he to be removed to Virginia would itself, if it eventuated, violate the standards set by Article 3 (though obviously that would involve no breach, since the United States was not a signatory to the ECHR). This I think is plain from paragraph 91 of the judgment in *Soering* and paragraph 39 in *Ullah*. I have already cited these. For convenience I repeat the critical passages. *Soering* paragraph 91:

"… the decision by a contracting state to extradite a fugitive may give rise to an issue under article 3… where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."

I would refer also to paragraph 104, which I need not set out. Then *Ullah*, at paragraph 39:

"… the underlying rationale… is that it is an affront to fundamental humanitarian principles to remove an individual to a country where there is a real risk of serious ill-treatment… Article 3 provides the test of such treatment."

But this condition, that what might befall the applicant if returned to his home country would violate the Article 3 standard, is expressly disavowed in D. I repeat these passages from of the judgment:

"49… [the court] is not… prevented from scrutinizing 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.

53… 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 his removal would expose him to a

real risk of dying under most distressing circumstances and would thus amount to inhuman treatment."

36. The decision in *D*, then, on its face contemplates that Article 3 may oblige a State Party to the ECHR to give refuge to an immigrant so as to protect him from the happening of events in his home country which would not themselves give rise to a violation of the Article 3 standard; and this despite the fact that, as *Ullah* makes plain, "extra-territorial" effect constitutes an exceptional extension of the Treaty obligations even in a case where what may await the applicant if returned home would breach the Article 3 standard. The reasoning in *D* appears to justify this position by reference to the contrast between the circumstances in which the applicant finds himself in the UK (at the time the court has to consider the matter) and those that would affect him on his return: see D paragraph 49, "the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling state", and paragraphs 51 - 52, "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… The abrupt withdrawal of these facilities will entail the most dramatic consequences for him."

37. In these circumstances Miss Giovannetti was in my judgment surely right to submit that the decision in *D* involved an "extension of an extension" to the Article 3 obligation. Not only was the signatory State made liable, by a constrained exception to its immigration policy, to protect an immigrant from what might happen to him in violation of the Article 3 standard in another jurisdiction over which it had no control: so much was given by Soering. It was now made liable to do so also where, and only because, the humanity of the immigrant's treatment here stood in too great a contrast to what, without violation of the Article 3 standard, would befall him there.

38. I am bound to declare, with great respect, that as a matter of principle I have much difficulty with the case of *D*. The contrast between the relative well-being accorded in a signatory State to a very sick person who for a while, even a long while, is accommodated there, and the scarcities and grave hardships which (without any violation of international law) he would face if he were returned home, is to my mind - even if the contrast is very great - an extremely fragile basis upon which to erect a legal duty upon the State to confer or extend a right to remain in its territory, a duty unsupported by any decision or policy adopted by the democratic arm, executive or legislature, of the State's government. The elaboration of immigration policy, with all that implies for the constituency of persons for whom within its territory a civilised State will undertake many social obligations, is a paradigm of the responsibility of elected government. One readily understands that such a responsibility may be qualified by a supervening legal obligation arising under ECHR where the person in question claims to be protected from torture or other mistreatment in his home country in violation of the Article 3 standards, especially if it would be meted out to him at the hands of the State. But a claim to be protected from the harsh effects of a want of resources, albeit made harsher by its contrast with facilities available in the host country, is to my mind something else altogether. The idea of the "living instrument", which is a well accepted characterisation of the ECHR (and some other international texts dealing with rights), no doubt gives the Convention a necessary elastic quality, so that its application is never too distant from the spirit of the time. I have difficulty in seeing that it should stretch so far as to impose on the signatory States forms of obligation wholly different in kind from anything contemplated in the scope of their agreement.

39. In these circumstances it is with respect no surprise that (as it appears to me) since *D* was decided the Strasbourg court has effectively been at pains, in decisions I have cited, to avoid any extension of the exceptional category of case which D represents. This view is not I think shifted, but if anything confirmed, by what was said by the court in *Pretty (Application 2346/02)* at paragraph 52:

"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 (see… *D*…and also *Bensaid*…) "

This court's obligation under s. 2(1) of the Human Rights Act is to "take into account" (rather than follow) the Strasbourg jurisprudence. However despite my reservations I am clear that it would not be right to hold that *D* should not be followed in our domestic jurisdiction. No such submission was made to us, and we must surely bear in mind in what was said by Lord Slynn of Hadley in *R. (Alconbury Developments Ltd) v Secretary of State for the Environment [2001] 2 WLR 1389* at paragraph 26:

""In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights."

40. But I am no less clear that *D* should be very strictly confined. I do not say that its confinement is to deathbed cases; that would be a coarse rule and an unwise one: there may be other instances which press with equal force. That said, in light of the considerations I have described I would hold that the application of Article 3 where the complaint in essence is of want of resources in the applicant's home country (in contrast to what has been available to him in the country from which he is to be removed) is only justified where the humanitarian appeal of the case is so powerful that it could not in reason be resisted by the authorities of a civilised State. This does not, I acknowledge, amount to a sharp legal test; there are no sharp legal tests in this area. I intend only to emphasise that an Article 3 case of this kind must be based on facts which are not only exceptional, but extreme; extreme, that is, judged in the context of cases all or many of which (like this one) demand one's sympathy on pressing grounds. On its facts, D was such a case. I consider that any broader view distorts the balance between the demands of the general interest of the community, whose service is conspicuously the duty of elected government, and the requirements of the protection of the individual's fundamental rights. It is a balance inherent in the whole of the Convention: see, for example, Soering paragraph 89.

41. Carnwath LJ observed in the course of argument that there was no evidence before us as to the numbers of actual or would-be immigrants to the UK whose aspirations to enter and remain here might be favoured if this appeal succeeds. With great respect he was plainly right to do so. However if on facts such as those of this case we were to fix the Secretary of State with a legal obligation to permit the appellant to remain in the UK, we would in my judgment effect an unacceptable - constitutionally unacceptable - curtailment of the elected government's power to control the conditions of lawful immigration. I do not believe that our benign obligations arising under the Human Rights Act 1998 require us to do any such thing. Quite the contrary; our duty is to strike the very balance between public interest and private right to which I have referred.

42. I should acknowledge that there exists a line of cases concerning Article 8 rights said to arise where the person in question claims that his mental health will be compromised or damaged if he is returned by the Secretary of State. The position has recently been examined by this court in *Razgar [2003] EWCA Civ 840*, and there are also material passages in *Bensaid*. We have not heard extended argument upon this appeal as to the scope of Article 8 in such circumstances. While I apprehend with respect that nothing I have said here is inconsistent with the court's reasoning in *Razgar*, it may be that the position regarding Article 8 will want some further scrutiny if my view of this case were to prevail.

43. In my view, the evidence for the appellant, taken at its highest, would not bring her within the extreme class of case to which in my judgment she must belong if her Article 3 case is good. She has no viable claim under Article 8 or any other provision of ECHR. No purpose would therefore be served by remitting the case to the IAT for a redetermination free of the flaws in its earlier reasoning. I would accordingly dismiss this appeal.

Lord Justice Dyson :

44. I agree that this appeal should be dismissed for the reasons given by Laws LJ. The reasoning at para 49 of the IAT's decision is flawed. I agree with what Laws LJ says about this at para 24 of his judgment. The more difficult issue is whether the matter should be remitted for re-determination, and that in turn raises the question whether, upon a reconsideration, the IAT would be bound to reject the Article 3 claim. A proper appreciation of the reach of *D v UK* is highly material to this question. The ECtHR made it clear that *D* was an exceptional case. Thus at para 53: "In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness …". And at para 54: " However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake …".

45. In his concurring opinion, Judge Pettiti said:

"Admittedly, in the instant case, the humanitarian considerations arose in exceptional circumstances (the AIDS disease in its final stages).

Accordingly, when the judgment is being read and interpreted, paragraphs 49, 50, 54 and 32 in particular must be looked at together.

The inequality of medical treatment was not the criterion adopted by the Court as medical equipment 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."

46. The court did not explain why it was only in exceptional circumstances that Article 3 was engaged in a case "where the source of the risk of proscribed treatment in the receiving countries 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" (para 49). But in my judgment it is implicit in the approach of the court that it recognised that this was an extension of an extension to the Article 3 obligation as Laws LJ explains at paras 36 and 37 of his judgment. For this reason, it is only in a very exceptional case, where there are compelling humanitarian considerations in play, that the application of the extension to the extension is justified. It is clear that what was considered by the court to be very exceptional about the facts in *D* was that the applicant's fatal illness had reached a critical stage, and that "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" (para 51). It was the removal of these facilities in these circumstances that would expose the applicant to the risk of dying under the most distressing circumstances. As Judge Pettiti pointed out, it was not the inequality of medical treatment that made the removal of D a violation of Article 3. It was the fact that the applicant was to be deported in the final stages of an incurable disease.

47. Sadly, there are many examples of persons who enter the UK and other Member States from developing world countries and who suffer from HIV/AIDS. They receive sophisticated treatment here, and if returned to their countries of origin they will receive much less effective treatment, and, in some cases, no treatment at all. The anti-retroviral drugs which they receive in this country may give them a life expectancy of many years. If they are returned to their countries of origin, their life expectancy may, and in many cases almost certainly will, be substantially reduced. But, tragic though all such cases are, it seems to me that it is clear from *D* that the ECtHR would not, without more, recognise such cases as raising humanitarian considerations so compelling as to engage Article 3. The court would not regard such circumstances as exceptional, still less very exceptional. The fact that an applicant's life expectancy will be

reduced, even substantially reduced, because the facilities in the receiving country do not match those in the expelling country is not sufficient to engage Article 3. Something more is required. I have already referred to the special circumstances which enabled the court in D to find that Article 3 was engaged. I do not say that Article 3 will only ever be engaged where the applicant is in the last stages of a terminal illness. But I consider that the class of case recognised in D as engaging Article 3 should be confined to situations where, broadly speaking, the humanitarian considerations are as compelling as they were in that case.

48. I turn, therefore, to the question whether the evidence for the appellant discloses a case which the IAT might reasonably conclude engages Article 3. The evidence is that, so long as she remains in this country and continues to receive treatment here, the appellant has a reasonable life expectancy. If she returns to Uganda, her life expectancy will be reduced to about 2 years. It goes without saying that, if she is returned to Uganda, this prospect is extremely distressing. Moreover, the death itself is likely to be painful and distressing.

49. But the question is whether these facts disclose a case which is so exceptional and in respect of which the humanitarian considerations are so compelling, that the IAT might reasonably conclude that Article 3 is engaged. In my judgment, the appellant does not satisfy this test. Her case is similar to that of many who suffer from HIV/AIDS. They enjoy sophisticated medical treatment in this country which keeps the disease at bay, and which ensures that they have a reasonable life expectancy. If they are returned to their countries of origin, they will be unlikely to receive the medical treatment that they currently enjoy, and, as a result, their life expectancies will be substantially reduced. It seems to me that if the Article 3 door is opened to such cases, it will be opened far wider than was intended by the signatories to the European Convention on Human Rights, and far wider than the court envisaged in D. Tragic though such cases undoubtedly are, unless they have some special feature which gives rise to particularly compelling humanitarian considerations, they do not meet the stringent requirement that they be truly exceptional in order to satisfy the Article 3 criteria. For the reasons that I have given, I do not consider that it is reasonably arguable that there is any such special feature in the appellant's case. Accordingly, I would dismiss the appeal.

Lord Justice Carnwath :

50. Persuasive as I have found the reasoning in the judgments just delivered, I am not satisfied that, in the present state of the law, the course proposed is open to us. Since I am in the minority, I will state my reasons shortly.

51. I agree with Laws LJ that it is difficult to fit *D -v- UK* into the ordinary framework of Article 3. The natural subject matter of the Article is state oppression, in either the member state or the receiving state. It would be tempting to treat *D v UK* as a one-off response to the brutal, and ultimately pointless exercise, of removing a dying man from his hospice bed and sending him to a far-off country where he had no support. However, subsequent Strasbourg authority, in the Commission and the Court, has treated it as exceptional but not unique. That is apparent, in particular, from *Bensaid* and *BB v France*, to which reference has been made. I note that in the former case three of the judges (including Sir Nicholas Bratza) expressed "considerable hesitation" in holding that Article 3 did not apply, and did so largely on the grounds that the risk of severe suffering in Algeria was "less certain and more speculative" than in *D v UK*. *BB v France*, though a decision of the Commission, was treated as correct in later Court admissibility decisions (see e.g. *Henao*). Further, as Laws LJ has noted, in *Pretty, D v UK* was treated as authority for the general proposition that Article 3 can apply to naturally occurring illness -

"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…" (para 52)

52. It is clear that the mere fact that treatment in the receiving country will significantly reduce life expectancy is not in itself enough to bring the Article into play. On the other hand, that factor, combined with other considerations such as the assumption of responsibility by the member state, the advanced state of the illness, and the lack of any family support in the receiving country, may combine, as a matter of degree, to bring the Article into force. As Sir Christopher Staughton said in *K -v- Secretary of State [2001] Imm AR 11* (para 11), there is no absolute rule:

"The question is whether it would be 'inhuman or degrading treatment' to expel the applicant, and to answer this question one has to weigh up all the circumstances of the case, as was done in the case of D and decide whether that test is fulfilled."

53. If that is the right approach, I am unable to say that the facts of the present case are so clear that the only reasonable conclusion was that Article 3 did not apply. The medical evidence shows the stark contrast between the applicant's present position, where she has a reasonable life expectancy with the benefit of suitable medical help, and the practical certainty of a dramatically reduced life expectancy if she is returned to Uganda. Further, after five years with adequate support in this country, she would be returned to an uncertain environment, where five of her six siblings have already died of H.I.V related illnesses, and where (according to her) she would have no effective family support.

54. In the present state of the law, unsatisfactory though it may be, the decision whether this combination of affairs is sufficiently serious to bring the case within Article 3 is one for the fact-finding tribunal not for this Court. Against that background, I cannot say that the decision of the Tribunal is unassailable, or that there could only be one right answer if it were remitted.

55. I am also concerned as to the way the matter was handled as a matter of evidence and procedure. The Adjudicator in a carefully reasoned decision formed a strong view of the evidence in support of the appellant, particularly that of Dr Meadway. He made a clear finding that "the treatment she needs would not be available to her in Uganda". That evidence was not in fact contradicted by the Department before the Adjudicator. The state of the medical evidence before the appeal tribunal was not materially different. While it was clear that some AIDS treatment would be available in Uganda, the particular combination of treatment, which has led to the applicant's increased life expectancy in this country, would not be available at affordable cost.

56. In spite of that, the Tribunal appear to have proceeded on the basis that "medical treatment is available in Uganda for the respondent's condition….", and that the facts of the present case were "quite different with regard to the availability of treatment to *D -v- UK*". It is difficult to understand the basis of that finding, since the Tribunal had expressed no basis for disagreement with the medical evidence. On the contrary, it had earlier referred to the evidence of her doctors that return to Uganda would result in her lifespan being reduced to "almost certainly less than two years" (para 41); and it had indicated that it was "all too mindful of the scenario suggested by the doctors of a dramatic reduction in her life expectancy".

57. The Tribunal also found that the case was quite different from *D -v- UK* in regard to "the availability of some family structure". Again that conclusion seems to me to call for further explanation. The background appears to be in the submission on behalf of the Department (para 19):

"Although the information about family support is limited, it was clear from enquiries made of the respondent by the Tribunal through counsel that there were some relatives - a brother and nephews and nieces in Uganda - in contrast to the position in D." (para 19).

The response of the applicant's counsel was:

"There was … a lack of social network, no parents, siblings had largely died of AIDS as had two of their husbands, and those siblings had never received treatment. The respondent had, she claimed, no contact with her family in Uganda". (para 29)

The issue was not, as the Tribunal implied, whether those facts were different from those in *D -v- UK*; but whether the degree of practical support likely to be available to her in Uganda, taken with all the other factors, would render her deportation "inhuman or degrading".

58. For these reasons, as well as those given by Laws LJ, I regard the Tribunal's reasoning as flawed. Left to myself, I would have felt bound to remit the matter to the Tribunal for re-determination. This, of course, would be no indication that it would ultimately be successful. However the applicant is entitled to a properly reasoned decision on the correct basis.

59. To that extent, in respectful disagreement with the majority, I would have allowed the appeal.