HOUSE OF LORDS SESSION 2004–05
[2005] UKHL 31

on appeal from: [2003]EWCA Civ 1369

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

N (FC) (Appellant)
v.
Secretary of State for the Home Department (Respondent)

ON
THURSDAY 5 MAY 2005

The Appellate Committee comprised:

Lord Nicholls of Birkenhead
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. This appeal raises a question of profound importance about the human rights obligations of the United Kingdom in respect of the expulsion of people with HIV/AIDS. The appellant, a woman 30 years of age, comes from Uganda. She was born there in December 1974. She came to London on a flight from Entebbe in March 1998. She was refused leave to enter this country. Her claim for asylum was rejected. The Secretary of State proposes to expel her. But there is a tragic complication: she suffers from advanced HIV/AIDS ('full blown AIDS', in the old terminology).

2. When the appellant arrived here she was very poorly. Within hours she was admitted to Guy's Hospital. She was diagnosed as HIV positive, with an AIDS defining illness. In August 1998 she 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.

3. As a result of modern drugs and skilled medical treatment over a lengthy period, including a prolonged course of systematic chemotherapy, the appellant 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 her 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.

4. The cruel reality is that if the appellant 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 switched off.

The proceedings

5. The history of the appellant's proceedings can be summarised shortly. On 28 March 2001 the Secretary of State refused her application for asylum. On 10 July 2002 the adjudicator, Mr Paul Norris, dismissed the appellant's appeal from that asylum decision. But he allowed her appeal on the ground that to return her to Uganda would be a breach of her Convention right under article 3 of the European Convention. He said that on the evidence her case for protection under article 3 was 'overwhelming'.

6. On 20 February 2003 the Immigration Appeal Tribunal allowed an appeal by the Secretary of State. The appellant appealed to the Court of Appeal. The court, comprising Laws, Dyson and Carnwath LJJ, held unanimously that the tribunal's conclusion was flawed for want of legally sufficient reasons: [2004] 1 WLR 1182. But by a majority, comprising Laws and Dyson LJJ, the appeal was dismissed on the ground that the appellant's evidence did not bring her case within that 'extreme' class of case to which it must belong if a claim based on article 3 is to succeed: paras 43 and 49. Carnwath LJ would have remitted the case to the tribunal for redetermination.

Article 3

7. I mention first, to put on one side, the fact that the Secretary of State has wide powers to grant the appellant leave to remain here. The existence, and exercise, of these powers are not in question on this appeal. The sole legal issue before the House is whether deporting the appellant to Uganda would be incompatible with her Convention right

under article 3 of the European Convention. Article 3 prohibits torture and, more widely, 'inhuman' treatment.

8. Clearly there is no question of any breach of article 3 so long as the appellant remains here. So long as she is in this country she, like everyone else here, will continue to receive the medical treatment on which her health and life are dependent. The question is whether the act of expelling the appellant would itself be inhuman treatment within article 3. Unlike the separatist Sikh in *Chahal v United Kingdom* (1996) 23 EHRR 413, the appellant if expelled is not at risk of being subjected to intentional ill-treatment in her home country. The adverse prospect confronting the appellant in Uganda is of a different character. It derives from Uganda's lack of medical resources compared with those available in the United Kingdom. Thus the all-important question is whether expelling the appellant would be inhuman treatment within article 3 given the uncertainties confronting her in Uganda through shortage of the necessary drugs and medical facilities there.

9. If the appellant were a special case I have no doubt that, in one way or another, the pressing humanitarian considerations of her case would prevail. But in principle the law should seek to treat like cases alike. A similar principle applies to the exercise of administrative discretions. Sadly the appellant is not a special case. In its overall shape the appellant's case as a would-be immigrant is far from unique. As everyone knows, the prevalence of AIDS worldwide, particularly in southern Africa, is a present-day human tragedy on an immense scale. Each case will differ in detail and degree. But a common feature in all these immigration cases is that the would-be immigrant faces a significantly shortened expectation of life if deported. The AIDS illness of the would-be immigrant is currently under control by treatment received here while the immigration process is being completed, but his medical condition will deteriorate rapidly and fatally if he is deported and in consequence the necessary medication is no longer available to him.

10. These brief statements of the problem encompass much human misery. No one can fail to be touched by the plight of the appellant and of others in a similar position. The prospect facing them if returned to their home country evokes a lasting sense of deep sadness.

The Strasbourg jurisprudence

11. It is against this background that the House must decide whether article 3 can properly be interpreted to afford protection against expulsion in cases such as that of the appellant. In reaching its decision the House is required to take into account the Strasbourg jurisprudence: section 2(1) of the Human Rights Act 1998. The principal decisions of the European Court of Human Rights are reviewed by my noble and learned friends Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood. As appears from those reviews, the Strasbourg jurisprudence, it has to be said, is not in an altogether satisfactory state. The difficulty derives from the decision in *D v United Kingdom* (1997) 24 EHRR 425, concerning the expulsion of an AIDS sufferer to St Kitts, and the basis on which the Strasbourg court has subsequently sought to distinguish that case.

12. In the case of *D* the court extended the reach of article 3. The court noted, at paragraph 46, that **c**ontracting states have the right, as a matter of well-established international law and subject to their treaty obligations including the European Convention, to control the entry, residence and expulsion of aliens. Having noted the *Chahal* type of case, the court said it must reserve to itself sufficient flexibility to consider the application of article 3 in other contexts: paragraph 49. The court then applied article 3 in what it described as the 'very exceptional circumstances' of that case.

13. The difficulty posed by this decision is that, with variations in degree, the humanitarian considerations existing in the case of *D* are not 'very exceptional' in the case of AIDS sufferers. In the case of *D* 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': see the court's appraisal of the 'exceptional circumstances' of *D's* case in *Bensaid v United Kingdom* (2001) 33 EHRR 205, 218, para 40. If unavailability of appropriate medical care or family support was regarded as an exceptional circumstance for the purpose of article 3 in the case of *D*, why is this not equally so in the case of other AIDS sufferers? In *D's* case there was the additional feature that *D* was dying. But the appellant's condition in the present case will rapidly become terminal, as soon as her life-preserving medication is discontinued. This prompts a further question: why is it *unacceptable* to expel a person whose illness is irreversible and whose death is near, but *acceptable* to expel a person whose illness is under control but whose death will occur once treatment ceases (as may well happen on deportation)?

14. As I see it, these questions are not capable of satisfactory humanitarian answers. This highlights, if I may respectfully say so, that on this subject the Strasbourg jurisprudence lacks its customary clarity. A supposed difference of degree in *humanitarian* appeal, with emphasis on a claimant's current state of health, is not a satisfactory basis for distinguishing between *D's* case and other AIDS cases. If a difference of degree in humanitarian appeal were the basis for distinguishing *D's* case from the present case I would unhesitatingly share the adjudicator's view that the appellant's case based on article 3 is overwhelming. The humanitarian considerations in the present case are of a very high order.

Article 3 and medical care for would-be immigrants

15. Is there, then, some other rationale underlying the decisions in the many immigration cases where the Strasbourg court has distinguished *D's* case? I believe there is. The essential distinction is not to be found in humanitarian differences. Rather it lies in recognising that article 3 does not require contracting states to undertake the obligation of providing aliens indefinitely with medical treatment lacking in their home countries. In the case of *D* and in later cases the Strasbourg court has constantly reiterated that in principle aliens subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social and other forms of assistance provided by the expelling state. Article 3 imposes no such 'medical care' obligation on contracting states. This is so even where, in the absence of medical treatment, the life of the would-be immigrant will be significantly shortened. But in the case of *D*, unlike the later cases, there was no question of imposing any such obligation on the United Kingdom. *D* was dying, and beyond the reach of medical treatment then available.

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

17. That the appellant should seek to do so is, of course, eminently understandable. But, as the Strasbourg jurisprudence confirms, article 3 cannot be interpreted as requiring contracting states to admit and treat AIDS sufferers from all over the world for the rest of their lives. Nor,

by the like token, is article 3 to be interpreted as requiring contracting states to give an extended right to remain to would-be immigrants who have received medical treatment while their applications are being considered. If their applications are refused, the improvement in their medical condition brought about by this interim medical treatment, and the prospect of serious or fatal relapse on expulsion, cannot make expulsion inhuman treatment for the purposes of article 3. It would be strange if the humane treatment of a would-be immigrant while his immigration application is being considered were to place him in a better position for the purposes of article 3 than a person who never reached this country at all. True it is that a person who comes here and receives treatment while his application is being considered will have his hopes raised. But it is difficult to see why this should subject this country to a greater obligation than it would to someone who is turned away at the port of entry and never receives any treatment.

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

19. For these reasons, which are substantially the same as those of Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood, I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

20. The decision which your Lordships have been asked to take in this case will have profound consequences for the appellant. The prospects of her surviving for more than a year or two if she is returned to Uganda are bleak. It is highly likely that the advanced medical care which has stabilised her condition by suppressing the HIV virus and would sustain her in good health were she to remain in this country for decades will no longer be available to her. If it is not, her condition is

likely to reactivate and to deteriorate rapidly. There is no doubt that if that happens she will face an early death after a period of acute physical and mental suffering. It is easy to sympathise with her in this predicament.

21. The function of a judge in a case of this kind, however, is not to issue decisions based on sympathy. Just as juries in criminal trials are directed that they must not allow their decisions to be influenced by feelings of revulsion or of sympathy, judges must examine the law in a way that suppresses emotion of all kinds. The position that they must adopt is an austere one. Some may say that it is hard hearted. But the fact is that there are at least two sides to any argument. The consequences if the decision goes against the appellant cannot sensibly be detached from the consequences if the decision is in her favour. The argument, after all, is about the extent of the obligations under article 3 of the European Convention on Human Rights ("the Convention"). It is about the treaty obligations of the contracting states. The Convention, in keeping with so many other human rights instruments, is based on humanitarian principles. There is ample room, where the Convention allows, for the application of those principles. They may also be used to enlarge the scope of the Convention beyond its express terms. It is, of course, to be seen as a living instrument. But an enlargement of its scope in its application to one contracting state is an enlargement for them all. The question must always be whether the enlargement is one which the contracting parties would have accepted and agreed to be bound by.

22. Lord Bingham of Cornhill described the judicial task in *Brown v Stott* [2003] 1 AC 681, 703, in this way:

> "In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure. This does not mean that nothing can be implied into the Convention. The language of the Convention is for the most part so general that some implication of terms is necessary, and the case law of the European Court shows that the court has been willing to

> imply terms into the Convention when it was judged necessary or plainly right to do so. But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept. As an important constitutional instrument the Convention is to be seen as a 'living tree capable of growth and expansion within its natural limits' (*Edwards v Attorney General for Canada* [1930] AC 124, 136 per Lord Sankey LC), but those limits will often call for very careful consideration."

23. The issue in this case has to be seen against that background. The need for careful consideration is made all the more acute by the fact that it is not the words of article 3 of the Convention that we are being asked to construe but the jurisprudence of the European Court of Human Rights in Strasbourg which explains the application of that article in its decision in *D v United Kingdom* (1997) 24 EHRR 423. There is no question in this case of the appellant having been subjected to inhuman or degrading treatment in this country. Nor is has it been suggested that there is any risk of her being subjected to any of the forms of treatment that article 3 proscribes from intentionally inflicted acts of the public authorities in Uganda or from those of non-state agents in that country against which the authorities there are unable to afford her appropriate protection. We are dealing here with a decision of the Strasbourg court which created what the Court of Appeal rightly accepted was an "extension of an extension" to the article 3 obligation: [2003] EWCA Civ 1369, per Laws LJ, para 37; Dyson LJ, para 46. Our task is determine the limits of that extension, not to enlarge it beyond the limits which the Strasbourg Court has set for it.

24. I would respectfully endorse what was said on this point by Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, 350, para 20:

> "In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v*

> *Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

25. Our task, then, is to analyse the jurisprudence of the Strasbourg court and, having done so and identified its limits, to apply it to the facts of this case. We must not allow sympathy for the appellant to divert us from this task. It is not for us to search for a solution to her problem which is not to be found in the Strasbourg case law. It is for the Strasbourg court, not for us, to decide whether its case law is out of touch with modern conditions and to determine what further extensions, if any, are needed to the rights guaranteed by the Convention. We must take its case law as we find it, not as we would like it to be.

D v United Kingdom

26. The starting point for an examination of the issue is to be found in the reasons which the Strasbourg court gave for its decision in *D v United Kingdom* [1997] 24 EHRR 423. The applicant in that case was diagnosed in August 1994 as suffering from AIDS while he was serving a prison sentence for being knowingly involved in the fraudulent evasion of the prohibition on the importation of controlled drugs. By August 1995 his CD4 count was below 10 cells/mm^3 and his illness was in the advanced stages. By January 1996, when his solicitors asked for him to be given leave to remain on compassionate grounds as St Kitts could not provide him with the medical treatment that he would require, he had had the disease for over 18 months and his prognosis was

extremely poor. In June 1996 the Commission declared his application admissible, on the view that article 3 would be violated if he were to be removed to St Kitts. His condition continued to deteriorate in the meantime. In October 1996 he was granted bail so that he could reside in special sheltered accommodation for AIDS patients provided by a charitable organisation working with homeless persons. There was a further and sudden deterioration in his condition in February 1997. When his case was heard by the court later that month his counsel stated that his life was drawing to a close. In paragraph 51 of its decision the court noted that he was in the advanced states of a terminal and incurable illness.

27. In its assessment the court began by rejecting any suggestion that account could be taken in the context of the article 3 guarantees of the state's right to control the entry, residence and expulsion of aliens and of what it recognised was a justified response to the scourge of drug trafficking. It stressed in para 47 that the article 3 guarantees applied irrespective of the reprehensible nature of the conduct of the person in question. There is, of course, no question of the appellant in this case having been engaged in reprehensible conduct. But it is important to appreciate that the reach of the article guarantees is all embracing, however disgraceful, promiscuous or reprehensible the applicant's conduct may have been. It is for the contracting state to secure those guarantees to the applicant irrespective of the gravity of any offences which he may have committed, or be likely to commit, while in its territory. The obligation under article 1 is to secure the rights and freedoms defined in the Convention to everyone within its jurisdiction. Physical presence within the territory is all that was needed to entitle an applicant to this protection.

28. The court then turned its attention in para 49 to the contexts in which the article 3 guarantees had been applied so far in extradition cases. These were where the individual was at risk of being subjected to any of the proscribed forms of treatment as a result of intentionally inflicted acts of the public authorities in the receiving country or of acts of non-state bodies in that country when the authorities there were unable to afford him the appropriate protection. Reference was made in a footnote to *Ahmed v Austria* (1996) 23 EHRR 278. But there are other examples. In *Soering v United Kingdom* (1989) 11 EHRR 439, para 88, the court said that to extradite a fugitive to another state where there were substantial grounds for believing that he would be in danger of being subject to torture, however heinous the crime allegedly committed, 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. So the inherent obligation to extradite was extended to cases where the fugitive was faced with a real risk of being exposed to the proscribed treatment in the receiving state. In *Chahal v United Kingdom* (1996) 23 EHRR 413, paras 80-81 the court observed that the protection afforded by article 3 was thus wider than that afforded by articles 32 and 33 of the United Nations Convention on the Status of Refugees 1951 and that even in this context there was no room for balancing the risk of ill-treatment against the reason for expulsion in determining whether a state's responsibility under article 3 was engaged. This too is an important point. The extension of the guarantee is not accompanied by a relaxation of its absolute nature.

29. The court then turned in the second paragraph of para 49 to the circumstances of the case that was before it. This part of the assessment is carefully worded and needs to be examined with care:

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

30. This passage indicates that the court was taking upon itself the responsibility of extending the application of article 3 beyond the extension which had previously been recognised. This is, of course, within its sphere of responsibility. The correct interpretation of the Convention as an international instrument can only be expounded authoritatively by the Strasbourg court. This is not an exercise that either can or should be undertaken by a national court. But the passage also indicates that the court was well aware of the sensitive nature of the area that it was entering into. Although it does not say so, it must have

appreciated that the effect of this further extension was to widen still further the extent of the protection afforded by article 3 as compared with that afforded by articles 32 and 33 of the Refugee Convention: see *Chahal v United Kingdom* (1996) 23 EHRR 413, para 80. Here too we are reminded of the absolute nature of the protection which is afforded by the article 3 guarantees to everyone within the jurisdiction of the contracting state. Once again the extension of its protection does not allow for any relaxation of its absolute nature.

31. It is not surprising therefore that the court insisted that in cases where this further extension applies all the circumstances are to be subjected to a rigorous scrutiny. While the phrase "all the circumstances" was used, the court singled out for special attention the applicant's personal situation in the expelling state. What it had in mind in regard to his personal situation is made clear by what is said in paras 50-53.

32. Here the court concentrated on the advanced state of his illness, on the availability of sophisticated treatment and medication in this country, on the care and kindness administered by the charitable organisation and on what the abrupt withdrawal of these facilities would mean for him. It was not just that his removal would hasten his death. There was a serious danger that the conditions in St Kitts would further reduce his limited life expectancy and subject him to acute mental and physical suffering. There was no evidence that any person was available to attend to the needs of what the court described in para 52 as "a terminally ill man" or of any other form of moral or social support. The court concluded in para 53 that in view of these exceptional circumstances and bearing in mind what it described as "the critical stage reached the applicant's fatal illness" it would be a breach of article 3 for him to be removed to St Kitts. In para 54 it explained that, although it could not be said that the conditions in the receiving country were themselves a breach of the standard of article, his removal would expose him to a real risk of dying under the most distressing circumstances and that this would amount to inhuman treatment.

33. The court concluded its assessment in para 54 by emphasising that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain on the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state during their stay in prison. While this statement was directed to applicants whose stay in the contracting state has been prolonged by a

prison sentence during which they have become accustomed to receiving the benefit of various forms of assistance, it must be understood as applying more generally. This is because a comparison between the health benefits and other forms of assistance which are available in the expelling state with those in the receiving country does not in itself give rise to an entitlement to remain in the territory of the expelling state. It was only because of the exceptional circumstances that were identified in D's case that he was found to be entitled to the absolute protection of article 3.

34. In a concurring opinion Judge Pettiti observed that the humanitarian considerations arose in exceptional circumstances, which he described as "the AIDS disease in its final stages". He stressed that the inequality of medical treatment was not the criterion adopted by the court, as medical equipment in the member states of the United Nations was not all of the same technological standard. The case was not concerned with hospital treatment in general, but only with the deportation of a patient in the final stages of an incurable disease. He noted that the earlier case law concerned only cases where there was direct state responsibility. This decision was intended to afford additional protection to individuals confronted with an affliction that affects thousands of victims.

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

36. What was it then that made the case exceptional? It is to be found, I think, in the references to D's "present medical condition" (para 50) and to that fact that he was terminally ill (paras 51: "the advanced stages of a terminal and incurable illness"; para 52: "a terminally ill man"; para 53: "the critical stage now reached in the applicant's fatal

illness"; Judge Pettiti: "the final stages of an incurable illness"). It was the fact that he was already terminally ill while still present in the territory of the expelling state that made his case exceptional.

The Strasbourg jurisprudence since D's case

37. The next question is whether any further guidance as to the criterion by which these exceptional cases are to be identified can be found in the reasons which have been given in Strasbourg for the way in which other similar cases have been disposed of. It is convenient to take these cases in their historical order.

38. In *BB v France*, 9 March 1998, RJD 1998-VI, p 2596, the applicant who had been serving a period of imprisonment was suffering from HIV/AIDS. Due to recent developments in the treatment of the disease in France, the therapy which he was currently receiving in the medical centres attached to the penal institutions where he was being held had stabilised the illness in his case. He claimed that he would not have access to that medical care and the ability to benefit from the new drugs for the treatment of HIV/AIDS that were becoming available in France if he were to be deported to his native country, the Democratic Republic of Congo. The Commission, referring to *Ahmed v Austria* and *D v United Kingdom*, said that it was important to examine the application of article 3 in the light of all the circumstances which could entail a violation of it: para 53. It noted that it was highly probable that if he were to be deported he would not have access to treatment designed to inhibit the spread of the virus and that the numerous epidemics raging in his country would increase the risk of infection. To expect him on these facts to confront his illness alone, without any support form his family, was likely to make it impossible for him to maintain human dignity as the disease ran its course: para 55. It was relevant too that he had been in France for a significant period of time as a result of measures taken by the French authorities to detain him there: para 56. The Commission concluded that deporting him would amount to a violation of article 3. The French government gave an undertaking that he would not be deported, so on 7 September 1998 his case was struck out of its list by the Strasbourg court. It would have been helpful if it had not been and the court had had an opportunity of considering it, as the circumstances of BB's case were not directly comparable with those in *D v United Kingdom*. BB was not yet terminally ill. The Commission did not say that the circumstances of his case were exceptional. On the contrary, his case could be compared with that of many others suffering from HIV/AIDS, such as the appellant in this

case, whose condition has been stabilised as a result of medical treatment in the expelling state which are unlikely to be available in the receiving state, with the result that the disease will before very long become terminal.

39. In *Karara v Finland*, Application No 40900/98, 29 May 1998, the circumstances were at first sight not unlike those in *BB v France*. The applicant, who was a citizen of Uganda, had been treated for an HIV infection since 1992. His infection had been stabilised by the medical treatment which he had received in Finland and was not yet at the stage of AIDS. His case was that his deportation to Uganda would result in an irrevocable deterioration of his state of health, as that medical treatment would no longer be available. The Commission, referring to *D v United Kingdom*, said that all the circumstances surrounding the case had to be subjected to a rigorous scrutiny, especially the applicant's personal circumstances in the deporting state. It directed its attention to the applicant's "present medical condition" when reaching its determination whether it would be contrary to article 3 for him to be deported. *BB v France* was distinguished on its facts, on the ground that the infection in that case had already reached an advanced stage necessitating repeated stays in hospital and the care facilities in the receiving country were precarious. The Commission concluded that the applicant's illness had not yet reached such an advanced stage that his deportation would amount to treatment proscribed by article 3. It is to be noted that he had an appalling record of criminal behaviour, as he had been convicted on five counts of attempted manslaughter for having raped several women and having other sexual contacts knowing that he had contracted an HIV infection. But the Commission reminded itself that the absolute guarantees in article 3 applied irrespective of the reprehensible nature of the applicant's conduct.

40. That case was followed shortly afterwards by *MM v Switzerland,* Application No 43348/98, 14 September 1998 and by *Tatete v Switzerland,* Application No 41874/98, 18 November 1998. MM claimed that it would be a violation of article 3 for him to be removed to the Democratic Republic of Congo. His case was declared manifestly ill founded because his present condition was that he was not suffering from any HIV related illness and because the Swiss authorities had offered to pay for his treatment for at least one year if he were to be deported. Tatete too was a national of the Democratic Republic of Congo. She had been admitted to hospital in September 1997 for a period of about three weeks with a chest infection. It was found that she was suffering from the effects of HIV/AIDS, with a CD count which

was less than 200 cells/mm^3. A medical report which was produced in January 1998 after a further period in hospital stated that the HIV infection had reached stage C3, that she was suffering from tuberculosis, from the hepatitis B infection and from depression and that without the intensive stabilising treatment which she was receiving these illnesses would prove fatal in the medium term. Her complaint that her deportation would amount to a violation of article 3 was declared admissible. Having set out her arguments and those of the Swiss government, the Commission said simply that the application raised complicated questions of law and fact that could not be resolved at that stage but which required to be examined in depth. So the application could not at that stage be said to be manifestly ill founded. The case was later disposed of by means of a friendly settlement.

41. *SCC v Sweden*, Application No 46553/99, 15 February 2000, was the first case of this kind in which the question of admissibility was considered by the court under the new procedure. The applicant was a Zambian national. She was diagnosed in 1995 as suffering from HIV. Since then she had made regular visits to a hospital. In 1998 it was planned that she should commence an anti-HIV treatment. At first it was indicated that as the treatment was complicated and required strict adherence it could only commence if she was given a long term permit to reside in Sweden, but it was initiated in January 1999 when her state of health deteriorated. She submitted a medical certificate which stated that a consequence of its initiation was that termination of the treatment would result in a faster progress towards the AIDS stage and her supposed death. In a further medical certificate it was stated that the life-prolonging treatment would have a much better success rate if she was given the chance to continue it in Sweden since the standard of care and monitoring possibilities in Zambia were reduced compared with those that could be offered in Sweden. The Swedish government position, based on an opinion of the National Board of Health and Welfare, was that the fact that a person had been diagnosed with HIV or AIDS should not alone and generally be decisive of the question whether leave to remain there should be granted on humanitarian grounds. The assessment should take account of the alien's general state of health taking serious clinical symptoms into consideration. The court declared her application to be inadmissible.

42. The reasons which the Court gave for its decision in *SCC v Sweden* followed closely those that were given by the court in *D v United Kingdom.* Reference was also made to the decision of the Commission in *BB v France*, adopting the same summary as was used in *Karara v Finland*. There then followed these paragraphs:

> "Against this background the court will determine whether the applicant's deportation to Zambia would be contrary to article 3 in view of her present medical condition. In so doing the court will assess the risk in the light of the material before it at the time of its consideration of the case, including the most recent available information on her state of health …
>
> The court recalls that the applicant's present medical status was diagnosed in 1995 and that her anti-HIV treatment has just recently commenced. The court further recalls the conclusion of the Swedish National Board of Health and Welfare that, when assessing the humanitarian aspects of a case like this, an overall evaluation of the HIV infected alien's state of health should be made rather than letting the HIV diagnosis in itself be decisive. The court finds that the Board's reasoning is still valid."

The court also noted that according to a report from the Swedish Embassy in Zambia the same type of AIDS treatment was available there, although at considerable cost, and that the applicant's children as well as other family members lived there.

43. Two points stand out from this decision. The first is that it was the applicant's present state of health that was subjected to close scrutiny. This is, of course, appropriate where a decision is being taken on grounds of humanity, because it ought to be based on the most up to date information that is available. But there is more in the point than that. It was the applicant's present state of health that was critical to the decision in *D v United Kingdom* that because of his present state of health his case was exceptional. The second is that the court did not apply the same high standard of scrutiny to the applicant's future prospects were she to be returned to Zambia. The question whether she would be able to afford the treatment that was said to be available there was not addressed, nor was her fate were it to turn out that she could not afford it. It was enough that the treatment was available. The court's approval of the National Board of Health and Welfare's opinion that the assessment should be based on the alien's general state of health taking serious clinical symptoms into consideration is also significant. In that opinion the Board was making the point that the question whether the state should allow the alien to remain on humanitarian grounds ought

not to receive a different answer in HIV cases from that which would be given in the case of other diseases with a serious prognosis.

44. That fact that the decision in *D v United Kingdom* is relevant to other serious illnesses was made clear in *Bensaid v United Kingdom* (2001) 33 EHRR 205. The applicant in that case was a schizophrenic who was suffering from a long-term psychotic illness. He was receiving treatment for his medical condition in this country which helped him to manage his symptoms. The drugs which he was receiving would not be available to him free if he were to be returned to Algeria, and there were other difficulties which gave rise to the risk that his existing mental illness would deteriorate resulting in self-harm and other kinds of suffering which the court said could in principle fall within the scope of article 3. It held nevertheless that his removal to Algeria would not violate that article: p 218. The difficulties of access to medical treatment there were noted, but the court said that nonetheless medical treatment was "available" to him there. The fact that his circumstances would be less favourable from that point of view from those enjoyed by him in the United Kingdom was not decisive. The risk that he would suffer a deterioration in his condition and that, if he did, he would not receive adequate support was said to be to a large degree speculative. The court summed the matter up in this way:

> "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 in these circumstances 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."

45. In *Henao v The Netherlands,* Application No 13669/03, 24 June 2003, the applicant was a national of Columbia. He was serving a prison sentence for drug trafficking when he was found to be HIV positive and had been given antiretroviral medication since September 1999 to control the progress of the disease. Reports by the Medical Advice Board of the Ministry of Justice stated that his continuous treatment had resulted in an improvement of his immune system and

that he was fit to travel, but that if that treatment were to stopped it could be expected that his health would relapse giving rise to an acute emergency which failing treatment would be permanent. The court declared his application that his removal to Columbia was a violation of article 3 to be inadmissible. Its reasoning followed the same pattern as in *Bensaid v United Kingdom.* Reference was made to *D v United Kingdom* ("the critical stage that the applicant's fatal illness had reached and the compelling humanitarian considerations at stake") and to *SCC v Sweden* (the need for the court to assess the risk that expulsion would be contrary to the standards of article 3 "in the light of the material before it at the time of its consideration of the case"). The reasons for the decision were summed up in these words:

> "In these circumstances the court considers that, unlike the situation in the above-cited case of *D v United Kingdom* or in the case of *BB v France* … , 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 Columbia would be less favourable than those he enjoys in the Netherlands cannot be regarded as decisive from the point of view of article 3 of the Convention."

46. The case of *Ndangoya v Sweden*, Application No 17868/03, 22 June 2004, fits into the same pattern as that established by the cases of *Bensaid* and *Henao*. The applicant in this case was a Tanzanian national. He was diagnosed as suffering from the HIV virus in 1991. In 1999 it was reported that he was engaging in sexual contacts without disclosing to his partners that he was HIV positive. He was charged and later convicted on criminal charges resulting from this activity and the Court of Appeal ordered that he should be expelled from Sweden. He had undergone antiretroviral treatment intermittently in 1996 and 1998, and had resumed that treatment in October 1999 when the viral levels in his blood were found to be very high and his immune system seriously weakened. That treatment had been successful in reducing his HIV levels to the point where they were no longer detectable. It was said that the prospects of his receiving that treatment in Tanzania were very slim and that its interruption would lead to a relatively rapid deterioration of his immune system, to the development of AIDS within 1 to 2 years and death within 3 to 4 years. The application was declared inadmissible. Here again, after stressing that the article 3 guarantees applied irrespective of the reprehensible conduct of the applicant, the court followed the same pattern of reasoning as it had adopted in *Bensaid v*

United Kingdom, and the cases of *D v United Kingdom* and *SCC v Sweden* were referred to. Addressing itself to the applicant's present medical condition the court noted that there was no indication in the medical evidence that the applicant had reached the stage of AIDS or that he was suffering from any HIV-related illness. Medical advice that he would develop aids within 1 to 2 years if the treatment were to be discontinued was accepted, but it was noted that adequate treatment was available in Tanzania, albeit at considerable cost, that the applicant was in principle at liberty to settle in a place where that treatment was available and that as his family links had not be severed completely he would not be unable to seek the support of his relatives. The reasons for the decision were summed up in the same words as those which the court used in *Henao v The Netherlands*.

47. The last case in this series is *Amegnigan v The Netherlands*, Application No 25629/04, 25 November 2004. The applicant was a national of Togo. In May 2001, following a medical examination which disclosed that he might be infected with HIV, he was found to be in the A3 clinical category of the disease with a CD4 count (measured in this case in microlitres of blood rather than cubic millimetres of blood cells) of less than 200 cells/µL. He was provided with antiretroviral treatment in August 2001, as a result of which by November 2003 his condition was stable although his immune system had still not been properly restored. The medical advice was that as soon as the therapy was stopped he would fall back to the advanced stage of the disease which, given its incurable nature, would entail a direct threat to life. A report on local conditions in Togo indicated that, while the treatment was available there, a person who did not have health insurance would hardly be able to afford it if relatives were unable to provide financial support. The application that his removal to Togo would violate article 3 was found to be manifestly ill-founded. The court recalled its statement of principle in *D v United Kingdom* that aliens who are subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state. The circumstances in *D* were described as very exceptional. Its examination of the case was then directed to the applicant's present medical condition, following *SCC v Sweden*, *Henao v The Netherlands* and *Ndangoya v Sweden*. The medical opinions which described his present condition and the prospects if the therapy were to be stopped were noted. But the court said, as it had done in *Ndangoya's* case, that it found no indication that the applicant had reached the stage of full-blown AIDS or that he was suffering from any HIV-related illness and it noted that adequate treatment was available in Togo, albeit at a possibly

considerable cost. The reasons for the decision were summed up in the same words as those which the court used in *Henao v The Netherlands*.

48. The conclusion that I would draw from this line of authority is that Strasbourg has adhered throughout to two basic principles. On the one hand, the fundamental nature of the article 3 guarantees applies irrespective of the reprehensible conduct of the applicant. It makes no difference however criminal his acts may have been or however great a risk he may present to the public if he were to remain in the expelling state's territory. On the other hand, aliens who are subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state. For an exception to be made where expulsion is resisted on medical grounds the circumstances must be exceptional. In May 2000 Mr Lorezen, a judge of the Strasbourg court, observed at a colloquy in Strasbourg that it was difficult to determine what was meant by "very exceptional circumstances". But subsequent cases have shown that *D v United Kingdom* is taken as the paradigm case as to what is meant by this formula. The question on which the court has to concentrate is whether the present state of the applicant's health is such that, on humanitarian grounds, he ought not to be expelled unless it can shown that the medical and social facilities that he so obviously needs are actually available to him in the receiving state. The only cases where this test has been found to be satisfied are *D v United Kingdom,* where the fatal illness had reached a critical stage, and *BB v France* where the infection had already reached an advanced stage necessitating repeated stays in hospital and the care facilities in the receiving country were precarious. I respectfully agree with Laws LJ's observation in the Court of Appeal, para 39, that the Strasbourg court has been at pains in its decisions to avoid any further extension of the exceptional category of case which *D v United Kingdom* represents.

49. It may be said that the court has not really faced up to the consequences of the developments in medical techniques since the cases of *D v United Kingdom* and *BB v France* were decided. The position today is that HIV infections can be controlled effectively and indefinitely by the administration of antiretroviral drugs. In almost all the cases where this treatment is being delivered successfully it will be found that at present the patient is in good health. But in almost all these cases stopping the treatment will lead in a very short time to a revival of all the symptoms from which the patient was originally suffering and to an early death. The antiretroviral treatment can be likened to a life support machine. Although the effects of terminating

the treatment are not so immediate, in the longer term they are just as fatal. It appears to be somewhat disingenuous for the court to concentrate on the applicant's state of health which, on a true analysis of the facts, is due entirely to the treatment whose continuation is so much at risk.

50. But it cannot be said that the court is unaware of the advances of medical science in this field. All the recent cases since *SCC v Sweden* have demonstrated this feature. The fact that the court appears to have been unmoved by them is due, I think, to its adherence to the principle that aliens who are subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state. The way this principle was referred to and then applied in *Amegnigan v The Netherlands* ("the court recalls that in *D v United Kingdom* it emphasised [the principle]") is, in my opinion, highly significant. What the court is in effect saying is that the fact that the treatment may be beyond the reach of the applicant in the receiving state is not to be treated as an exceptional circumstance. It might be different if it could be said that it was not available there at all and that the applicant was exposed to an inevitable risk due to its complete absence. But that is increasingly unlikely to be the case in view of the amount of medical aid that is now reaching countries in the third world, especially those in Sub-Saharan Africa. For the circumstances to be, as it was put in *Amegnigan v The Netherlands*, "very exceptional" it would need to be shown that the applicant's medical condition had reached such a critical stage that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services which he would need to prevent acute suffering while he is dying. This is, in effect, the same test as that which my noble and learned friend Baroness Hale of Richmond has identified.

The facts in this case

51. The appellant's disease had reached an advanced stage by November 1998 when the antiretroviral treatment was prescribed for her. Her CD4 count at presentation was just 10 cells/mm^3, indicating severe damage to her immune system, and she was suffering from various AIDS defining illnesses. But as a result of the treatment her condition has now stabilised. So long as she 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 in article 3 of the Convention.

52. The corollary of what I have just said is that a decision that her appeal should nevertheless be allowed would amount to an extension of the exceptional category of case which is represented by *D v United Kingdom.* As I said at the start of this opinion, it is not open to the national court to extend the scope of the Convention in this way. If an extension is needed to keep pace with medical developments, this must be left to the Strasbourg court.

53. It must be borne in mind too that the effect of any extension would be to widen still further the gap that already exists between the scope of articles 32 and 33 of the Refugee Convention and the reach of article 3 of the Human Rights Convention to which the Strasbourg court referred in *Chahal v United Kingdom* (1996) 23 EHRR 438, para 80. It would have the effect of affording all those in the appellant'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.

Conclusion

54. I agree with my noble and learned friend Lord Brown of Eaton-under-Heywood that the temptation to remit this case for further consideration of the facts should be resisted. I would dismiss the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

55. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Nicholls of Birkenhead, Lord Hope of Craighead, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood. I am in full agreement with them. This is a very sad case but it is, unfortunately, not exceptional. I too would dismiss this appeal.

BARONESS HALE OF RICHMOND

My Lords,

56. The appellant is HIV positive and as a result has contracted a number of serious diseases. These have been successfully treated but of course she remains HIV positive. Her immune system is seriously and permanently compromised. These days sophisticated drug treatment can restore her ability to withstand infection. With it, she is currently well and can expect to remain so for decades. Without it, if she is exposed to infections, she can expect that they will take hold and, unless treated, kill her within a period of at most two years.

57. The appellant has no right to remain in this country. She has been refused refugee status. Yet she has been seriously ill-treated. The adjudicator accepted that she was kidnapped by the Lords Resistance Army (LRA) in Uganda, that she was held by them against her will between 1996 and 1998, and that she was then captured by the National Resistance Movement (NRM), an official part of the Ugandan security

forces, by whom she was ill-treated and raped. She came to this country to escape from those who had harassed and ill-treated her. She did not know then that she was suffering from a life-threatening illness and she did not come here to obtain medical treatment. But she was not entitled to refugee status because the acts of which she complained were not committed or condoned by the Ugandan authorities. The adjudicator found that the LRA was a terrorist organisation, so that it was reasonable to interrogate her to find out whether she was a member, and that the "ill-treatment and rape she suffered at the hands of the NRM were in my view the acts of rogue elements in the security force". They were not acts of the Ugandan state, nor would she be in danger of persecution if she were returned to Uganda now.

58. I mention all this because many might think that women who have been kidnapped by a terrorist organisation and then raped by members of the state security forces have a powerful claim on the protection of the state to which they flee. I have explained in another case (*In re B* [2005] UKHL 19, paras 27 to 39) how the jurisprudence under the Refugee Convention is developing to recognise that rape is not simply an expression of individual aggression or desire but may be used as a systematic weapon of persecution or war. Regime changes may be less effective in protecting women from such dangers than they are for men. But no-one has challenged the adjudicator's decision on her asylum claim. The history does however reveal that she is not a would-be immigrant who came here to benefit from our superior medical services.

59. However, the strength of her claim under Article 3 does not depend upon the history, no matter how deserving or undeserving of our compassion, but upon her present situation and her immediate or very near future. The issue is when it is permissible to expel a person who is suffering from an illness which can be treated here but whose prospects of receiving such treatment in her home country do not look good. How are we to distinguish between the sad cases where we must harden our hearts and the even sadder cases where to do so would be inhumane? In short, what is the test?

60. Article 3 of the European Convention of Human Rights is in absolute terms:

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

The test applied by the adjudicator was that set out in paragraph 2.1 of the Asylum Directorate's 1998 Instructions on the Grant of Exceptional Leave to Remain, which was obviously drawn from the decision of the European Court of Human Rights in *D v United Kingdom* (1997) 24 EHRR 423:

> "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."

The adjudicator had no doubt that all the requirements of that paragraph had been met in this case and that returning her to Uganda would be a breach of her Article 3 rights.

61. If the test set out in those instructions were correct, the adjudicator's decision on the facts of this case could not be challenged. But the Secretary of State, who had not appeared at the hearing before the adjudicator, argued on appeal for a more stringent test, based on the complete absence of medical treatment in the country concerned. The reasoning in the IAT focussed almost entirely on the availability of treatment in Uganda. They allowed the Secretary of State's appeal because there was some medical treatment available, although at a lower level and lagging behind advances made in highly developed countries. The majority in the Court of Appeal found the Tribunal's reasoning insufficient but dismissed the appeal because a claim of this sort 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": [2003] EWCA Civ 1369, per Laws LJ at para 40.

62. So what is the test to be derived from the decision in *D v United Kingdom* (1997) 24 EHRR 423 and the cases which followed? In *D* the court first acknowledged that article 3 had in the past been applied only to expulsions where the risk of ill-treatment "emanates from the 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"; it

"reserved to itself sufficient flexibility" to address the application of article 3 in other contexts; but it emphasised that in such other contexts it must subject all the circumstances to the most rigorous scrutiny, "especially the applicant's personal situation in the expelling State" (para 49). The Court therefore set out to determine whether there was a real risk that the applicant's removal would be contrary to the standards in Article 3 "in view of his present medical condition" (para 50). In doing so, it noted that the applicant was "in the advanced states of a terminal and incurable illness" (para 51); that his illness had reached a "critical stage" (para 53); that the abrupt withdrawal of his present treatment facilities "will entail the most dramatic consequences for him", would "reduce his already limited life expectancy" and "subject him to acute mental and physical suffering" (para 52); and that the United Kingdom had assumed responsibility for treating his condition for some years (para 53). It emphasised that "aliens who . . . are subject to expulsion cannot in principle claim any entitlement to remain on the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State . . . " (para 54). However "in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake" implementation of the decision to remove him would be a violation of Article 3 (para 54).

63. It appears, therefore, that the test in the Asylum Directorate's instructions was already too generous. It did not stress how exceptional the circumstances must be, that the question was whether removal would be contrary to Article 3 "in view of his present medical condition", that the disease must have reached an advanced or critical stage, or that after being looked after for some years in this country, the applicant would be sent back to meet his fate without medical, social or family support. Perhaps that is not surprising, as *D* was a ground-breaking case and it has taken the Commission and Court of Human Rights some time to achieve a consistent approach.

64. My noble and learned friends, Lord Hope of Craighead and Lord Brown-of-Eaton under Heywood, have reviewed the Strasbourg jurisprudence in the HIV/AIDS cases in some detail. This shows that, following *D v United Kingdom*, only two further cases have been found admissible. In *BB v France*, 9 March 1998, the Commission found a breach and a friendly settlement was later reached, so that the Court was not called upon to consider the case (see judgment of 7 September 1998). In that case, the Commission's focus did appear to be more on conditions in the receiving country than on the severity of the applicant's present condition: "the Commission considers that exposing

a person to a real and substantiated risk to his health which is so serious as to amount to a violation of Article 3 on account of other factors in the receiving country, such as the lack of medical care and services, as well as social and environmental factors, are [sic] capable of engaging the responsibility of the State intending to expel the person" (para 54). However, it is clear that the applicant's illness had by then reached an advanced stage requiring frequent hospital admissions. In *Tatete v Switzerland*, 18 November 1999, the Commission held that there were complicated questions of fact and law, so that the application could not be said to be manifestly ill founded, and once again a friendly settlement was later reached. Neither case was as extreme as *D*, although the applicant in *BB* was already very ill.

65. All the other cases have been found inadmissible: see *Karara v Finland*, Application No 40900/98, 29 May 1998; *MM v Switzerland*, Application No 43348/98, 14 September 1998, *SCC v Sweden*, Application No 46553/99, 15 February 2000, *Henao v The Netherlands*, Application No 13669/03, 24 June 2003, *Ndangoya v Sweden*, 22 June 2004, and *Amegnigan v The Netherlands*, Application No 25629/04, 25 November 2004. In all of these the Commission or Court has asked itself whether the expulsion "would be contrary to the standards of Article 3 in view of [the applicant's] present medical condition". Their findings in *Henao v The Netherlands* (at p 8) are typical:

> ". . . 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."

Also typical is the statement of principle in *Henao* (at pp 7-8):

> "According to established case-law aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State. However, in exceptional circumstances an implementation of a decision to remove an alien may, owing to compelling humanitarian considerations, result in a violation of Article 3."

66. In the most recent of these cases, *Amegnigan v The Netherlands*, 25 November 2004, the Court was faced with evidence that "as soon as the anti-HIV therapy was stopped, the applicant would fall back to the advanced stage of the disease which, given its incurable nature, would entail a direct threat for life" (p 4) but that "the HIV virus would be suppressed as long the applicant would continue taking medication, so that there was no direct threat for life" (p 5). It nevertheless concluded that, unlike the situation in *D*, "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 Togo where his mother and a young brother are residing. The fact that the applicant's circumstances in Togo would be less favourable than those he enjoys in the Netherlands cannot be regarded as decisive from the point of view of Article 3 of the Convention." To this extent, therefore, the Court has confronted the problem that in this country HIV is a long term but treatable illness whereas in sub-Saharan Africa for all but the tiny minority who can secure treatment it is a death sentence.

67. The notion of compelling humanitarian considerations was invoked by Laws LJ in this case, at para 40:

> " . . . 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."

I do not find that concept at all helpful. The humanitarian appeal of this case is very powerful indeed. None of us wishes to send a young woman, who has already suffered so much but is now well cared for and with a future ahead of her, home to the likelihood of an early death in a much less favourable environment. But sadly her circumstances are not exceptional. There are millions of people in the world who are HIV positive, many of them in sub-Saharan Africa; thousands of people arrive in this country every year without leave to enter or remain but are for one reason or another able to stay here for some considerable time during which they will usually receive the medical care they need; the anti-retroviral therapy now available here can, for as long as it continues, restore the compromised immune system to such an extent that life expectancy is greatly enhanced; for the fortunate few that or at least some therapy may be available in their home countries, but for

most it will remain only a theoretical possibility for many years to come. If, as Laws LJ went on to say, the facts must be not only exceptional but extreme, she would not qualify.

68. In common with Dyson LJ, I have found helpful the concurring opinion of Judge Pettiti in *D v United Kingdom*, p 455:

> "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."

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

69. In my view, therefore, the test, in this sort of case, is 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. This is to the same effect as the text prepared by my noble and learned friend, Lord Hope of Craighead. It sums up the facts in *D*. It is not met on the facts of this case.

70. There may, of course, be other exceptional cases, with other extreme facts, where the humanitarian considerations are equally compelling. The law must be sufficiently flexible to accommodate them. The European Court of Human Rights took very seriously the claim of the schizophrenic patient in *Bensaid v United Kingdom* (2001) 33 EHRR 205 who risked relapse into hallucinations and psychotic delusions involving self harm and harm to others if deprived of appropriate medication. But it nevertheless concluded at para 40:

> "Having regard however to the high threshold set by article 3, particularly when 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 in these circumstances 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."

71. For these reasons I conclude that we would be implying far more into our obligations under Article 3 than is warranted by the Strasbourg jurisprudence, if we were to allow the appeal in this case, much though I would like to be able to do so.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

72. There are an estimated 25 million people living with HIV in Sub-Saharan Africa (July 2004 UNAIDS report), many more million AIDS sufferers the world over. The prospects for the great majority are bleak indeed. For those few who reach these shores, however, the prospects are immeasurably improved. From the moment of their arrival,

throughout the duration of their stay in the United Kingdom, they are entitled to all the care and treatment which the National Health Service and support agencies provide. Their health is likely to improve; illnesses will be kept at bay; their life expectancy will be greatly increased.

73. This appellant, a Ugandan national, is a case in point. Seven years ago, then aged 23, she arrived on a flight from Entebbe and the following day, seriously ill, was admitted to Guy's Hospital where she was diagnosed HIV positive with severe damage to the immune system (a CD4 count of ten) and disseminated TB. Following a long initial stay in hospital she developed a second AIDS defining illness, Kaposi's sarcoma, a particularly aggressive form of cancer. She was readmitted to hospital and started a prolonged course of chemotherapy. By 2002, after some years of treatment with anti-retroviral drugs and many setbacks, her CD count had risen to 414 and she was well. In October 2002, the date of the latest medical evidence in the case, she was described by Dr Meadway as "stable and free of any significant illness" and, were she to remain in the UK, "likely to remain well for decades." Were she, however, to be returned to Uganda, her prospects would deteriorate dramatically. In this event it was Dr Meadway's view that:

> "the formulation of anti-retroviral drugs Ms N is currently taking are not available in Uganda. Ms N's HIV virus already has some resistance and in the future she will require a change of anti-retrovirals which is likely to include other drugs not available in Uganda. If she returns to Uganda although anti-retrovirals 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."

By "an early death" it appears that Dr Meadway was suggesting death within a year or at most two. Dr Larbalestier, a Consultant Physician at Guy's, also reporting in October 2002, said:

> "I have no doubt at all that if she is forced to return to Uganda her life span will be dramatically shortened from potentially decades of high quality life to almost certainly less than 2 years."

74. It is in these circumstances that the present appeal arises. The appellant has been refused leave to enter the UK. Her asylum claim has been rejected both by the Secretary of State and on appeal. The Secretary of State now proposes to deport her. The issue for your Lordships' decision could hardly be starker: is he entitled to do so or would he thereby be acting contrary to article 3 of the European Convention on Human Rights? The Court of Appeal by a majority (Laws and Dyson LJJ) held that, even taking the evidence in the case at its highest in favour of the appellant, her article 3 claim to remain in the United Kingdom could not properly succeed. That being so, it would be wrong to remit the matter to the IAT for re-determination despite their decision (allowing the Secretary of State's appeal from the adjudicator's prior determination in the appellant's favour) being flawed for want of sufficient reasons. Carnwath LJ, dissenting, thought the matter less clear-cut and for his part would have remitted the case for re-determination by the IAT, although emphasising that this "would be no indication that it would ultimately be successful."

75. Essentially three conclusions are open to your Lordships. First, that on the bare facts already outlined the article 3 claim here succeeds; second, that on these bare facts it fails; third, that the outcome should properly turn on a more detailed consideration of the facts, taking particular account for example of the length of time during which the appellant has been undergoing treatment in the UK, the circumstances which prompted her to leave Uganda in the first place, the precise level, cost and accessibility of treatment available to her on return, and the social and human support available to her respectively here and in Uganda.

76. In deciding between these three possible outcomes your Lordships must clearly be guided to a large degree by the Strasbourg case law on article 3. It would not be appropriate for this House to interpret the scope of Convention protection in this sort of case significantly more generously than does the European Court of Human Rights itself.

77. Article 3 of the Convention provides:

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

This case has nothing to do with torture or punishment. The question for present purposes is whether deporting the appellant in the circumstances outlined would be subjecting her to inhuman or degrading treatment. I shall refer to such treatment generically as article 3 ill-treatment: it seems unhelpful in a case like this to attempt any sub-classification although the Strasbourg jurisprudence sometimes suggests it—see, for example, *Pretty v United Kingdom* (2002) 35 EHRR 403 at para 52.

78. One's starting point in this case must inevitably be the decision of the E Ct HR in *D v UK* (1997) 24 EHRR 423. The facts of *D* were very extreme. D was arrested in possession of cocaine on his arrival in the UK from St Kitts in January 1993. Following conviction and imprisonment he was released on licence in January 1996 and placed in immigration detention pending removal back to St Kitts. During his term of imprisonment, however, he had been diagnosed HIV positive and he sought to remain on compassionate grounds. Despite treatment his HIV infection worsened and in January 1997 he was transferred to an AIDS hospice. At the beginning of February 1997 there was a sudden deterioration in his condition and he had to be transferred to hospital. At the time of the hearing of his application before the E Ct HR 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 or even that he would be guaranteed a bed in either of the hospitals on the Island which cared for AIDS patients.

79. The Court's judgment on D's article 3 complaint constitutes the essential framework within which all subsequent case law in this area, and indeed the present appeal, falls to be considered and I propose, therefore, to set it out at some length:

> "46 The court recalls at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. It also notes the gravity of the offence which was committed by the applicant and is acutely aware of the problems confronting Contracting States in their efforts to combat the harm caused to their societies through the supply of drugs from abroad. The

administration of severe sanctions to persons involved in drug trafficking, including expulsion of alien drug couriers like the applicant, is a justified response to this scourge.

47. However in exercising their right to expel such aliens Contracting States must have regard to article 3 of the convention which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question.

48. … It is for the respondent State therefore to secure to the applicant the rights guaranteed under article 3 irrespective of the gravity of the offence which he committed.

49. It is true that this principle has so far been applied by the court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection.

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

50. Against this background the court will determine whether there is a real risk that the applicant's removal would be contrary to the standards of article 3 in view of

his present medical condition. In so doing the court will assess the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on his state of health.

51. The court notes that the applicant is in the advanced states of a terminal and incurable illness. At the date of the hearing, it was observed that there had been a marked decline in his condition and he had to be transferred to a hospital. His condition was giving rise to concern. 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. While he may have a cousin in St Kitts no evidence has been adduced to show whether this person would be willing to or capable of attending to the needs of a terminally ill man. There is no evidence of any other form of moral or social support. Nor has it been shown whether the applicant would be guaranteed a bed in either of the hospitals on the island which, according to the Government, care for AIDS patients.

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.
>
> Without calling into question the good faith of the undertaking given to the court by the Government, it is to be noted that the above considerations must be seen as wider in scope than the question whether or not the applicant is fit to travel back to St Kitts.
>
> 54. Against this background the court emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain on the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison.
>
> However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of article 3.

80. The Court's judgment in *D* supports the following propositions at least:

1) Article 3 enshrines one of the fundamental values of democratic societies and constitutes an absolute prohibition on article 3 ill-treatment irrespective of how reprehensibly the applicant may have behaved.

2) Notwithstanding that ordinarily a state is entitled to extradite, expel or deport aliens, whether to honour extradition treaties, combat crime, safeguard its own population, or more generally in the interests of immigration control, the exercise of such a power may itself in certain circumstances constitute article 3 ill-treatment. This will be so if the applicant would be at substantial risk of article 3 ill-treatment in the receiving country (a proposition previously established by the Court in cases such as *Soering v United Kingdom* (1989) 11 EHRR 439 and *Chahal v United Kingdom* (1997) 23 EHRR 413) or even exceptionally (as on the facts of *D* itself) if the applicant's removal would sufficiently exacerbate the suffering flowing from a naturally occurring illness (see for this formulation of the nature of the violation, *Pretty* at para 52).

3) In this latter exceptional class of case the Court will assess whether the applicant's removal is itself properly to be characterised as article 3 ill-treatment in the light of the applicant's present medical condition. The mere fact that the applicant is fit to travel, however, is not of itself sufficient to preclude his removal being characterised as article 3 ill-treatment.

4) An alien otherwise subject to removal cannot in principle claim any entitlement to remain in order to benefit from continuing medical, social or other assistance available in the contracting state.

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

82. It is instructive to note how the court in later cases came to characterise the decision in *D.* In *Bensaid v United Kingdom* (2001) 33 EHRR 10 (a case of psychotic illness rather than AIDS) the Court referred to "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".

83. In *Henao v The Netherlands* (App No 13669/03, 24 June 2003) the court contrasted the position of that applicant, an AIDS sufferer, with D (and with the applicant in *BB v France*—a case held admissible by the Commission (App No 39030/96) but, following the French Government's agreement not after all to remove the applicant, not then adjudicated upon by the Court because it saw "no reason of public policy to proceed with the case [since in *D*] the Court [had already] explained the nature and extent of the obligations under the Convention": (para 39 of the Court's judgment of 7 September 1998, Reports 1998-VI, p2595)):

> "unlike the situation in the above-cited case of *D v United Kingdom* or in the case of *BB v France* .., 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 of the Convention."

84. The application in *Henao* was accordingly held inadmissible. So too, for identical reasons, were the applications in each of the succeeding two cases: *Ndangoya v Sweden* (App No 17868/03, 22 June 2004) and *Amegnigan v The Netherlands* (App No 25629/04, 25 November 2004)—identical, that is, save that the applicant in *Ndangoya* was to be returned from Sweden to Tanzania; in *Amegnigan* from The Netherlands to Togo.

85. In stating in all three of these cases that "it does not appear that the applicant . . . has no prospect of medical care or family support" in his own country, the Court was very far from saying that the applicant was likely to be able to access and afford treatment and support remotely comparable to that enjoyed in the contracting state. On the contrary, the evidence before the Court suggested that in reality this was unlikely. The Court found only that "the required treatment is in principle available in Colombia, where the applicant's father and six siblings reside" (*Henao* p8); "adequate treatment is available in Tanzania, albeit at a considerable cost . . . the applicant is in principle at liberty to settle at a place where medical treatment is available . . . it is clear that he has many siblings in the country. It therefore appears that the family links have not been completely severed and that, consequently, the applicant would not be unable to seek the support of his relatives upon return to Tanzania" (*Ndangoya* pp12/13); "adequate treatment is in principle available in Togo, albeit at a possibly considerable cost. . . . His mother and a younger brother are residing [in Togo]" (*Amegnigan* p9). (It is convenient to note at this stage that Uganda is said to be one of the most advanced African countries in the treatment of AIDS and that, although the appellant has lost five of her siblings to HIV-related illnesses and would herself clearly have the very greatest difficulty in accessing and paying for the necessary treatment, she has some 10 or 12 relatives still living in Uganda.)

86. The unmistakable conclusion to be drawn from this series of recent decisions is that the Court has adopted the clear stance that article 3 is not breached by the return of an AIDS sufferer to his or her home country save in circumstances closely comparable to those in *D* itself.

87. This is not perhaps surprising. *D* represented, as Laws LJ below observed, "an extension of an extension to the article 3 obligation". The Court in *Bensaid* (para 40) spoke of "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 threshold must if anything be higher still where the Contracting State not only has no direct responsibility for the infliction of harm but rather is contemplating a decision falling at the very opposite end of the spectrum from those article 3 cases which involve State-sponsored violence. It was in *Limbuela v Secretary of State* [2004] QB 1440 (a case involving the refusal of asylum support) that Laws LJ suggested the metaphor of a spectrum and he later carried the analysis further in *Gezer v Secretary of State for the Home Department* [2004] EWCA Civ 1730 (where an asylum seeker was challenging his dispersal to Glasgow). *Gezer*, particularly at paras 24-29, usefully explores the categories and sub-categories of article 3 cases falling within the spectrum and also the kind of action required in any given case to exonerate the State from liability under article 3, action which reflects but is not identical with the distinction between the different categories.

88. Although, as Laws LJ in *Gezer* rightly observes, the utility of the distinction between a negative obligation not to inflict article 3 ill-treatment and a positive obligation to take steps to protect persons from forms of suffering sufficiently grave to engage article 3 (positive obligations being intrinsically less absolute in character) is limited and capable of giving rise to sterile argument, it is in my judgment essential, in a case like the present, to look at the problem in the round and to recognise that it is indeed positive obligations for which the appellant here must necessarily be contending. It is quite unreal to treat this article 3 complaint for all the world as if all that is required to safeguard the appellant's health is that the State refrain from deporting her. Realistically what she seeks is continuing treatment for her condition and it is necessarily implicit in her case that the State is bound to provide it. There would simply be no point in not deporting her unless her treatment here were to continue.

89. This brings me to the second colloquy on the European Convention on Human Rights and the protection of refugees, asylum-

seekers and displaced persons, held at Strasbourg in May 2000, and in particular the keynote presentation made by Mr Lorenzen, a judge at the E Ct HR. Under the heading "Cases where there is a lack of adequate medical treatment" Mr Lorenzen stated that the leading case was *D*, that "the difficulty was to determine what was to be understood by 'very exceptional circumstances'", that "it was too early to say whether the Court would take a restrictive line or whether it would be willing to adopt a more liberal line", that the position remained unclear following *BB v France, Tatete v Switzerland* (App No 41874/98) and *SCC v Sweden* (App No 46553/99); that "it was therefore necessary to await the outcome of the pending cases in order to have a better picture", and that:

> "this type of case presented a challenge to the court, which was not easily solved. On the one hand, no one could reasonably deny that compelling humanitarian considerations demanded that persons suffering from serious diseases should be given appropriate treatment that was unavailable in their country of origin. The protection under article 3 was consistently held to be absolute in the case law of the Court: those in need of it were entitled to it despite individual circumstances, such as, for example the fact that the applicant's stay in the host country was short. On the other hand, the consequences of granting an absolute right for seriously ill persons to remain in the host country to get treatment, provided they had managed to set foot there, were very far reaching."

90. As already indicated, my clear understanding of the subsequent Strasbourg case law is that the Court has now adopted "a restrictive line". It has not been prepared to grant "an absolute right for seriously ill persons to remain in the host country to get treatment, provided they had managed to set foot there." The "very far-reaching" consequences of such a right would give rise to positive obligations which the Court has not thought it right to impose upon the Contracting States.

91. I do not pretend to find the precise reasoning by which the Court has come to its conclusion entirely convincing or satisfactory. The contrasts which the Court has struck between *D* and the recent cases are, as I have already shown, first that *D's* illness had attained its terminal stage and secondly that *D*, unlike the later applicants, had no prospect of medical care or family support on return home. It is perhaps not, however, self-evidently more inhuman to deport someone who is facing

imminent death than someone whose life expectancy would thereby be reduced from decades to a year or so. Nor, as already suggested, has there generally been a sound evidential basis for supposing that much if anything in the way of medical care or family support would be available to the applicants on return.

92. The reality is that the medicine has developed hugely since *D* and that a quite different problem now presents itself from that presented by *D*. The choice now is between allowing the patient to remain in the host state to enjoy decades of healthy life at the expense of that state—an expense both in terms of the cost of continuing treatment (the medication itself being said by the Intervener to cost some £7,000 per annum) and any associated welfare benefits, and also in terms of immigration control and the likely impact of such a ruling upon other foreign AIDS sufferers aspiring to these benefits—and deporting the patient to a life of rapidly declining health leading to a comparatively early death.

93. The logical distinction between the two very different scenarios presented respectively by *D* and the later cases is surely this. *D* appeared to be close to death; paragraph 21 of the Court's judgment there records that at the hearing on 20 February 1997: "according to his counsel, it would appear that the applicant's life was drawing to a close much as the experts had predicted" (a medical report of June 1996 having stated that D's prognosis was limited to 8-12 months). The critical question there was accordingly where and in what circumstances *D* should die rather than where he should live and be treated. *D* really did concern what was principally a negative obligation, not to deport *D* to an imminent, lonely and distressing end. Not so the more recent cases including the present one. Given the enormous advances in medicine, the focus now is rather on the length and quality of the applicant's life than the particular circumstances of his or her death. In these cases, therefore, the real question is whether the State is under a positive obligation to continue treatment on a long-term basis. It is precisely in this type of case that the Court's statement in *D* (para 54), that those subject to removal "cannot in principle claim any entitlement to remain on the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state", has particular application.

94. What then must be established to bring a case of this nature within the category of very exceptional cases represented by *D*? I am content to adopt the test stated by my noble and learned friend, Lord

Hope of Craighead: it must be shown that the applicant's medical condition has reached such a critical state, that there are compelling humanitarian grounds for not removing him or her to a place which lacks the medical and social services which he or she would need to prevent acute suffering.

95. Is that test satisfied here? Much though I would prefer not to have to make this decision, I for my part feel driven to answer no to this question. This was, of course, the answer given by the majority below (consistently with earlier Court of Appeal decisions on the point—see in particular *K v Secretary of State for the Home Department* [2001] Imm AR 11)—and, although Carnwath LJ dissented, he did so only on the basis that the decision might be affected by a fuller factual examination. Altogether more importantly, however, this is the answer which, as I have sought to demonstrate, all the recent Strasbourg case law clearly suggests the E Ct HR would now give to these questions and, as I began by saying, this House ought largely to be guided by the jurisprudence of that Court.

96. I set out in paragraph 75 above the three conclusions now open to your Lordships. It is tempting to hold (as Carnwath LJ below was inclined to hold) that all these AIDS cases are fact sensitive and that the matter should now therefore be remitted for further consideration by the IAT (or the adjudicator) as the appropriate fact-finding body with regard to judgments of this kind. I conclude, however, that this temptation should be resisted: this is, after all, in all its essentials, a paradigm case which inevitably will be widely replicated and which is realistically indistinguishable from the recent line of Strasbourg cases.

97. True, there are circumstances in the present case which induce particular sympathy for this appellant, perhaps beyond the extreme sympathy one inevitably feels for anyone in her position. Not least amongst these are the length of her stay in this country and the excellence of her recovery. But is it really to be said that a different conclusion might have been reached had her case fallen for decision after only four years, or two years, or 6 months or immediately on her arrival? Surely not. The moral quandary remains the same. Why should article 3 be engaged here but not had the UK succeeded in denying the appellant entry in the first place (she arrived on a false passport) or managed to deport her much earlier?

98. From all this it follows that, substantially for the same reasons as those given by Lord Hope, I too would dismiss this appeal.

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