INTRODUCTORY NOTE TO UNITED KINGDOM (U.K.) SUPREME COURT OF JUDICATURE-COURT OF APPEAL (CIVIL DIVISION): N. V. SECRETARY OF STATE FOR THE HOME DEPARTMENT,

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Within the jurisprudence of the *European Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol 11*, (November 4, 1950, Rome) ("European Convention"), an inherent tension has developed between two fundamental principles in international law: 1) the right of States to "control the entry, residence and expulsion of aliens,"[1] *see Bensaid v. United Kingdom* (33 EHRR 205, 216, para 32 (2001)), and 2) the absolute, non-derogable prohibition under Article 3 of the ECHR that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." This tension was addressed in the landmark *Soering v. United Kingdom* (11 EHRR 439 (1989)) decision by the European Court of Human Rights in Strasbourg, France, (the "ECHR" or the "Court"), wherein the Court gave extraterritorial effect to Contracting States' obligation under Article 3 to aliens. Traditionally, under Article 1 of the European Convention, Contracting States are bound by the "territoriality principle" such that they must secure for all individuals *within their jurisdiction* the rights and freedoms guaranteed by the Convention. That principle was extended under *Soering* when the Court held that the U.K. would violate its obligation under Article 3 if it allowed a German national to be extradited to the United States where he would face charges of murder and the death penalty if convicted, even though the violation would take place outside of U.K. borders.[2] The Court reasoned that:

> It would hardly be compatible with the underlying values of the Convention . . . were a contracting state knowingly to surrender a fugitive to another state where there were substantial grounds for believing that he would be in danger of being subjected to torture . . . [or] would be faced in the receiving state by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that article. (*Soering*, para.88).

Following the *Soering* decision, the ECHR and courts in the Contracting States have struggled to discern what contexts would prohibit a Contracting State from removing an alien to another country because the effect would be that the individual's guaranteed rights under the European Convention would not be upheld. A particularly difficult subset of cases has arisen addressing the claims of alien defendants from poor, developing countries infected with HIV (human immuno deficiency virus) and acquired immunodeficiency syndrome ("AIDS") seeking relief from expulsion, removal or deportation largely under Article 3. The crucial question has been: what amounts to "inhuman or degrading treatment" in this context? In *D v. United Kingdom* (24 EHRR 423 (1997)), the ECHR held that the D's removal to St. Kitts by the U.K. would amount to inhuman treatment where D was in the advanced stages of AIDS, hospitalized and near death. The Court found that D's deportation to St. Kitts would expose him to a real risk of death where any medical treatment obtained could not address the infections he could possibly contract; where there was no evidence indicating that the defendant would have sufficient moral or social support; and where he would face lack of shelter and a proper diet as well as exposure to health and sanitation problems. The Court established a new interpretation of Article 3 violations applying a weighing of "all of the circumstances" test rather than the strict "acts of public authorities" standard stating that:

> It is true that [Article 3] 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 . . . [however] it is not . . . 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 . . . 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.* (*D*, para. 49) (emphasis added).

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Since the issuance of the *D* decision, a number of courts in the Contracting States have distinguished and limited the reach of its holding due to the perceived "exceptional circumstances" of the case.[3] One such opinion is the recent *N v. The Secretary of State for the Home Dept.* [2003] ECWCA Civ 1369 decision by the United Kingdom Supreme Court of Judicature Court of Appeal (Civil Division)("U.K. court"). In *N*, the court was required under the Human Rights Act of 1998 ("HRA") "to give further effect to rights and freedoms guaranteed" under the European Convention. Under § 2 of the HRA, any U.K. court or tribunal "must take into account" Strasbourg jurisprudence when determining an issue in connection with a European Convention right. The issue before the court was, in light of the ECHR's decision in *D*, what is the extent to which a Contracting State to the European Convention is obliged to protect individuals from human rights violations that they may suffer in other jurisdictions? The case concerned a Ugandan woman who was diagnosed as HIV positive within days of her arrival in the U.K.; it was not disputed by the parties that she was unaware that she had this condition. Several months later, she developed full-blown AIDS. Doctors' reports indicated that if returned to Uganda, she would have a reduced life expectancy of about two years. This was due to the fact that there was no prospect of her getting adequate triple combination therapy in her home village eighty miles from the capital, Kampala, and because of the exorbitant cost of the drugs. Whereas, she would likely live for decades under the care provided for her in the U.K.. Furthermore, the woman had few people to return to: her parents were dead; five of her six siblings died from HIV-related conditions as had other close relatives; and she was separated from her former partner who had custody of her two children. If she returned to Uganda, she would live in overcrowded conditions and not be strong enough to work. After her asylum application was rejected, the woman appealed to the Adjudicator and also sought protection under Article 3 of the European Convention from return to Uganda. The Adjudicator dismissed her asylum appeal but found in her favor under Article 3 in that the totality of her circumstances would amount to inhuman treatment once in Uganda. Upon appeal to the Immigration Appeal Tribunal ("IAT"), the Tribunal reversed concluding that because there would be some availability of treatment for the woman and some family structure, her situation did not rise to the level of extremity for an Article 3 case as found in *D*. In the final appeal of the IAT's decision, the Court of Appeal agreed with the IAT. As stated in an earlier U.K. decision, *Ullah v. Special Adjudicator*, [2003] H.R.L.R. 12, the court reasoned that giving extra-territorial effect to Article 3 violations in *Soering* was itself an "exceptional" extension of treaty obligations under the European Convention for Contracting States. (*See N*, para. 37). The Court critiqued the ECHR's holding in *D* as a questionable extension of the already exceptional extraterritorial extension by making a Contracting State responsible to protect an alien where "the humanity of the immigrant's treatment here stood in too great a contrast to what, without violation of the Article 3 standard, would befall him there." (*Id.*). In other words, the court found problematic the basis of the decision in *D* on the great contrast "between the relative well-being accorded in a signatory State to a very sick person who for a while, even a long while, is accommodated there, and the scarcities and grave hardships which . . . he would face if he were returned home." (*Id.* at 38). The court held that *D* must be strictly confined and that where the complaint was in essence one of a want of resources in the applicant's home country, the humanitarian appeal of the case had to be so extreme, as in *D*, that it could not be resisted by the authorities of a civilized State. (*Id.* at 40). The court then concluded that *N's* case did not fall within that exceptional category of cases.

The potential implications of the *N* decision are several. The Court of Appeals has set a high bar for future aliens suffering from a severe, life-threatening illness to be able to seek relief from removal under Article 3 grounds.[4] In other words, although the *N* court disavowed that it was holding that an alien with AIDS must literally be on death's door for removal to be found inhumane, it is unclear what additional evidence will be required than was proffered in *N* to constitute a case with extreme humanitarian appeal. Perhaps evidence of a complete lack of drugs, or that the particular State to which the alien is being removed does not recognize HIV/AIDS as a legitimate disease and has no program attempting to combat it, would suffice; it will be up to future U.K. courts to decide.

In addition, the *N* decision limits application of the ECHR's weighing of the circumstances test in *D* for future cases of aliens with severe illness seeking relief from return under Article 3. The court justified its strict confinement of *D* on grounds that the decision was primarily a resource issue; *i.e.* that the *D* decision was problematic in that it resulted largely due to the stark contrast between D's treatment in the U.K. versus in St. Kitts. This interpretation raises two

separate issues. First, it is debatable whether this is a fair interpretation of *D*. As pointed out by Lord Justice Carnwath in his dissent in *N*, the *D* court actually looked to the several combined circumstances as a matter of degree beyond the fact that treatment in the receiving country will significantly reduce life expectancy including: the assumption of responsibility for care by the Contracting State; the advanced state of the illness; and the lack of family support in the receiving country. (*N*, at para. 52). There is a possibility that future courts handling cases of aliens like that of N's will be tempted to deny relief under Article 3 without proper analysis by framing them as cases having to do with inequality of health care in various countries rather than looking to all of the circumstances on a case by case basis that may amount to inhuman treatment in the receiving country. Second, the court's interpretation of *D* in *N* highlights the broader problem of maintaining a uniform and coherent body of jurisprudence under the European Convention where Contracting States are not required to strictly follow the decisions issued by Strasbourg. In the U.K., courts are obliged to take them into account, but not necessarily follow them under the HRA. While the *N* court emphasized that U.K. courts should generally try to follow ECHR jurisprudence (*see* para. 39), it then proceeded to distinguish and narrow the application of *D*'s holding. (*N*, at para. 39).

Finally, as a policy matter, the *N* decision highlights the importance often placed by U.K. courts in these types of European Convention cases on the State's right of immigration control as generally trumping individual, private rights, unless the cases involve compelling humanitarian concerns. The courts are careful in immigration policy matters to defer to the power of the legislature and the executive. As reasoned by the court in denying N's application, "if . . . we were to fix the Secretary of State with a legal obligation to permit the appellant to remain in the U.K., we would . . . effect an unacceptable–constitutionally unacceptable–curtailment of the elected government's power to control the conditions of lawful immigration." (*N*, at para. 41).

ENDNOTES

1. This principle is reflected in Article 5(1)(f) of the European Convention wherein the right to liberty and security is conditioned as follows:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . . the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. The ECHR left open the possibility that flagrant violation of the right to a fair trial under Art. 6 might also be grounds for refusing to extradite.

3. In the U.K., *see e.g.*, *I v. Secretary of State* [1997] IAR 172; *K v. The Secretary of State* [2001] IAR 41.

4. As pointed out by Lord Justice Carnwath in his dissent, it is questionable whether the *D* decision was meant to be exceptionally applied as was implied by the *N* majority opinion. (*N*, at para. 51). While the ECHR clearly stated several times that its decision was based upon "exceptional circumstances," the Court and European Commission have not hesitated to look to *D* in several subsequent cases to determine whether Article 3 protection for aliens may apply in cases of life threatening illness. *See e.g. Bensaid v. U.K.* (33 EHRR 205 (2001)); *Pretty v. U.K.* (Application No. 2346/02 (2002)); *Henao v. the Netherlands* (Application No. 13669 (2003)).