Neutral Citation Number: [2018] EWCA Civ 64

Case No: C5/2016/4178 & C5/2016/4677

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
DA/01209/2013 & IA/00803/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2018

Before:

LORD JUSTICE PATTEN
LORD JUSTICE SALES
and
LORD JUSTICE HICKINBOTTOM

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Between:

1) AM (Zimbabwe) **2) Hamzeh Mamoun Naji Abu Nowar**	**Appellants**
- and -	
The Secretary of State for the Home Department	**Respondent**

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Zane Malik and Darryl Balroop (instructed by **Shan and Co Solicitors**) for the **First Appellant**
Edward Nicholson (instructed by **Elder Rahimi Solicitors**) for the **Second Appellant**
Lisa Giovanetti QC and Rory Dunlop (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 16 January 2018

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Judgment Approved

Lord Justice Sales:

1. This is the judgment in two appeals which are concerned with the question of the operation of Article 3 of the European Convention on Human Rights, applied as a Convention right in domestic law under the Human Rights Act 1998, in relation to removal of foreign nationals from the UK where they are suffering from serious illnesses. The position in domestic law was authoritatively settled in *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 AC 296. The approach laid down by the House of Lords in that case was endorsed by the Grand Chamber of the European Court of Human Rights ("ECtHR") in *N v United Kingdom* (2008) 47 EHRR 39. However, a question arises whether the test for application of Article 3 in this context should now be adjusted in light of the further Grand Chamber judgment in *Paposhvili v Belgium*, judgment of 13 December 2016; [2017] Imm AR 867.

2. The First-tier Tribunal ("FTT") in each case before us found the relevant facts, as set out below. Although respective counsel for each appellant sought to go behind the findings made and invited us to consider some of the underlying evidence, there was no proper basis for them to do so. The grounds of appeal for which they had been granted permission to appeal did not include any challenge to the findings of fact made below in each case, being limited to the issue of the proper application of Article 3 in relation to the facts as found by the FTT. In any event, the underlying materials to which we were taken indicated that the FTT in each case was entitled to make the findings which it did.

The facts in AM's case

3. The appellant AM is a national of Zimbabwe, born in 1987. He came to the UK as a teenager in 2000 to join his mother. He was granted indefinite leave to remain in 2004. In 2006 he was convicted of a number of criminal offences, being sentenced to a total of 12 months imprisonment. In 2009 he was convicted of offences relating to possession of a firearm and supply of heroin and was sentenced to 9 years imprisonment (2 years for possession of a firearm and 7 years for supplying a class A drug). The Secretary of State wishes to deport him. The issue which arises, so far as is relevant before us, is whether to return AM to Zimbabwe would violate his right under Article 3 not to be subjected to inhuman treatment, by reason of his medical condition.

4. AM is HIV positive. His condition is controlled by an anti-retroviral ("ARV") treatment he receives in the UK involving medication called Eviplera, and has been since 2012. He was placed on Eviplera after first having tried another ARV drug which produced significant side-effects. We were not told what these side-effects were.

5. As the FTT found, if AM is returned to Zimbabwe a range of ARV drugs would be available to him for treatment of his condition, but they would not include Eviplera. None of the medical reports provided in evidence by AM indicated that he would not be able to tolerate any of the other treatments available to him in Zimbabwe.

6. At the hearing before the FTT, counsel then appearing for AM (who was different from his present counsel) said that she was not relying on Article 3, but instead relied on AM's medical condition and the limits on treatment available for him in Zimbabwe

in the context of a claim based on Article 8 of the Convention which he was also seeking to maintain at that stage. This approach was probably adopted because of the strict approach to claims under Article 3 relying on medical conditions set out in *N v Secretary of State for the Home Department* and *N v United Kingdom* and because the hearing pre-dated the decision of this court in *GS (India) v Secretary of State for the Home Department* [2015] EWCA Civ 40; [2015] 1 WLR 3312, which brought the test under Article 3 and the approach under Article 8 into close alignment. Be that as it may, the FTT nonetheless addressed Article 3, to avoid any doubt on the point, holding that Article 3 did not prevent the deportation of AM and saying that it was not satisfied that AM was at a critical stage of his illness nor that treatment for his condition would not be available for him in Zimbabwe if he were returned there, even though the specific ARV drug he was then taking (Eviplera) would not be available: [101]-[102]. The FTT also dismissed AM's claim based on Article 8 at [103]ff, in the course of which discussion it made further and more detailed findings in respect of his medical condition and the ARV treatments available in Zimbabwe: [173]-[183].

7. The Upper Tribunal dismissed AM's appeal, holding that the FTT had properly considered the medical evidence and that there was nothing in it to indicate that Eviplera was the only possible ARV drug which AM could take. At [39] the Upper Tribunal observed that the burden of proof was on the appellant and that it had been incumbent on him to show that he would be at risk of a significant deterioration in his health and possible death in Zimbabwe if he could not take Eviplera but could only take the other ARV treatments which were available in Zimbabwe; and the FTT had not engaged in improper speculation, but in light of the burden of proof and the evidence before it had come to a conclusion which was properly open to it.

8. Despite the way in which AM's case was presented below, in reliance on Article 8 rather than Article 3, it is common ground that it is open to him on this appeal to rely now on Article 3, as he seeks to do.

The facts in Mr Nowar's case

9. Mr Nowar is a national of Jordan, born in 1986. In early 2012, when he was in Jordan, he was diagnosed with cancer, a primary mediastinal large B-cell lymphoma, for which he was treated at the King Hussein Cancer Centre ("KHCC") in that country. He was successfully treated at the KHCC, by a course of radiotherapy and chemotherapy. As the FTT found, this was successful and the disease was found to be in remission and he was given "the all-clear".

10. At that point, late in 2012, Mr Nowar applied for entry clearance to come to the UK as a student, which was granted. He came to the UK in November 2012. Unfortunately, in April 2013, while he was in the UK, it was found that he had suffered a relapse and that his cancer was active again. In December 2013 he was given an advanced form of therapy here, involving an autologous stem cell transplant. This again was successful, and he was found to be in full remission with no symptoms. Understandably, however, he remains concerned that he might suffer another relapse at some point in the future. If that did happen, he does not believe that he would receive as good treatment in Jordan as he would if he remains in the UK. In particular, he maintains that the effective treatment he received in the UK involving autologous stem cell transplantation is not available in Jordan. At the time of the hearing before the FTT he had received a further medical report dated 3 July 2015

which stated that a CT scan identified that he had a 7mm nodule which required investigation.

11. In February 2014 Mr Nowar applied for leave to remain under Article 8, relying in particular on his medical condition and wish to be able to receive treatment in the UK, should he suffer a relapse. By a decision letter dated 9 December 2014, the Secretary of State refused his application. According to a PubMed article from August 2008, the KHCC had been performing the same form of stem cell transplantation since 2003. Further, the KHCC had previously treated his cancer successfully and the Secretary of State had no reason to believe that it could not continue to treat him should the cancer come back. She concluded that suitable medical treatment would be available in Jordan.

12. Mr Nowar appealed to the FTT, relying at this stage on his rights under Article 3 as well as under Article 8. The FTT referred to relevant authority then in place, including in particular *N v Secretary of State for the Home Department* and *N v United Kingdom*, and held that his claim under Article 3 failed. His claim under Article 8 was also dismissed. The FTT judge said this at [39]:

> "Part of this appellant's case is of course (paragraphs 3, 4, 5 and 6 of the witness statement) to seek to draw a distinction between the treatment he received in Jordan at KHCC and the treatment he has received in the UK. He argues that at least one of the UK medical reports supports a contention that the treatment and quality of drugs in Jordan was "sub-optimal" and that in any event the experimental treatment which he underwent at King's College Hospital was a last chance. He submits that that regime would not be available in Jordan and it is the only one that finally worked. In particular at paragraph 5 he analyses the prognostic tool used by KHCC, which showed him to be a low risk of falling out of remission, and urged me to find that that IPI index was not relevant for his type of lymphoma and that he has been diagnosed with CD 30 positive (general evidence folder page 8) which, according to a PubMed article published in 2015, shows a poor outcome of the first treatment for patients of diffuse large B-Cell lymphoma. This, he argues, is support for his contention that in Jordan they fail to understand the full spectrum of his disease. However, my reading of the legal authorities is that Article 3 does not impose an obligation on an expelling state to provide individuals with a particular standard of health care. It is undeniable in this case that the appellant did receive sufficient health care in Jordan sufficient to put him into remission, and I cannot construe any of the UK medical evidence before me to found the basis for a contention that either the Jordan treatment fell so below international standards that it could be said to have done him harm, or that he has shown that he would be denied treatment on return. I am satisfied on the evidence before me that he would be able to avail himself of further treatment in Jordan and, equally importantly, that he would have the considerable

> support of his family and friends in doing so. I do accept that the respondent was in error in concluding that his parents were both available for him in Jordan as the evidence clearly shows that his mother has unfortunately passed away. However I note from his evidence and that of the photographs and generally that his father, resident in Jordan (and an ex aviation pilot for Jordan Airlines) is still resident in that country and I have no doubt that he would be able to offer him the support and assistance he needs."

13. The FTT's statement that the treatment which Mr Nowar received in Jordan did not fall so below international standards that it could be said to have done him harm was its finding in answer to suggestions made by Mr Nowar that there had been some impact on his lungs and his heart as a result of the treatment he had received there and that he had not been properly diagnosed and treated there. The medical reports did not indicate that Mr Nowar had been subjected to inappropriate or incompetent treatment in Jordan, nor that he would not be treated in a medically satisfactory way if he suffered a relapse after his return to Jordan. Insofar as the reports might be taken to indicate that Mr Nowar had suffered some degree of side-effects from his treatment in Jordan, the effect of the FTT's findings is that any such side-effects were within the bounds of what could reasonably be expected from appropriate treatment and did not show that he would be at risk of not receiving appropriate and effective treatment for his cancer in Jordan, if he suffered a relapse.

14. Mr Nowar's appeal to the Upper Tribunal was dismissed. He has been granted permission to appeal by Hickinbottom LJ in relation to his case under Article 3, in light of *Paposhvili*. In the relevant ground of appeal, Mr Nowar contends that his case fell to be distinguished from the authorities relied upon by the FTT due to the likelihood of him being exposed to further harmful treatment if he were returned to Jordan.

The authorities prior to Paposhvili v Belgium

15. Article 3 is headed "Prohibition of torture". It is in unqualified terms. It provides:

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

16. It is common ground that where a foreign national seeks to rely upon Article 3 as an answer to an attempt by a state to remove him to another country, the overall legal burden is on him to show that Article 3 would be infringed in his case by showing that that there are substantial grounds for believing that he would face a real risk of being subject to torture or to inhuman or degrading treatment in that other country: see, e.g., *Soering v United Kingdom* (1989) 11 EHRR 439, para. [91], which is reflected in the formulations in *Paposhvili*, paras. [173] and [183], set out below. In *Paposhvili*, at paras. [186]-[187], set out below, the Grand Chamber of the ECtHR has given guidance how he may achieve that, by raising a prima facie case of infringement of Article 3 which then casts an evidential burden onto the defending state which is seeking to expel him.

17. The test to determine when Article 3 may prevent removal of a foreign national from the UK, where he is suffering from a medical condition which may get worse if he is removed, was authoritatively laid down in domestic law by the House of Lords in *N v Secretary of State for the Home Department*. That case concerned a Ugandan woman suffering from advanced HIV, or full-blown AIDS as it was called, who was receiving effective treatment in the UK which would not be available to her if she was returned to Uganda. If returned to Uganda, the claimant would die within a matter of months, whereas if she stayed in the UK she could live for decades. Despite this, her claim under Article 3 failed.

18. Lord Hope of Craighead gave the principal speech. He referred to what was then the leading judgment of the ECtHR, in *D v United Kingdom* (1997) 24 EHRR 423, which also concerned expulsion of a foreign national suffering from AIDS, and a range of other authorities. The claimant in *D v United Kingdom* was in an advanced stage of AIDS and close to death; he would receive no comfort or moral support while dying if returned to his country of origin. The case was treated as an exceptional one, in which the ECtHR held that Article 3 would prevent removal. In *Amegnigan v The Netherlands*, judgment of 25 November 2004, the ECtHR characterised the circumstances in *D v United Kingdom* as "very exceptional". Lord Hope set out the test to be derived from the Strasbourg authorities in [50], as follows:

> "…. For the circumstances to be … '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. …"

To similar effect, see also [69]-[70] per Baroness Hale of Richmond and [94] per Lord Brown of Eaton-under-Heywood. As Laws LJ pithily summarised the effect of these opinions in *GS (India)* at [66], according to the House of Lords the *D v United Kingdom* exceptional situation in which Article 3 will prevent removal to another country with lesser standards of care "is confined to deathbed cases."

19. The claimant in *N v Secretary of State for the Home Department* applied to the ECtHR, relying on Article 3. In its judgment in *N v United Kingdom*, the Grand Chamber dismissed her application, holding that her case "does not disclose very exceptional circumstances, such as in *D v United Kingdom*" and that her removal to Uganda would not give rise to a violation of Article 3. The ECtHR referred to the speeches in the House of Lords without adverse comment. Its summary of the principles to be drawn from its own case law included this:

> "42. In summary, the Court observes that since D v United Kingdom it has consistently applied the following principles.
>
> 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 and services provided by the expelling state. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be

> removed from the contracting state is not sufficient in itself to give rise to breach of Art.3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the contracting state may raise an issue under Art.3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the D case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.
>
> 43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in D v United Kingdom and applied in its subsequent case law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-state bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country."

20. It is common ground in this case that neither AM nor Mr Nowar can bring himself within the test for application of Article 3 laid down in *N v Secretary of State for the Home Department*. Indeed, I would observe that both of them are very far from being able to do so.

Paposhvili v Belgium

21. The Grand Chamber of the ECtHR returned to the issue of application of Article 3 in the context of expulsion of individuals who are suffering from serious illness in its judgment in *Paposhvili v Belgium*, delivered in December 2016. That case concerned a Georgian national suffering from chronic lympocytic leukaemia whom Belgium wished to return to Georgia. His claim that his removal to Georgia would violate Article 3, on the grounds that he would not receive effective medical care there, was dismissed by the Fifth Section of the ECtHR, by a majority, by reference to the test in *N v United Kingdom* in a judgment dated 17 April 2014. On the evidence at the time of that judgment, the applicant's disease was stable and he was not in imminent danger of dying (para. [120] of that judgment) and the ECtHR considered that though there were limits on treatment available in Georgia, the applicant was not without resources which might help in that regard. The application was referred to the Grand Chamber.

22. Before the Grand Chamber there was further medical evidence prepared in 2015 that, whilst the applicant's medical condition was being kept stable in Belgium by use of an expensive drug, Ibrutinib, and careful monitoring, with a view to trying to enable him to undergo a donor transplant which represented the last remaining prospect of a cure if carried out within a fairly short timeframe, without that drug it was likely he would

die within 6 months (paras. [44], [46] and [195]). The applicant (who had died by the time of the hearing in the Grand Chamber) put in evidence from his doctor that neither Ibrutinib nor a donor transplant would be available in Georgia and also maintained that there was no guarantee that he would in practice be able to have access to other forms of leukaemia treatment in Georgia: the ECtHR said that in its view "these assertions are not without some credibility" (para. [197]). The applicant also argued that the burden of proving the existence of real and practical access to health care in Georgia lay with the Belgian authorities.

23. The Grand Chamber set out the circumstances of the case at paras. [10]ff. Of particular relevance are the facts that in 2007 the applicant made a request for regularisation of his residence on medical grounds which was refused by the relevant decision-making bodies in Belgium (the Aliens Office and the Aliens Appeals Board) without examination of the merits of the case on the medical evidence presented to them, because he was a foreign criminal who did not fall within the scope of the relevant Belgian statute and no removal order had yet been made in respect of him which required examination under Article 3 (paras. [54]-[58]); in the meantime, in 2008 the applicant lodged a second request for regularisation on medical grounds which was refused by the Aliens Office and the Aliens Appeals Board, and on appeal to the Conseil d'État, on similar grounds, i.e. without examination of the merits of his case based on Article 3 (paras. [59]-[64]); an application by the applicant to challenge a deportation order made in relation to him in 2007 was dismissed in 2008 as being out of time (paras. [73]-[74]); and the applicant's further challenge to the 2007 deportation order and a further removal order made in relation to him in 2010 was rejected by the Aliens Appeal Board in a judgment of 29 May 2015 on the ground that the applicant had not attended the hearing or been represented (paras. [78]-[85]). The net effect of all this was that no relevant decision-making body in Belgium had actually examined the merits of the applicant's claim that to remove him to Georgia would violate his rights under Article 3: see para. [199]. The most that had happened was that the medical service of the Aliens Office had reviewed the applicant's medical case in order to provide information in connection with the proceedings before the ECtHR, in the course of which a report dated 23 June 2015 was drawn up by the medical adviser to the Board in which he expressed his view that the threshold of illness identified in *D v United Kingdom* and *N v United Kingdom* was not met (paras. [65]-[68]). However, the views of the medical service were not examined by the relevant decision-making bodies, the Aliens Office and the Aliens Appeals Board, from the perspective of Article 3 in the course of the relevant proceedings: paras. [200]-[201].

24. The Grand Chamber set out the general principles governing cases of this kind at paras. [172]-[193]. In view of the importance of this part of the Grand Chamber's judgment, I set these out in full here:

> "172. The Court reiterates 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 (see *N. v. the United Kingdom*, cited above, § 30). In the context of Article 3, this line of authority began with the case of *Vilvarajah and Others*

v. the United Kingdom (30 October 1991, § 102, Series A no. 215).

173. Nevertheless, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3 of the Convention where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see *Saadi*, cited above, § 125; *M.S.S. v. Belgium and Greece*, cited above, § 365; *Tarakhel*, cited above, § 93; and *F.G. v. Sweden*, cited above, § 111).

174. The prohibition under Article 3 of the Convention does not relate to all instances of ill-treatment. Such treatment has to attain a minimum level of severity if it is to fall within the scope of that Article. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *N. v. the United Kingdom*, cited above, § 29; see also *M.S.S. v. Belgium and Greece*, cited above, § 219; *Tarakhel*, cited above, § 94; and *Bouyid v. Belgium* [GC], no. 23380/09, § 86, ECHR 2015).

175. The Court further observes that it has held that the suffering which flows from naturally occurring illness may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (see *Pretty*, cited above, § 52). 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 of that country (see *D. v. the United Kingdom*, cited above, § 49).

176. In two cases concerning the expulsion by the United Kingdom of aliens who were seriously ill, the Court based its findings on the general principles outlined above (see paragraphs 172-74 above). In both cases the Court proceeded on the premise that aliens who were subject to expulsion could not 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 and services provided by the returning State (see *D. v. the United Kingdom*, cited above, § 54, and *N. v. the United Kingdom*, cited above, § 42).

177. In *D. v. the United Kingdom* (cited above), which concerned the decision taken by the United Kingdom authorities to expel to St Kitts an alien who was suffering from Aids, the Court considered that the applicant's removal would expose him to a real risk of dying under most distressing circumstances and would amount to inhuman treatment (see *D. v. the United Kingdom*, cited above, § 53). It found that the case was characterised by "very exceptional circumstances", owing to the fact that the applicant suffered from an incurable illness and was in the terminal stages, that there was no guarantee that he would be able to obtain any nursing or medical care in St Kitts or that he had family there willing or able to care for him, or that he had any other form of moral or social support (ibid., §§ 52-53). Taking the view that, in those circumstances, his suffering would attain the minimum level of severity required by Article 3, the Court held that compelling humanitarian considerations weighed against the applicant's expulsion (ibid., § 54).

178. In the case of *N. v. the United Kingdom*, which concerned the removal of a Ugandan national who was suffering from Aids to her country of origin, the Court, in examining whether the circumstances of the case attained the level of severity required by Article 3 of the Convention, observed that neither the decision to remove an alien who was suffering from a serious illness to a country where the facilities for the treatment of that illness were inferior to those available in the Contracting State, nor the fact that the individual's circumstances, including his or her life expectancy, would be significantly reduced, constituted in themselves "exceptional" circumstances sufficient to give rise to a breach of Article 3 (see *N. v. the United Kingdom*, cited above, § 42). In the Court's view, it was important to avoid upsetting the fair balance inherent in the whole of the Convention between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. A finding to the contrary would place too great a burden on States by obliging them to alleviate the disparities between their health-care system and the level of treatment available in the third country concerned through the provision of free and unlimited health care to all aliens without a right to stay within their jurisdiction (ibid., § 44). Rather, regard should be had to the fact that the applicant's condition was not critical and was stable as a result of the antiretroviral treatment she had received in the United Kingdom, that she was fit to travel and that her condition was not expected to deteriorate as long as she continued to take the treatment she needed (ibid., § 47). The Court also deemed it necessary to take account of the fact that the rapidity of the deterioration which the applicant would suffer in the receiving country, and the extent to which she

would be able to obtain access to medical treatment, support and care there, including help from relatives, necessarily involved a certain degree of speculation, particularly in view of the constantly evolving situation with regard to the treatment of Aids worldwide (ibid., § 50). The Court concluded that the implementation of the decision to remove the applicant would not give rise to a violation of Article 3 of the Convention (ibid., § 51). Nevertheless, it specified that, in addition to situations of the kind addressed in *D. v. the United Kingdom* in which death was imminent, there might be other very exceptional cases where the humanitarian considerations weighing against removal were equally compelling (see *D. v. the United Kingdom*, cited above, § 43). An examination of the case-law subsequent to *N. v. the United Kingdom* has not revealed any such examples.

179. The Court has applied the case-law established in *N. v. the United Kingdom* in declaring inadmissible, as being manifestly ill-founded, numerous applications raising similar issues, concerning aliens who were HIV positive (see, among other authorities, *E.O. v. Italy (*dec.*)*, no. 34724/10, 10 May 2012) or who suffered from other serious physical illnesses (see, among other authorities, *V.S. and Others v. France* (dec.), no. 35226/11, 25 November 2014) or mental illnesses (see, among other authorities, *Kochieva and Others v. Sweden* (dec.), no. 75203/12, 30 April 2013, and *Khachatryan v. Belgium* (dec.), no. 72597/10, 7 April 2015). Several judgments have applied this case-law to the removal of seriously ill persons whose condition was under control as the result of medication administered in the Contracting State concerned, and who were fit to travel (see *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10, 20 December 2011; *S.H.H. v. the United Kingdom*, no. 60367/10, 29 January 2013; *Tatar*, cited above; and *A.S. v. Switzerland*, no. 39350/13, 30 June 2015).

180. However, in its judgment in *Aswat v. the United Kingdom* (no. 17299/12, § 49, 16 April 2013), the Court reached a different conclusion, finding that the applicant's extradition to the United States, where he was being prosecuted for terrorist activities, would entail ill-treatment, in particular because the conditions of detention in the maximum security prison where he would be placed were liable to aggravate his paranoid schizophrenia. The Court held that the risk of significant deterioration in the applicant's mental and physical health was sufficient to give rise to a breach of Article 3 of the Convention (ibid., § 57).

181. The Court concludes from this recapitulation of the case-law that the application of Article 3 of the Convention only in cases where the person facing expulsion is close to death,

which has been its practice since the judgment in *N. v. the United Kingdom*, has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of that provision. As a corollary to this, the case-law subsequent to *N. v. the United Kingdom* has not provided more detailed guidance regarding the "very exceptional cases" referred to in *N. v. the United Kingdom*, other than the case contemplated in *D. v. the United Kingdom*.

182. In the light of the foregoing, and reiterating that it is essential that the Convention is interpreted and applied in a manner which renders its rights practical and effective and not theoretical and illusory (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I; and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 175, ECHR 2012), the Court is of the view that the approach adopted hitherto should be clarified.

183. The Court considers that the "other very exceptional cases" within the meaning of the judgment in *N. v. the United Kingdom* (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.

184. As to whether the above conditions are satisfied in a given situation, the Court observes that in cases involving the expulsion of aliens, the Court does not itself examine the applications for international protection or verify how States control the entry, residence and expulsion of aliens. By virtue of Article 1 of the Convention the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities, who are thus required to examine the applicants' fears and to assess the risks they would face if removed to the receiving country, from the standpoint of Article 3. The machinery of complaint to the Court is subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention (see *M.S.S. v. Belgium and*

Greece, cited above, §§ 286-87, and *F.G. v. Sweden*, cited above, §§ 117-18).

185. Accordingly, in cases of this kind, the authorities' obligation under Article 3 to protect the integrity of the persons concerned is fulfilled primarily through appropriate procedures allowing such examination to be carried out (see, mutatis mutandis, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 182, ECHR 2012; *Tarakhel*, cited above, § 104; and *F.G. v. Sweden*, cited above, § 117).

186. In the context of these procedures, it is for the applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *Saadi*, cited above, § 129, and *F.G. v. Sweden*, cited above, § 120). In this connection it should be observed that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment (see, in particular, *Trabelsi v. Belgium*, no. 140/10, § 130, ECHR 2014 (extracts)).

187. Where such evidence is adduced, it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it (see *Saadi*, cited above, § 129, and *F.G. v. Sweden*, cited above, § 120). The risk alleged must be subjected to close scrutiny (see *Saadi*, cited above, § 128; *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 214, 28 June 2011; *Hirsi Jamaa and Others*, cited above, § 116; and *Tarakhel*, cited above, § 104) in the course of which the authorities in the returning State must consider the foreseeable consequences of removal for the individual concerned in the receiving State, in the light of the general situation there and the individual's personal circumstances (see *Vilvarajah and Others*, cited above, § 108; *El-Masri*, cited above, § 213; and *Tarakhel*, cited above, § 105). The assessment of the risk as defined above (see paragraphs 183-84) must therefore take into consideration general sources such as reports of the World Health Organisation or of reputable non-governmental organisations and the medical certificates concerning the person in question.

188. As the Court has observed above (see paragraph 173), what is in issue here is the negative obligation not to expose persons to a risk of ill-treatment proscribed by Article 3. It follows that the impact of removal on the person concerned must be assessed by comparing his or her state of health prior

to removal and how it would evolve after transfer to the receiving State.

189. As regards the factors to be taken into consideration, the authorities in the returning State must verify on a case-by-case basis whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3 (see paragraph 183 above). The benchmark is not the level of care existing in the returning State; it is not a question of ascertaining whether the care in the receiving State would be equivalent or inferior to that provided by the health-care system in the returning State. Nor is it possible to derive from Article 3 a right to receive specific treatment in the receiving State which is not available to the rest of the population.

190. The authorities must also consider the extent to which the individual in question will actually have access to this care and these facilities in the receiving State. The Court observes in that regard that it has previously questioned the accessibility of care (see *Aswat*, cited above, § 55, and *Tatar*, cited above, §§ 47-49) and referred to the need to consider the cost of medication and treatment, the existence of a social and family network, and the distance to be travelled in order to have access to the required care (see *Karagoz v. France* (dec.), no. 47531/99, 15 November 2001; *N. v. the United Kingdom*, cited above, §§ 34-41, and the references cited therein; and *E.O. v. Italy (dec.)*, cited above).

191. Where, after the relevant information has been examined, serious doubts persist regarding the impact of removal on the persons concerned – on account of the general situation in the receiving country and/or their individual situation – the returning State must obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3 (on the subject of individual assurances, see *Tarakhel*, cited above, § 120).

192. The Court emphasises that, in cases concerning the removal of seriously ill persons, the event which triggers the inhuman and degrading treatment, and which engages the responsibility of the returning State under Article 3, is not the lack of medical infrastructure in the receiving State. Likewise, the issue is not one of any obligation for the returning State to alleviate the disparities between its health-care system and the level of treatment existing in the receiving State through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. The responsibility that is engaged under the Convention in cases of this type is that of the

> returning State, on account of an act – in this instance, expulsion – which would result in an individual being exposed to a risk of treatment prohibited by Article 3.
>
> 193. Lastly, the fact that the third country concerned is a Contracting Party to the Convention is not decisive. While the Court agrees with the Government that the possibility for the applicant to initiate proceedings on his return to Georgia was, in principle, the most natural remedy under the Convention system, it observes that the authorities in the returning State are not exempted on that account from their duty of prevention under Article 3 of the Convention (see, among other authorities, *M.S.S. v. Belgium and Greece*, cited above, §§ 357-59, and *Tarakhel*, cited above, §§ 104-05)."

(I note that the reference to para. [43] of the judgment in *D v United Kingdom* in the penultimate sentence of para. [178] above is clearly a slip and should be to para. [43] in *N v United Kingdom*, as the parties agree).

25. At paras. [194]-[206] the Grand Chamber applied those principles to the particular case. It found that the applicant had raised a case regarding difficulties in relation to treatment of his illness if he were returned to Georgia which was "not without some credibility" (para. [197]), i.e. which prima facie raised an issue under Article 3. It found that the relevant decision-making authorities had not examined that issue: paras. [198]-[201]. The fact that an assessment could have been carried out immediately before the removal measure was enforced was not an adequate response to the applicant's case on the particular facts (para. [202]; it is also germane here that the Fifth Section in its judgment at paras. [94]-[109] had already ruled that the possibility of an urgent application to stay removal at the final stage did not constitute an adequate alternative remedy for the purposes of Article 35 of the Convention because, as had already been determined in the judgment in *MSS v Belgium and Greece* (2011) 53 EHRR 2, the procedure at that stage could not be relied upon to be sufficiently rigorous in its examination of the complaint under Article 3). At para. [205] the Grand Chamber said:

> "In conclusion, the Court considers that in the absence of any assessment by the domestic authorities of the risk facing the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities was insufficient for them to conclude that the applicant, if returned to Georgia, would not have run a real and concrete risk of treatment contrary to Article 3 of the Convention (see paragraph 183 …)".

26. On this basis, the Grand Chamber found that there had been a violation of Article 3. It also dealt with claims under Article 2 and Article 8, but it is not necessary to discuss those claims here. The Grand Chamber's formal disposal of the claim based on Article 3 was in these terms:

> "For these reasons, the Court, unanimously,

> *Holds* that there would have been a violation of Article 3 of the Convention if the applicant had been removed to Georgia without the Belgian authorities having assessed, in accordance with that provision, the risk faced by him in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia."

27. I have dealt with the Grand Chamber's judgment in *Paposhvili* at some length, because the context of the case and what exactly was decided in it are of significance for interpreting the guidance given at para. [183]. The Grand Chamber did not itself rule that on the medical evidence adduced by the applicant and his contentions about the state and availability of medical assistance in Georgia, had those been properly examined by the Belgian authorities, it would in fact have been a violation of Article 3 to remove him to Georgia. Its ruling was to the effect that Belgium would have violated a procedural aspect of Article 3 if it had removed him without examination of the issue which the applicant had raised relying on Article 3 and his medical condition.

28. This interpretation of the judgment is reinforced by the concurring opinion of Judge Lemmens in the Grand Chamber, who had been a party to the judgment of the Fifth Section which had dismissed the applicant's claim under Article 3 on the basis of its own examination of the medical evidence then available in the case. Judge Lemmens said:

> "1. I voted like my colleagues in the Grand Chamber in favour of the (retroactive) finding of a procedural and conditional violation of both Article 3 and Article 8 of the Convention. As I was a member of the Chamber and voted then for finding no violation of those two Articles, I would like to explain briefly why I changed my mind.
>
> 2. During the Chamber's examination of the case I took the view that we should follow the strict interpretation of Article 3 of the Convention applied by the Court since the Grand Chamber judgment in N. v. the United Kingdom ([GC], no. 26565/05, ECHR 2008). On the basis of the strict interpretation of the threshold of severity, I concluded with the majority of the Chamber that the applicant's removal would not entail a violation of Article 3 (see paragraph 126 of the Chamber judgment of 17 April 2014). Likewise, with regard to the refusal of the applicant's request for regularisation of his residence status, I agreed with the majority of the Chamber that the State had not failed to comply with its positive obligations under Article 8 of the Convention (see paragraph 155 of the Chamber judgment).
>
> 3. With the referral of the present case to the Grand Chamber the question arose whether strict application of the criterion established in N. v. the United Kingdom, without taking into consideration circumstances other than the fact that the person concerned was "close to death" (see paragraph 181 of the

> present judgment), did not create a gap in the protection against inhuman treatment. I have no difficulty finding, like my colleagues in the Grand Chamber, that such a gap exists, and in clarifying our case-law in order to fill that gap while at the same time maintaining a high threshold for the application of Article 3 of the Convention (see, in particular, paragraph 183 of the present judgment).
>
> I also subscribe fully to the different manner in which the Grand Chamber approaches the applicant's complaint. Whereas the Chamber examined whether the applicant's removal would be compatible with the prohibition of inhuman and degrading treatment, the Grand Chamber stresses the primary responsibility of the national authorities when it comes to examining the arguments advanced by aliens under Article 3 of the Convention (see, in particular, paragraph 184 of the present judgment, which highlights the fact that the machinery of application to the Court is subsidiary to national systems safeguarding human rights).
>
> From this fresh perspective I agree with my colleagues that the domestic authorities did not have sufficient information in the present case for them to conclude that, if the applicant were returned to Georgia, he would not face a real and concrete risk of treatment contrary to Article 3, regard being had to the criterion established in N. v. the United Kingdom as clarified in the present judgment.
>
> 4. As to the complaint under Article 8 of the Convention, the Grand Chamber also takes a different approach from the Chamber. Whereas the Chamber examined the refusal to regularise the applicant's residence status from the standpoint of proportionality, the Grand Chamber, here too, focuses on the procedural obligations of the respondent State (see, in particular, paragraph 224 of the present judgment, which again emphasises that the machinery of application to the Court is subsidiary to national systems safeguarding human rights).
>
> On the basis of this new approach I cannot but agree with my Grand Chamber colleagues that the domestic authorities' assessment as to whether the refusal of a residence permit was compatible with Article 8 of the Convention was not based on all the relevant information in the present case. …"

Discussion

(i) Should this court rule upon the meaning of the judgment in Paposhvili*?*

29. An issue arises whether it is appropriate for this court to express any view about the true meaning and effect of the guidance in *Paposhvili*, and in particular regarding the test in para. [183] of the judgment in that case. The appellants contend that we should

not venture to do this, but should simply apply the law as laid down domestically by the House of Lords in *N v Secretary of State for the Home Department* and dismiss the appeals, with a view to granting permission to apply to the Supreme Court. They say that since we are bound to dismiss the appeals, anything we say about the new test in *Paposhvili* will be *obiter* and will not provide assistance for other courts or tribunals. The Secretary of State, however, disputes this and argues that we should review and rule upon the meaning and effect of the guidance in *Paposhvili*.

30. As noted above, the parties in the present appeals are agreed that on the facts of their particular cases neither AM nor Mr Nowar can satisfy the test for breach of Article 3 set out in *N v Secretary of State for the Home Department* and *N v United Kingdom*. The parties are also in agreement that the decision of the House of Lords in *N v Secretary of State for the Home Department* is binding authority so far as this court is concerned regarding the test to be applied in domestic law in this type of case, with the consequence that both appeals to this court have to be dismissed. It is common ground that this is so even though it appears that the ECtHR has more recently, in *Paposhvili*, decided to clarify or qualify to some degree the test previously laid down in *N v United Kingdom*, which corresponds with that set out by the House of Lords in *N v Secretary of State for the Home Department.* This is a result of application of the usual rules of precedent in this jurisdiction: see *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465, at [43].

31. However, the appeals have been brought with a view to seeking to rely on the new guidance given by the ECtHR in *Paposhvili* not in this court, but on a further appeal to the Supreme Court. It is clear that the appellants will seek to extend existing orders preventing their removal from the UK until the final determination of their cases in the court and tribunal system, on the basis that their appeals will or should be going to the Supreme Court. Ordinarily, permission would only be granted for an appeal to the Supreme Court in a case in which there was a real prospect of success on the facts of that case.

32. There is also a significant number of other cases involving claims by foreign nationals to resist removal from the UK by invoking Article 3 on medical grounds which are already in the system, in which again reliance is sought to be placed on *Paposhvili* even though the claims have been dismissed by application of *N v Secretary of State for the Home Department* and *N v United Kingdom*. In those cases, orders have been made in a similar way to prevent the removal of the appellants from the UK until final determination of their cases, which are on hold until the position in relation to the adoption of the guidance in *Paposhvili* into domestic law has been clarified.

33. In addition, similar new claims based on application of Article 3 on medical grounds may be brought forward at any time. In relation to those claims, all courts below the Supreme Court will be bound by the decision in *N v Secretary of State for the Home Department,* but claimants may contend that they have grounds for saying that their cases are covered by the new guidance in *Paposhvili* (in particular at para. [183]) and that any question of their removal from the UK should be stayed until the Supreme Court has decided to modify domestic law (potentially decisively in their favour) by reference to that guidance.

34. In all of these situations, where an appellant or other claimant has no good claim to resist removal from the UK other than on the footing that the Supreme Court might

adopt the guidance in *Paposhvili*, a stay of removal would usually only be justified pending a new decision by the Supreme Court if their case would satisfy the test set out in *Paposhvili* at para. [183]. If a court or tribunal at a full hearing can determine that it does, a stay is likely to be justified; and if not, not. If a court or tribunal is for some reason having to make a decision regarding a stay without a full examination of the Article 3 case with reference to the test in *Paposhvili*, then it might be sufficient if the claimant has a good arguable case that his claim would satisfy that test.

35. In all these situations, the test in para. [183] of *Paposhvili* provides the relevant criterion which will in practical terms determine whether a stay of removal from the UK is justified or not. Therefore, contrary to the argument of the appellants, it is relevant and appropriate for this court to rule upon the meaning and effect of the guidance in *Paposhvili*, in particular as regards the test in para. [183]. In doing so, we will provide guidance to other courts and tribunals which are faced with arguments based on the test in *Paposhvili* to ensure that they adopt a uniform and consistent approach to such arguments. At the very least, what we say will be persuasive authority.

36. However, in my view it goes further than this. We are providing authoritative guidance on the true interpretation of a legal criterion governing how courts and tribunals in the domestic legal system should make judgments regarding the exercise of their powers to grant stays of removal. That guidance will be formally binding upon courts and tribunals below the level of the Supreme Court, in the usual way.

The effect of the judgment in Paposhvili

37. I turn, therefore, to consider the extent of the change in the law applicable under the Convention which is produced by the judgment in *Paposhvili*, as compared with the judgments in *D v United Kingdom* and *N v United Kingdom*. In my view, it is clear both that para. [183] of *Paposhvili*, set out above, relaxes the test for violation of Article 3 in the case of removal of a foreign national with a medical condition and also that it does so only to a very modest extent.

38. So far as the ECtHR and the Convention are concerned, the protection of Article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where "substantial grounds have been shown for believing that [the applicant], although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" (para. [183]). This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the Article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely "rapid" experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state.

39. There are a number of powerful indicators, including in the Grand Chamber's judgment itself, which support this interpretation of para. [183] and the inference that the Grand Chamber only intended to make a very modest extension of the protection under Article 3 in medical cases:

    i) Article 3 is an unqualified right with a high threshold for its application (see *N v United Kingdom*, para. [43], and also *Paposhvili*, para. [174]);

    ii) the Grand Chamber cited with approval at paras. [175]-[181] the ECtHR's previous case-law set out there, including in particular *D v United Kingdom* and *N v United Kingdom*, and in doing so it specifically noted at para. [178] that *N v United Kingdom* was a case in which there had been no violation of Article 3 where removal of the applicant would result in a significant reduction in her life expectancy;

    iii) as appears from the Grand Chamber judgments in *N v United Kingdom*, at para. [43], and in *Paposhvili*, at paras. [178], [181] and [183], the paradigm case for finding a violation of Article 3 in a medical case is *D v United Kingdom*, and the Grand Chamber in *Paposhvili* was only concerned to provide guidance regarding the "other very exceptional cases" referred to in *N v United Kingdom* at para. [43], i.e. those "where the humanitarian considerations are equally compelling" to those in *D v United Kingdom* (*ibid*.; and *Paposhvili*, para. [178]): see *Paposhvili*, paras. [181]-[183]. The Grand Chamber in *Paposhvili* itself recited at para. [177] the circumstances in *D v United Kingdom* which made it a compelling case and characterised it as a case of "very exceptional circumstances" - it should be noted that this characterisation was not used in the judgment in *D v United Kingdom* itself, but was stated to be the relevant characterisation of that case by the Grand Chamber in its judgment in *N v United Kingdom* and is deliberately repeated by the Grand Chamber here in its judgment in *Paposhvili*;

    iv) the Grand Chamber in *Paposhvili* seeks only to "clarify" the approach set out in *N v United Kingdom* (see para. [182]), not to effect any major change to what had been authoritatively laid down in that case; and

    v) the Grand Chamber at para. [183] in *Paposhvili*, as well as using the rubric "other very exceptional cases", which itself indicates how rarely the test in Article 3 will be found to be satisfied in medical cases, emphasised in the final sentence that it was still intending to indicate that there was "a high threshold for the application of Article 3" in medical cases. This echoes the point made by the Grand Chamber in para. [43] of *N v United Kingdom*, set out above, about the high threshold for application of Article 3.

40. It is true that if one read the phrase "would face a real risk … of being exposed … to a significant reduction in life expectancy" in para. [183] out of context, it might be taken to indicate a very wide extension of the protection of Article 3 in medical cases, since in very many such cases where a foreign national is receiving treatment at a higher level of effectiveness in the removing state than would be available in the receiving state (e.g. in the case of those suffering from AIDS) they would be able to say they would face a real risk of a significant reduction of life expectancy if they were removed. But this is not a tenable interpretation of para. [183] of *Paposhvili*,

read in its proper context. *N v United Kingdom* was itself a case where removal resulted in a very significant reduction in life expectancy (as was also noted in *Paposhvili* at para. [178]), in which no violation of Article 3 was found, and the Grand Chamber in *Paposhvili* plainly regarded that case as rightly decided. *N v United Kingdom* was itself a Grand Chamber judgment, decided by 14 votes to 3. It is impossible to infer that by the formula used in para. [183] of *Paposhvili* the ECtHR intended to reverse the effect of *N v United Kingdom*. Moreover, the Grand Chamber's formulation in para. [183] requires there to be a "serious" and "rapid" decline in health resulting in intense suffering to the Article 3 standard where death is not expected, and it makes no sense to say in the context of analysis under Article 3 that a serious and rapid decline in health is *not* a requirement where death rather than intense suffering is the harm expected. In my view, the only tenable interpretation of para. [183], read in context, is the one given above.

41. In that regard, it is also significant that even on the extreme and exceptional facts of the *Paposhvili* case, where the applicant faced a likelihood of death within 6 months if removed to Georgia, the Grand Chamber did not feel able to say that it was clear that a violation of Article 3 would have occurred for that reason had he been removed. Instead, all that the Grand Chamber held was that the applicant had raised a sufficiently credible Article 3 case that it gave rise to a procedural obligation for the relevant Belgian authorities to examine that case with care and with reference to all the available evidence. The violation of Article 3 which the Grand Chamber held would have occurred if the applicant had been removed to Georgia was a violation of that procedural obligation.

Disposal of the two appeals

42. In the two cases before us, we have heard full argument on whether the Article 3 claims of AM and Mr Nowar fall within the scope of the test in para. [183] of the judgment in *Paposhvili*. We are in a position to determine that question. Accordingly, in these appeals it is not appropriate at this stage for us simply to consider whether either of them has a good arguable case that his situation falls within para. [183] of *Paposhvili* or not.

43. In my judgment, neither AM's nor Mr Nowar's claim satisfies the test in para. [183] of *Paposhvili*. We can and should rule accordingly. I would add that even if the question for us were whether either claim constitutes a good arguable case that their situation satisfies that test, my view is that it is clear that neither of them does constitute such a case.

44. AM's claim fails to satisfy the test in para. [183] of *Paposhvili* because he has failed to show that there are substantial grounds to believe he faces a real risk of a serious and rapid decline in his health resulting either in intense suffering (to the Article 3 standard) or death in the near future if he is removed to Zimbabwe. He is HIV positive, but does not yet have AIDS. He has adduced no medical report which says that he is likely to die soon if removed to Zimbabwe, even if he received no treatment at all; or that he could not tolerate, without side-effects, any of the range of ARV treatments available in Zimbabwe; or that, if the only ARV treatments available to him in Zimbabwe are ones which would produce side-effects, those side-effects would be so severe as the cost of keeping him alive that they would constitute suffering at an intensity to bring his case within Article 3 according to the high

threshold which applies in that regard. AM's case is not even as strong as that of the applicant with AIDS in *N v United Kingdom*, which the Grand Chamber in *Paposhvili* has affirmed was correctly decided.

45. Mr Nowar's claim fails to satisfy the test in para. [183] of *Paposhvili* because he too has failed to show that there are substantial grounds to believe he faces a real risk of a serious and rapid decline in his health likely to result in his death in the near future if he is removed to Jordan. The evidence is that his cancer is in full remission at the moment. It is speculative whether and when it might recur and, if it does, what Mr Nowar's life expectancy would be. Also, he was successfully treated for his cancer previously in Jordan and there is no good reason to think the same effective treatment would not be available to him in Jordan if his cancer does recur. The Grand Chamber has affirmed in *Paposhvili*, and indeed has emphasised in its judgment, that a violation of Article 3 does not occur just because the care in the receiving state does not meet the same high standards as the care in the removing state: see paras. [178], [189] and [192], set out above. Article 3 does not impose an obligation on a removing state ensure an absence of disparities between the health service provision which it is able to provide and that available in the receiving state.

46. The effect of this analysis for each appellant is that his appeal to this court should be dismissed and any application for an extension of the stay of his removal from the UK is likely to be dismissed as well, subject to what might happen in relation to any grant of permission to appeal to the Supreme Court in these cases. We have not heard argument about that and I express no view about it, save to say that (a) as presently advised, it seems to me to be highly desirable that the Supreme Court should consider the impact of *Paposhvili* for the purposes of domestic law at an early stage, and (b) I think these cases fall a long way short of satisfying the test in para. [183] of *Paposhvili* and consequently I have some doubt whether they are ideal as vehicles for that exercise. If this court were to refuse permission to appeal, the appellants could of course ask the Supreme Court for permission to appeal and it might be appropriate to extend the stay of removal in their cases while that procedure was implemented.

Lord Justice Hickinbottom:

47. I agree.

Lord Justice Patten:

48. I also agree.