A0173

IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

APPLICATION OF ARTICLE 3 ECHR

- ADVANCED COURSE

12 April 2000

Murray Hunt

Introduction

1. Article 3 ECHR provides very simply:

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

2. The rights protected by this Article are very clearly related to an individual's dignity as a human being. Uniquely amongst the Convention's rights, the rights in Article 3 are expressed without qualification: there is no paragraph (2) setting out grounds on which limitations may be justified, nor may they be derogated from in an emergency situation. In view of the history from which the Convention emerged this is hardly surprising.

3. The threshold to be reached to establish torture or inhuman or degrading treatment or punishment in the Article 3 sense is a high one. Partly because of its historical genesis, and partly because it is expressed in unqualified terms and cannot be derogated from, the Court has frequently reminded that the standard enshrined in Article 3 is not to be "trivialised".

4. Generally speaking, a fairly severe level of deprivation is required to establish a breach of Article 3. The standard has inevitably been affected by the fact that early consideration of this Article by the Convention organs was in the context of politically contentious inter-state cases involving serious allegations of ill-treatment

arising out of various emergency situations: in particular the *Greek Case*[1] and *Ireland v UK*.[2] In these cases, the Court and the Commission have distinguished between torture, inhuman treatment or punishment and degrading treatment or punishment in terms of a sliding scale of severity, but with the common denominator that to fall within Article 3 at all the ill-treatment must attain a minimum level of severity.

5. In the *Greek Case*, for example, the distinctions drawn between the degrees of prohibited conduct were as follows:

> (i) Torture: inhuman treatment which has a purpose, such as the obtaining of information or concessions, or the infliction of punishment;
>
> (ii) Inhuman treatment or punishment: such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable;
>
> (iii) Degrading treatment or punishment: treatment that grossly humiliates before others or drives him to act against his will or conscience.

6. The Commission in the *Greek Case* and in *Ireland v UK*, concerning the treatment of persons detained during the UK Government's policy of internment in Northern Ireland, held that the notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical; and treatment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his own will or conscience.

7. Thus in the *Greek case*, conditions in which political detainees were kept were inhuman because of overcrowding, inadequate heating, toilets, sleeping

---

[1] (1969) 12 YB 1, Cyprus v Turkey (1976) 4 EHRR 482.

[2] (1978) 2 EHRR 1.

arrangements, food, recreation and provision for contact with the outside world. And in *Cyprus v Turkey* , the withholding of food and water and medical treatment from detainees was held to be inhuman treatment.

8. How does the Commission or Court decide whether there has been a breach of Article 3? The Court in *Ireland v UK* acknowledged that the assessment of whether the minimum level of severity had been met in any particular case was necessarily relative: it depended on the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.

Application of Article 3 to Expulsion

9. Since the landmark case of *Soering v UK* it has been well established in the case-law of the Convention that the expulsion, deportation or extradition of an individual will be in breach of Article 3 if there is a real risk that the individual will be subjected to torture or inhuman or degrading treatment or punishment in the receiving state, whether at the hands of the public authorities in that state, or by non-state bodies or individuals against whom the state cannot provide protection.[3]

10. The important case of *Chahal v UK* establishes that the protection afforded by Article 3 is absolute, and not subject to an implied limitation as the UK Government had sought to argue. The Court said:

> "The prohibition provided by Article 3 against ill-treatment is absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of

[3] A/161 (1989), (1989) 11 EHRR 439, paras 90-91. See also *Cruz Varas v Sweden*, A/201 (1991), (1992) 14 EHRR 1, paras 69-70; *Vilvarajah v UK*, A/215 (1991), (1992) 14 EHRR 248, para. 103; *Chahal v UK*, judgment of 15 November 1996, *Reports* 1996-V, (1997) 23 EHRR 413, paras 73-74 and 80; *Ahmed v Austria*, judgment of 17 December 1996, (1997) 24 EHRR 278, para. 39.

the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the UN 1951 Convention on the Status of Refugees."

11. Article 3 may also apply to prevent expulsion where the risk of ill-treatment comes from private groups or individuals, rather than the state itself, although this will be dependent on the applicant being able to demonstrate that the receiving country will be unable to provide appropriate protection against the risk of such ill treatment. In *H.L.R. v France*, for example, the Court accepted that where the threat emanated from persons other than the state, expulsion could still engage Article 3. It held, however, that there would be no violation of Article 3 if a deportation order on a Colombian drug trafficker were implemented.[4] The smuggler, who had informed on other drug traffickers to the French authorities, feared reprisals from other traffickers on whom he had informed if he were returned to Colombia and claimed that the Government there could not protect him. The Court, however, held that he had failed to show by evidence that the risk he alleged was real, or that the Colombian authorities were incapable of affording him appropriate protection. It noted that there was a general situation of violence in Colombia, but considered that the applicant had failed to show that he would be in any worse situation than any other Colombian if he were to be returned.[5]

12. The case makes clear the importance of evidence in making out an Article 3 claim. This is a heavy onus to discharge, however, particularly in relation to the receiving state's ability to provide adequate protection. That may simply be a matter which is not susceptible of proof by a would-be deportee. The dissenters[6] took the view that

[4] (1998) 26 EHRR 29.

[5] In *Paez v Sweden*, decision of 30 October 1997, the Court struck out of its list a case in which the applicant, an active member of the Shining Path, alleged that his expulsion to Peru would violate Article 3 because it would expose him to a real risk of ill-treatment on his return to that country. The Commission narrowly expressed the view that there had been no violation of Article 3, by 15 votes to 14, but the Government subsequently lifted the expulsion order.

[6] The Court found no violation of Article 3 by 15 votes to 6. The Commission had voted 19 votes to 10 in favour of a violation.

the burden on the applicant had been discharged: that in view of the general climate of lawlessness in Colombia, the powerful private armies of the drug cartels and the likelihood that they would seek vengeance, he was subject to as great a risk of reprisals as was Chahal had he been returned to India. They therefore thought that there were substantial reasons to believe that there was a real risk of him being subjected to treatment contrary to Article 3 if he were deported.

13. In *D v UK*, however, the Court took a significant step in the evolution of this line of authority.[7] D, who was from St. Kitts, had been diagnosed as HIV positive and as suffering from AIDS whilst serving a six year prison sentence for attempting to smuggle £120,000 worth of cocaine into the UK. He had been found in possession of the drugs at the airport and refused leave to enter before being prosecuted and imprisoned. Immediately before his release from prison on licence, the immigration authorities gave directions for his removal to St. Kitts and he was taken from prison to immigration detention pending removal. By this time his illness was at an advanced stage and expert medical reports put his life expectancy at no more than 8 to 12 months. He was receiving medical treatment including drug therapy and other care for the various AIDS-related symptoms he had developed, treatment which was not available in St. Kitts. He had no home and no family in St. Kitts who would be able to look after him. His request for leave to remain on compassionate grounds, on the basis that loss of the treatment he was currently receiving would shorten his life expectancy, was refused by the Chief Immigration Officer. The relevant Home Office policy document, which set out guidelines on how to proceed in cases involving people with HIV or AIDS, distinguished between applications for leave to enter, where the policy was to adhere to the Immigration Rules in the normal way, and applications for leave to remain. In the latter case the guidance stated that it would normally be appropriate to grant leave to remain where it was apparent that there are no facilities for treatment available in the applicant's own country and evidence suggests that the absence of treatment will significantly shorten their life expectancy. Since D had never been granted leave to enter, his application was treated as an application for leave to enter, and the relevant paragraph of the

[7] Judgment of 2 May 1997, (1997) 24 EHRR 423.

guidance was therefore said not to apply. Leave to apply for judicial review of the decision to refuse him leave to enter was refused by both the High Court and the Court of Appeal, on the basis that the Chief Immigration Officer had correctly treated D's application as an application for leave to enter and that an argument that the decision was irrational did not have any hope of success at all.

14. The Court of Human Rights unanimously upheld D's complaint that the implementation of the decision to remove him to St. Kitts would violate Article 3 of the Convention.[8] Although the right of Contracting States to control the entry, residence and expulsion of aliens was undoubted, and the use of severe sanctions such as expulsion was a justified response to the scourge of drug trafficking, states still had to have regard to Article 3, which prohibits in absolute terms the treatment it proscribes. As the Court had made clear in *Chahal*[9] and *Ahmed*,[10] an individual is entitled to the guarantees in Article 3 no matter how reprehensible their conduct or how grave the offence which they may have committed. The Court in *D* added that an individual was also entitled to those guarantees irrespective of their precise immigration status, so it was irrelevant that he had never been given leave to enter so long as he had been physically present in the jurisdiction.

15. The UK Government argued that D had no valid claim under Article 3 because he would not be exposed in St. Kitts to any form of treatment which could be said to breach the standards of Article 3. It claimed that the hardship he would suffer and his reduced life expectancy would be due to his terminal illness coupled with the deficiencies in the health and social welfare system of a poor developing country.[11] The Court acknowledged that its case-law establishing the absolute nature of Article

[8] Ibid, paras 46-54. The applicant's complaint that he had no effective remedy in UK law, contrary to Article 13, is considered in XII below, under "Effective Remedies".

[9] Ibid, paras 73-74.

[10] Ibid, para 38.

[11] The 7 dissenters in the Commission were of the view that the UK's responsibility under Article 3 was not engaged merely because D would face "difficult circumstances" on his return to St. Kitts. In their view, while health care had properly been provided by the state during D's imprisonment, the direct responsibility of the UK authorities for his health ceased on his release from prison, and the lack of comparable medical facilities in St. Kitts could not impose an obligation on the UK to revoke its refusal of leave to enter.

3's limits on a state's right to remove aliens had so far been confined to 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 state or from those of non-state bodies against whom the authorities were unable to afford protection. However, given the absolutely fundamental importance of Article 3 in the Convention system, it did not see why it should be so constrained. It had to reserve to itself sufficient flexibility to address the application of the Article in other contexts which might arise, and it therefore felt free to scrutinise a 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."

16. Whether in any particular case removal would amount to a breach of Article 3, however, would require a rigorous scrutiny of all the circumstances of the case, including in particular the applicant's personal situation in the expelling state. The Court therefore carried out a detailed assessment of the evidence, including the most up-to-date information about D's present medical condition.[12] It noted that his illness was now at an extremely advanced stage and that such limited quality of life as he now had resulted from the availability of treatment and medication in the UK and the care and kindness of a charitable organisation. He had been counselled on how to approach death and formed bonds with his carers. The Court noted that the abrupt withdrawal of all this would have the most dramatic consequences for him. The Government did not dispute that his removal would hasten his death. The adverse conditions he would encounter in St. Kitts would also exacerbate his condition and subject him to acute mental and physical suffering, and no evidence had been adduced by the Government to suggest that there was anyone or anything who could mitigate the situation by providing him with the care he needed.[13] In

[12] Judgment of 2 May 1997, (1997) 24 EHRR 423, paras 50-51. In Article 3 cases, the Court will carry out its assessment in the light of the material before it at the time of its consideration of the case: see eg. *Ahmed v Austria*, above, para. 43.

[13] It is notable that the Court appears to have assumed, at para 52, that the onus was on the Government to produce evidence to satisfy it that, for example, any relative in the receiving

view of these exceptional circumstances and the compelling humanitarian considerations at stake, the Court concluded that to implement the decision to remove D to St. Kitts would amount to inhuman treatment in violation of Article 3.

17. The significant departure in this decision is the acceptance by the Court that a state may be in breach of Article 3, not only where the risk of proscribed treatment in the receiving country could not possibly engage the responsibility of the public authorities in that state, but even where "it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of Article 3."[14] The basis of the expelling state's responsibility cannot be explained in the same terms as have usually been used to justify the principle established in the *Soering* line of cases. The United Kingdom was not being held responsible for an anticipatory breach of Article 3 in the receiving state, nor for facilitating such a breach by exposing an individual to a risk of such proscribed treatment from an external source in another State. Rather, it was liable for a quite independent breach of that Article, the essence of which lay in the sudden deprivation of certain treatment and conditions in circumstances which amounted to an affront to their human dignity. In D's case, the inhuman treatment consisted of exposing him to "a real risk of dying under most distressing circumstances." So it was not so much that to hold otherwise would be to "undermine the absolute character" of Article 3's protection, as the Court claimed; it was more a case of an evolution in the character of that protection, to embrace a wider conception of what it is to be human. This is a welcome expansion of the Court's conception of "inhuman treatment" for the purposes of Article 3, and certainly amounts to a significant development in the evolution of the scope of that Article's protection. The sheer callousness of a state deporting a dying man in the certain knowledge that such an act would not only hasten his death but would also add to his suffering demanded a legal response. Doctrinal development is often forged in the face of states acting in ways which outrage basic norms of common decency, and *D v UK* was undoubtedly such a case.

---

country would be willing and able to attend to the needs of a terminally ill man, or that there was any other form of moral or social support, or that a bed would be available in any of the hospitals which the Government claimed cared for AIDS patients.

[14] Ibid, para 53.