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## Human rights claims on medical grounds

This information sheet discusses the recent judgment of the European Court of Human Rights in *Paposhvili v Belgium (Application no.41738/10)* ECHR, 13 December 2016 and considers how it will affect the determination of human rights claims where it is argued that removal would lead to the deterioration of a person's health or their death.

### The case before the European Court of Human Rights

Mr Paposhvili had an aggressive form of leukaemia which was in its late stages. It was argued that he would be unable to obtain treatment if he was removed to Georgia from Belgium where he was living as even if the necessary treatments were available in Georgia, these were not in practice accessible to people who did not have the means to pay for health care. It was argued that his return to Georgia placed him at serious risk of a severe and rapid deterioration in his state of health and lead to his swift and certain death.

Mr Paposhvili's case was considered by the Grand Chamber of the European Court of Human Rights. He died before the proceedings reached the Grand Chamber but the Court took the opportunity to give guidance on the law because of its importance for other individuals. As the Grand Chamber is made up of 17 judges, including the President and Vice President of the Court, its judgments have particular authority.

### Article 3 of the European Convention on Human Rights

Article 3 of the European Convention on Rights prohibits torture, inhuman or degrading treatment or punishment. Inhuman or degrading treatment may include suffering caused by a naturally occurring illness where this is exacerbated by an action taken by a state authority (for example to expel the person from the country) and is sufficiently severe. Suffering that is not severe enough to breach Article 3 may in some cases lead to a breach of Article 8 of the Convention protecting the right to private and family life.

The Court considered its previous decisions on when removal of a person who was seriously ill would breach Article 3 of the European Convention on Human Rights and reviewed its approach to ensure that the Convention remains practical and effective in protecting human rights.

### Previous decisions of the European Court of Human Rights

The European Court of Human Rights found a breach of Article 3 of the Convention in the case of *D v the United Kingdom* as it considered the circumstances were exceptional. The applicant was close to death in the last stages of an incurable disease and his removal would lead to him dying in distressing circumstances in St Kitts with no access to medical care or help from his family. In the later case of *N v the United Kingdom*, the Court did not accept that there would be a breach of the applicant's human rights on removal to Uganda.

She was suffering from AIDS-defining illnesses but as she was receiving retroviral treatment in the UK her condition was stable. Treatment was available in Uganda but it was not accessible to N because of its high cost. The Court considered that her suffering would not lead to a breach of Article 3 of the Convention even though it accepted that her condition would deteriorate without medication and lead to an early death. Since then, only one case involving serious ill-health had been successful before the European Court of Human Rights before it heard the case in *Paposhvili v Belgium*.

### **Revised approach in *Paposhvili v Belgium***

In the case of *Paposhvili v Belgium*, the Court stated that it was 'clarifying' its approach to cases involving serious ill-health, however the content of the judgment shows that it has changed its approach. The Court has acknowledged that Article 3 offers more protection than just for those who are about to die. It identified that situations involving the following circumstances could potentially breach Article 3 of the European Convention on Human Rights:

*“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, 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 also explained the approach that States should take when assessing human rights claims involving serious illness. It states that where a person provides evidence that the effect of removal on their health would place them at risk of suffering inhuman or degrading treatment, the impact of removal must be assessed by comparing their health prior to removal with how it would evolve after transfer to the receiving State. The Court makes clear that it is the effect on the individual that is important and not the general situation of health care in the receiving State. Nor does it necessarily make a difference if the receiving country is itself a party to the European Convention on Human Rights, as in the case of Georgia.

Decision-makers must verify on a case-by-case basis whether the care available in the receiving state is sufficient and appropriate in practice for the treatment of the applicant's illness. The authorities must consider the extent to which the person will actually have access to that care, including factors such as the cost of medication and treatment, the existence of a social and family network and the distance that would need to be travelled to access the necessary care. If serious doubts remain about access to treatment on removal, the returning State must obtain individual and sufficient assurances from the receiving State that appropriate treatment will be available and accessible to the person concerned before being able to remove the person.

The Court held in the case of *Paposhvili v Belgium* that removal of Mr Paposhvili would have breached Article 3 of the European Convention on Human Rights

### **What does the case mean for human rights claims determined in the UK?**

The approach outlined by the European Court of Human Rights offers more protection for people with serious or chronic illnesses than is currently applied in the UK. Under UK law, courts should follow the guidance given by the European Court of Human Rights unless there are special circumstances. The case therefore has the potential to assist clients with serious or chronic illnesses who would not have been able to access protection in the UK previously, as well as those whose human rights claims have previously been refused. People in this position should seek legal advice on whether their case can be reopened in light of the decision in *Paposhvili v Belgium*.