Neutral Citation 2011 [IEHC] 545

THE HIGH COURT

[2010 No. 956 J.R.]

BETWEEN/

MEO

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 5th day of September, 2011

1. May a failed asylum seeker who is HIV positive and in receipt of anti-retroviral therapy and care in this State which is essential for her survival and care be deported to her country of origin where the availability of the necessary medical treatment in that country is, at best, uncertain? This is the essential question presented in this application for leave to apply for judicial review. It is another example of the human tragedies which are so often thrown up by the asylum system and which present often impossible dilemmas for Ministers, administrators and the courts alike.

2. If the State is indeed under a duty- whether by reason of the Constitution or by virtue of the European Convention of Human Rights Act 2003- to vindicate the applicant's right to life by ensuring that life-saving drugs are made available to her, then this raises significant public policy concerns. If that were the law, then it would raise the distinct possibility that many other persons living in developing countries and who were suffering from acute and life threatening illness might be tempted to come to this State by making a false asylum claim in order to secure such treatment: see, *e.g.*, in particular the views expressed in this regard by Lord Hope in *N. v. Home Secretary* [2005] UKHL 31, [2005] 2 A.C. 296.

3. Other than mentioning these concerns at the present stage, I will refrain at this juncture from expressing any view thereon in view of the fact that they will be presumably addressed at the full hearing as, for reasons which will become clearer in the course of this judgment, I propose to grant the applicant leave to apply for judicial review.

4. The applicant, Ms. MEO, is a Nigerian citizen who arrived in Ireland on the 21st November, 2006, and sought asylum. She is aged 44 years and her medical circumstances are poor. She is separated from husband and she is unsure of the location of her three adult children. Her parents are deceased and her one sibling, a sister, died from cancer in 2009.So far as can be judged, she is largely isolated in the world. For reasons I will later develop, it is of some importance to note that while she is an active member of both a local support group for HIV sufferers and a local church group in this jurisdiction, it would seem that she has no family members and no established network of friends in Nigeria. While I will deal later with the details of her medical condition, I will first outline the circumstances by which her application for asylum and subsidiary protection came to be refused.

5. On the 10th January, 2007, the Office of the Refugee Applications Commissioner ("ORAC") recommended that she not be declared a refugee. This was followed by an oral hearing before the Refugee Appeals Tribunal on the 14th April, 2007. On the 29th May, 2007, the Refugee Appeals Tribunal affirmed the earlier ORAC decision. On the 19th July, 2007, submissions were made to the Minister to the effect that the applicant was entitled to subsidiary protection but this was rejected on the 24th June, 2008.

6. There then followed a series of exchanges between the parties which culminated in the Minister making a deportation order on the 12th March, 2009. Those proceedings were subsequently challenged in separate judicial review proceedings before this Court. The proceedings were, however, compromised and the applicant was given a further opportunity to make representations in support of an application for leave to remain in the State. Her solicitors made a series of further representations dealing principally with her medical condition and the likely consequences for her if she were to be, in fact, deported to Nigeria. Following an examination of file the relevant departmental officials recommended that a deportation order be made and the Minister made such an order on the 17th June, 2010. It is this deportation order that is the subject of the present application for leave to apply for judicial review.

7. The applicant's medical condition is not in dispute. It is accepted that the applicant is HIV positive and is in receipt of anti-retroviral therapy and care. It is important to emphasis that anti-retroviral therapy is essential for this applicant and she will require life long treatment requirement. If applicant were not to have such treatment, the consequences would in all probability be fatal. This point was made by the applicant's treating consultant, Professor Samuel McConkey, in his medical report of the 17th July, 2007:-

> "She is likely to need anti-retroviral treatment for the rest of her life and without this it is likely that she will deteriorate within a year or two to AIDS and death. This is illustrated in the decline in the CD4 count soon after she came here which show that without control of her virus, the HIV infection rapidly causes a severe immune suppression."

8. Unfortunately, her medical problems are not confined to any retroviral therapy because the applicant suffers a range of other severe medical and mental health problems. Sadly, the HIV infection has brought with it a range of complications the treatment of which requires sophisticated advanced medical care. Thus, for example, Ms.O. suffers from cerebral toxoplasmosis, peripheral neuropathy, ocular complications as well as significant cognitive impairment. Adding to her distress is the fact that she also experiences significant lumbar and leg pains as well as headaches and frequent infections. These complications cause various sight and visual disturbances, irrational behaviour and change of personality, difficulty with walking any distance and acute tiredness. She has undergone a procedure to have calcified toxoplasmosis lesions to her brain removed following which she commenced the necessary anti-retroviral therapy.

9. A key consideration is, of course, whether the applicant would be in a position to secure effective access to such treatment were she to be returned to Nigeria. It is also contended that the applicant would suffer considerable societal discrimination were she to be returned to Nigeria.

10. Both of these issues are hotly contested by the respondents. It is nonetheless important to bear in mind that Dr. McConkey was of the view Ms. O had had the benefit of such therapy in Nigeria prior to her arrival in Ireland. Thus, in his report of the 17th July, 2007, Dr. McConkey observed:-

> "I find it difficult to understand why this particular patient's infection and the laboratory results we have found could be explained other than by her having taken highly effective anti-retroviral therapy which was controlling her HIV replication up to November or, at least, early December, 2006."

11. Dr. McConkey further stated:-

> "This suggests that in her specific situation she was able to avail of excellent and effective treatment before the arrival here. It is unclear to me what the source of that was and the patient has denied that this is the case. In the last three years there has been a widespread expansion of the availability of anti-retroviral therapy throughout Africa in general and, in particular, in Nigeria specifically."

12. While the examination of file memorandum prepared for the Minister of May 27th, 2010 stated that Dr. McConkey had not submitted an up-dated report, so that "there is no evidence on file since [July 2007] to indicate at what stage her medical condition is at and what the prognosis is from the doctors who are treating here at Beaumont Hospital", I would for my part suggest that the prognosis is fairly clear. Her psychologist, Dr. Giller, prepared a report in April 2010 showing a marked decline in cognitive ability due to her suppressed immune system and Dr. McConkey's reports attest to the fact that without anti-retroviral therapy it seems all too probable that Ms. O.'s condition will quickly decline. She is likely in that event to develop full-blown AIDS and then die.

13. Both sides have sought to invoke relevant country of origin information concerning the Nigerian HIVIAIDS epidemic in order to advance their respective points ofview. The examination of the file memorandum stated that based on a 2010 report by the Nigerian Government to the United Nations General Assembly Special Session ("the UNGASS Report"):-

> "....at least 60% of eligible adults and 60% of children are receiving [antiretroviral therapy and it is hoped to provide at least 60% of eligible adults of HIV patients with quality management of [opportunistic infections] (diagnosis, prophylaxis and treatment) in 2010 and 2011. The government stated that it provides an adequate system to manage HIV/AIDS, Ols and sexually transmitted inflections and this involves over 200, 000 patients on ART. Policies have been put in place to reduce discrimination and stigmatisation of people living with HIV/AIDS. A key objective of the Nigerian Government is to create an enabling social, legal and policy environment by a 50% increase in the number of reviewed gender-sensitive and human-rights friendly policies, legislation and enforcement of laws that protect the rights of the general population, particularly those with HIV/AIDS by the year 2009."

14. Counsel for the applicant, Mr. Woolfson, counters by referring to other country of origin information which suggest that the statements contained in the UNGASS Report are highly optimistic. Indeed, he contends with some force that it becomes clear on a close reading of the UNGASS Report it becomes evident that the 60% figure is a purely aspirational target and does not yet reflect the reality. But even taking the UNGASS Report completely at face value, there are still huge gaps in the Nigerian health care system. Even if 60% of eligible adults can access anti-retroviral therapy, there is still a large swathe of the population who cannot gain access to a course of treatment which is essential to Ms. O's very survival. From that perspective, there is a very significant risk that Ms. O. will be condemned to a slow and lingering death within months of her deportation.

15. The authors of the memorandum on file thought otherwise:-

> "Based on all of the information on file, including medical reports and country of origin reports it is clear that her fears of not receiving treatment for her condition in Nigeria is unfounded. There is evidence available that the applicant had prior treatment before she entered Ireland and as the applicant has stipulated that she travelled from Nigeria to Ireland, this treatment must have been available to her in Nigeria. There is no reason to believe that this treatment would not be available to her again in Nigeria if she was to return there."

16. Based on the information available to me, I am driven to the conclusion that the authors of the memorandum are correct in saying that Ms. O. must have had access to anti-retroviral treatment in Nigeria. This, after all, was the expert view of Dr. McConkey. While this was denied by the applicant, she has not put before the court any other evidence to suggest the contrary.

17. At the same time, there is reason to suppose that the authors of the memorandum over-stated the position in saying that Ms. O.'s fears regarding treatment in Nigeria are unfounded. While there are probably aspects of Ms. O's life which are hidden from the Court, one cannot be quite as sanguine as the authors of the memorandum apparently were regarding any guarantee or assurance regarding the provision of anti-retroviral treatment. There is no reason to believe that Ms. O.'s financial position is anything other than precarious and her physical and (especially) her mental condition has deteriorated in the meantime. But for the fact that she received treatment in 2006, one could not be confident that an indigent middle-aged woman with no access to family and a declining cognitive capacity would be in a position to access such treatment . Dr. Giller expressed concern about Ms. O.'s "ability to travel independently and to negotiate a return to a life in Nigeria." I accept that she received treatment in Nigeria in the past, but after an interval of five years one cannot readily assume that such treatment will be made available to her again, not least given Dr. Giller's doubts about Ms. O.'s present ability to re-establish her life in Nigeria in view of her present mental condition.

18. Given the centrality of the question of whether Ms. 0. can effectively access such treatment if deported, there are substantial grounds for contending that the memorandum contains a material error of fact (*cf* by analogy *K v. Refugee Appeals Tribunal* [2011] IEHC 301). It could also be said that there are substantial grounds for contending that this reasoning does not meet the requisite Meadows standard (*Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701). I propose therefore to grant leave to the applicant in respect of this issue.

19. Mr. Woolfson further makes the point that the analysis of the availability ofHIV services in Nigeria and the question of stigma and discrimination against HIV sufferers contained in the examination of the file analysis is incomplete and highly selective. This point is encompassed in the grant of leave in respect of the material error of fact issue and, for the avoidance of doubt, I will also give the applicant leave to argue that the Minister relied on highly specialised reports, not otherwise generally available, the existence of which ought, as a matter of fair procedures to have been disclosed to her legal team. I should record, however, that counsel for the Minister, Mr. Conlan Smyth, disputed the specialist nature of these reports. This, however, is a matter which can be argued at the full hearing.

Overlap of Constitutional and Convention Issues

20. The applicant also contends that her deportation in such circumstances would violate her rights as protected variously by Article 40.3.2 of the Constitution and Article 3 ECHR and Article 8 ECHR.

21. In *Carmody v. Minister for Justice, Equality and Law Reform* [2009] IESC 91, [2009] 1 I.R. 635 the Supreme Court held where a litigant seeks to challenge the constitutionality of a statute and simultaneously seeks a declaration of incompatibility under s. 5(1) of the European Convention of Human Rights Act 2003, the court must ordinarily consider the constitutional issue first. For the reasons which I more fully set out in my judgment in *RX v. Minister for Justice, Equality and Law Reform* [2010] IEHC 446, I consider that the same principle must apply by analogy in cases where administrative action is challenged on the grounds that it breaches both

constitutional rights and rights guaranteed by the European Convention of Human Rights. I accordingly propose to commence a consideration of the matters raised by this case by reference in the first instance to Article 40.3.2 of the Constitution.

Article 40.3.2: The right to life and the protection of the person

22. Article 40.3.2 of the Constitution requires the State by its laws to:-

> "protect as best it may from unjust attack and, in the case of injustice done, to vindicate the life, person, good name and property rights of every citizen."

23. The extent to which- if, indeed, at all- the State is under a positive obligation to protect the life and person of a seriously ill individual by making available to that person a system of health care which reasonably meets their needs is a matter which has heretofore remained, to some degree, unexplored. There have, of course, been cases where it has been held that the *actions* of the State violated Article 40.3.2 in particular cases. A recent example is provided by my own judgment in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235, a case where I held that the incarceration of a prisoner in a padded cell under more or less continuous lock-up for an eleven day period amounted to a form of sensory deprivation which, if continued, exposed the prisoner to the risk of psychiatric disturbance. I went on to hold that the State had thereby breached its Article 40.3.2 duty to protect the prisoner.

24. Quite apart from the fact that prisoners are in a special category of cases since the State has implicitly assumed obligations towards them by virtue of their incarceration, *Kinsella* also concerned a situation where the State's *actions* had jeopardised his constitutional rights. In the present case, there is a serious risk that Minister's actions in deporting the applicant will serve effectively to deprive her of access to the medical care which she requires for her daily survival. No Irish court has heretofore been required squarely to consider this question in the context of the State's Article 40.3.2 obligations.

25. It is, of course, clear that the courts will not sanction the removal of a person from the State where to do so would involve a potential breach of his constitutional rights: see, *e.g., Finucane v. McMahon* [1990] 1 I.R. 165,226, per McCarthy J. In the same vein, Finlay Geoghegan J. said in *Makumbi v. Minister for Justice, High Court*, 15th November 2006 held that a transfer order could not be made "where the respect or protection of the right to life of a person to whom it relates so requires." Likewise in OO*. v. Minister for Justice* [2004] 4 I.R. 426, 432 Gilligan J. observed:-

> "The Constitution prohibits acts or omissions which expose a person to a real and substantial risk to their right to life or to a breach of their human rights) (including their right to freedom from torture, inhuman and degrading treatment."

26. Fundamentally, the present case involves an assessment of whether this constitutional obligation to protect the life and person extends only to the protection against the wrongful acts of third parties- such as the fear of potential ill-treatment by prison officers at issue in *Finucane* - or whether there are circumstances in which the State must take positive steps to protect individuals against naturally occurring events, such as insidious diseases. If the guarantee is indeed broader and more far-reaching than simply providing protection against the wrongful and unlawful actions of third parties, then the questions of resource allocation and the role of the courts in such matters in view of separation of powers principles would also come into play: see, *e.g., TD v. Minister for Education and Science* [2001] 4 I.R. 287.

27. Before considering these questions, it may be useful at this juncture to observe that the present case is obviously very different from *Agbonlahor v. Minister for Justice* [2007] IEHC 309, [2007] 4 I.R. 309. In *Agbonlahor* the applicants were a mother and her two young twin children from Nigeria who had sought to resist their deportation on the ground that the medical condition of the twins was such that their deportation would infringe their rights to private life as protected by Article 8 ECHR. One of the twins presented on the autistic spectrum and the other had an attention deficit hyperactivity disorder along with an intellectual disability. It was contended that Nigeria had no treatment facilities for such children and that they would be socially isolated.

28. Feeney J. rejected the argument that the present case came within the parameters of the well known decision of the European Court of Human Rights in *D. v. United Kingdom* (1997) 24 EHRR 423. In that case, the Court had held that the deportation of an asylum seeker who was in the last throes of a terminal AIDS-related illness to St. Kitts would have violated Article 3 ECHR in circumstances where that applicant faced the prospect of death with almost no medical facilities or family members and not even the guarantee of a hospital bed. Feeney J. rejected that argument ([2007] 41.R. 309 at 321):-

> "....because what is at issue here is not a lack of treatment which will result in the likely death of the applicant, but rather the absence in the receiving state of educational and medical facilities to ensure the full development of the second applicant."

29. The present case is also very different from *Odulana v. Minister for Justice, Equality and Law Reform,* High Court, 25th June 2009. Here the two applicants sought to resist their deportation to Nigeria on the ground that as they both suffered from sickle cell anaemia disease, their removal from the State would infringe their rights under Article 3 ECHR and Article 8 ECHR. While the medical evidence was that the life expectancies of both applicants "would be much reduced" if they were so repatriated, it cannot be said that their condition approaches that of Ms. O. in the present case.

30. Clark J. concluded that:-

> "...the ill health of the applicants [did not] reach the level required to bring them within the truly exceptional and tragic facts of *D. v. United Kingdom* such that their deportation would violate Article 3....It is undoubtedly odious for a court to have to measure the degree of illness of one applicant against that of another in establishing the risk of inhuman or degrading treatment for a foreign national who is facing deportation or transfer....The fact remains, however, that the State retains the right to deport failed asylum seekers even if those asylum seekers have serious medical conditions. In principle, the law should treat like cases alike where treatment is required and where the medical treatment in the country of origin is unable to match the level of care and treatment available to them here. While obviously the Minister retains a degree of discretion in granting humanitarian leave to remain in order to reflect the differences in particular cases, the courts should be slow to annul a ministerial decision taken which complies with the clearly accepted law with respect to the right to deport. That law is, that unless a case is exceptional as in *D.*...the Minister is entitled to sign deportation orders relating to failed asylum seekers even if they are receiving medical treatment here which either is not available at all or is less available than the country of origin. It may appear harsh on an individual basis to send this mother and her young child back to their country of origin, but it is the application of the law equally and where the concept of legal certainty has a value."

Conclusions on the constitutional issue
31. While accepting that the issue is one of relative novelty, I am of the view that the applicant has raised substantial grounds for contending that her rights under Article 40.3.2 of the Constitution will be breached if deported to Nigeria where, possibly deprived of access to life saving treatment and being indigent, poor and bereft of family and friends while at the same time suffering from impaired mental cognition, she will be condemned to face decline and death over months in circumstances where her human dignity cannot be maintained This litany of suffering would be made all the worse if, as Mr. Woolfson contends, persons who have succumbed to this illness are subject to pervasive discrimination and social isolation in Nigeria. After all, one of the objectives of the Constitution as declared in the Preamble is that "the dignity and freedom of the individual may be assured" and clearly the State's obligations under Article 40.3.2 must be construed in the light of that objective: see *Garvey v. Ireland* [1981] I.R. 75 at 99-100, per Henchy J.

32. It is true, of course, that if Article 40.3.2 were to be construed as placing such a duty on the State this would have serious public policy implications for both immigration policy and the administration of health care, along with the kind of separation of powers issues canvassed in the Supreme Court judgments in *TD*. The very fact, however, that the issues of access to life saving health care and the protection of life and person as required by Article 40.3.2 have never previously been comprehensively examined at constitutional level in itself demonstrates that Ms. O. has raised substantial issues which merit adjudication at a full hearing.

Article 3 ECHR and Article 8 ECHR
33. It may be convenient now to consider some of the related ECHR case-law. Reference has already been made to *D v. United Kingdom*, but it is clear from the subsequent case-law of the Strasbourg Court that this case is regarded as exceptional. Indeed, as the European Court of Human Rights subsequently indicated in *N v. United Kingdom* (2008) 47 EHRR 39 (a case with facts similar- but far from identical to- the present case), the Court has never held that a proposal removal of a foreign national from a Contracting State gave rise to an Article 3 violation on grounds of the applicant's ill health.

34. It may be useful here to say something further about *D. v. United Kingdom*. The applicant was a national of St Kitts, who had been convicted and sentenced in the United Kingdom in connection with a drugs offence. When he had completed his sentence of imprisonment the United Kingdom authorities sought to deport him to St Kitts. He was, however, by that time in the advanced stages of AIDS. By the time the case came before the European Court of Human Rights he had suffered severe and irreparable damage to his immune system and his prognosis was very poor; it appeared that he was close to death. He had been counselled about dying and had formed bonds with his carers. There was evidence before the Court that the medical facilities in St Kitts did not have the capacity to provide the applicant with the treatment he needed and he had no family home or close relatives able to look after him there. I pause here to draw attention to the fact that Ms. O. would appear to have no family home in Nigeria and, as I have already observed, no family members or friends in that country either.

35. The Court held (at paragraphs 53-54) that:-

> "[i]n view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3.
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> ... [T]he respondent State has assumed responsibility for treating the applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3, his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.
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> Against this background, the Court emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison.
>
> However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3."

36. In *D.*, the Court also referred to an earlier decision of the (former) European Commission of Human Rights, *B.B. v. France*, no. 30930/96, Reports 1998-VI. In that case the applicant, who had been serving a period of imprisonment in France, was suffering from AIDS with acute immunosuppression. His condition had reached an advanced stage, requiring repeated hospital stays, but had stabilised as a result of antiretroviral treatment which he claimed would not be available to him in his home country, the Democratic Republic of Congo. The Commission in its report on the case had found that it was highly probable that if the applicant were to be deported he would not have access to treatment designed to inhibit the spread of the virus and that the numerous epidemics raging in his country would increase the risk of infection. As the Court summarised it in its later judgment in *N v. United Kingdom*:-

> "To expect him to confront his illness alone, without any support from family members, was likely to make it impossible for him to maintain human dignity as the disease ran its course. It concluded that deporting him would amount to a violation of Article 3."

37. The case was referred to the Court, but before it could examine it the French Government gave an undertaking that the applicant would not be deported and the case was therefore struck out of the Court's list on grounds of mootness.

38. That case may be contrasted with a decision of the European Court in *S.C. C. v. Sweden* (dec.), no. 46553/99, 15 February 2000. This case involved a Zambian national who had been refused leave to enter Sweden, where she had previously lived and where she had been treated for HIV. The applicant submitted medical evidence to the effect that life-prolonging treatment would have a much better success rate if she was given the chance to continue it in Sweden since the standard of care and monitoring possibilities in Zambia were reduced in comparison. The Court declared the application inadmissible, on the basis that, according to a report from the Swedish Embassy in Zambia, the same type of AIDS treatment was available there, although at considerable cost, and that the applicant's children as well as other family members lived there. Taking into account the applicant's present state of health, her removal to Zambia would not amount to treatment proscribed by Article 3.

39. This was followed by *Bensaid v. United Kingdom* [2001] ECHR 82, (2001) 33 EHRR 10. In that case the applicant, an Algerian national, was a schizophrenic who had been treated for this illness for some years in the United Kingdom. The Court unanimously rejected the complaint under Article 3 and held as follows (at paras. 36 - 40):-

"In the present case, the applicant is suffering from a long-term mental illness, schizophrenia. He is currently receiving medication, olanzapine, which assists him in managing his symptoms. Ifhe returns to Algeria, this drug will no longer be available to him free as an outpatient. He does not subscribe to any social insurance fund and cannot claim any reimbursement. It is, however, the case that the drug would be available to him if he was admitted as an inpatient and that it would be potentially available on payment as an outpatient. It is also the case that other medication, used in the management of mental illness, is likely to be available. The nearest hospital for providing treatment is at Blida, some 75 to 80 km from the village where his family live.

The difficulties in obtaining medication and the stress inherent in returning to that part of Algeria, where there is violence and active terrorism, would, according to the applicant, seriously endanger his health. Deterioration in his already existing mental illness could involve relapse into hallucinations and psychotic delusions involving self-harm and harm to others, as well as restrictions in social functioning (such as withdrawal and lack of motivation). The Court considers that the suffering associated with such a relapse could, in principle, fall within the scope of Article 3.

The Court observes, however, that the applicant faces the risk of relapse even if he stays in the United Kingdom as his illness is long term and requires constant management. Removal will arguably increase the risk, as will the differences in available personal support and accessibility of treatment. The applicant has argued, in particular, that other drugs are less likely to be of benefit to his condition, and also that the option of becoming an inpatient should be a last resort. Nonetheless, medical treatment is available to the applicant in Algeria. The fact that the applicant's circumstances in Algeria would be less favourable than those enjoyed by him in the United Kingdom is not decisive from the point of view of Article 3 of the Convention.

The Court finds that the risk that the applicant would suffer a deterioration in his condition if he were returned to Algeria and that, if he did, he would not receive adequate support or care is to a large extent speculative. The arguments concerning the attitude of his family as devout Muslims, the difficulty of travelling to Blida and the effects on his health of these factors are also speculative. The information provided by the parties does not indicate that travel to the hospital is effectively prevented by the situation in the region. The applicant is not himself a likely target of terrorist activity. Even if his family does not have a car, this does not exclude the possibility of other arrangements being made.

The Court accepts the seriousness of the applicant's medical condition. Having regard, however, to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. The case does not disclose the exceptional circumstances of *D. v. the United Kingdom*.....where the applicant was in the final stages of a terminal illness, Aids, and had no prospect of medical care or family support on expulsion to St Kitts."

40. *Ndangoya v. Sweden* (dec.), no. 17868/03, 22 June 2004 is another case in the same vein. Here a Tanzanian national had been treated with antiretroviral medication which been successful in reducing his HIV levels to the point where they were no longer detectable. His case was summarised thus by the Court in its subsequent judgment *N. v. United Kingdom*:-

"It was contended that the prospects of his receiving that treatment in Tanzania were very slim and that its interruption would lead to a relatively rapid deterioration of his immune system, to the development of AIDS within one to two years and death within three to four years. The application was declared inadmissible, on the grounds that the applicant's illness had not reached an advanced or terminal stage; adequate treatment was to be had in Tanzania, albeit at considerable cost and with limited availability in the rural area from whence the applicant came; and that he maintained some links with relatives who might be able to help him."

41. In *N. v. United Kingdom* the facts were similar to the present case. The applicant was a Ugandan national who was HIV positive who sought to resist deportation on grounds very similar to the present case. While there was a dispute about the availability of anti-retroviral therapies at reasonable prices in Uganda, it was not in dispute but that the applicant's life expectancy would be greatly reduced if she were deported. While she was presently in good health, this was contingent on the availability of anti-retroviral therapy. The applicant's challenge to the validity of the deportation order ultimately failed before the House of Lords: see *N. v. Home Secretary* [2005] UKHL 31, [2005] 2 AC 296.

42. Ms. N. then petitioned the Strasbourg Court. Here the Court summarised the relevant principles to be applied:-

"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 Article 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 Article 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.

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."

43. The Court went on to observe that:-

"Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.

> Finally, the Court observes that, although the present application, in common with most of those referred to above, is concerned with the expulsion of a person with an HIV and AIDS-related condition, the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost."

44. The Court then applied these principles to the present case:-

> "According to information collated by the World Health Organisation....., antiretroviral medication is available in Uganda, although through lack of resources it is received by only half of those in need. The applicant claims that she would be unable to afford the treatment and that it would not be available to her in the rural area from which she comes. It appears that she has family members in Uganda, although she claims that they would not be willing or able to care for her if she were seriously ill.
>
> The United Kingdom authorities have provided the applicant with medical and social assistance at public expense during the nine-year period it has taken for her asylum application and claims under Articles 3 and 8 of the Convention to be determined by the domestic courts and this Court. However, this does not in itself entail a duty on the part of the respondent State to continue so to provide for her.
>
> The Court accepts that the quality of the applicant's life, and her life expectancy, would be affected if she were returned to Uganda. The applicant is not, however, at the present time critically ill. The rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, must involve a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV and AIDS worldwide.
>
> In the Court's view, the applicant's case cannot be distinguished from [cases such as *Ndandgoya*]. It does not disclose very exceptional circumstances, such as in *D. v. United Kingdom*, and the implementation of the decision to remove the applicant to Uganda would not give rise to a violation of Article 3 of the Convention."

45. On the face of it, therefore, N. represents a powerful authority which serves to bar the way of the applicant's claim. There are, nevertheless, subtle differences between Ms. O.'s claim and the circumstances which prevailed in *N*. In the first place, Ms. O.'s medical condition appears to be somewhat worse - perhaps even appreciably worse - than that of the applicants in cases such as *N., SCC* and *Ndangoya*, not least given that her cognitive capacity in particular has been considerably impaired as a result of the illness. Second, there seems every likelihood that Ms. O. would arrive back in Nigeria bereft of any income, family home, friends or family, whereas the applicants in the other cases had, at least, some access to family members who might assist them. In the event that she were to be deported, Ms. O. would then be required to summon the resources to endeavour to secure anti-retroviral therapy or face almost certain decline and death. It may well be that her case is much more similar to that of BB. v. France where, it will be recalled, the Commission concluded that to require the applicant to confront his illness alone, without any support from family members, was likely to make it impossible for him to maintain human dignity as the disease ran its course. The position of Ms. O. may not be altogether dissimilar.

46. Given that there was no indication in *N*. that *BB* was not correctly decided, it seems to me that for these reasons Ms. 0. has established substantial grounds in relation to the ECHR grounds as well as the constitutional grounds. In other words, there are substantial grounds for contending that her factual circumstances are such as that *N*. can be distinguished and that her case is governed by the decision of the Commission in *BB*.

Conclusions

47. In summary, therefore, I am of the view that the applicant has established substantial grounds within the meaning of s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 for contending that:-

> (i) The Minister's decision was vitiated by material error of fact, namely, that her concerns regarding access to anti-retroviral therapy was "unfounded". By the same token the applicant will have leave to argue that the Minister's reasoning was deficient in the *Meadows* sense. The applicant will further have leave to contend that the examination of file in relation to the Nigerian material was highly selective and that fair procedures required the advance disclosure of some of the specialised material relied on by the Minister.
>
> (ii) That her rights under Article 40.3.2 of the Constitution will be breached if deported to Nigeria where, possibly deprived of access to life saving treatment, indigent, poor and bereft of family and friends and suffering from impaired mental cognition, she will be condemned to face a decline and death over months in circumstances where her human dignity cannot be maintained.
>
> (iii) That her rights under Article 3 ECHR and Article 8 ECHR may be similarly breached, having regard in particular to the Commission's decision in *BB. v. France*.