Convention obligations in 'foreign cases'

N v UK, no. 26565/05, and EM (Lebanon) v Secretary of State for the Home Department [2008] UKHL 64

By Jessica Boyd

When does the ECHR prohibit the return of a foreign national to a state where her convention rights are liable to be breached? Two recent judgments have considered the stringency of Convention obligations in such 'foreign cases': *N v UK*, no. 26565/05, and *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.

N, a Ugandan national, was seriously ill when she arrived in the UK in 1998. She received anti-retroviral therapy for her AIDS-defining illnesses, which had gone into remission by the time her case was considered by the Lords in 2005. Medical evidence suggested that if N remained in the UK she was likely to remain healthy for several decades; if returned to Uganda, she would die within two years.

N argued that her removal in these circumstances would breach Article 3 of the ECHR, relying on *D v UK* (1997) 24 EHRR 423, in which the ECtHR acknowledged that, in exceptional circumstances, returning a seriously ill patient to a country with poor medical facilities would constitute a breach. Reluctantly, the Lords dismissed her appeal, on the basis that this result followed 'inevitably' from the Strasbourg case law. The case was heard by the Grand Chamber on 26th September 2007, where a 14-strong majority affirmed the Lords' decision.

The majority identified two principles that had underpinned its decisions since D: (1) aliens 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 or other assistance; (2) the decision to remove a seriously ill alien to a country with inferior medical facilities will raise an issue under Article 3 "only in a very exceptional case, where the humanitarian grounds against removal are compelling" [42].

D's was a case in which this high threshold was met, because D was close to death when his removal was contemplated. By contrast, N's case was not distinguishable from such cases as *Karara v Finland* and *Ndangoya v Sweden*, in which there had been no breach of Article 3, and so could not be said to disclose "very exceptional circumstances".

It may be doubted that this decision does much to pacify the concerns of the Lords below, who had found the ECtHR's reasoning in relation to foreign medical cases not "entirely convincing or satisfactory". As Lord Brown observed: "It is perhaps not… self-evidently more inhuman to deport someone who is facing imminent death than someone whose life expectancy would thereby be reduced from decades to a year or

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February 2009

so" [91]." Nonetheless, in EM, decided last month, the Lords relied on N to provide guidance on the standard to be applied in a different sort of foreign case, concerning Article 8 rights.

EM had fled Lebanon with her son in 1994. It was accepted by the courts that, were EM to return to Lebanon, she would, under Sharia law, be separated from her son, who would be placed in the custody of a former abusive husband whom the child did not know. EM argued that her return would therefore breach her right to family life under Article 8 of the Convention, read alongside Article 14. Unanimously, the Lords allowed EM's appeal, Lords Hope and Bingham delivering the most substantial judgments. Both reaffirmed the Lords' conclusions in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, to the effect that (1) Articles other than Article 3, including Article 8, could in principle be engaged in foreign cases; and (2) the test for determining breach in such cases was whether there was a "real risk of a flagrant denial" of the right in question. The Lords agreed that, while such formulations as "complete denial", "nullification" and "gross invasion" had variously been used in relation to foreign cases, all of these formulations referred to a single test. The Court of Appeal had therefore been wrong to dismiss EM's appeal on the basis that there was a real risk on return of "flagrant denial", but not of "nullification" of her Article 8 rights. Moreover, Lords Hope, Brown and Carswell made explicit use of the phrasing adopted by the ECtHR in N. Lord Hope stated that it could be inferred from N that the ECtHR would consider that the "flagrant denial" threshold would be met only in "exceptional circumstances", where the humanitarian grounds against removal were "compelling".

Applying these various principles to EM's case, the Lords found that the effect of removal would be to destroy the family life of mother and son. The "flagrant denial" test was undoubtedly met, and removal would be unlawful.

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