



Strathprints Institutional Repository

Webster, Elaine (2013) Medical-related expulsion and interpretation of article 3 of the European Convention on Human Rights. Inter-American and European Human Rights Journal, 6 (1-2). p. 36. ISSN 2030-7942 ,

This version is available at <http://strathprints.strath.ac.uk/47121/>

Strathprints is designed to allow users to access the research output of the University of Strathclyde. Unless otherwise explicitly stated on the manuscript, Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Please check the manuscript for details of any other licences that may have been applied. You may not engage in further distribution of the material for any profitmaking activities or any commercial gain. You may freely distribute both the url (<http://strathprints.strath.ac.uk/>) and the content of this paper for research or private study, educational, or not-for-profit purposes without prior permission or charge.

Any correspondence concerning this service should be sent to Strathprints administrator: strathprints@strath.ac.uk

MEDICAL-RELATED EXPULSION AND INTERPRETATION OF ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

ELAINE WEBSTER*

Abstract

This article critically reviews the jurisprudence of the European Court of Human Rights ('the Court') in cases of expulsion of non-nationals receiving medical care for a serious health condition, based upon Article 3 of the European Convention on Human Rights. On only one occasion has the Court found a violation of Article 3. To date, critique of this jurisprudence has focused on two points: policy considerations evident in the case-law, and the Court's refusal to find a violation in respect of applicants not in a terminal phase of illness. This article begins from an alternative perspective. It observes that the Court, whose approach has been mirrored by applicants and domestic courts, has not transparently situated the alleged inhuman or degrading treatment within circumstances of medical-related expulsion; a feature that is unique within the wider body of Article 3 jurisprudence. The extent to which recognising this atypical aspect can shed new light upon the past and future trajectory of the case-law is explored. Three ways of situating the Article 3 harm are considered: inhuman/degrading treatment brought about by sources within the receiving state; inhuman/degrading treatment inflicted by the expelling state; and inhuman/degrading treatment flowing from illness. It is argued that more explicit engagement with the nature of the alleged harm would be a progressive step towards a richer and appropriately justified jurisprudence. This is important for the reasoning of the Court in medical-related expulsion cases and, more broadly, for the development of the conceptual scope of Article 3.

* Lecturer, University of Strathclyde, Glasgow. <elaine.webster@strath.ac.uk>. Thank you to Mary Neal and Sophie Oliver for comments on an earlier draft of this article.

Resumen

Este artículo revisa críticamente la jurisprudencia del Tribunal Europeo de Derechos Humanos en casos de expulsión de extranjeros que reciben atención médica debido a una condición de salud seria, basada en el artículo 3 del Convenio Europeo de Derechos Humanos. Sólo en una ocasión el Tribunal ha establecido la violación del artículo 3. Hasta ahora, la crítica de esta jurisprudencia se ha centrado en dos puntos: consideraciones evidentes de política en la jurisprudencia, y la denegación del Tribunal a encontrar una violación con respecto a los peticionarios que no se encuentran en una fase terminal de la enfermedad. Este artículo inicia desde una perspectiva alternativa. Se observa que el Tribunal, cuyo enfoque se ha reflejado por los solicitantes y los tribunales nacionales, no ha situado de forma transparente el supuesto trato inhumano o degradante dentro de las circunstancias de expulsión relacionados con situaciones medicas; es una característica que es única dentro del cuerpo más amplio de la jurisprudencia sobre el artículo 3. Se explora en que medida el reconocimiento de este aspecto atípico puede arrojar nueva luz sobre la trayectoria pasada y futura de la jurisprudencia. Se consideran tres formas de situar el artículo 3, el daño: trato inhumano/degradante causado por fuentes dentro del Estado receptor; trato inhumano/degradante infligidos por el Estado que expulsa, y trato inhumanos/degradante que fluye de la enfermedad. Se argumenta que un compromiso más explícito con la naturaleza del supuesto daño daría un paso adelante hacia una jurisprudencia más rica, y debidamente justificada. Esto es importante para el razonamiento del Tribunal en los casos de expulsiones médicas, y de manera más amplia, para el desarrollo de la amplitud conceptual del artículo 3.

1. INTRODUCTION

Several applications invoking the right not to be subjected to inhuman or degrading treatment (Article 3 ECHR) have been made by applicants who are non-nationals receiving treatment for a serious medical condition in a Council of Europe state, whom the state party wishes to return to the country of origin. *D v. United Kingdom*, 15 years ago, is the only case in which the European Court of Human Rights ('the Court') has found a violation of Article 3.¹ The majority of applications since have concerned HIV and Aids, and increasingly mental health.² *D v. United Kingdom* remains the leading case on medical-related expulsion.

¹ As of 1st August 2013. The European Commission of Human Rights found a violation of Article 3 in ECommHR (Report) 9 March 1998, Case No. 30930/96, *B.B. v. France*; a case later struck out of the Court's list.

² The Court summarises its case-law until 2008 in ECtHR (Grand Chamber Judgment) 27 May 2008, Case No. 26565/05, *N v. United Kingdom*, paras. 32–41. Recent applications include ECtHR (Judgment) 28 March 2013, Case No. 2964/12, *I.K. v. Austria*, and ECtHR (Judgment) 15 May 2012, Case No. 16567/10, *Nacic and others v. Sweden*.

The continuing relevance of this case was confirmed in the Grand Chamber decision in the 2008 case of *N v. United Kingdom*. The Strasbourg Court found that there would be no violation of Article 3 if Ms. N were returned to her home country of Uganda, despite the negative impact this would have on access to the life-sustaining antiretroviral medication and care that she had been receiving. A number of scholars responded critically to the Grand Chamber judgment; in particular to the economic and political pragmatism evident in the judgment and addressed in the forceful dissenting opinion.³

Concern from within the Strasbourg judiciary was reignited in the 2011 case of *Yoh-Ekale Mwanje v. Belgium*. The judgment in this case, brought by a Cameroonian woman suffering from HIV, was accompanied by a partly concurring opinion of six of the seven Chamber judges.⁴ The Court found that the circumstances were not sufficiently ‘exceptional’ to find a violation of Article 3, following *N*.⁵ The partly concurring opinion, however, urges the Grand Chamber of the Court to reconsider its current approach to expulsion claims of this kind. The specific focus of the judges’ criticism is the distinction made by the Grand Chamber between individuals who are already critically ill whilst in the expelling state and those who are not yet critically ill but who are likely to become so if expelled from the host country. In the former case applicants may benefit from Article 3 protection against expulsion, whilst applicants in the latter category have not to date been protected by Article 3. The partly concurring opinion argues that this distinction is unconvincing and not in line with the spirit of the right.⁶ The Strasbourg response to medical-related expulsion claims remains controversial. Critical voices, both within the judiciary and in commentary responding

³ ECtHR (Grand Chamber Judgment) 27 May 2008, Case No. 26565/05, *N v. United Kingdom*, joint dissenting opinion, para. 8: “[...] the view expressed by the majority that such a finding “would place too great a burden on the Contracting States” [...] reflects the real concern that they had in mind: if the applicant were allowed to remain in the United Kingdom to benefit from the care that her survival requires, then the resources of the State would be overstretched. Such a consideration runs counter to the absolute nature of Article 3 of the Convention and the very nature of the rights guaranteed by the Convention that would be completely negated if their enjoyment were to be restricted on the basis of policy considerations such as budgetary constraints. So does the implicit acceptance by the majority of the allegation that finding a breach of Article 3 in the present case would open up the floodgates to medical immigration and make Europe vulnerable to becoming the “sick-bay” of the world. [...]”. See V. Bettinson and A. Jones, “The integration or exclusion of welfare rights in the European Convention on Human Rights: The removal of foreign nationals with HIV after *N v UK* (Application No. 26565/05; decision of the Grand Chamber of the European Court of Human Rights, 27 May 2008)”, 31(1) *Journal of Social Welfare and Family Law* (2009), p. 83–94; V. Mantouvalou, “*N. v. UK: No Duty to Rescue the Nearby Needy?*”, 72(5) *Modern Law Review* (2009), p. 815–828; D. Stevens, “Asylum seekers and the right to access health care”, 61(4) *Northern Ireland Legal Quarterly* (2010), p. 363–390. For a contrary view see M. Bossuyt, “Judges on Thin Ice: The European Court of Human Rights and the treatment of asylum seekers”, 3(1–2) *Inter-American and European Human Rights Journal* (2010), p. 3–48, at p. 41–43.

⁴ ECtHR (Judgment) 20 December 2011, Case No. 10486/10, *Yoh Ekale Mwanje v. Belgium* (judgment available in French only).

⁵ *Ibid.*, para. 83.

⁶ *Ibid.*, partly concurring opinion, para. 6.

to *N v. United Kingdom*, have focused on questioning political constraints that the Court has seemingly accepted and the conceptual coherence of the state of health-based distinction.

This article revisits the question of how a more appropriately justified jurisprudence might be achieved for medical-related expulsion claims, and reflects on what progress in this respect might mean for the conceptual development of Article 3. In scholarship relating to asylum seekers and the ECHR Bossuyt has highlighted the *N v. United Kingdom* judgment as unusual; as one exception within a general trend of receptiveness to the claims of asylum seekers in the Court's case-law.⁷ Other recent writing to touch upon expulsion and Article 3 has tended to focus on the impact of expulsion case-law on the absolute nature of the right⁸ and on the principle of *non-refoulement* and the interface between ECHR and EU rules.⁹ It is valuable to revisit medical-related expulsion jurisprudence. Greater clarity of reasoning would assist potential applicants, their legal advisors and national courts. Recently questions have arisen about whether this line of case-law concerning medical conditions should be relevant to an individual with a disability¹⁰ and this case-law appears to have influenced the Court's approach to expulsion cases more broadly.¹¹

Revisiting the Strasbourg approach also matters in light of the potential of medical-related expulsion judgments to make important contributions to the interpretive development of Article 3. This would be positive. Although the Court's interpretation of the terms within Article 3 over the past 50 years has arguably been coherent and consistent¹² there remains significant scope to develop the interpretation of this right. Situations of medical-related expulsion, because they push the boundaries of Article 3, should urge the Court to continue to engage in conceptual development. This is

⁷ Bossuyt, *supra* n. 3, p. 4; M. Bossuyt, "The Court of Strasbourg Acting as an Asylum Court", 8(2) *European Constitutional Law Review* (2012), p. 203–254. See also Battjes' discussion of *refoulement* under Article 3, in which he acknowledges medical cases as a distinctive category; H. Battjes, "In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 Reassessed", 22(3) *Leiden Journal of International Law* (2009), p. 583–621.

⁸ Battjes, *supra* n. 7; N. Mavronicola and F. Messineo, "Relatively Absolute? The Undermining of Article 3 ECHR in *Ahmad v. UK*", 76(3) *Modern Law Review* (2013), p. 589–619.

⁹ See, e.g., G. Clayton, "Asylum seekers in Europe: *M.S.S. v Belgium and Greece*", 11(4) *Human Rights Law Review* (2011), p. 758–773; L. Lavrysen, "European asylum law and the ECHR: an uneasy coexistence", 4(1) *Gottingen Journal of International Law* (2012), p. 217–262; J. Mink, "EU Asylum Law and Human Rights Protection: Revisiting the Principle of *Non-refoulement* and the Prohibition of Torture and Other Forms of Ill-treatment", 14(2) *European Journal of Migration and Law* (2012), p. 119–149.

¹⁰ ECtHR (Judgment) 29 January 2013, Case No. 60367/10, *S.H.H. v. United Kingdom*.

¹¹ See reference to *N v. United Kingdom* at para. 177 of the judgment in ECtHR (Judgment) 10 April 2012, Case Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, *Baber Ahmad and Others v. United Kingdom*. The ECtHR's statement in this paragraph has been described as a 'curious' development in Article 3 case-law; Mavronicola and Messineo, *supra* n. 8, p. 600.

¹² See E. Webster, "Degradation: A Human Rights Law Perspective", in P. Kaufman et al (eds.), *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Dordrecht, Springer 2011), p. 67–84, at p. 72–74.

significant not least because the ECtHR has been recognised as a leader in international human rights interpretation of the prohibition of torture, inhuman or degrading treatment.¹³

In critically analysing the jurisprudence, the present discussion draws attention to one aspect of the Strasbourg line of medical-related expulsion case-law which has rarely been explicitly acknowledged – these cases do not show a consistent approach to establishing what would actually constitute the alleged inhuman/degrading¹⁴ treatment within the situation faced by an individual applicant. That is to say, there is no transparent pinpointing of what is to be judged against the minimum level of severity threshold in the application of Article 3.¹⁵ In general, the application of Article 3 is based upon a clear understanding of what is argued to be the inhuman/degrading treatment. This is usually obvious from the facts of the case and if it is not the Court's reasoning normally makes this clear.¹⁶ In medical-related expulsion cases there is not a transparent or consistent approach to situating the inhuman/degrading treatment, which is unique to this one category of Article 3 case.

The first section shows that there is no clear approach to specifying what constitutes alleged inhuman/degrading treatment within situations of medical-related expulsion. The second section considers why this has been the case, highlighting ambiguity caused by an enlargement of the scope of interpretation of Article 3 in the original medical-related expulsion case of *D v. United Kingdom*, and considers what this explanation implies for the future approach of the Strasbourg Court. In the third section it is asked, if the Court were to pinpoint the alleged inhuman/degrading treatment in a more consistent and transparent way, would this make a difference to the reasoning of the Court? It is concluded that it is necessary to progress towards a more justifiable jurisprudence, and that the best way to achieve this is for the Court to identify precisely what constitutes the complained-of harm as a constructive first step.

¹³ M.D. Evans and R. Morgan, *Preventing Torture – A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford, Clarendon Press 1998), p. 74; D. Weissbrodt and I. Hortreiter, "The Principle of Non-Refoulement: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties", 5(1) *Buffalo Law Review* (1999), p. 1–73, at p. 43–46.

¹⁴ 'Inhuman/degrading' is used as shorthand for 'inhuman and/or degrading'. This does not suggest a conceptual elision of the two terms.

¹⁵ ECtHR (judgment) 18 January 1978, Case No. 5310/71, *Ireland v. United Kingdom*, para. 162.

¹⁶ For example, in cases concerning conditions of detention it is clear that the conditions themselves are argued to amount to inhuman/degrading treatment (E.g. ECtHR (judgment) 19 April 2001, Case No. 28524/95, *Peers v. Greece*, para. 75). In a case concerning, for example, conditions of detention and a particular instance of behaviour towards an applicant the Court's reasoning will make clear that each aspect is argued to amount to inhuman/degrading treatment and each is separately assessed (E.g. ECtHR (judgment) 24 July 2001, Case No. 44558/98, *Valasinas v. Lithuania*, paras. 98–125).

2. SITUATING INHUMAN/DEGRADING TREATMENT

There is evidence of a number of approaches to situating the alleged inhuman/degrading treatment within circumstances of medical-related expulsion. These different approaches can be seen in the judgments of the Strasbourg Court, preceding judgments of national courts and in applicants' claims.

In the well-known case of *D v. United Kingdom*, when the ECtHR began to apply its past case-law to the facts, it appeared clear that the *situation that the applicant risked facing in his home country* was the potential inhuman/degrading treatment. It was argued that if the authorities deported the applicant to his home country he would die in circumstances of pain and destitution, with no relatives, accommodation or access to social support. When the Court concluded its judgment, however, this was no longer obvious. It concluded that: 'the *implementation of the decision* to remove him to St Kitts would *amount to* inhuman treatment *by* the respondent State'.¹⁷ This conclusion is echoed in *Bensaid v. United Kingdom* concerning an applicant receiving treatment for Schizophrenia.¹⁸ Whereas at the outset in both *D* and *Bensaid* the Court acknowledged its established principles on expulsion and a real risk of inhuman/degrading treatment in a receiving state, starting with the *Soering* case,¹⁹ it ended by implying that the United Kingdom would inflict inhuman treatment upon the applicant through the act of expulsion. This suggests potentially different instances of Article 3 harm – *in the receiving state* on the one hand, and *by the respondent state* on the other hand. This is a key ambiguity which has been present in subsequent cases.

In the Grand Chamber judgment and dissenting opinion in *N v. United Kingdom*, and in the related judgments in the United Kingdom courts, there is evidence of both understandings – of the prohibited harm as taking place in the receiving state and as being inflicted by the respondent state. In addition, there is evidence of a third possibility: an understanding of Article 3 harm as the suffering flowing from an illness. This range of possibilities can be seen in the following examples: Laws LJ in the Court of Appeal was of the view that the harm was essentially the *lack of resources in the home country*.²⁰ In the House of Lords, Lord Brown seemed to interpret the harm in *D as treatment by the host state* that exacerbated suffering flowing from an illness.²¹

¹⁷ ECtHR (Judgment) 2 May 1997, Case No. 30240/96, *D v. United Kingdom*, paras. 53–54 [emphasis added].

¹⁸ ECtHR (Judgment) 6 February 2001, Case No. 44599/98, *Bensaid v. United Kingdom*, paras. 34–35, 41.

¹⁹ ECtHR (Judgment) 7 July 1989, Case No. 14038/88, *Soering v. United Kingdom*, para. 92. It is also clear that a focus on the risk of inhuman/degrading treatment in the receiving state was what the United Kingdom government was expecting in *D*; ECtHR (judgment) 2 May 1997, Case No. 30240/96, *D v. United Kingdom*, para. 42.

²⁰ *N v. Secretary of State for the Home Department* (2004) 1 W.L.R. 1182, para. 38.

²¹ *N v. Secretary of State for the Home Department* (2005) 2 W.L.R. 1124, paras. 80, 93.

He described the issue in *N* as being whether “deporting the appellant in the circumstances outlined would be subjecting her to inhuman and degrading treatment”.²² Lord Nicholls asked whether the act of expulsion *would itself amount to prohibited treatment*.²³ These statements demonstrate that the way the potential inhuman/degrading treatment is identified is not uniform or settled. In *N v. United Kingdom*, in the submissions of the Government and of the applicant, it is clear that a risk of Article 3 harm was seen to be in the receiving state.²⁴ The Grand Chamber acknowledged this whilst also stating that: “[t]he suffering which flows from naturally-occurring illness [...] may be covered by Article 3, where it is [...] exacerbated by treatment [...] for which the authorities can be held responsible [...]”.²⁵ Certain of the Court’s statements in its overview of the line of case-law subsequent to *D v. United Kingdom* point towards the ‘removal’/‘expulsion’ as the potential Article 3 harm.²⁶ In their dissent in *N v. United Kingdom*, Judges Tulkens, Bonello and Spielmann recognised different possible instances of potential inhuman/degrading treatment, occurring *separately or in combination*.²⁷ They first expressed the view that Ms N faced a real risk of “prohibited treatment in her home country”.²⁸ They also expressed the view that “deportation of an ‘applicant on his or her death bed’ would *in itself* be inconsistent with the absolute provision of Article 3 [...]”.²⁹ They also referred to the situation where “the harm stems from a naturally occurring illness and a lack of adequate resources to deal with it in the receiving country [...]”.³⁰ Within this single dissenting opinion several possible understandings and combinations of prohibited harm are apparent.

In summary, the Strasbourg Court began its application of Article 3 in *D v. United Kingdom* by indicating that the situation in *D* was regarded as one further step in the case-law on expulsion – expulsion to a risk of prohibited treatment in the receiving state – and thereby as an extension of an established position. This perception is a current

²² Ibid., para.77; see also para. 93.

²³ Ibid., para. 8. See also ECtHR (Grand Chamber Judgment) 27 May 2008, Case No. 26565/05, *N v. United Kingdom*, para. 17.

²⁴ ECtHR (Grand Chamber Judgment) 27 May 2008, Case No. 26565/05, *N v. United Kingdom*, paras. 22, 25.

²⁵ Ibid., para. 29.

²⁶ Ibid., para. 37, referring to ECtHR (Decision) 15 February 2000, Case No. 46553/99, *S.C.C. v. Sweden*; para. 39, referring to ECtHR (Decision) 24 June 2003, Case No. 13669/03, *Arcila Henao v. The Netherlands*.

²⁷ Ibid., joint dissenting opinion of Judges Tulkens, Bonello and Spielman, paras. 20–23.

²⁸ Ibid., joint dissenting opinion, para. 3; see also para. 9.

²⁹ Ibid., joint dissenting opinion, para. 20.

³⁰ Ibid., joint dissenting opinion, para. 5. This view is reflected in the non-medical expulsion case of *Sufi and Elmi v. United Kingdom* referring to *N v. United Kingdom*: “In reaching its conclusions, the Court noted that the alleged future harm would emanate not from the intentional acts or omission of public authorities or non-State bodies but from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.” ECtHR (Judgment) 28 June 2011, Case Nos. 8319/07; 11449/07, *Sufi and Elmi v. United Kingdom*, para. 281.

one, seen in the argument of the applicant in *Yoh-Ekale Mwanje v. Belgium*.³¹ But, in a seemingly contradictory move, the Court's conclusion in *D* was less clear about whether its approach was a simple extension of previous expulsion case-law or whether it was qualitatively different. Its conclusion was ambiguous about whether the inhuman/degrading treatment was the situation that would be faced by the applicant in his home country, or whether the inhuman/degrading treatment was the act of expulsion by the United Kingdom state, or something else in between, including deriving from the illness itself. This has led, in subsequent cases, to several possible harms to which the label of inhuman/degrading treatment might be attached. This implies that there are a number of possible focal points for judging whether there is indeed a risk of prohibited treatment.

3. *D v. UNITED KINGDOM: THE SOURCE OF INHUMAN/DEGRADING TREATMENT AND THE LIMITS OF STATE RESPONSIBILITY*

It is evident in arguments put forward by states in expulsion cases generally that they are concerned in a broad, fundamental sense about the attribution of responsibility for far-removed harm.³² In *N v. United Kingdom* the ECtHR seemed to accept economics-based policy considerations when judging the applicability of Article 3, for which it has been criticised in dissent and in commentary, as noted above. Such willingness to entertain health-care immigration 'floodgates' arguments in medical-related expulsion cases can be seen to reflect a fundamental question about where the limits should lie in terms of the responsibility of Council of Europe states. It is inevitable in this class of medical-related expulsion case that the claims highlight an uncomfortable tension between global wealth and healthcare inequalities and the limited capacity of a regional human rights system to protect the individual within this. Even if the reality of this context might have impeded to some extent the Court's openness to finding Article 3 violations in medical-related expulsion cases, it does not explain a lack of consistent identification of the potential harm in medical-related expulsion cases. This atypical aspect of the case-law does not stem from this backdrop, but rather can be seen as more concretely rooted in the ambiguous conclusion in *D v. United Kingdom*, which continues to shape the Strasbourg approach.

³¹ ECtHR (Judgment) 20 December 2011, Case No. 10486/10, *Yoh Ekale Mwanje v. Belgium*, para. 76: "[S]i on l'expulse vers le Cameroun, elle y courra un risque réel d'être soumise à des traitements inhumains et dégradants contraires à l'article 3 [...]"; see also reference to the inhuman nature of the situation in Cameroon at para. 78. The domestic decision of the Conseil Contentieux des Etrangers / De Raad voor Vreemdelingenbetwistingen is available in Flemish; 23 December 2009, No. 36562, available via: <www.rvvv-ccce.be>.

³² E.g. ECtHR (Grand Chamber Judgment) 21 January 2011, Case No. 30696/09, *M.S.S. v. Belgium and Greece*; ECtHR (Judgment) 28 June 2011, Case Nos. 8319/07 and 11449/07, *Sufi and Elmi v. United Kingdom*; ECtHR (Judgment) 17 January 2012, Case No. 8139/09, *Othman (Abu Qatada) v. United Kingdom*.

In the *D v. United Kingdom* case it is reasonable to assume that the Court could have foreseen concern by states parties to the Convention about the implications of this decision. *D* was initially presented by the Court as representing one further step in the body of general expulsion case-law. As such, it represented an expansion of the scope of the right to new lengths. The prohibited treatment in this case was geographically distant, as in previous expulsion cases concerning a risk of harm in the receiving state, but here it was even further-removed from the institutions of the expelling state; that is, it would be inflicted, neither by institutions of another state³³ nor by identifiable private actors within another state,³⁴ but by a new source – an indeterminate source, rather than (a) particular, identifiable actor(s). The government of St Kitts was not responsible for the lack of family support, and it could not be found to be at fault if it was unable to provide accommodation or support equivalent to that which the applicant had been receiving in the United Kingdom. The harm would be inflicted, neither by agents of the state nor by private persons within the home country. The ‘conditions of adversity’ would be nobody’s fault as such. This was a new progression in the case-law at that time. The accepted *sources* of inhuman/degrading treatment were expanded, which represented a significant enlargement of the scope of application of Article 3. The link between the state and the prohibited treatment would be stretched further than it had been before and this had the potential to provoke anxiety amongst states parties about the limits of responsibility for far-removed harm. In the Court’s ambiguous conclusion (“the *implementation of the decision* to remove him to St Kitts would *amount to* inhuman treatment *by* the respondent State”)³⁵ the prohibited treatment could be read as the act of expulsion inflicted by the United Kingdom, despite having been initially suggested to be constituted by the situation in the applicant’s home country. The responsibility of the state was bolstered by this form of expression because it suggested direct infliction of harm by the state. As *D* remains a pivotal case, this ambiguity has become a key feature of medical-related expulsion cases.

In accepting a new source of inhuman/degrading treatment the Strasbourg Court justifiably expanded the scope of application of Article 3. It has long been accepted that the term ‘treatment’ could be interpreted as a set of circumstances; the meaning of ‘treatment’ which is visible in detention conditions cases.³⁶ It was a progressive interpretation of the Court to accept that a set of circumstances could be inhuman/degrading even if inflicted by no one identifiable actor/group (responsibility of the expelling state would be engaged by the power to expel or not expel). One consequence of the ambiguous approach to situating the proscribed treatment in *D v. United*

³³ ECtHR (Judgment) 7 July 1989, Case No. 14038/88, *Soering v. United Kingdom*, para. 92.

³⁴ ECtHR (Grand Chamber Judgment) 29 April 1997, Case No. 24573/94, *H.L.R. v. France*, paras. 39–40.

³⁵ ECtHR (Judgment) 2 May 1997, Case No. 30240/96, *D v. United Kingdom*, paras. 53–54 [emphasis added].

³⁶ E.g. ECtHR (judgment) 19 April 2001, Case No. 28524/95, *Peers v. Greece*, para. 75.

Kingdom has been that this new source of inhuman/degrading treatment has not been critiqued in scholarship. In the Court's case-law an indeterminate source of inhuman/degrading treatment has gradually become more common. In a non-medical expulsion case the Court has referred to the "cumulative risks" faced by an asylum seeker if returned to Afghanistan, where these risks stemmed in part from "Afghan society".³⁷ This case provides an example of harm which would stem from no one identifiable actor, but from an indeterminate source. The Court has increasingly accepted that a real risk of prohibited treatment can stem from "dire humanitarian conditions" and "a situation of general violence".³⁸ Therefore, the interpretation of Article 3 that arguably led to the ambiguous conclusion in the first medical-related expulsion case can be seen as no longer novel, and need not be a barrier to the Court transparently situating the harm in medical-related expulsion cases today.

4. BACK TO BASICS: THE INTERPRETATION OF ARTICLE 3

In medical-related expulsion case-law three broad ways of situating the Article 3 harm can be seen: inhuman/degrading treatment inflicted by sources within the receiving state; inhuman/degrading treatment inflicted by the expelling state; and inhuman/degrading treatment 'flowing' from illness.³⁹ This section considers how judicial reasoning might differ in future medical-related expulsion cases if the Court would revisit the step of identifying the harm being complained of, and reflects on an appropriate response to judicial critique of Strasbourg's restrictive application of Article 3.

4.1. THE NATURE OF ARTICLE 3 HARM

4.1.1. *Inhuman/degrading treatment inflicted by sources within the receiving state: the absence of moral and social support or inaccessibility of life-sustaining medical care*

In judgments pertaining to inhuman/degrading treatment and expulsion beyond the medical context it is in general clear that the prohibited harm which risks occurring

³⁷ ECtHR (Judgment) 20 July 2010, Case No. 23505/09, *N v. Sweden*, para. 62.

³⁸ ECtHR (Judgment) 28 June 2011, Case Nos. 8319/07; 11449/07, *Sufi and Elmi v. United Kingdom*, paras. 292–293. Both this judgment and *N v. Sweden* (ECtHR (Judgment) 20 July 2010, Case No. 23505/09) are described by Marc Bossuyt as controversial. This is on the basis of the Court's relationship with national courts and governments and not because of a broadening of the sources of inhuman/degrading treatment. Indeed, Bossuyt recognises the significance of this broadening scope of sources of harm. Bossuyt, *supra* n. 7, p. 219–221.

³⁹ It is possible that more than one instance of inhuman/degrading treatment could be argued to co-exist within the situation of a particular applicant. The dissenting judges in *N* were of the view that different forms of inhuman/degrading treatment should have been seen to coexist; ECtHR (Grand Chamber Judgment) 27 May 2008, Case No. 26565/05, *N v. United Kingdom*, joint dissenting opinion, paras. 20–23.

would take place in the receiving state, as noted above. If the potential Article 3 harm would occur in the receiving state the root of the harm would be an indeterminate combination of actors and elements rather than one particular, identifiable source. To identify inhuman/degrading treatment as harm that would occur in the receiving state it is necessary to recognise this source of harm. ‘Treatment’ in this context would be an amalgamation of circumstances; a situation.

In medical-related expulsion cases there are two key aspects of the situation in the receiving state: the inaccessibility of life-sustaining medication and care, and the absence of moral and social support. To determine what the risk consists of for a particular applicant the Court should be guided by his/her current stage of illness. Where an individual is in stable health at the time of the proposed expulsion and needs to access medical care in order to remain well, as in the cases that have followed *D*, the harm that s/he would be subjected to must be inaccessibility of that medical care. This implies, firstly, that the absence of home country support – referred to in *N v. United Kingdom*⁴⁰ – should not be a decisive consideration in the Court’s assessment of whether the situation would be inhuman/degrading. Inaccessibility of medical care cannot be negated by the presence of moral and social support. Secondly, if an applicant is in stable health this implies that the *degree of inaccessibility* of medical care should be pivotal. The Court would need to further develop a test for ascertaining what amounts to effective inaccessibility. In applications to date the respondent state has argued that some medical care is available to the applicant, even if not of the same standard and with financial and practical barriers⁴¹ and the Court has engaged with this to an extent, referring to sources such as World Health Organisation reports.⁴² The Court should assess the degree of inaccessibility of medical care with the same level of detail as it assesses whether there is a real risk of inhuman/degrading treatment from actors within the receiving state in non-medical expulsion cases.⁴³

For an individual in a terminal stage of illness the potential harm is not ultimately the inaccessibility of life-sustaining medical care but the circumstances of the end of life. This implies that the situation in the receiving state should be subject to a relative assessment of the minimum level of severity. All aspects of the situation, including the level of moral and social support, should be equally relevant in determining whether the amalgamation of circumstances should be described as inhuman/degrading treatment. Although, as Stevens observes, claims concerning HIV/Aids in which an

⁴⁰ ECtHR (Grand Chamber Judgment) 27 May 2008, Case No. 26565/05, *N v. United Kingdom*, paras. 48, 50.

⁴¹ ECtHR (Decision) 15 February 2000, Case No. 46553/99, *S.C.C. v. Sweden*; ECtHR (Judgment) 6 February 2001, Case No. 44599/98, *Bensaid v. United Kingdom*, paras. 31, 38.

⁴² E.g. ECtHR (Decision) 25 November 2004, Case No. 25629/04, *Amegnigan v. Netherlands*; ECtHR (Grand Chamber Judgment) 27 May 2008, Case No. 26565/05, *N v. United Kingdom*, para. 19.

⁴³ See, e.g., ECtHR (Grand Chamber Judgment) 15 November 1996, Case No. 22414/93, *Chahal v. United Kingdom*. See Battjes, *supra* n. 7, p. 608–612 for discussion of how the standard of ‘real risk’ has been applied in medical cases.

applicant is terminally ill are significantly less likely to come before the Court in future as a result of advances in medical treatment,⁴⁴ an end-of-life dimension could remain relevant to a non-national applicant in the terminal phase of a different illness.

4.1.2. *Inhuman/degrading treatment inflicted by the expelling state: lack of respect at the end of life or withdrawal of medical care*

P.J. Duffy, in an early article deliberating whether expulsion could raise an issue under Article 3 if the risk of prohibited treatment would stem from private individuals, expressed the view that the “theoretical basis for applying Article 3 to expulsion cases is that the act of expulsion itself in all the circumstances constitutes inhuman and degrading treatment”.⁴⁵ The theoretical basis for expulsion cases suggested by Duffy is not explicitly evidenced in expulsion cases.⁴⁶ There may be a view that inhuman/degrading treatment is inflicted by *both* the sending state and the receiving state but in general this is not explicit in the case-law.

Article 3 ‘treatment’ seems to have been perceived as harm inflicted by the expelling state, both by the House of Lords and by the Strasbourg Court in *N*.⁴⁷ If there is a risk of inhuman/degrading treatment inflicted by the expelling state the ‘treatment’ would be a series of actions towards the applicant. This interpretation accords with the most common meaning of the word ‘treatment’. The *source* of the inhuman/degrading treatment would be state actors/institutions, and responsibility of the state under the Convention would therefore be inherent. There is perhaps an intuitive preference for seeing the prohibited treatment as inflicted by the expelling state in medical-related expulsion cases, due to the simplicity of this understanding of the source of harm and the form that treatment takes.

Two key aspects within the expelling state might be argued to be inhuman/degrading treatment: a lack of respect at the end of life, or the withdrawal of medical care in conjunction with expulsion. Again, the Court should be guided by an applicant’s current stage of illness. The Grand Chamber has so far maintained that an applicant must essentially be close to death at the time of the expulsion. This requirement might be rationalised on the basis that persons who are dying are in a special category and should be accorded special consideration. The Court, if it were to explicitly adopt this understanding of inhuman/degrading treatment, should explain

⁴⁴ Stevens, *supra* n. 3, p. 372.

⁴⁵ P.J. Duffy, “Article 3 of the European Convention on Human Rights”, 32(2) *International and Comparative Law Quarterly* (1983), p. 316–346, at p. 339.

⁴⁶ Expulsion case-law consistently refers to the risk of ill-treatment in the state to which an individual will be sent, as noted above (*supra*, n. 20). A recent example is ECtHR (Judgment) 27 June 2013, Case Nos. 66523/10 66523/10, *S.A. v. Sweden*, para. 41.

⁴⁷ The same perception is visible in other cases which have cited *D v. United Kingdom*; see ECtHR (Judgment) 29 April 2002, Case No. 2346/02, *Pretty v. United Kingdom*, para. 53; *R (Pretty) v. Director of Public Prosecutions* (2001) 3 W.L.R. 1598, para. 14.

why a lack of respect towards a person who is dying could fall within the meaning of inhuman/degrading treatment. The Court might be reluctant to make such a statement as it would be conscious of a lack of moral consensus within Council of Europe states on the ‘death with dignity’ debate and variations in the legal regulation of end-of-life interventions at state level.⁴⁸ If the Court did adopt this interpretation it would be obliged to move to new conceptual ground.

If the Court were to pinpoint the inhuman/degrading treatment as the withdrawal of medical care through expulsion it should be clear about why the *combination* of expulsion from the host state *and* withdrawal of medical care might amount to inhuman/degrading treatment. Whether the form of state obligation in play would be described as positive or negative⁴⁹ would not lead to a practical difference in outcome since state responsibility would be inherent either way. The Court should undertake a relative assessment of whether an individual, subjected to simultaneous expulsion and deprivation of life-sustaining care, would suffer prohibited treatment. This way of situating the Article 3 harm implies that the applicant would be in a stable condition at the time of the proposed expulsion, which is of course contrary to the practice of the Court to date.

4.1.3. *Inhuman/degrading treatment ‘flowing’ from illness*

In *Bensaid v. United Kingdom* the Court referred to suffering as a result of ill-health, noting that this suffering might fall within Article 3’s scope.⁵⁰ It is not clear what is envisaged as the potential inhuman/degrading treatment from this perspective:

“The suffering which flows from naturally-occurring illness, physical or mental, 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 [...].”⁵¹

There is reference to ‘suffering’ made worse by ‘treatment’ of the state. This might indicate that the *actions of the state* would in themselves amount to inhuman/degrading treatment *because* they exacerbate suffering caused by illness. Alternatively, this statement might indicate that the *suffering itself* would be the potential inhuman/degrading treatment, for which the state would be *responsible* because of its own actions which exacerbate suffering.

⁴⁸ ECtHR (Judgment) 20 January 2011, Case No. 31322/07, *Hass v. Switzerland*, para. 55.

⁴⁹ I.e., a negative state obligation not to inflict inhuman/degrading treatment or a positive obligation to prevent inhuman/degrading treatment by the state’s own agents.

⁵⁰ ECtHR (Judgment) 6 February 2001, Case No. 44599/98, *Bensaid v. United Kingdom*, para. 37.

⁵¹ ECtHR (Grand Chamber Judgment) 27 May 2008, Case No. 26565/05, *N v. United Kingdom*, para. 29.

In a case brought against Lithuania concerning gender reassignment treatment, in which *D v. United Kingdom* was applied but which preceded *N v. United Kingdom*, the Court stated that:

“Article 3 entails a positive obligation on the part of the State to protect the individual from acute ill-treatment, whether physical or mental, whatever its source. Thus if the source is a naturally occurring illness, the treatment for which could involve the responsibility of the State but is not forthcoming or is patently inadequate, an issue may arise under this provision [...]”⁵²

This paragraph indicates that inhuman/degrading treatment can be brought about by an illness and the state’s responsibility engaged by a failure to respond adequately, thus breaching an obligation of protection from Article 3 harm. If this interpretation is correct, ‘treatment’ would take the form of a situation of suffering, which would be argued to be inhuman/degrading within the meaning of Article 3. It is this situation that should be the focus of the Court’s assessment of whether the nature of the suffering caused by the illness would reach the minimum level of severity.

Arguably, to see Article 3 harm as being capable of emanating from *any* source entails a significant enlargement of the scope of Article 3, which in the past has applied to harm brought about by human actors/human-made societal conditions and not suffering which is ‘naturally-occurring’. If the Court were to adopt this particular interpretation it should explain the conceptual rationale behind accepting that Article 3 harm can be inflicted by illness and how this fits with the Court’s established interpretation of inhuman/degrading treatment.

4.2. TOWARDS A JUSTIFIABLE JURISPRUDENCE

The reasoning of the Strasbourg Court should be revisited from the perspective of transparently situating the alleged inhuman/degrading treatment. The different ways in which the Court might situate inhuman/degrading treatment give rise to different implications for the reasoning of the Court. The foregoing discussion clarifies that situations of advanced-stage illness and stable illness should attract different reasoning in an assessment of the minimum level of severity, whether the Article 3 harm is situated within the receiving state, in the expelling state, or seen to flow from illness. It indicates that whether the Strasbourg approach is coherent – acceptance of a violation of Article 3 in a situation of terminal illness whilst refusing Article 3 protection to applicants who are not yet terminally ill – should depend directly upon how the harm is identified and assessed.

Judicial critique itself seems to view the harm in medical-related expulsion cases as inflicted by the respondent state, which need not necessarily be the case. This

⁵² ECtHR (Judgment) 11 September 2007, Case No. 27527/03, *L v. Lithuania*, para. 46.

becomes clear if the potential inhuman/degrading treatment is more clearly pinpointed. There are two potential forms of Article 3 harm implied in this critique: lack of respect by the state towards a dying person, and the withdrawal of life-sustaining medical care. These situations are not analogous and the evaluation of each should be different. If the Court were to uncouple these two situations, on the one hand, it would be more difficult for the Court to compare the circumstances of applicants in stable health to those of applicants at advanced stage of illness. It is possible that this approach could encourage a new line of case-law for medical expulsion claims concerning withdrawal of, or lack of access to, life-sustaining medication. These cases need not be artificially pressed into a *D v. United Kingdom* mould because in *D* the applicant was not ultimately complaining about restriction of access to life-sustaining medication. On the other hand, the Court might maintain that the Article 3 threshold could be crossed in respect of terminally ill applicants but not in respect of applicants in stable health. This is because it would not necessarily be the case that it would be unconvincing to see the threshold as crossed in one situation and not in the other, just as it is possible to see the threshold as crossed in the case of one applicant, for example at advanced stage of illness, and not in the case of a different applicant, who may also be at an advanced stage of illness. It is right that the assessment of whether treatment can be described as inhuman/degrading should be a relative one depending on all the circumstances of each individual applicant. Therefore, clearly situating the Article 3 harm would not point to a single conclusion but would allow the Court to move towards a more appropriately justified jurisprudence.

To do so would bring the reasoning in medical-related expulsion cases into line with the rest of Article 3 case-law in which the alleged harm is clearly demarcated. It would also allow for a better understanding of how the interpretation of Article 3 in this line of cases might impact upon the application of the right to new, related situations. For example, to health-related expulsion claims in which the applicant is not reliant upon access to specific medical care; to medical-related claims in which the applicant is a national of the respondent state; or to claims by applicants at the end of life within a national context.

As to whether there is one preferable approach in medical-related expulsion cases, from the perspective of doctrinal cohesion, there is a strong argument that the Court should place this line of case-law firmly in the tradition of non-medical expulsion cases, in which the risk of Article 3 harm stems from the receiving state. It is not clear that medical-related expulsion cases should be treated as qualitatively different from non-medical expulsion cases. As noted above, there has perhaps been an implicit view in expulsion cases that, even if the inhuman/degrading treatment would be inflicted in the receiving state, the expelling state would *also* inflict inhuman/degrading treatment by choosing to expel the person to a situation of such risk. Perhaps the understanding of the harm in all expulsion cases would benefit from renewed consideration, but a prerequisite for this is that the Article 3 harm should be transparently demarcated.

If the risk of Article 3 harm were seen to stem exclusively from sources within the home country both applicants at advanced stage of illness and in stable health could argue a violation of Article 3. The weighting of factors within the Court's assessment of the minimum level of severity should be different in respect of each: if the applicant is terminally ill, the set of circumstances that would face him/her in the home country should be assessed; if an applicant is in stable health at the time of the proposed expulsion, the degree of access to life-sustaining medication should be the crucial test determining whether this situation would cross the minimum severity threshold. If the Court were to place medical-related expulsion cases exclusively in the tradition of cases where the risk of Article 3 harm stems from the receiving state, this would also further strengthen the acceptance of the 'indeterminate' source of harm, described above as a key development which led to the ambiguous conclusion in *D v. United Kingdom*. This interpretation, already relied upon in *N v. Sweden* concerning societal gender-based discrimination,⁵³ could play a significant role in the future development of the scope of application of Article 3; for example, this interpretation might be of particular relevance in situations concerning socio-economic conditions.⁵⁴

It is not possible in the scope of this article to address whether there is one preferable approach from a normative perspective. This would be best achieved by putting forward conceptual understandings of the terms 'inhuman' and 'degrading' which fit with, and build upon, an in-depth analysis of the conceptual scope of these terms as they have developed in the Court's case-law. A normative argument should address a number of conceptual questions. These include: Why might it be inhuman/degrading treatment for a state to show a lack of respect for a person who is in the final stages of life? For example, should the way that human life ends be seen to hold special significance, and if so in which sense?⁵⁵ If inhuman/degrading treatment is inflicted by the expelling state, is it relevant that life-sustaining medical care is deemed by the state to be legitimately withdrawn *because* the person is a non-national? That is, might

⁵³ *Supra* n. 38.

⁵⁴ There is a growing body of literature on the socio-economic reach and potential of the ECHR. For example, C. O'Connell, "A modest proposal: Destitution, State responsibility and the European Convention on Human Rights" 5 *European Human Rights Law Review* (2008), p. 583–605; E. Palmer, "Protecting socio-economic rights through the European Convention on Human Rights: Trends and developments in the European Court of Human Rights", 2(4) *Erasmus Law Review* (2009), p. 397–425; L. Clements and J. Simmons, "European Court of Human Rights: Sympathetic Unease", in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge, Cambridge University Press 2008), p. 409–427; J. Kenny, "European Convention on Human Rights and social welfare", 5 *European Human Rights Law Review* (2010), p. 495–503. See also the partly concurring, partly dissenting opinion of Judge Sajó in ECtHR (Grand Chamber Judgment) 21 January 2011, Case No. 30696/09, *M.S.S. v. Belgium and Greece*.

⁵⁵ Ronald Dworkin and Charles Foster have described the end of life as reflective of the entire life lived; See R. Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (London, HarperCollins 1993), p. 199; C. Foster, *Human Dignity in Bioethics and Law* (Oxford, Hart Publishing 2011), p. 165.

there be a pertinent dimension of nationality-based discrimination?⁵⁶ To what extent can different forms of harm within situations of medical-related expulsion be seen to convincingly fall within the meaning of inhuman/degrading treatment, as opposed to being morally problematic in some other sense?⁵⁷ If the Strasbourg Court would engage more transparently with how the Article 3 harm is demarcated it would create an opportunity to address such questions and to develop the interpretive scope of Article 3 based on the conceptual meaning of the terms ‘inhuman’ and ‘degrading’.

5. CONCLUSION

It has been argued that a preliminary step is missing in medical-related expulsion case-law, of transparently situating the harm being complained of. There is evidence of a range of possible ways of situating the alleged inhuman/degrading treatment, which can be seen as rooted in an ambiguous conclusion in the case of *D v. United Kingdom*. If the Article 3 harm is not clearly situated the application of the right – in future medical-related expulsion cases and in other situations which draw upon this irregular line of case-law – will inevitably be flawed because there is no focus for judging whether a foreseeable situation would fall within the meaning of the terms ‘inhuman’, ‘degrading’ and ‘treatment’.

Greater transparency in situating the harm in medical-related expulsion cases would contribute to addressing concerns about the state of health distinction that has resulted in a denial of Convention protection to many applicants. The question of whether it is conceptually defensible to maintain the distinction based on the applicant’s state of health, and the broader question of whether the Court *should* find that Article 3 has been violated in cases similar to *N v. United Kingdom*, is tied to how the harm is situated. The approach advocated in this article does not necessarily imply a greater likelihood of findings of Article 3 violations.⁵⁸ It is a proper exercise of the

⁵⁶ The Strasbourg Court has accepted that discrimination could in principle fall within Article 3, in the sense of being constitutive of prohibited harm, rather than an additional harm (based on Article 14 ECHR in conjunction with Article 3). See ECtHR (Judgment) 27 September 1999, Case Nos. 33985/96 and 33986/96, *Smith and Grady v. United Kingdom*, para. 121. In the context of border restrictions on the movement of non-nationals, Dembour and Kelly observe: “We do not rule out that future generations may put national discrimination on a par with racial and gender discrimination in terms of abhorrence.”; M. Dembour and T. Kelly, “Introduction”, in M. Dembour and T. Kelly (eds.), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Oxon, Routledge 2011), p. 1–22, at p. 5.

⁵⁷ J. Waldron, “The Coxford Lecture, Inhuman and Degrading Treatment: The Words Themselves”, 23(2) *Canadian Journal of Law and Jurisprudence* (2010), p. 269–286, at p. 276.

⁵⁸ An alternative, or at least additional, direction for medical-related expulsion claims is the Article 8 route. The decision by the ECtHR not to examine the Article 8 claim in *N v. United Kingdom* (ECtHR (Grand Chamber Judgment) 27 May 2008, Case No. 26565/05) was criticised in the dissent in that case. The decision not to examine perhaps indicates that the Court was clear that an interference with the Article 8 right to respect for private and family life would have been justified. If there would be an interference, then the proportionality analysis should be carried out.

Court's role to determine whether harm falls within the scope of Article 3, but the basic step of demarcating the alleged harm within the Court's reasoning should be its first step.

This step would make a difference to the way the Strasbourg Court's decisions are reached in medical-related expulsion cases and allow for a richer and more appropriately justified jurisprudence to develop. It is necessary to move towards a better-justified jurisprudence, not ultimately because the current situation as concerns medical-related expulsion seems untenable, but fundamentally because the Court should fulfil its core role of developing the interpretation of the Convention rights themselves. To unpack more explicitly what precisely might constitute the harm would have positive implications for the doctrinal development of Article 3 by allowing for a fuller understanding of how principles developed in this line of cases might influence the future interpretation and application of the right in new, challenging situations that will inevitably arise.