THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of his family in connection with these proceedings.

Easter Term

[2020] UKSC 17

On appeal from: [2018] EWCA Civ 64

JUDGMENT

AM (Zimbabwe) (Appellant) vSecretary of State for the Home Department (Respondent)

before

Lady Hale

Lord Wilson

Lady Black

Lady Arden

Lord Kitchin

JUDGMENT GIVEN ON

29 April 2020

Heard on 4 December 2019

Appellant	Respondent
Zane Malik	Lisa Giovannetti QC
Darryl Balroop	Rory Dunlop QC
(Instructed by Shan & Co Solicitors)	(Instructed by The Government Legal Department)

Interven

(The AIRE C

Charles Bann

Yaaser Vande

(Instructed

Herbert Sn

Freehills L

LORD WILSON: (with whom Lady Hale, Lady Black, Lady Arden and Lord Kitchin agree)

Introduction

1.
This appeal requires the court again to consider one of the most controversial questions which the law of human rights can generate. It relates to the ability of the UK to deport a foreign citizen who, while lawfully resident here, has committed a string of serious crimes. The reaction of many British citizens is likely to be: “We don’t want this man here”. His response is: “But I need to remain here”. In this case he no longer casts his response under article 8 of the European Convention on Human Rights (“the Convention”) by reference to respect for his private and family life. Instead he wishes to cast it under article 3 of the Convention which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

For the appellant is HIV positive. He is a citizen of Zimbabwe and his contention, which for reasons which I will explain has not yet been fully developed still less tested, is that, if deported to Zimbabwe, he would be unable to access the medication which, here in the UK, prevents his relapse into full-blown AIDS. So considerations of public policy on the one hand and of what is said to be private existential need on the other clash like warriors; and upon the courts lies a heavy burden in determining which should, under the law, prevail.

2.
Reliance by the appellant on rights under article 3 has arisen at a late stage in these proceedings, which encompass a challenge on his part, so far entirely unsuccessful, to a decision by the Secretary of State to refuse to revoke an order for his deportation. At the first and second stages of them, namely in his successive appeals to the Immigration and Asylum Chamber of the First-tier Tribunal and then of the Upper Tribunal, the appellant relied only on rights under article 8. Before those tribunals he conceded that, in the light of the decision of the House of Lords in N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)[2005] UKHL 31, [2005] 2 AC 296, his appeal could not succeed by reference to article 3.

3.
But, before the appellant’s further appeal to the Court of Appeal was heard, the Grand Chamber of the European Court of Human Rights (“the ECtHR”) delivered its judgment in Paposhvili v Belgium [2017] Imm AR 867. On advice, the appellant then formed the view that in that judgment the Grand Chamber had given an expanded interpretation of article 3 in the context of a situation such as his own; and so he decided to abandon his reliance on article 8 and to seek to obtain an order for a rehearing before one or other of the tribunals at which he could present a case under article 3. He recognised, however, that, even if, as a result of the judgment in the Paposhvili case, the decision of the House of Lords in the N case, cited in para 2 above, about the breadth of that article had become out of step with the jurisprudence of the ECtHR, that decision remained binding on the Court of Appeal: Kay v Lambeth London Borough Council[2006] UKHL 10, [2006] 2 AC 465. Accordingly he conceded before the Court of Appeal that, at that level, his appeal, newly formulated by reference to article 3, fell to be dismissed. On 30 January 2018 the Court of Appeal duly dismissed his appeal, together with another appeal against removal brought by a Jordanian citizen suffering from cancer: [2018] EWCA Civ 64, [2018] 1 WLR 2933. It is against its order that today the appellant appeals; and he asks us to do what he could not ask the Court of Appeal to do, namely to depart from the decision in the N case by reference to the judgment in the Paposhvili case and to remit his application for rehearing by reference to article 3.

4.

In his judgment in the Court of Appeal, with which Patten and Hickinbottom LJJ agreed, Sales LJ, as he then was, not only explained why that court was required to dismiss the appeals. He also offered an interpretation of the effect of the judgment of the Grand Chamber in the Paposhvili case which the Secretary of State commends to us as correct but with which the appellant, supported by the AIRE Centre which intervenes in the appeal, strongly takes issue. It goes without saying that the interpretation offered by Sales LJ deserves considerable respect; inevitably, however, it also demands close scrutiny.

Background

5.
The appellant was born in Zimbabwe in 1987 and is now 33 years old. He lived there until 2000 when he came to the UK, where his mother was already living. He has lived here ever since. In 2004 he and his mother were granted indefinite leave to remain in the UK.

6.
Early in 2005, when aged almost 18, the appellant sustained his first criminal conviction. It was for battery. During the next two years he sustained further convictions, including for assault, for receiving stolen goods and, twice, for possession of sharp blades in public places. In November 2006, soon after a son was born to the appellant and his partner (to whom he has since become married), the Secretary of State issued a decision to deport him. In January 2007 his appeal against the decision was dismissed so, in March 2007, the order for his deportation was made. He was detained pending deportation but in 2008 he was released on bail.

7.
In May 2009 the appellant was convicted of further offences. The reason why he had not by then been deported is unclear. The further offences were very serious: they were for possession of a firearm and ammunition, for which he was sentenced to seven years, and for possession of heroin with intent to supply, for which he was sentenced to two years, to run consecutively.

8.
In 2012, while he remained in prison, the appellant, by solicitors, applied to the Secretary of State to revoke the order for deportation made in March 2007 by reference to his rights under article 8 of the Convention. In due course he forwarded to the Secretary of State a letter about his medical condition. He contended that it was relevant to his right to respect for his private and family life. The letter had been written by a nurse in the sexual health clinic of a hospital. She said that he had been diagnosed as HIV positive in 2003; that the diagnosis had not given rise to concern until 2011, when his CD4 blood count had begun to fall; that in 2012 he had undertaken antiretroviral therapy (“ART”) but initially with a drug which had given rise to intolerable side-effects, later identified as vomiting, stomach cramps, dizziness and night sweats; that the clinic had then prescribed a different drug for him, namely Eviplera, which, during the year prior to the date of the letter, had not given rise to significant side-effects and which had enabled his CD4 blood count to increase and his HIV viral load to become undetectable; that his treatment and the monitoring of his condition needed to continue; that it was doubtful whether he could access ART in Zimbabwe, without which his CD4 blood count would fall again; and that in that event he would be prey to opportunistic infections which, if untreated, would lead to his death.

9.
In 2013 the Secretary of State, by letter, announced her refusal to revoke the deportation order made against the appellant. She duly determined it by reference to his claim under article 8. But, having

considered the evidence referable to his medical condition, including the letter from the nurse and a country information report that ART was in principle available in Zimbabwe, she observed in passing:

“It is not considered for the reasons given above that you have shown that your case meets the high threshold for article 3 to be engaged.”

10.
Later in 2013 the appellant was released from prison on licence. Shortly afterwards, however, he was found guilty of bringing cannabis into the prison in the course of a visit. He was recalled to prison and ordered to serve an additional six months. He was therefore again in prison at the time of the hearing before Judge Cameron in the First-tier Tribunal late in 2014.

11.
At that hearing the appellant was represented by counsel. She presented his case under article 8 by reference to a wide variety of factors, including his relationship with his wife and son and also his medical condition. In the latter respect counsel relied not only on the letter from the nurse but also on a more recent letter, dated 14 August 2014, from a consultant physician in the same clinic who had been treating him for four years. He reported that the treatment of the appellant with Eviplera was continuing satisfactorily. He added:

“However, there is no cure for HIV at present. It is vital for individuals on antiretroviral therapy to be maintained on lifelong HIV treatment. Should this gentleman stop his treatment or be denied access to his treatment, his HIV viral load will rise, his CD4 count will decrease and he will be at risk of developing opportunistic infections, opportunistic cancers and premature death. It is vital for individuals living with HIV to maintain regular specialist follow up, and access to effective antiretroviral therapy.”

Counsel pointed out to Judge Cameron that, in the country information report referable to Zimbabwe, the list of ART medications available there did not include Eviplera.

12.
In the course of his Determination Judge Cameron wrote, at paras 101-102:

“[Counsel for the appellant] specifically indicated that article 3 was not being raised. However for the avoidance of doubt notwithstanding that the appellant is suffering from HIV and also depression, I am not satisfied that he is currently at a critical stage of the illness nor that treatment could not be available in Zimbabwe on his return albeit that it does not appear the exact medication he is currently taking is available … There is nothing on the papers before me which would indicate that the appellant’s current medical or mental health condition would be sufficient to reach the high threshold necessary to engage [article] 3.”

Jurisprudence

13.
It is necessary to chart the development of the jurisprudence in the ECtHR and in our domestic courts in relation to claims under article 3 to resist return by reference to ill-health. There are six main authorities.

14.
The first is the decision of the ECtHR in D v United Kingdom(1997) 24 EHRR 423. The applicant was a citizen of St Kitts. He was convicted of attempting to smuggle cocaine into the UK. Following his

release from prison, the Secretary of State sought to deport him. But he was suffering from AIDS. It was in an advanced stage. His CD4 cell count, which should have been more than 500, was below 10 so he was vulnerable to a wide range of infections. In June 1996 his life expectancy was assessed as no more than a year. By the time of the hearing in Strasbourg in February 1997, he was in hospital and his life appeared to be drawing to a close. There was no drug treatment for AIDS available on St Kitts. The ECtHR held that his deportation would violate article 3. The court referred in para 51 to the advanced state of his terminal illness; in para 52 to the dramatic consequences which would attend the abrupt withdrawal of the regime of medication and care for him in the UK and his removal to an island where apparently no care was available for him; and in para 54 to the exceptional circumstances and the compelling humanitarian considerations in his case. In summary the applicant in the D case was about to die; and the essence of the decision was not the absence of treatment on St Kitts but the inhumanity of, in effect, pulling a man off his deathbed.

15.
The second is the decision of the House of Lords in the N case, cited in para 2 above. The appellant was a citizen of Uganda, aged 30. She came to the UK and claimed asylum. Her claim was rejected and the Secretary of State sought to return her to Uganda. But she was HIV positive and had suffered AIDS-defining illnesses. Her CD4 cell count had fallen to 10; but over the following years the administration to her in the UK of ART and of chemotherapy had enabled it to recover to 414 and had stabilised her condition. If the administration to her of ART and the monitoring of her were to continue, as it would in the UK, she would be likely to live for decades. But her ability to access the appropriate medication and facilities in Uganda was problematic; and the prospect of her survival there for more than two years was bleak.

16.
In the N case the House of Lords examined the determination in the ECtHR during the eight years following the D case of claims under article 3 to resist removal from contracting states by reference to ill-health: see in particular the speech of Lord Hope of Craighead in paras 37 to 50. Lady Hale summarised their effect in para 68:

“As Lord Hope’s analysis shows, the later cases have made it clear that it is the patient’s present medical condition which is the crucial factor. The difficulty is in understanding where conditions in the receiving country fit into the analysis.”

In the event, however, Lady Hale expressed her conclusion in terms which did make limited allowance, perhaps only a token allowance, for conditions in the receiving state. It was as follows:

“69. In my view, therefore, the test, in this sort of case, is whether the applicant’s illness has reached such a critical stage (ie he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity.”

17.
It was the unanimous conclusion of the House of Lords in the N case that, in the light of her stable condition, the appellant’s claim under article 3 had to be dismissed. It is clear that all members of the appellate committee viewed this result with discomfort: see, for example, the speech of Lady Hale at paras 67 and 71. Some of them also expressed unease at the distinction which the jurisprudence of the ECtHR had drawn. Lord Brown of Eaton-under-Heywood said in para 91:

“It is perhaps not, however, 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 so.”

And see, to similar effect, the speech of Lord Nicholls of Birkenhead at para 13. But it was Lord Brown himself who drew a significant distinction between the D case and the case of N then before the committee. He pointed out, in paras 88 and 93, that the appellant in the N case contended for an interpretation of article 3 which would cast upon the UK a positive obligation, namely to continue to treat her indefinitely; whereas, in the light of his imminent death, the applicant in the D case had secured an interpretation which had cast upon the UK only a negative obligation, namely not to deport him. Lord Brown also adverted in para 89 to the far-reaching consequences for contracting states if they were unable to remove foreign citizens with no other right to remain there just because treatment for their life-threatening conditions in their country of origin would be far less effective than that currently administered.

18.
The third is the decision of the Grand Chamber of the ECtHR in N v United Kingdom(2008) 47 EHRR 39. The appellant in the N case in the House of Lords had become the applicant in the N case in the ECtHR. Again she relied on article 3. But, by a majority, her application was rejected. The Grand Chamber observed in para 34 that, since the judgment in the D case 11 years previously, the court had never held that removal of an alien would violate the article on grounds of ill-health; in para 42 that in the D case the applicant had appeared to be close to death and that a reduction in life expectancy in the event of removal had never in itself been held to amount to a violation of article 3; in para 43 that, although there might be “other very exceptional cases in which the humanitarian considerations are equally compelling”, the high threshold for violation set in the D case should be maintained; and in paras 44 and 45, much as Lord Brown had suggested, that an obligation to provide free and unlimited treatment for a serious condition, if of a standard unmet in the applicant’s country of origin, would place too great a burden on contracting states. In para O-I8 of the dissenting Opinion the relevance of this last consideration to a claim under article 3 was challenged in trenchant terms.

19.
The fourth is the decision of the ECtHR in Yoh-Ekale Mwanje v Belgium(2013) 56 EHRR 35. The applicant was a citizen of Cameroon. Belgium sought to return her there. But she was HIV-positive. The administration to her in Belgium of ART had stabilised her condition. The seven members of the court held that her return to Cameroon would not violate her rights under article 3. It observed in para 80 that the case was indistinguishable from the decision of the Grand Chamber in the N case; in para 81 that it was improbable that the applicant would obtain the necessary medication in Cameroon and that, without it, her survival in the short or medium term (later described as for more than a year) was in doubt; but in para 83 that the chief consideration was the applicant’s condition prior to removal, which was stable. Nevertheless six of the seven judges added a concurring opinion which, at para OI-6, concluded as follows:

“We believe however that such an extreme threshold of seriousness - to be nearing death - is hardly consistent with the letter and spirit of article 3, an absolute right which is among the most fundamental rights of the Convention and which concerns an individual’s integrity and dignity. In this regard, the difference between a person on his or her deathbed and a person who everyone acknowledges will die very shortly would appear to us to be minimal in terms of humanity. We hope that the Court may one day review its case law in this respect.”

20.

The fifth is the decision of the Grand Chamber of the ECtHR in the Paposhvili case cited in para 3 above. The applicant was a citizen of Georgia who had lived in Belgium for 18 years with his wife and family. His application for asylum was rejected. He was convicted of various criminal offences, including robbery and, ultimately, involvement in an extortion racket for which he was sentenced to imprisonment for three years. Belgium resolved to deport him to Georgia. He sought to resist deportation by reference to his rights under article 8 of the Convention but also, in particular, under article 3 in light of his grave ill-health. His application to the ECtHR was first considered by its Fifth Section, which held that his deportation would not violate his Convention rights. But the Grand Chamber accepted referral of his application. During the period when, following the hearing, the Grand Chamber was deliberating upon the application, the applicant died. Nevertheless it decided to proceed to judgment, which it delivered in December 2016. In the event the Grand Chamber held that, if carried out at the stage proposed by Belgium, his deportation would have violated his rights under article 3 and, in a section of the judgment which it is unnecessary to address, also under article 8 of the Convention.

21.
The principal feature of the applicant's ill-health in the Paposhvili case was chronic lymphocytic leukaemia, from which he had suffered for ten years. He had undergone extensive courses of chemotherapy but after five years his level of leukaemia had risen from Binet stage B to Binet stage C and in 2014 a different course of treatment had been considered necessary. Short-term treatment with the medication Ibrutinib was prescribed for the applicant, in a dose costing about €6,000 per month; and the plan, in the event never implemented, was that the medication might swiftly improve his condition to the point where he could receive a donor blood stem cell transplant, at a cost of about €150,000. Shortly before the hearing in the Grand Chamber the applicant filed an up-to-date report by his haematology specialist. He explained that the Ibrutinib had stabilised the applicant's condition; that, were it discontinued, he would be likely to die within six months; that the proposed donor transplant, albeit risky, offered the only prospect of a cure; and that neither Ibrutinib nor a transplant would be available to him in Georgia. The specialist also referred to a variety of collateral conditions from which the applicant suffered and which rendered treatment for his leukaemia even more difficult, including pulmonary tuberculosis, hepatitis C and a recent stroke which had permanently paralysed his left arm.

22.
Following a careful analysis of the decision in the D case and of its own decision in the N case, the Grand Chamber in the Paposhvili case expressed the view in para 182 that the approach hitherto adopted should be "clarified". The Convention is a living instrument and when, however appropriately, the ECtHR charts its growth, it may generate confusion for it to claim to be providing only clarification. The court proceeded as follows:

"183. The Court considers that the 'other very exceptional cases' within the meaning of the judgment in N v The United Kingdom (para 43) which may raise an issue under article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness."

This important exposition will require study in paras 27 to 31 below; but, again, it is hard to think that it is encompassed by the reference in the N case to “other very exceptional cases” because any application of the criterion in the quoted passage would be likely to have led to a contrary conclusion in the N case itself. It is also convenient at this stage to address the words “although not at imminent risk of dying” in the first long sentence of the paragraph. As was agreed by counsel, the words refer to the imminent risk of death in the returning state. So the Grand Chamber was thereby explaining that, in cases of resistance to return by reference to ill-health, article 3 might extend to a situation other than that exemplified by the D case, cited in para 14 above, in which there was an imminent risk of death in the returning state.

23.
Its new focus on the existence and accessibility of appropriate treatment in the receiving state led the Grand Chamber in the Paposhvili case to make significant pronouncements about the procedural requirements of article 3 in that regard. It held

(a)
in para 186 that it was for applicants to adduce before the returning state evidence “capable of demonstrating that there are substantial grounds for believing” that, if removed, they would be exposed to a real risk of subjection to treatment contrary to article 3;

(b)
in para 187 that, where such evidence was adduced in support of an application under article 3, it was for the returning state to “dispel any doubts raised by it”; to subject the alleged risk to close scrutiny; and to address reports of reputable organisations about treatment in the receiving state;

(c)
in para 189 that the returning state had to “verify on a case-by-case basis” whether the care generally available in the receiving state was in practice sufficient to prevent the applicant’s exposure to treatment contrary to article 3;

(d)
in para 190 that the returning state also had to consider the accessibility of the treatment to the particular applicant, including by reference to its cost if any, to the existence of a family network and to its geographical location; and

(e)
in para 191 that if, following examination of the relevant information, serious doubts continued to surround the impact of removal, the returning state had to obtain an individual assurance from the receiving state that appropriate treatment would be available and accessible to the applicant.

These procedural obligations on returning states, at first sight very onerous, will require study in paras 32 and 33 below.

24.
It was the failure of Belgium to discharge the suggested procedural obligations which precipitated the Grand Chamber’s conclusion in the Paposhvili case that deportation of the applicant to Georgia would have violated his rights under article 3. It seems from para 197 that it treated the doctor’s evidence as “capable of demonstrating that there [were] substantial grounds for believing” that deportation would expose him to a real risk of treatment contrary to article 3. Belgium’s procedural obligations were therefore engaged but not discharged: see para 205.

25.
The sixth is the decision of the Fourth Section of the ECtHR in Savran v Denmark[2019] ECHR 651, given as recently as 1 October 2019. The applicant was a Turkish citizen who, in 1991 when aged six, had come with his family to live in Denmark and who had remained living there. In 2001 he was convicted of robbery and in 2008 he was convicted of acting with others in an assault which had led to the victim's death. It seems that, by the time of his conviction (in fact reconviction) for the latter offence, he had been diagnosed with paranoid schizophrenia and so he was sentenced to committal to psychiatric care, to be followed by expulsion to Turkey. In 2014 a City Court in Denmark varied the sentence so as to permit the applicant to receive his psychiatric treatment as an outpatient. But the main issue before that court was whether the order for his expulsion should be revoked. In this regard the applicant relied not on his Convention rights but on a domestic statute which required its revocation if his state of health made expulsion of him conclusively inappropriate. The City Court revoked the order but the High Court reversed its decision, whereupon he applied to the ECtHR by reference to his rights under article 8 and in particular under article 3.

26.
In the Savran case the revocation proceedings in Denmark had been concluded prior to delivery by the Grand Chamber of its judgment in the Paposhvili case. But, as the Grand Chamber acknowledged, the Danish courts had considered in some detail the availability and accessibility of appropriate treatment for the applicant in Turkey, as later mandated for the purposes of article 3 by the judgment in the Paposhvili case. By that stage treatment of the applicant in Denmark took the form of the daily ingestion of Clozapine, which required monitoring in particular with blood tests, and of the fortnightly injection of Risperidone. There was evidence that both drugs were available in Turkey and could be supplied free of charge if appropriate. But his treating psychiatrist had also suggested to the Danish courts that other elements of the necessary treatment package were the presence of a regular contact person and a scheme for follow-up and for his overall supervision, without which he would relapse and become dangerous; and, in deciding that on the present state of the evidence his removal to Turkey would violate his rights under article 3, the majority in the Fourth Section held in paras 63 to 65 that, crucially, there had been no evidence before the Danish courts about the accessibility of those elements. Of the seven judges in the ECtHR, three wrote a dissenting Opinion in which in para 9 they accused the majority of pushing the door into article 3 wide open in circumstances in which the Grand Chamber in the Paposhvili case had opened it only slightly; and in which in paras 11 to 14 they alleged that, had it applied what the minority described as "the new criterion" identified in para 183 of the judgment in the Paposhvili case by asking whether there was a real risk of the applicant's exposure to a serious, rapid and irreversible decline in his health resulting in intense suffering, the majority could not have held that his rights under article 3 would be violated. In January 2020 the Grand Chamber accepted a request by Denmark for referral to it of the Savran case; and we are told that the UK has recently applied for leave to intervene in the proceedings. This court has not been invited to postpone delivery of its judgment until after the decision of the Grand Chamber in the Savran case; and it means no disrespect to the Grand Chamber by not postponing it. The Grand Chamber's decision cannot be imminent; and, so this court is told, the determination of other urgent appeals to the tribunals awaits its judgment on this appeal.

Analysis

27.
We need to analyse the effect of the decision in the Paposhvili case and, first, to survey the analysis of its effect conducted by the Court of Appeal. It was that court's view, at para 39, that the decision

reflected only a “very modest” extension of the protection against return given by article 3 in cases of ill-health. The Court of Appeal fastened in para 39(iv) upon the Grand Chamber’s questionable choice of language that the previous approach to such cases needed only to be “clarified”. And it buttressed its restrictive view of the effect of the decision by claiming in para 39(ii) that the Grand Chamber had noted that there had been no violation of article 3 in the N case and in para 40 that the Grand Chamber had “plainly regarded that case as rightly decided”. But the careful reader of paras 178 to 183 of the judgment in the Paposhvili case may find it hard to agree with the Court of Appeal in this respect. Of course the Grand Chamber noted that it had been held in the N case there had been no violation of article 3; but there is no express agreement on its part with that conclusion and, subject to the precise meaning of the new criterion in para 183 of the judgment (to which we should now turn), its application to the facts of the N case would suggest a violation.

28.
The Court of Appeal interpreted the new criterion in para 183 of the judgment in the Paposhvili case, at para 38 as follows:

“This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (ie to the article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (ie likely ‘rapid’ experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state.”

29.
The criticism of the above passage made by the appellant and by the AIRE Centre largely relates to the second sentence. In relation, however, to the first sentence, they suggest that, irrespective of the precise meaning, in context, of “a significant reduction in life expectancy” in para 183 (as to which see para 31 below), the paraphrase of “death within a short time” favoured by the Court of Appeal may not be entirely accurate. In relation to the second sentence, their criticism is directed to the words “the imminence (ie likely ‘rapid’ experience) of … death in the receiving state” attributable to the non-availability of treatment. They point out that the Grand Chamber was addressing exposure “to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy” (italics supplied); and they contend that the Court of Appeal has misinterpreted those words so as to refer to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or in a significant reduction in life expectancy. The Secretary of State, for her part, rejects their criticism as narrow and syntactical, apt perhaps to the construction of a statute but inapt to the present context in which the meaning of para 183 should be informed by “case law and realism”. Her reference to case law turns out to be an indorsement of the questionable conclusion of the Court of Appeal that in the Paposhvili case the Grand Chamber approved its decision in the N case. What remains is her reference, rather undeveloped, to realism.

30.
There is, so I am driven to conclude, validity in the criticism of the Court of Appeal’s interpretation of the new criterion. In its first sentence the reference by the Grand Chamber to “a significant reduction in life expectancy” is interpreted as “death within a short time”. But then, in the second sentence, the interpretation develops into the “imminence … of … death”; and, as is correctly pointed out, this is achieved by attributing the words “rapid … decline” to life expectancy when, as written, they apply

only to “intense suffering”. The result is that in two sentences a significant reduction in life expectancy has become translated as the imminence of death. It is too much of a leap.

31.
It remains, however, to consider what the Grand Chamber did mean by its reference to a “significant” reduction in life expectancy in para 183 of its judgment in the Paposhvili case. Like the skin of a chameleon, the adjective takes a different colour so as to suit a different context. Here the general context is inhuman treatment; and the particular context is that the alternative to “a significant reduction in life expectancy” is “a serious, rapid and irreversible decline in … health resulting in intense suffering”. From these contexts the adjective takes its colour. The word “significant” often means something less than the word “substantial”. In context, however, it must in my view mean substantial. Indeed, were a reduction in life expectancy to be less than substantial, it would not attain the minimum level of severity which article 3 requires. Surely the Court of Appeal was correct to suggest, albeit in words too extreme, that a reduction in life expectancy to death in the near future is more likely to be significant than any other reduction. But even a reduction to death in the near future might be significant for one person but not for another. Take a person aged 74, with an expectancy of life normal for that age. Were that person’s expectancy be reduced to, say, two years, the reduction might well - in this context - not be significant. But compare that person with one aged 24 with an expectancy of life normal for that age. Were his or her expectancy to be reduced to two years, the reduction might well be significant.

32.
The Grand Chamber’s pronouncements in the Paposhvili case about the procedural requirements of article 3, summarised in para 23 above, can on no view be regarded as mere clarification of what the court had previously said; and we may expect that, when it gives judgment in the Savran case, the Grand Chamber will shed light on the extent of the requirements. Yet observations on them may even now be made with reasonable confidence. The basic principle is that, if you allege a breach of your rights, it is for you to establish it. But “Convention proceedings do not in all cases lend themselves to a rigorous application of [that] principle …”: DH v Czech Republic(2008) 47 EHRR 3, para 179. It is clear that, in application to claims under article 3 to resist return by reference to ill-health, the Grand Chamber has indeed modified that principle. The threshold, set out in para 23(a) above, is for the applicant to adduce evidence “capable of demonstrating that there are substantial grounds for believing” that article 3 would be violated. It may make formidable intellectual demands on decision-makers who conclude that the evidence does not establish “substantial grounds” to have to proceed to consider whether nevertheless it is “capable of demonstrating” them. But, irrespective of the perhaps unnecessary complexity of the test, let no one imagine that it represents an undemanding threshold for an applicant to cross. For the requisite capacity of the evidence adduced by the applicant is to demonstrate “substantial” grounds for believing that it is a “very exceptional” case because of a “real” risk of subjection to “inhuman” treatment. All three parties accept that Sales LJ was correct, in para 16, to describe the threshold as an obligation on an applicant to raise a “prima facie case” of potential infringement of article 3. This means a case which, if not challenged or countered, would establish the infringement: see para 112 of a useful analysis in the Determination of the President of the Upper Tribunal and two of its senior judges in AXB v Secretary of State for the Home Department[2019] UKUT 00397 (IAC). Indeed, as the tribunal proceeded to explain in para 123, the arrangements in the UK are such that the decisions whether the applicant has adduced evidence to the requisite standard and, if so, whether it has been successfully countered fall to be taken initially by the Secretary of State and, in the event of an appeal, again by the First-tier Tribunal.

33.
In the event that the applicant presents evidence to the standard addressed above, the returning state can seek to challenge or counter it in the manner helpfully outlined in the judgment in the Paposhvili case at paras 187 to 191 and summarised at para 23(b) to (e) above. The premise behind the guidance, surely reasonable, is that, while it is for the applicant to adduce evidence about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to access it, the returning state is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state. What will most surprise the first-time reader of the Grand Chamber's judgment is the reference in para 187 to the suggested obligation on the returning state to dispel "any" doubts raised by the applicant's evidence. But, when the reader reaches para 191 and notes the reference, in precisely the same context, to "serious doubts", he will realise that "any" doubts in para 187 means any serious doubts. For proof, or in this case disproof, beyond all doubt is a concept rightly unknown to the Convention.

34.
This court is not actively invited to decline to adopt the exposition of the effect of article 3 in relation to claims to resist return by reference to ill-health which the Grand Chamber conducted in the Paposhvili case. Although the Secretary of State commends the Court of Appeal's unduly narrow interpretation of the Grand Chamber's exposition, she makes no active submission that, in the event of a wider interpretation, we should decline to adopt it. Our refusal to follow a decision of the ECtHR, particularly of its Grand Chamber, is no longer regarded as, in effect, always inappropriate. But it remains, for well-rehearsed reasons, inappropriate save in highly unusual circumstances such as were considered in R (Hallam) and R (Nealon) v Secretary of State for Justice (JUSTICE intervening)[2019] UKSC 2, [2020] AC 279. In any event, however, there is no question of our refusing to follow the decision in the Paposhvili case. For it was 15 years ago, in the N case cited at para 2 above, that the House of Lords expressed concern that the restriction of article 3 to early death only when in prospect in the returning state appeared illogical: see para 17 above. In the light of the decision in the Paposhvili case, it is from the decision of the House of Lords in the N case that we should today depart.

Disposal

35.
As indicated above, the Secretary of State, the First-tier Tribunal and the Upper Tribunal each specifically noted that the appellant was not making a claim under article 3. In the light of the decision of the House of Lords in the N case, no such claim could have prevailed, as, in passing, the Secretary of State and the First-tier Tribunal each observed.

36.
By the time of the hearing in the Court of Appeal, however, the decision in the Paposhvili case had raised the prospect that we in this court might depart from the decision of the House of Lords in the N case. So the appellant began to express the wish to be allowed to cast his claim under article 3 instead of under article 8. He accepted, however, that such a claim could not succeed unless, on further appeal, he could persuade this court to depart from the decision in the N case. For that reason he did not, with whatever degree of difficulty at an appellate level, attempt to adduce before the Court of Appeal evidence in support of his proposed new claim under article 3. This, however, did not deter the Secretary of State from contending before the Court of Appeal, nor did it deter that court from accepting, that, even by reference to the decision in the Paposhvili case, the appellant would have no claim under article 3. For, from the evidence submitted by the appellant to the First-tier Tribunal in

support of his claim under article 8, the Secretary of State extracted the two medical reports summarised in paras 8 and 11 above; and she contended that they failed to cross the threshold required to be crossed by applicants pursuant to para 186 of the decision in the Paposhvili case, as set out in para 23(a) above. In the light of its erroneous opinion that the decision in the Paposhvili case required evidence of a real risk that either intense suffering or death would be imminent in the receiving state, it was not difficult for the Court of Appeal to conclude, in para 44, that the two medical reports were insufficient to cross that threshold.

37.
Apart from the fact that the Court of Appeal's conclusion about the insufficiency of the reports was therefore, with respect, flawed, it is inappropriate to extract the medical reports from the other evidence submitted in furtherance of the claim under article 8 and to ask whether they cross the threshold now required of an applicant under article 3 pursuant to the decision in the Paposhvili case. The reports did not address that requirement, which did not exist when they were written. Indeed they were both written more than five years ago. So in my view this court should not address the argument presented to it by the appellant, and strongly disputed by the Secretary of State, namely that, upon application of this court's wider interpretation of the Grand Chamber's decision, the reports suffice to cross the requisite threshold. The proper course is to allow the appeal and to remit the appellant's proposed claim under article 3 to be heard, on up-to-date evidence properly directed to the Grand Chamber's substantive and procedural requirements, by the Upper Tribunal and, if practicable, by a panel including its President.