

# A POSITIVE PARTNERSHIP

## THE HIV IMMIGRATION PROJECT 2003–2009

A joint project by Positively Women, Asylum Aid and  
International Community of Women Living with HIV/AIDS

**POSITIVELY WOMEN**

living with HIV ... changing lives

HIV+



International Community of  
Women living with HIV/AIDS (ICW)



**Asylum Aid**  
Protection from Persecution

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## Acknowledgements

This report was written by Shirin Sethna and edited by Debora Singer and Nick Oakeshott, all of Asylum Aid, with additional contributions from Sarah Fraser and Beatrice Osoro of Positively Women and Fiona Pettitt and Carmen Terrades of International Community of Women living with HIV/AIDS.

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## Executive summary

The HIV Immigration Project was a partnership of three organisations which ran from 2003 to 2009 to meet the needs of women from abroad who were living with HIV in the UK. Positively Women, Asylum Aid and, during the second phase, the International Community of Women living with HIV/AIDS provided a holistic response to women's needs with a particular emphasis on legal advice in relation to asylum and immigration law. Throughout most of the course of the Project the case of N was going through the courts. The case examined the circumstances in which the removal of a person living with HIV could constitute a breach of their human rights because appropriate treatment would not be available or accessible in their country of origin. The numerous court decisions in this case had a major effect on the potential for the Project's clients to obtain protection from removal to their country of origin. They resulted in the emergence of a clear protection gap for women living with HIV which the Project attempted to resolve.

### Case Study: K

*K came to the UK from Zimbabwe on a visitor's visa to visit her sister. Within three months K was diagnosed HIV positive with AIDS defining illness. By the time K's health had stabilised on combination therapy, her visa had expired and her sister had asked her to leave.*

*K went to Positively Women who provided advice and signposting for her housing and financial needs. K's application for asylum had been refused and after having all her appeals dismissed, her solicitor decided to close her file. Through Positively Women K was referred to Asylum Aid's one-to-one advice session. K asked how to find information about returning to Zimbabwe. K then had one-to-one sessions with a member of ICW to identify services and treatment that might be available in Zimbabwe. Through ICW K was connected with another HIV positive woman to receive her on arrival on her return to Zimbabwe.*

## **1. The partners**

### **Positively Women**

Positively Women is the only national charity for women and families living with HIV in the UK. The organisation provides practical and emotional support, enables women to make informed decisions about health and personal choices, and challenges stigma and discrimination. Established 21 years ago by two women living with HIV determined to address the lack of services available for women, today Positively Women remains strongly committed to the ethos of peer support and empowerment. Services include guidance, advice and advocacy, outreach work in hospitals, clinics and prisons, information services, support to children and families, skills building programmes, as well as campaigning activities.

### **Asylum Aid**

By combining expert legal advice work with campaigning activities, Asylum Aid responds to asylum-seekers' immediate legal needs and addresses the underlying causes of the difficulties they encounter during the asylum process. Asylum Aid was established in 1990 and set up the Refugee Women's Resource Project (RWRP) at Asylum Aid in 2000 in recognition of the fact that women who have fled their homes in search of safety have particular problems and their needs and circumstances are not adequately addressed by the UK asylum system. The RWRP provides a unique blend of legal casework, information, research, and policy work and campaigning for women seeking asylum.

### **The International Community of Women living with HIV/AIDS**

The International Community of Women Living with HIV/AIDS (ICW) is the only international network run for and by women living with HIV. ICW was founded in 1992 by 50 women living with HIV to address the desperate lack of support, information and services available to women living with HIV worldwide and the need for HIV positive women to have influence and input on policy development. ICW, which currently has a membership of 8000 women in 138 countries, continues to address these issues through increasing representation and advocacy by women living with HIV, facilitating research led by and for women living with HIV, networking and shared communication.

## 2. Why set up this Project?

The HIV Immigration Project (the Project) was set up because of a specific gap identified relating to women living with HIV and the provision of advice about asylum, immigration, nationality and human rights law.

Positively Women had provided an immigration law advice service in conjunction with Terrence Higgins Trust from 1997 until funding ceased in 1999. Positively Women identified that there was still a need for this type of assistance as their clients came from a range of countries and 61% of them had unresolved immigration issues.<sup>1</sup>

The Project set out to fill this gap in provision of HIV sensitive immigration advice. Initially a partnership involving two organisations, Positively Women and Asylum Aid, the Project aimed to share the different skills and expertise of these organisations to provide a wide range of emotional, social, legal and practical support services for women living with HIV. The Project was funded by the Community Fund from 2003/6 which was renamed the Big Lottery and funded the second phase of the Project from 2006/9.

The Project created a post of HIV Immigration Project Caseworker at Positively Women to provide information, advice and advocacy on issues affecting HIV positive refugees and asylum seekers on an individual basis. These issues included health and social care services, housing, benefits, education and employment. Asylum Aid provided an outreach service offering individual legal advice on asylum, immigration and human rights law at Positively Women.

By early 2005 at the time of applying for the second phase of funding for the Project, the aims and objectives had altered, due to the unfavourable developments in N v Secretary of the State for the Home Department.<sup>2</sup> The Court of Appeal had made a restrictive judgment in that case in October 2003 and the case was awaiting consideration by the House of Lords.

Due to the concerns that many women living with HIV could soon face enforced removal and repatriation to countries where their health would deteriorate because of lack of access to appropriate treatment meaning they could die, a third partner was brought into the Project. This was the International Community of Women living with HIV/AIDS (ICW). It was anticipated that, as ICW has extensive global contacts, its members and regional staff would be able to advise women living with HIV about support networks in their countries of origin and about available medical treatment.<sup>3</sup>

The second phase of the Project thus built upon the initial HIV Immigration Project but now provided a more comprehensive service directed at women from abroad who were living with HIV in the UK, assisting those newly arrived

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<sup>1</sup> See Appendix A

<sup>2</sup> [2003] EWCA Civ 1369 See Appendix B

<sup>3</sup> See Appendix D

and those who were settled but still had no immigration status and those facing potential repatriation to their country of origin.

**Case Study: F**

*F fled Ghana as she did not wish to have to undergo the traditional practice of female genital mutilation (FGM). After she came to London she was diagnosed as HIV positive so she was referred to Positively Women for support.*

*Positively Women referred F to a one-to-one advice session with Asylum Aid. Here it was identified that F potentially had an asylum claim based, not on her HIV status, but solely on gender persecution. They undertook research which demonstrated that there was sufficient evidence to show that F would be at risk of FGM and therefore of serious harm or persecution if returned to Ghana and she could therefore apply for asylum. F was provided with legal representation by Asylum Aid.*

### 3. How did the Project work?

The joint approach of Asylum Aid's legal knowledge and expertise within the holistic framework provided by Positively Women gave women living with HIV the opportunity to obtain legal advice alongside peer support, ie support for women living with HIV by women living with HIV. The overall aims were to ensure that women had the personal stability they needed by regularising and resolving their immigration status and to improve their access to health protection and treatment as well as improving their mental well-being and confidence through emotional and practical support from their peers.

Trained caseworkers from Asylum Aid undertook one-to-one sessions providing individual, expert, HIV sensitive, legal advice and representation on asylum issues. They also facilitated group sessions providing legal information regarding the UK's immigration and asylum system, focusing on issues pertaining to women living with HIV. As well as group sessions for clients, there were also group sessions for staff and volunteers and individual sessions for the HIV Immigration Project Caseworker who were all then able to provide appropriate advice, support and referral to the clients.

During the six year period of the Project a major case was going through the courts which would hugely affect the chances of success of women whose asylum claims rested solely on their HIV status, namely N v Secretary of State for the Home Department. Prior to the Court of Appeal's decisions in N and the subsequent change in Home Office policy, the Home Office often gave limited leave to people living with HIV allowing them to remain in the UK to continue to receive life-prolonging treatment. After the Court of Appeal's restrictive approach was confirmed and strengthened by House of Lords and the European Court of Human Rights it became very unlikely that women living with HIV would be protected from removal on the basis of their need to stay in the UK to access life-prolonging treatment.

The one-to-one legal sessions provided by Asylum Aid gave women the opportunity to obtain an understanding of what their legal representatives had done and were doing, as well as providing referrals or signposting to other agencies where necessary. This could provide reassurance as, for example, many women were anxious that their legal representatives were "doing nothing", when in fact it might be that there was nothing that could be done until the final outcome of the N case was known. During the course of the Project Asylum Aid provided individual advice to 176 clients and provided direct representation for 16 women.

The second phase of the Project drew on ICW's membership, regional offices and links through its membership to positive women's networks at local and national level. Through these linkages ICW staff were able to establish the situation in women's countries of origin regarding medical treatment and discrimination. They offered one-to-one sessions with clients to discuss this information, and by putting clients in touch with local sources of support prior to their return, it was intended that women would feel less anxiety about this. Further, it was hoped that when women returned, they could utilise the

knowledge gained through their attendance at Positively Women in order to become involved in health and human rights advocacy efforts either through local networks or ICW.

A referral protocol was agreed between all three organisations but this was regularly updated as the caselaw changed. The HIV Immigration Project Caseworker benefitted from the training by Asylum Aid's caseworkers and had key responsibilities for the delivery of the Project. This involved coordination of group sessions, liaison between staff within and between organisations, advising her colleagues and clients and determining who would benefit from a referral to Asylum Aid. Clients could discuss their cases with the HIV Immigration Project Caseworker before and after their one-to-one legal advice session. This enabled more appropriate referrals. Also the clients were able to debrief and clarify issues after their advice session.

Due to the changes in caselaw, the nature of the advice and support offered by the outreach service changed gradually over time. During the second phase of the Project one-to-one sessions were gradually tapered out and replaced by group sessions.

Group sessions concerning the asylum or immigration process and updates on the relevant law operated to empower women through a better understanding of how the system worked and of what their position was within its framework. During the second phase of the Project there was more of an emphasis on providing peer support through these group sessions so that women felt less isolated at being told "bad news" in relation to the potential of any claim to remain on human rights grounds because of N. The group sessions allowed women to understand the asylum system and to recognise when delays or rejections in their cases were a general issue rather than a personal one. New group sessions by Positively Women on peer support/self-esteem and by ICW on their role for women returning to their countries of origin were set up in an attempt to counter the difficult legal situation and provide other options to the clients.

As the restrictive approach to these sorts of cases began to take effect, ICW's role in the Project increased and Asylum Aid's role became more limited.

### **Case Study: E**

*E faced being returned to Jamaica and was given very little time to prepare for her departure. Positively Women passed her contact details to ICW, who contacted an ICW member working at the Jamaican Network of People living with HIV (JN+). Through ICW, JN+ ascertained the support E would need on arrival in Jamaica and offered to meet E on her arrival at the airport with medication, if this was needed. Subsequently, E has contacted JN+ and received advice and support from them to assist with her living in Jamaica.*

## 4. The protection gap for women living with HIV

The 1951 Geneva Convention on Refugees sets out certain conditions under which a person who has a well-founded fear of persecution in their home country of origin may seek and be granted the protection of another State. Only a few of Positively Women's clients were seeking refuge from such persecution.

The Human Rights Act 1998 came into force in the United Kingdom in October 2000. As a consequence, UK domestic law provided that where a person did not qualify as a refugee under the Geneva Convention, they might still be provided with protection against removal through a grant of a limited period of stay if their removal would be prohibited because it would breach their human rights guaranteed by Article 3 of the European Convention on Human Rights (ECHR), the right not to be subjected to torture or inhuman or degrading treatment or punishment.

The Project was strongly influenced by the case of N v Secretary of State for the Home Department which was argued under this human rights legislation. The passage of this case through the appeal courts in the United Kingdom to the European Court of Human Rights in Strasbourg ran from 2001 to 2008 – in parallel with the life span of the Project.<sup>4</sup>

The main issue in N's case was whether or not it was a breach of Article 3 of the ECHR for a woman living with HIV to be removed to her country of origin even when to do so would mean she would die from a lack of availability of treatment or from a lack of access to treatment.

The House of Lords and subsequently the European Court of Human Rights concluded that the Convention did not encompass the right to social welfare for people who lacked the legal right to stay in a country. Therefore it was not a breach of her human rights for a woman living with HIV to be repatriated, even where the treatment she relied on to prevent the progression of her illness would not be available to her. The European Court of Human Rights added that this was not solely with regard to people living with HIV, but applicable to anyone who had ill health (such as cancer or kidney failure) and lacked the lawful right to remain in a Council of Europe member state.

Following the decision of the European Court in N's case in 2008, the vast majority of women living with HIV who did not have the right to remain in the UK could no longer rely on human rights law to ensure that the UK government would allow them to remain in this country in order to continue to receive treatment for their illness. This resulted in a major protection gap.

During the course of the Project, Asylum Aid identified a few cases that could avoid this protection gap. In the case of CA v Secretary of State for the Home

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<sup>4</sup> The case of N was heard on appeal at the Immigration Appeals Tribunal (now known as the Asylum & Immigration Tribunal) in 2001, at the Court of Appeal in 2003, in the House of Lords in 2007 and at the European Court of Human Rights in 2008

Department<sup>5</sup> the Court of Appeal held that removing a mother living with HIV to her country of origin, which would risk her watching her child contract a terminal illness due to having to mix formula milk with unclean water and then die, was capable of constituting the sort of inhuman treatment prohibited by Article 3 ECHR. This led the way to cases being successfully taken on focusing on women living with HIV who had a child with HIV as their return would result in the mother witnessing the child's death.

However, the protection gap means that the majority of women living with HIV now have no right to be protected from removal from the UK on that basis alone and may have to return to countries where the provision of life-prolonging treatments are less effective, not available or only available at great cost or when a woman's immune system falls below a certain level.

### **Case study: B**

*B came to the UK from Zambia on a student visa with her two daughters, who are now 15 and 13 years of age. When B was diagnosed as HIV positive eighteen months later she became very depressed and as a result gave up her studies. When her student visa expired, B could not renew it so she overstayed her visa.*

*B came to Positively Women and at the one-to-one legal advice session with Asylum Aid, she was given information about her legal status. She was grateful to know what her position was and about her future choices even though they were limited and it was not what she wanted to hear. She was also glad that she did not have to pay for legal advice.*

*B and her daughters live cramped in one room with no privacy and in fear of being found by Immigration Services and repatriated. B laments that she has skills but is not allowed to work. She regrets the way her life has turned out but says that going back home empty handed with an incurable disease is too much to bear. Her only prayer is for her children to have a better future.*

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<sup>5</sup> [2004]EWCA Civ 1165

## 5. What has been learned from the Project?

- The Project has identified a major protection gap in respect of women from abroad living with HIV in the UK who wish to remain for the purposes of securing access to treatment. The hope that the test case of *N* would result in broader human rights protection for women in this position proved over-optimistic. The chances of a woman living with HIV being able to remain in the UK on the basis of human rights law are limited except to the most exceptional of cases. Most applicants will have to now rely on the Secretary of State's discretion in considering the compassionate circumstances of their case.
- Through its holistic approach to providing services to women living with HIV the Project has demonstrated that its partnership is more than the sum of its parts. By increasing the skills of staff and raising awareness in all three organisations the Project has created a connection between three topics: the issues facing women living with HIV, asylum and human rights law and country information. This is demonstrated in the following ways:
  - Through the training from Asylum Aid caseworkers, Positively Women's staff learnt to identify clients who might benefit from legal advice and refer them appropriately. This meant significant cases were less likely to be missed and that other clients did not waste their time having one-to-one sessions when there was nothing that could be done in their case (although they could still access advice through group sessions).
  - Asylum Aid's caseworkers have developed their knowledge of asylum and human rights law with regard to obtaining international protection for women living with HIV. They have demonstrated innovative practice in trying to close the protection gap as it emerged and will continue to progress this.
  - ICW can provide country information and expert advice with regard to local availability of HIV treatment and support networks, human rights issues and levels of discrimination. This is all useful in providing evidence to support the asylum/immigration cases of women living with HIV. The Project has increased ICW's exposure to legal representatives undertaking asylum and immigration work. Asylum Aid will continue to ensure that such information is disseminated through its Refugee Legal Group.<sup>6</sup>

### Case study: *O*

*O* arrived in the UK from Nigeria while she was pregnant. When she gave birth to a boy, *W*, they were both diagnosed to be HIV positive. Because of *O*'s HIV status, *W*'s

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<sup>6</sup> an electronic discussion group for lawyers practising in refugee law

*brain and nerves were affected during the pregnancy and this severely shortened his life expectancy.*

*Asylum Aid represented O. They instructed an expert in HIV to prepare a detailed report on the prognosis and developmental needs of W and invited the expert to give evidence at the appeal hearing. The Asylum and Immigration Tribunal acknowledged that W's needs were very much dependent on his having access to drugs. They recognised that it would breach article 3 of the ECHR to make a mother watch her child die a certain horrible death. They distinguished this case from the case of N by focusing their concern on the child, W.*

## 6. What happens next?

Changes in caselaw which make it much harder for women living with HIV to be protected by human rights law from removal to their country of origin resulted in the decision not to continue the Project after the second phase is completed and funding expires at the end of March 2009.

The partnership between Positively Women, Asylum Aid and the International Community of Women living with HIV/AIDS has been a very positive one. Through this, women living with HIV have had access to a range of advice, support and information provided in a holistic and sensitive way.

The benefits of the partnership will continue in two ways. Firstly, the new links forged between the organisations and the knowledge gained will remain in place after the end of the Project. Secondly, the organisations will continue to identify ways in which the caselaw might be used to benefit women living with HIV.

### Maintaining links/sharing knowledge

The ending of the Project has meant that Asylum Aid will no longer provide an outreach service to women living with HIV in London. However, because of the training updates on law and practice supplied by Asylum Aid in the group sessions to Positively Women staff and volunteers, the latter are now in a position to recognise when a client has asylum/immigration issues that require her to be signposted for further advice.

Positively Women will continue to refer clients to Asylum Aid where appropriate. As Asylum Aid provides an Advice Line, Positively Women's clients and staff will still be able to obtain initial advice about immigration and asylum directly. The Advice Line provides a gateway to referrals through which Asylum Aid can take on cases and represent clients.

Positively Women will identify another agency that is able to provide legal advice and representation with regard to immigration advice rather than asylum advice (for example for those wanting to extend student visas or make claims in relation to their family life) as this is an area identified as requiring ongoing assistance.

ICW will continue to provide information and support to women living with HIV who are considering returning to their country of origin. Because of the support provided by Positively Women and ICW it is hoped that women who do return will feel empowered to maintain their own self-esteem and possibly to support other women living with HIV.

Country information and contacts provided by ICW will benefit legal representatives representing women living with HIV. ICW is a partner organisation in the People Living with HIV Stigma Index which will be a useful evidence-based resource for legal representatives both when challenging discrimination against women living with HIV and in asserting that, in certain

cases, the degree of discrimination is of a severity that constitutes persecution or serious harm.

### Using caselaw

Towards the close of the Project, new avenues for resolving the immigration status of women living with HIV were identified by Asylum Aid. They included:

1. Women whose children were HIV positive;
2. Women who are HIV positive and where there is no treatment for the woman on return and the HIV negative child could be left orphaned with no one to look after them;
3. Women who were granted Exceptional Leave to Remain (ELR) or Discretionary Leave (DL) or Humanitarian Protection (HP) on the grounds of their health prior to the decision in N particularly if they have been in the UK for some time and have been receiving treatment;
4. Clients from Zimbabwe in particular but possibly other countries who would be discriminated against in accessing treatment because of their actual or imputed political opinion (for example, ICW research has discovered several instances of HIV positive young women in Namibia being subject to forcible sterilisation);
5. Under Immigration Rule 395C all women living with HIV who do not have leave to enter or remain will be able to make representations citing their compassionate circumstances before they are removed and these will have to be considered before their removal.

Whilst these examples provide new possibilities for women living with HIV, they are limited to those in certain circumstances and will depend on the facts of each particular case. Furthermore, recent developments in caselaw on Article 8 of the European Convention on Human Rights provide greater protection against removal for women who have established families in the UK. Applications on these lines will depend upon the facts of the particular case.<sup>7</sup> Asylum Aid will continue to monitor ways in which changes in caselaw might benefit women living with HIV.

With the knowledge base developed between Positively Women, Asylum Aid and ICW, it is anticipated that additional ways to close the protection gap may be identified. However, until then, women with HIV will continue to live without formal immigration status in the UK with all the ensuing difficulties this entails.

### Case study: S

*S came to the UK from Kenya and she and her young son are HIV positive. Her initial application for leave to remain in the United Kingdom was refused but she had a right of appeal. Three days before the hearing her solicitor decided to drop her case saying that S's case had no chance of winning.*

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<sup>7</sup> See Appendix C

*Because S had been volunteering at Positively Women she knew about the Project and quickly approached the HIV Immigration Project Caseworker who referred her to Asylum Aid. Asylum Aid represented S at an adjourned hearing and made an application, not on the grounds of her ill-health, but with regard to that of her child.*

*S's young son has a rare protein deficiency. The technology to monitor his HIV status and thus administer his treatment regime only exists in more technologically advanced countries. Asylum Aid obtained an expert medical report to confirm that this technology was not available in Kenya. On appeal, the court decided that the case was so exceptional as to fall within the remit of rare cases in which a person could claim to remain in the UK for medical treatment in order to avert a breach of their rights under Article 3 ECHR.*

*S said, "My son and I won our case only because Asylum Aid took it on and I am so happy I got the chance through Positively Women."*

## Appendix A

### Countries of origin of clients attending for one-to-one legal advice

Burundi  
Cameroon  
Congo-Brazzaville  
Cote d'Ivoire  
DRC  
Ethiopia  
EU national  
Ghana  
Guinea  
Guyana  
Jamaica  
Kenya  
Liberia  
Malawi  
Nicaragua  
Nigeria  
Russia  
Rwanda  
Sierra Leone  
South Africa  
Sudan  
Swaziland  
Tanzania  
Togo  
Uganda  
Zambia  
Zimbabwe

The majority of clients were from Africa with the highest numbers being from Uganda and Zimbabwe.

## Appendix B

### The law relating to women living with HIV

The first key case relating to people with HIV was that of D v UK.<sup>8</sup> This case concerned a man who was HIV positive and had developed AIDS. He had reached the end of a prison sentence, and was challenging deportation to St Kitts from the United Kingdom. His lawyers appealed against his removal and the case went from the English court system to the European Court of Human Rights in Strasbourg. There was, at that time, no medical treatment available for D in St Kitts. Additionally, none of his family would assist him. In the light of the fact that his condition was regarded as terminal, it was held that the act of removing him from the UK would be a breach of his rights under Article 3 of the European Convention on Human Rights.

Following this decision the Secretary of State for the Home Department (SSHD) followed a policy that made it possible that the majority of women seeking advice about immigration matters at Positively Women might expect a favourable outcome in an application for leave to remain.

In the meantime, however, cases from other European States began to fail at the Strasbourg Court. This was because once medical therapies for the treatment of HIV advanced such that the disease was no longer regarded as immediately fatal, the European Court decided that there would be no breach of Article 3 for a person who was not dying if they were repatriated. Despite these decisions, the UK government took no action to amend its policy on people living with HIV until 2001.

In that year the SSHD refused to grant leave to remain on the grounds of her HIV positive status to N, a woman from Uganda, whose asylum application had failed.<sup>9</sup> N had the decision refusing her leave to remain on Article 3 grounds overturned on appeal and SSHD in turn appealed successfully against the decision to the Immigration Appeal Tribunal. SSHD's appeal succeeded on the grounds that the factual situation in 2003 was completely different to that which had applied with regard to D in 1997.

The Tribunal found that when the decision was reached in D's case there were far fewer treatments for alleviating the symptoms of HIV and slowing or preventing it proceeding to the fatal consequences of AIDS. In fact, D had been regarded as nearing the end of a terminal illness. Furthermore, no other care and support would have been available to D from family members in St Kitts.

At the time N's case fell to be decided, medication in the form of anti-retroviral therapies (ARV's) had become available and were being prescribed in many Western countries – although many in Africa living with HIV either could not afford them or did not have access to them. It was held that N had family

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<sup>8</sup> D v UK 30240/96 [1997] ECHR 25 (2 May 1997)

<sup>9</sup> [2003] EWCA Civ 1369

members who could assist her in Uganda (albeit N maintained that they would not be able to, or would not wish to, assist her) and the government of that country was regarded as being ahead of many other African countries with regard to policies and schemes implemented in order to assist those living with HIV. Due to the therapies available to her in the UK, N was no longer suffering from AIDS-related illnesses and her CD4 count (measuring the strength of her immune system) had risen considerably. In this respect her situation was very different from that of D, who had been close to death at the time of the hearing in his case.

As such the Tribunal found that N could be returned to Uganda as the therapy she required was available there, albeit at a price. It decided that Article 3 of the European Convention on Human Rights could not be relied upon to prevent her removal, as it did not exist in order to permit people to opt for what was termed “health tourism” and that the UK had a right not to be expected to provide people who were not its citizens and did not have permission to remain in the UK with NHS care. Even if, in reality, N would die as she could either not afford or access treatment, it was sufficient that the treatment existed in Uganda.

N's lawyers appealed against the decision. In 2003, the Court of Appeal delivered its judgment. It found that only where there were “exceptional circumstances” would it be the case that to remove a person with HIV to a place where treatment did not exist or where there were other specific circumstances, would there be a breach of Article 3. In other words, unless N was terminally ill, as D had been, she could be removed from the UK, whether or not she could obtain treatment in Uganda.

Again, N's lawyers appealed, this time to the House of Lords, the highest court in the United Kingdom. The Lords considered previous decisions of the European Court of Human Rights and concluded that while Article 3 could apply in what they termed the receiving state (that is the HIV positive person's country of origin), in that a person could not be returned where to do so would expose them to a risk of torture, inhuman or degrading treatment or punishment, a distinction could be made in a case such as N's. They referred to these types of cases as “medical” cases.

In “medical” cases, the receiving state was not actively setting out to cause a type of serious harm. Instead, it was the absence of either treatment or access to treatment (because of, for example, cost or geographical proximity) that was the problem. Thus there was no breach of Article 3 by the UK in expelling such a person.

While the receiving state might not live up to the standards demanded by Article 3 ECHR that was irrelevant as Uganda was not a party to the European Convention on Human Rights, and further, was not intending to proceed upon a course of action that would cause harm to N. A lack of resources on the part of a receiving State did not, of itself, cause a breach of Article 3.

While the House of Lords was prepared to concede that there may be exceptions to that rule it noted that these would have to cross a high threshold, that is, with facts similar to those in D's case.

In reaching their conclusions, the Lords considered previous case law from the European Court of Human Rights. They concluded that the Court had made an exception in D's case because he was dying. It was notable that since D, no other HIV cases had succeeded at the Strasbourg Court. In fact, most had been declared inadmissible and had not proceeded to a full hearing on precisely those grounds. Where the person concerned was receiving ARV therapies, they were so improved in their state of health that they were deemed not to be at the same level of risk of harm as D and no breach of Article 3 would occur were they to be removed.

As such, there were strong precedents for the House of Lords in denying N the right to remain in the UK, even though the judges conceded that removal would probably result in her death.

They concluded that in N's case the Ugandan government was not trying to cause her serious harm. It was attempting to address the massive problem its population faced from HIV. If it had been the case that N, perhaps for political reasons, was to be denied treatment or access to treatment that would be a different matter. In such an instance, Article 3 – and also the Refugee Convention might apply.

Once again, N's lawyers lodged an appeal, this time to the European Court of Human Rights in Strasbourg – the final arbiter on matters relating to the ECHR. The Strasbourg Court considered the application and produced their decision in May 2008.

The Strasbourg judgment also considered precedents and agreed with the House of Lords. It found that there were two key issues: one was the absolute nature of Article 3 and the other was the right of States to control the entry and right to remain in their territories of aliens. The basic principles that arose from a consideration of case law were as follows. First, people who are not lawfully present have no right to avail themselves of Council of Europe member state systems of welfare support – including health care.

Second, the fact that the person's life expectancy would be "significantly reduced" by expulsion would only engage Article 3 in "very exceptional circumstances" – that is where death was imminent and the person concerned "could not be guaranteed any nursing or medical care in [her] country of origin and had no family there willing or able to care for [her] or provide [her] with even a basic level of food, shelter or social support".<sup>10</sup>

Third, the decision did not preclude there being "other very exceptional cases where the humanitarian considerations are equally compelling", although the high threshold set in D v UK would remain.

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<sup>10</sup> N. v. the United Kingdom, Application no. 26565/05, Paragraph 42

Fourth, Article 3 does not place an obligation upon Contracting States “to alleviate such disparities [as may exist between healthcare in an expelling and a receiving State] through the provision of free and unlimited healthcare to all aliens without a right to stay within its jurisdiction”<sup>11</sup>.

Fifth, the judgment does not solely apply with regard to people with HIV or AIDS, but with regard to the “expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant’s country of origin or which may be available only at a substantial cost”.<sup>12</sup>

Those then are the principles set out by the Strasbourg Court. With regard to the second finding, as to other circumstances in which expulsion should not be sought, the UK courts have found that where a child is concerned, the threshold for Article 3 must be a lower one than would be applied in the case of an adult. Thus, in the unreported case of Q,<sup>13</sup> the Tribunal held that a woman who was HIV positive should not be returned to her country of origin as she would die and witnessing her suffering and eventual demise would be a breach of her young child’s Article 3 rights. As such, it may be that where an HIV positive woman has a child who is either very young or who has serious medical or other problems (not necessarily HIV or HIV related), then leave to remain may be obtained.

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<sup>11</sup> Ibid., Paragraph 44

<sup>12</sup> Ibid., Paragraph 44

<sup>13</sup> For Case study of O see chapter 5

## Appendix C

### New legal avenues

One aspect of the story of this Project shows that women living with HIV are going to find it increasingly difficult to resolve their lack of immigration status through a combination of the reliance on European human rights law and their vulnerable health status. A protection gap has been identified, which is unlikely to be closed through progressive caselaw.

Consequently, immigration lawyers will have to look to other legal avenues to secure their client's status in the UK. This appendix sets out new developments under Article 8, paragraph 395C of the Immigration Rules and other immigration solutions that may exist for women living with HIV.

It seems likely that applications to extend pre-existing leave, particularly where that leave has been granted on the basis of the applicant's health status, may prove to be successful. Further, applications under the Immigration Rules themselves may be possible for women living with HIV who are able to meet the specified criteria. Recent caselaw has made it clear that a provision of the Immigration Rules, paragraph 395C, which requires the Secretary of State to consider the compassionate circumstances of any individual before they are removed may provide a different route to an immigration solution for applicants who would otherwise face removal. Importantly the judgment recognises that this provision may require the Secretary of State not to remove, even if that removal would not breach the applicant's human rights<sup>14</sup>.

Furthermore, recent caselaw of the House of Lords and the Court of Appeal have established that the Secretary of State's approach to applications to remain in the UK on the basis of family life established here were too restrictive. Women living with HIV who have established a family life in the UK ought to seek legal advice on the issue, even if their cases had failed or they had been advised that they did not have sufficient merit before June 2008.

The key findings of the cases are:

1. The Home Office policy that expected undocumented migrants who had established a family life in the UK to return to their country to make an application for entry clearance from abroad to return was not compatible with Article 8 ECHR, particularly where children were involved<sup>15</sup>;

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<sup>14</sup> TE (Eritrea) [2009] EWCA Civ 174

<sup>15</sup> Chikwamba v Secretary of State for the Home Department [2008] UKHL 40

2. The rights of the whole family, including children, needed to be considered in assessing whether a decision to remove an applicant was compatible with their right to respect for family life<sup>16</sup>;
3. Delays in Home Office decision making can be relevant to assessing whether a decision to remove an applicant, who has established family life in the UK, is proportionate<sup>17</sup>;
4. In considering whether it was appropriate for the spouse of a migrant to return to the migrant's country of origin to enjoy family life there, the test was not whether there were insurmountable obstacles in the way of family life being enjoyed there, rather whether it was reasonable to expect the couple to leave the UK.<sup>18</sup>

These developments reveal that if women living with HIV who fear removal to their country of origin are unable to access expert and well-informed legal advice, they may not be able to find solutions to the immigration problems that they face.

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<sup>16</sup> *Beoku-Betts v SSHD* [2008] UKHL 39

<sup>17</sup> *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41

<sup>18</sup> *VW v SSHD and AB v SSHD* [2009] EWCA Civ 5

## Appendix D

### Anti-Retro Viral (ARV) Therapies

There is no cure for HIV. However, HIV drugs (usually known as anti-retrovirals or ARV's) used in combination therapy (known as Highly Active Anti-retroviral Therapy or HAART) effectively reduce the amount of virus to such low levels that the immune system is able to recover. Women can then continue to lead long and fulfilling lives.

This is true for women, men and children and every country where there is access to treatment has seen dramatic increases in life expectancy.

Without effective treatment, for a woman living with HIV, every cough or cold could be a precursor to a more serious and life-threatening illness such as pneumonia and a weakened immune system lays the body more open to other diseases such as cancer.

ARV therapies are not perfect. Apart from the cost, they can cause side-effects which may be debilitating and require almost perfect adherence to treatment (that is, never missing a dose). If one combination fails, this limits future options for treatment because resistance to one drug often means that similar drugs in the same class are less likely to work.

In the UK there are over 20 drugs from five main groups of medication but this still only leads to three or perhaps four main combinations. If a woman fails to follow the strict regime required, her body will become resistant to those drugs. She may also have intolerable side-effects that limit her choices of treatment.

Some of the HIV drugs that are most widely used in developing countries are more difficult to tolerate. They are less effective and associated with more serious and difficult side effects. Just as importantly, most countries only offer one chance at therapy. In the UK, if a woman has developed resistance to the first combination, then second or third-line therapy will work. These newer drugs are not routinely available in developing countries.

In the UK, women living with HIV are carefully monitored both for side effects and, or, the continued effectiveness of treatment. The most routine test, called a viral load test, which will detect any early problems and limit the damage caused from drug resistance, is not widely available in developing countries where people continue treatment until resistance is much more serious.

These difficulties mean that unless a woman being returned to her country of origin is likely to have access to the same drugs and level of monitoring this will increase her risk of developing resistance. In many countries, drug supplies run out or are interrupted for days, weeks or months, and the resulting intermittent treatment usually leads to drug resistance. In that sense, the benefits from the ARV programme that she has received so far in the UK, are then lost forever.

In summary, the treatment problems raised include:

- access to the same medications and monitoring is unlikely;
- when treatment is available, it is likely to be with drugs that are less effective and more difficult to tolerate;
- routine viral load monitoring is less frequent or not available, meaning a failing treatment may continue to be used for many years;
- most countries only have one first-line treatment;
- where second-line treatment is available it is more difficult to access. No further options are available if this fails;
- interruption of drug availability leads to early resistance for many people and this is irreversible.

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