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Debunking the Deathbed Analysis: Exploring A New Approach to Article 3 Health Cases

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DEBUNKING THE DEATHBED ANALYSIS: EXPLORING A NEW APPROACH TO ARTICLE 3 HEALTH CASES

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ABSTRACT—This essay will explore Article 3 of the European Convention on Human Rights (ECHR) as it has been applied to deportation cases of persons in poor health, with the ultimate goal of answering the following question: Whether the deportation of a person to a place where she or he will not receive adequate health care should constitute a violation of ECHR Article 3. Further, this article will suggest how the European Court of Human Rights (ECtHR) and the national courts below them can better review such cases in order to provide more meaningful protection to those inflicted. In doing so, this essay specifically finds that (i) the ECtHR incorrectly applied Article 3 to cases of poor health and deportation in the past, (ii) the ECtHR still needs to further clarify an appropriate standard for these cases, (iii) the national courts, particularly in the United Kingdom, are incorrectly following old precedent, (iv) the ECtHR needs to explore all claims presented to it in these cases, including claims of Article 2 and 8 violations, and (v) the ECtHR should shift more toward the American Convention on Human Rights approach to Article 3 health cases in better aligning with the European policies on the right to health. Ultimately, these conclusions should assist in establishing sound justification for a relaxation of the current standard used in Article 3 health cases in Europe today.

Note that this article was written as the *Savran* decision was being handed down, so an in-depth analysis on *Savran* is absent. *Savran* was decided in October 2019, after this article was started and shortly before the article was finalized. *Savran* applied *Paposhvili* to mental health situations, which is a significant development. In the section 'Recommendations for Future Research,' this article calls for an examination of the role that mental health plays in ECtHR decisions and how the court's treatment of mental health has changed over the years. *Savran* should help inform, and be a part of, this future research.

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INTRODUCTION

Waterboarding, starvation, flogging – these are the obvious thoughts that cross one's mind when thinking of the Article 3 provision of the European Convention on Human Rights ("ECHR"), which protects citizens from undergoing any form of torture or inhuman or degrading treatment or punishment.[1] However, in 1997, the European Court on Human Rights ("ECtHR") expanded the traditional meaning[2] of an Article 3 violation to apply to deportation cases of seriously ill persons to places where they would likely receive inadequate health care.[3] That said, the meaning and application of this expansion was effectively limited to only "very exceptional

[1] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, art. 3 (Nov. 4, 1950), https://www.refworld.org/docid/3ae6b3b04.html [hereinafter ECHR].

[2] *See, e.g.*, Aktaş v. Turkey, App. No. 24351/94, (April 24, 2003); Soering v. U.K., App. No. 14038/88, (July 7, 1989), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57619%22]}; Ireland v. U. K., App. No. 5310/71, (Jan. 18, 1978), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57506%22]}; *see also*, U.N. High Commissioner for Refugees, Manual on Refugee Protection and the ECHR Part 2.1 — Fact Sheet on Article 3 (Mar. 2003), https://www.unhcr.org/3ead2d262 [hereinafter ECHR Article 3 Fact Sheet].

[3] *See generally*, D. v. U.K., App. No. 30240/96, ¶ 53 (May 2, 1997), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58035%22]}. This inadequacy in care includes both a lack in necessary medical treatment and in personal support for their illness. *Id.*

circumstances",[4] which courts consistently interpreted very narrowly and eventually limited to only "deathbed" cases.[5]

Subsequently finding only one other violation of Article 3 in such cases over a twenty-year period,[6] the ECtHR essentially nullified the original protections promulgated in its 1997 decision. Nevertheless, recent developments in Article 3 health cases present uncertainty as to the true application of Article 3,[7] particularly in the United Kingdom.[8] To briefly explain, the ECtHR's recent ruling in *Paposhvili v. Belgium* issued one of the greatest changes to Article 3 health cases since the previously mentioned 1997 decision, *D v. United Kingdom*. In *Paposhvili*, the ECtHR Grand Chamber broadened the types of health cases which trigger Article 3 from the previously restricting standard requiring the applicant to be "terminally ill or at an advanced stage of their illness" to cases where the absence of appropriate treatment exposes the individual to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering

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[4] *Id*. at ¶ 54.

[5] *See* Paposhvili v. Belgium, App. No. 41738/10, ¶ 183 (Dec. 13, 2016), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-169662%22]} (broadening Article 3 violations to apply when the absence of appropriate treatment exposes the individual 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."); N. v. U.K., App. No. 26565/05, (May 27, 2008), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-86490%22]} (observing the courts consistently narrow application since D. v. U.K.); GS (India) v. Sec'y of State for the Home Dep't [2015] EWCA (Civ) 40 (Eng.)

(limiting the application of Article 3 to health cases only when the deathbed test is applicable, with deathbed referring to "terminally ill" or at an "advanced stage of their illness"); *see also* Julia Lowis, *Establishing a breach of Article 3 in medical cases: The 'applicability' of Strasbourg jurisprudence*, OXFORD HUMAN RIGHTS HUB, (Jan. 15, 2018),

https://ohrh.law.ox.ac.uk/establishing-a-breach-of-article-3-in-medical-cases-the-applicability-of-strasbourg-jurisprudence/ (reiterating the "deathbed test" from *N. v. SSHD* in claiming the "exceptional" Article 3 cases are only those where the individual is already terminally ill and still present in the territory of the expelling state).

[6] *See generally*, B.B. v. France, App. No. 47/1998/950/1165, (Sept. 7, 1998), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58224%22]}.

[7] Savran v. Denmark, App. No. 57467/15, ¶¶ 35–54 (Oct. 1, 2019), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-196152%22]}; Paposhvili v. Belgium, App. No. 41738/10 at ¶¶ 131–56; Aswat v. U.K., App. No. 17299/12, ¶¶ 50–62 (Apr. 16, 2013), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-118583%22]}; EA & Ors v. Sec'y of State for the Home Dep't [2017] UKUT 00445 (IAC); MM (Malawi) v. Sec'y of State for the Home Dep't [2018] EWCA (Civ) 1365 (Eng.); GS (India) v. Sec'y of State for the Home Dep't [2015] EWCA (Civ) 40 (Eng.).

[8] N. v. Sec'y of State for the Home Dep't [2003] EWCA (Civ) 1369 (Eng.); GS (India) v. Sec'y of State for the Home Dep't [2015] EWCA (Civ) 40 (Eng.) (significantly limited the application of Article 3 to cases involving an individual on their deathbed); EA & Ors v. Sec'y of State for the Home Dep't [2017] UKUT 00445 (IAC).

or to a significant reduction in life expectancy.[9] In doing so, the court officially denounced the deathbed analysis and instead set forth a more comprehensive test for courts to apply moving forward.

Ultimately, the *Paposhvili* decision promulgated a more favorable analysis for applicants of Article 3 health cases. Nevertheless, the United Kingdom national courts subsequently refused to recognize the new *Paposhvili* standard for Article 3 health cases and instead maintained the "clear and constant line of decisions by ECtHR" using the deathbed analysis, severely hindering the growth of Article 3 protections in such instances.[10] Since then, courts, scholars, and citizens subject to the ECHR have struggled to understand the interpretation and application of Article 3 to health cases.[11]

In sum, the severely limited and inconsistent approaches taken in such instances leaves a protection gap in Article 3 health cases. Therefore, this essay will examine the need for the ECtHR to resolve the complexity of applying Article 3 protections to cases of deteriorated health and deportation. Specifically, this article will (i) explore the development of Article 3 case law and (ii) further analyze the Article 3 health case law, (iii) identify ECHR Articles 2 and 8 as other potential legal implications for such health cases, and (iv) compare ECHR Article 3 to Article 5 of the American Convention on Human Rights ("ACHR"). In doing so, this essay will generally argue that the ECtHR and national courts should recognize the *Paposhvili* case as a step toward broadening the application of Article 3 to cases of deportation in poor health. With that said, the ECtHR needs to set forth a more definitive test for national courts to apply. Thus, this essay will also attempt to introduce concepts that the ECtHR should consider in developing a new standard in order to provide a firmer Article 3 protection beyond the deathbed scenario.

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[9] Paposhvili v. Belgium, App. No. 41738/10 at ¶¶ 180–84; *see also* Chloe Spaven, *Article 3 Health Cases – A new approach*, WILSON SOLICITORS LLP (Apr. 21, 2017), https://www.wilsonllp.co.uk/article-3-health-cases-new-approach/.

[10] EA & Ors v. Sec'y of State for the Home Dep't [2017] UKUT 00445 (IAC) (limiting the application of *Paposhvili* in national courts since a current and conflicting standard already exists in UK domestic law (i.e. N. v. U.K.)).

[11] *See, e.g.*, Chai Patel, *Split human rights court suggests lower threshold for resisting removal on medical grounds*, FREE MOVEMENT, (Oct. 15, 2019), https://www.freemovement.org.uk/split-human-rights-court-suggests-lower-threshold-for-resisting-removal-on-medical-grounds/; Alice Muzira, *Article 3 Medical Condition Cases: The Paposhvili Test Returns to Plague the Court of Appeal*, UK IMMIGRATION JUSTICE WATCH BLOG (June 19, 2018), https://ukimmigrationjusticewatch.com/2018/06/19/article-3-medical-condition-cases-the-paposhvili-test-returns-to-plague-the-court-of-appeal/ (claiming that national courts are currently stuck between two applicable tests in medical condition cases).

I. BACKGROUND

This article will first explore the history and development of (i) Article 3 itself; (ii) Article 3 health law; (iii) other legal implications in Article 3 health cases, including ECHR Articles 2 and 8; and (iv) Article 5 of the ACHR. Cultivating a better understanding of these individual topics provides firmer standing for why these deportation cases belong under the purview of ECHR Article 3 protections. The succeeding information will then be used to advance the argument for why and how the current Article 3 health standard should be loosened.

A. The Development of ECHR Article 3

In practice, Article 3 of the ECHR affords two separate components to its enforcement – (i) torture and (ii) inhuman and degrading treatment and punishment.[12] That said, the ECtHR requires the allegedly wrongful treatment to meet an entry-level threshold based on the severity of the suffering incurred.[13] The measurement of this minimum depends on certain circumstances of the case (e.g., duration of the treatment, physical or mental effects, sex, age, and state of health of the victim).[14] Once the entry level threshold is met, though, the ECtHR has traditionally distinguished between inhuman and degrading treatment and the much worse torture claims by establishing another separate severity threshold.[15] Essentially, torture developed a much higher threshold, separate from the "minimum level of severity" threshold to receive Article 3 standing, due to its "special stigma."[16] Everything not found to be torture is thus encompassed in inhuman and degrading treatment.[17]

The distinction between these three acts has developed through ECtHR case law over time, with torture always somehow alluding to an aggravated form of inhuman and degrading treatment or punishment.[18] At first, torture

[12] ECHR, *supra* note 1, at art. 3; ECHR Article 3 Fact Sheet, *supra* note 2, at 1–5; ASS'N FOR THE PREVENTION OF TORTURE, *Guide to Jurisprudence on Torture and Ill Treatment*, 13 (June 2002), https://www.files.ethz.ch/isn/16023/Guide%20to%20Jurisprudence%20on%20Torture_E.pdf [hereinafter APT Guide].

[13] Ireland v. United Kingdom, App. No. 5310/71 at ¶ 162 (references this minimum level of severity); *see also* ECHR Article 3 Fact Sheet, *supra* note 2, at 3 ("[I]ll-treatment must attain a minimum level of severity to fall within the scope of Article 3.").

[14] APT Guide, *supra* note 12, at 13 (noting this as being an "entry level threshold").

[15] *Id.*

[16] *Id.* at 14 ("torture was often an 'aggravated form of inhuman treatment'") (internal citation omitted).

[17] *Id.* at 13.

[18] Greek Case, Judgement of 18 November 1969, No. 12 Y.B. Eur. Conv. on H.R. (1969) (Eur. Comm'n on H.R.) (reading a purposive element into torture); *see also* Aktaş v. Turkey, App. No.

was distinguished from the other two acts through a finding of purpose in the act committed.[19] However, *Ireland v. U.K.* adjusted this analysis ten years later to instead base it upon a level of severity threshold. Not only did the ECtHR in *Ireland* initially allude to the two individualized concepts of Article 3 – "torture" and "inhuman or degrading treatment or punishment" – but it also acknowledged the torture threshold to be "serious and cruel suffering."[20] This case thus shifted the focus of the distinction between the three elements of Article 3 from a finding of purpose in conducting the act to the severity of its suffrage. This was also the first instance of tiering the three acts based upon the progression of severity. [21] Eventually, the purpose element was reintroduced in *Selmouni v. France* and remains implicitly acknowledged in the ECtHR analysis today.[22] Also, *The Greek Case* and *Ireland* remain the two prominent cases in defining the three acts which make up Article 3, with both indicating that the two most relevant features of distinction are purpose for the act and severity of the suffering.

In 1989, exactly twenty years after *the Greek Case*, *Soering v. United Kingdom* explored a different aspect of Article 3 analysis in evaluating whether potential harm can constitute a breach of Article 3 in extradition and expulsion cases.[23] Here, extradition would not be allowed where "substantial grounds" were shown that the person would face "a real risk" of being subjected to torture or inhuman or degrading treatment in the receiving

24351/94; APT Guide, *supra* note 12, at 13–14 (noting that the purposive element read into torture was later refined in favor of a "threshold based on a sliding scale of severity between the three acts.").

[19] The *Greek Case* involved a review from the ECtHR on treatment from Greek security forces following a military coup in 1967. Specifically, the Article 3 allegations included an administrative practice of the government which led to a destruction of political participation and a breach in Article 3. *Id*.

[20] Ireland v. United Kingdom, App. No. 5310/71 (the court recognized that the two threshold determinations involved a similar subjective measuring of severity of pain and suffering occasioned by the act.). The Ireland case concerned five methods of interrogation used by the UK troops on suspected IRA members and found that the five techniques of sleep deprivation, stress positions, deprivation of food and drink, subjection to noise and hooding to be in violation of Article 3, as inhuman treatment. *Id.* (finding the five techniques did not rise to the high threshold necessary to constitute torture since there was no physical bodily injury but there was at least intense physical and mental suffering and psychiatric disturbances during interrogations.); *see S*elmouni v. France, App. No. 25803/94, (July 28, 1999), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58287%22]}; APT Guide, *supra* note 12, at 14.

[21] APT Guide, *supra* note 12, at 14–15.

[22] Selmouni v. France, App. No. 25803/94; *see also* Aktaş v. Turkey, App. No. 24351/94 at ¶ 315; APT Guide, *supra* note 12, at 16.

[23] Soering v. United Kingdom, App. No. 14038/88 at ¶ 23. This case concerned a German national residing in the United Kingdom on a charge of murder in the United States and found that UK would be in violation of Article 3 if it were to extradite the applicant due to the "real risk of being subject to inhuman or degrading treatment" on death row upon extradition. *Id.*

country.[24] However, the case clarified that a *mere possibility* of ill treatment in the receiving country would not give rise to a violation of Article 3.[25] While the ECtHR is allowed to subjectively determine cases of potential harm or risk, *Saadi v. Italy* concluded that the Court cannot undergo a balancing test to extradite a person based on the level of harm he or she poses to society.[26]

Overall, the general understanding coming out of these significant Article 3 cases is that the ECtHR maintains its "degree of flexibility" by purposefully refraining from the creation of an official list of acts which classify as either torture, inhuman or degrading treatment.[27] In doing so, the Court regards the ECHR as "a living instrument which must be interpreted in light of present-day conditions" and affords itself great flexibility when applying it to Article 3 cases.[28] These changes in perspective can be essential in recognizing the extension of a right, as is seen in Article 3 health cases where a real risk of substantial harm is presented by deportation.

B. The Absolute Nature of Article 3

Though the ECHR does not expressly maintain that the protections of Article 3 are absolute, they are generally understood to be absolute rights in nature,[29] emerging from "human rights discourse" and ECtHR

[24] *Id.* at ¶ 29; Cruz Varas & Others v. Sweden, App. No. 15576/89, (Mar. 20, 1991), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57674%22]} (involving the potential expulsion of two political asylum applicants and finding no violation merely because they did not establish strong enough reasoning, or 'substantial grounds', to obtain refugee status). The *Soering* decision has also been expanded to apply when the expulsion of a person has already occurred, indicating that the "level of risk" be determined from the knowledge accrued at the time of the decision to deport. *See* Vilvarajah and Others v. U.K., App. No. 13448/87, (Oct. 30, 1991), https://hudoc.echr.coe.int/eng#{%22appno%22:[%2213448/87%22],%22itemid%22:[%22001-57713%22]} (reaffirming *Cruz Varas* and setting specific criteria for assessing the risk of ill-treatment); Chahal v. U.K., App. No. 22414/93, (Nov. 15, 1996), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58004%22]}; Saadi v. Italy, App. No. 37201/06, ¶¶ 124–27, (Feb. 28, 2008), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-85276%22]}.

[25] Soering v. United Kingdom, App. No. 14038/88 at ¶ 37; Vilvarajah and Others v. United Kingdom, App. No. 13448/87 at ¶¶ 109–113.

[26] Saadi v. Italy, App. No. 37201/06 at ¶ 124–27.

[27] APT Guide, *supra* note 12, at 15.

[28] *Id.* at 13; *see, e.g.*, Selmouni v. France, App. No. 25803/94 at ¶ 101 (noting "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies").

[29] Saadi v. Italy, App. No. 37201/06 at ¶ 124–27; Michael K. Addo & Nicholas Grief, *Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?*, EUR. J. INT'L L., 510, 510–524 (1998).

jurisprudence.[30] An absolute right is defined as being absent "permissible limitations, exceptions or derogations," and holds applicable regardless of who the potential victim of torture, inhuman or degrading treatment is, what she may have done, or where the treatment at issue would occur.[31] Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees present similar protections; however, the ECtHR itself has argued that ECHR Article 3 Protections are "wider" than those set forth in said Convention.[32] According to the UN Refugee Agency, this interpretation of Article 3 serves as a "useful safety net" in international deportation law and reminds the Court of its incredibly important role.[33] For instance, in *Vilvarajah v. United Kingdom*, the Court recognized that its examination into breaches of Article 3 "must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe."[34] This absolute nature of the protections afforded by Article 3 can also play a significant role in cases where the court appears to be taking inappropriate factors into consideration of whether or not a breach of Article 3 is found. This recognition might be essential in the analysis of Article 3 health cases.

C. Article 3 Health Law

The general Article 3 information outlined above may prove helpful on its own for finding a clear Article 3 protection in cases of health and deportation. This subsection, however, takes a more in-depth view of the most relevant Article 3 health cases and the key concerns implicated by them in order to help facilitate a better understanding of the essential elements and issues of this jurisprudence. It is easiest to understand the Article 3 health case law as creating three separate periods: (1) *D. v. United Kingdom* and the "very exceptional circumstances" assessment,[35] (2) *N. v. United Kingdom*

[30] *Id*. at 512–13; *see also* Ireland v. U.K., App. No. 5310/71 at ¶ 163 (ECtHR formaly declaring "the Convention prohibits *in absolute terms* torture and inhuman and degrading treatment or punishment.") (emphasis added).

[31] Addo & Grief, *supra* note 29, at 513; *see also* ECHR, *supra* note 1, at art. 15(2); ECHR Article 3 Fact Sheet, *supra* note 2, at 4–8.

[32] *See* Chahal v. U.K., App. No. 22414/93 at ¶¶ 79–83; *see also* Equality and Human Rights Commission, *Article 3: Freedom from torture and inhuman or degrading treatment* (Nov. 15, 2018), https://www.equalityhumanrights.com/en/human-rights-act/article-3-freedom-torture-and-inhuman-or-degrading-treatment (noting that the absolute nature of Article 3 "means it must never be limited or restricted in any way").

[33] ECHR Article 3 Fact Sheet, *supra* note 2, at 7.

[34] Vilvarajah & Others v. U.K., App. No. 13448/87 at ¶¶ 105–08.

[35] D. v. U.K. was decided in 1997 and this period lasted until N. v. U.K. was decided in 2008.

and the "deathbed" analysis,[36] and (3) *Paposhvili v. Belgium* and the formal expansion of Article 3.[37] This section thus analyzes these three periods accordingly.

1. D. v. United Kingdom *and the "very exceptional circumstances" assessment*

As briefly discussed earlier, *D. v. United Kingdom* was the first decision to apply Article 3 protections to cases of deportation involving sickly individuals who would receive inadequate health care upon arrival to the receiving State. The applicant in this case suffered from HIV/AIDS when he was threatened with expulsion from the United Kingdom to St. Kitts due to his criminal convictions.[38] The ECtHR found the removal would expose him to the risk of dying under the "most distressing circumstances," which amounted to inhuman treatment under Article 3.[39] The significance of this case lies in the Courts' pronouncement that this ruling was due to the "very exceptional circumstances of [the] case and given the compelling humanitarian considerations at stake."[40] This groundbreaking case set the path for an abundance of similar Article 3 health cases, where the ECtHR attempted to make sense of the "very exceptional circumstance" standard.[41] Post-*D. v. U.K.* case law was quick to limit situations that were very exceptional, though, as only one other case led to a violation of Article 3 in the designated period.[42]

The one other case, *B.B. v. France* (1998), involved an applicant who was suffering from the AIDS virus compounded by Kaposi's syndrome and

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[36] N. v. U.K. was decided in 2008 and this period technically lasted until 2016, when Paposhvili was decided. However, national courts have refused to recognize *Paposhvili*, so it could be argued that N. v. U.K. still rules.

[37] Paposhvili was decided in 2016 and should arguably still be in effect today.

[38] D. v. U.K., App. No. 30240/96 (finding three factors—(i) critical illness and being close to death, (ii) no guaranteed access to medical care in the receiving State, and (iii) lack of availability of family care or social support in the receiving State—as the "very exceptional circumstances" needed to meet the Article 3 threshold).

[39] *Id.*

[40] *Id.* at 15.

[41] N. v. U.K., App. No. 26565/05; Ndangoya v. Sweden, App. No. 17868/03, 12–13, (June 22, 2004), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-24018%22]}; Amegnigan v. Netherlands, App. No. 25629/04, 8–10, (Nov. 25, 2004), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-67675%22]}; Arcila Henao v. Netherlands, App. No. 13669/03, 7–9, (June 24, 2003), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-23281%22]}; Bensaid v. U.K., App. No. 44599/98, ¶¶ 303, 319, (Feb. 6, 2001), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-59206%22]}; S.C.C. v. Sweden, App. No. 46553/99, 6–8, (Feb. 15, 2000), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-5079%22]}; Karara v. Finland, App. No. 40900/98, (May 29, 1998), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-4301%22]}; B.B. v. France, App. No. 47/1998/950/1165 at ¶¶ 37–39.

[42] *Id.*

presented signs of acute immunosuppression. The significance of this case, according to subsequent courts, was that the applicant had reached an "advanced stage" of his illness.[43] The ECtHR found that the applicant's return to his native country of the Democratic Republic of Congo, where it was likely he would lack access to treatment specifically designed to inhibit the spread of the virus, would considerably increase the risk of infection.[44] The Court, in ruling that his deportation would violate Article 3, therefore found that the exposure of this applicant to a substantial risk to his health was so serious as to amount to a violation of Article 3.[45] Following this, though, Article 3 health cases were all rejected, even under seemingly similar circumstances.

2. N. v. United Kingdom *and the "deathbed" analysis*

D. v. U.K. was severely limited by the time *N. v. United Kingdom* (hereinafter *N. v. U.K.*) came along, which only further narrowed its interpretation. *N. v. U.K.* developed from the United Kingdom Upper Tribunal's ruling in *N. v. Secretary of State for the Home Department ("SSHD")*, which clarified that "very exceptional circumstances," meant the applicant was in the "last stage of his terminal illness".[46] Therefore, the "very exceptional circumstances" standard should only apply in such cases of either terminal illness or the advanced stage of an illness. The applicant in this case also suffered from chronic AIDS with "considerable immunosuppression and . . . disseminated mycobacterium TB" but she was not considered critically ill and thus no violation of Article could be found upon her deportation to Uganda.[47] On appeal, the ECtHR Grand Chamber in *N. v. U.K.* affirmed the Upper Tribunal's decision that this particular case did not constitute a breach of Article 3.[48] While the ECtHR alluded to the possibility that there could be "very exceptional circumstances" other than deathbed cases,[49] it did not set forth a definitive standard for subsequent

[43] B.B. v. France, App. No. 47/1998/950/1165 at ¶¶ 19–23.

[44] *Id.* at 12.

[45] *Id.*

[46] N. v. Sec'y of State for the Home Dep't [2003] EWCA (Civ) 1369 [16], (Eng.) ("The fact that an applicant's life expectancy will be reduced, even substantially reduced, because the facilities in the receiving country do not match those in the expelling country is not sufficient to engage Article 3. Something more is required. I have already referred to the special circumstances which enabled the court in D to find that Article 3 was engaged. I do not say that Article 3 will only ever be engaged where the applicant is in the last stages of a terminal illness. But I consider that the class of case recognised in *D.* as engaging Article 3.").

[47] *Id*. at 3.

[48] N. v. U.K., App. No. 26565/05.

[49] Id. . Specifically, where the "humanitarian considerations are equally compelling."; *Id*.

courts to apply and instead recommended each case be determined on a case-by-case basis.

Thus, the affirmation of the *N. v. SSHD* decision instead allowed for national courts to officially restrict Article 3 health cases to the deathbed analysis.[50] This situation was later found in *GS (India) v. SSHD*.[51] Therefore, the issues of the *N. v. U.K.* period more so involve the misapplication by ECHR signatory states of ECtHR standards to cases following the 2008 decision rather than the error in judgment on behalf of the ECtHR. That is not to say that the ECtHR did nothing wrong, though. It should have found a violation of Article 3 in *N. v. U.K.* based on "compelling humanitarian considerations" or, at the very least, provided distinct factors of "very exceptional circumstances" for future courts to apply rather than the vague statement that it did.[52] In fact, the dissent in *N. v. U.K.* expresses a reasoned analysis more aligned with *Paposhvili* in recognizing that the Court is on the wrong side of the argument.[53]

3. Paposhvili v. Belgium *and the Formal Expansion of Article 3*

On its face, *Paposhvili v. Belgium* might not appear to affect much change from the principles referenced in *N. v. U.K.* However, the standard it produced can be thought to "clarify or qualify" the *N. v. U.K.* standard to some degree, and relax the language for which circumstances are "very compelling".[54] *Paposhvili* involved an applicant suffering from chronic lymphocytic leukemia and tuberculosis. The ECtHR found it would be a violation of Article 3 to deport Paposhvili to Georgia, declaring his condition as life-threatening, based on considerably detailed evidence provided by Paposhvili of his specialized treatment.[55] Coming out of this case, the Court

[50] *See generally*, Aswat v. U.K., App. No. 17299/12 at ¶¶ 50–52; GS (India) & Ors v. Sec'y of State for the Home Dep't [2015] EWCA (Civ) 40 [66] (Eng.); Tatar v. Switzerland, App. No. 65692/12, ¶ 50 (July 14, 2015), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-153770%22]}.

[51] GS (India) v. Sec'y of State for the Home Dep't [2015] EWCA (Civ) 40 (Eng.) (This case involved six applicants, five of which were suffering from terminal renal failure or end stage kidney disease (ESKD) and the sixth was at an advanced stage of HIV infection. The court here decided that these applicants could not fall within the *D* exception because their conditions could not be "alleviated by recourse to Article 3", no matter how grave they may be.); *Id.* (After further analysis of the application of *D. v. U.K.*, the court here found "[the *D. v. U.K.*] citations demonstrate that in the view of the House of Lords the *D* exception is confined to deathbed cases.").

[52] N. v. U.K., App. No. 26565/05 (applying Article 3 to cases where the individual is "critically ill" and "close to death," thereby indirectly affirming the deathbed application).

[53] *Id.* at 251–62 (Tulkens, J., dissenting).

[54] AM (Zimbabwe) & Anor v. Sec'y of State for the Home Dep't [2018] EWCA (Civ) 64, [30] (Eng.); Paposhvili v. Belgium, App. No. 41738/10 at ¶ 194 (changing, for instance, *N. v. U.K.*'s "critically ill" and "close to death" Article 3 qualifications to "very serious", "chronic illness" that is "life-threatening.").

[55] Paposhvili v. Belgium, App. No. 41738/10 at ¶ 206 .

provided guidance on the burden of proof necessary for the expelling State to comply with Article 3, focusing on the foreseeable consequences of removal.[56] Specifically, the court listed three verifications for the returning State to make prior to a person's deportation: (i) to verify whether the available care is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3; (ii) to consider the extent to which the individual in question will actually have access to this care and these facilities in the receiving State; and (iii) to consider the cost of medication and treatment, the existence of a social and family network, and the distance to be travelled in order to have access to the required care.[57] The Court also added that if there remain "serious doubts" regarding the impact of removal following the States' assessment, then the returning State "must obtain individual and sufficient assurance from the receiving State that appropriate treatment will be available and accessible on return."[58] Ultimately, the ECtHR shifted a significant amount of the pleading burden onto the expelling state and presented a more lenient standard for the protection of sick individuals facing deportation. Nevertheless, national courts have either refused to apply the *Paposhvili* standard or have arguably applied it incorrectly.[59]

For instance, *EA &. Ors* specifically rejected *Paposhvili* in favor of the clear and constant *N. v. U.K.* standard applied in the United Kingdom.[60] Tensions between these standards increased even more in the United Kingdom when the national court was presented with cases like *AM (Zimbabwe) v. SSHD* and *MM (Malawi) v. SSHD*. In particular, *AM (Zimbabwe)* confirmed that *Paposhvili* "relax[ed] the test for violation of Article 3 in the case of removal of a foreign national with a medical condition," moving past the previously accepted deathbed analysis.[61] But, it

[56] Id. at ¶¶ 170, 187.

[57] Id. at ¶¶ 189-91.

[58] *Id*. at ¶ 191.

[59] Savran v. Denmark, App. No. 57467/15; Aswat v. United Kingdom, App. No. 17299/12; EA & Ors v. Sec'y of State for the Home Dep't [2017] UKUT 00445 (IAC); MM (Malawi) v. Sec'y of State for the Home Dep't [2018] EWCA (Civ) 1365 (Eng.); GS (India) v. Sec'y of State for the Home Dep't [2015] EWCA (Civ) 40 (Eng.); N. v. Sec'y of State for the Home Dep't [2003] EWCA (Civ) 1369 (Eng.).

[60] EA & Ors v. Sec'y of State for the Home Dep't [2017] UKUT 00445 (IAC).This case concerned three applicants suffering from schizoaffective disorder, HIV/AIDS, and ankylosing spondylitis. All were receiving treatment in the United Kingdom but were not yet at a critical stage in their illness. The Upper Tribunal found that it was not bound to follow the *Paposhvili* test because it departed from a "clear and constant line of authority" including *N. v U.K.* and was not consistent with domestic law of the United Kingdom. Instead of applying this "contrary . . . judicial precedent", the court followed *N. v. U.K.* and *GS (India)*, which applied *N. v. U.K.*, in finding the *D. v. U.K.* exception "confined to deathbed cases." *Id*. at [29].

[61] AM (Zimbabwe) v. Sec'y of State for the Home Dep't [2018] EWCA (Civ) 64, [37] (Eng.).

"did so only to a very modest extent."[62] *MM (Malawi)*, however, complicated the situation by presenting a convoluted approach to Article 3 health cases in holding that an applicant might meet the *Paposhvili* test even if they do not meet the *N. v. U.K.* standard.[63] It further confused the situation by applying the binding *N. v. U.K.* criteria but also appearing to equate the actual test used with that of the *Paposhvili* factors.[64] Ironically, the ECtHR during this time made clear that *Paposhvili* was the "formally binding guidance on the removal of seriously ill people" and that it should be applied when considering removal.[65]

Very recently, the ECtHR split in its decision to validate *Paposhvili* in *Savran v. Denmark*, which dealt with the aspect of "sufficient assurance" from the *Paposhvili* test.[66] In officially affirming the *Paposhvili* test over *N. v. U.K.*, the ECtHR found that the expelling State had not adequately mitigated the uncertainties raising serious doubts as to the impact of removing the applicant.[67] Even given the direct language of this analysis, critics today argue that this case was not the correct one to affirm *Paposhvili* and the ECtHR rushed into this decision in an attempt to tie the hands of ECtHR signatory states regarding Article 3 health cases.[68] However, the true effect of this case is yet to be determined, as it was only decided in January 2019. Until then, these cases ultimately represent a potential failure of the ECtHR and national courts to protect sickly individuals from inhumane and degrading treatment following their deportation. Two major issues cause this: (1) ECtHR has not provided an effective standard for the national courts

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[62] *Id.*

[63] MM (Malawi) v. Sec'y of State for the Home Dep't [2018] EWCA (Civ) 1365, [¶ 10] (Eng.) (involving applicants who were suffering from HIV infection and primary mediastinal large-B cell lymphoma. Despite there being no violation of Article 3 found, the Court did recognize that applicants can meet *either N. v. U.K.* or *Paposhvili*); *see also* Muzira, *supra* note 11.

[64] *Id.*

[65] Khaksar v. U.K., App. No. 2654/18, ¶ 32 (Apr. 3, 2018), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-182755%22]}. The applicant in this case was a victim of bombing in Afghanistan and suffered from medical conditions following the blasts. He was threatened with deportation back to Afghanistan and was not considered to be in a critical stage of an illness. While the court could not apply the *Paposhvili* standard because the applicant had not exhausted all national remedies available to him, the Court did affirm the standing of *Paposhvili* in such circumstances. *Id.*

[66] Savran v. Denmark, App. No. 57467/15 at ¶ 22. This case concerned a paranoid schizophrenic applicant whom was being deported to Turkey on account of his criminal convictions. The court recognized the burden shift from *Paposhvili* in finding that the expelling State needed to mitigate any doubts of treatment contrary to Article 3 upon deportation. *Id.*

[67] *Id.*

[68] Mark Klaassen, *A new chapter on the deportation of ill persons and Article 3 ECHR: the European Court of Human Rights judgment in Savran v. Denmark*, STRAUSBOURG OBSERVERS (Oct. 17, 2019), https://strasbourgobservers.com/2019/10/17/a-new-chapter-on-the-deportation-of-ill-persons-and-article-3-echr-the-european-court-of-human-rights-judgment-in-savran-v-denmark/.

to follow in applying Article 3 as *Papshvili* did and (2) the national courts are improperly applying the principles and standards which are provided by the ECtHR. Given this, it follows that the ECtHR and national courts need to resolve the complexity involved in applying Article 3 to deportation cases of individuals in poor health.

D. Other Legal Implications: ECHR Articles 2 and 8

Aside from the implication of torture and inhuman or degrading treatment, these Article 3 health cases present corresponding issues for an individual's rights to life, privacy, and family life. In fact, **"**[h]ealth-related cases brought before the [ECtHR] have most frequently been argued under Articles 2, 3, [and] 8 . . . of the Convention."[69] Still, the ECtHR regularly dismisses any adjoining Article 2 or 8 claims when they are advanced in such Article 3 health cases.[70] Therefore, this section will explore Articles 2 (right to life) and 8 (right to privacy and family life) of the ECHR and their corresponding case law in order to develop the argument that these articles can greatly enhance the finding of an ECHR violation, especially when Article 3 alone proves insufficient . In general, this section will help develop the idea that the ECtHR should review all claims pleaded in such Article 3 health cases to provide the full protections postulated by the Convention. This is especially relevant when Article 3 fails.[71]

1. Article 2 and the Right to Life

Article 2 of the ECHR protects "[e]veryone's right to life" and specifies that "[d]eprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary."[72] Similar to Article 3, Article 2 is said to fundamentally tie to the absolute protections provided by Article 15 of the ECHR, meaningthere must be no derogation from its protections.[73] In practice, the Court has interpreted Article 2 to include two substantive obligations of the State: (1) the general obligation to protect the right to life

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[69] Thematic Report, Health-related issues in the case-law of the European Court of Human Rights, 1, 5 Eur. Ct. H.R. (2015) [hereinafter Thematic Report].

[70] *See, e.g.*, N. v. U.K., App. No. 26565/05 at ¶ 16.

[71] *See Id*. at 20–31 (Tulkens, J., dissenting).

[72] ECHR, *supra* note 1, at art. 2; ECtHR, *Guide on Article 2 of the European Convention on Human Rights*, (updated 2020), https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf [hereinafter ECtHR Article 2 Guide] at 6 (listing "(a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; [and] (c) in action lawfully taken for the purpose of quelling a riot or insurrection" as examples of absolutely necessary situations).

[73] ECtHR Article 2 Guide, *supra* note 69.

and (2) the prohibition of intentional deprivation of life.[74] The effect of this was the complete abolition of death penalty sentences in Protocol 13 to the Convention.[75]

As expected, there are many Article 2 cases which help to inform issues presented in Article 3 health cases. For instance, *McCann and Others v. United Kingdom* provides that "the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions must be interpreted and applied so as to make its *safeguards practical and effective*."[76] It also creates an "absolutely necessary" threshold for Article 2 cases involving intentional acts to require proof that a violation has occurred beyond that which was absolutely necessary.[77] Taken together with the ECtHR ruling in *Oyal v. Turkey*, where the court found allegations of persons suffering from serious illnesses to fall under Article 2 of the Convention when the circumstances potentially engaged the responsibility of the State, ECtHR case law indicates that both intentional acts or decisions of the State in question *as well as* omission of necessary acts of the State implicate Article 2, as related to health cases.[78] Finally, the ECtHR in *R.R. and Others v. Hungary* examined allegations of Article 2 violations

[74] *Id*.; *see also* Boso v. Italy (Reports of Judgements and Decisions), App. No. 50490/99, ¶¶ 458–60 (May 9, 2002), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-23338%22]} (providing a list of exceptions).

[75] ECHR, *supra* note 1, at art. 15; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstance, *opened for signature* Mar. 5, 2002, ETS No. 187 (2002) [hereinafter Protocol 13]; ECtHR, *Guide on Article 15 of the European Convention on Human Rights*, (2020), https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf [hereinafter ECtHR Article 15 Guide].

[76] McCann & Others v. U.K., App. No.18984/91, ¶ 146 (Sept. 27, 1995), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57943%22]} (emphasis added); *see also* Soering v. United Kingdom, App. No. 14038/88 at ¶ 27.

[77] *Id.*

[78] Oyal v. Turkey, App. No.4864/05 at ¶ 76, (June 6, 2010), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-97848%22]} (unanimously finding a violation of Article 2 due to the States' failure to train, supervise and inspect the work of the medical staff involved in blood transfusions, which led to his HIV infection, and emphasizing the need to do so for "more general considerations" of public health and safety and the prevention of similar errors.); *see also* L.C.B. v. U.K., App. No. 23413/94, (Nov. 26, 1996), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-45780%22]} (concerning an applicant suffering from leukaemia); G.N. & Others v. Italy, App. No. 43134/05, (Jan. 03, 2010), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-95926%22]} (concerning applicants suffering from a potentially life-threatening disease of hepatitis); Hristozov & Others v. Bulgaria, App. No. 47039/11, (Apr. 29, 2013), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-114492%22]} (concerning applicants suffering from different forms of terminal cancer).

involving potential risks to an individual's life that had not yet materialized and found that there had been a serious threat to their lives.[79]

Following this, it is understandable why Article 3 health cases regularly include Article 2 violation claims.[80] However, the Court often opts to dismiss the Article 2 analysis once they have made a ruling on the Article 3 violation.[81] In doing so, the ECtHR reasons that the substance of Article 2 and Article 3 complaints are "indissociable . . . in respect of the consequences of the impugned decision for [the applicant's] life, health and welfare."[82] Interestingly enough, the ECtHR's own guidelines include a procedural obligation "to carry out an effective investigation into alleged breaches of its substantive limb" due to its fundamental character.[83] However, the case law is lacking on such investigation in Article 3 health cases.

2. Article 8 and the Right to Privacy and Family Life

Article 8 of the ECtHR proclaims, "everyone has the right to his private and family life, his home and his correspondence" and "[t]here shall be no interference by a public authority with the exercise of this right . . . ."[84] Section 1 of Article 8 signifies four individual categories for invoking the article in a complaint – private life, family life, home, and correspondence.[85] Much like Article 3, the ECtHR has broadly defined the scope of Article 8,

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[79] R.R. & Others v. Hungary, App. No. 36037/17, (Mar. 2, 2021), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-208406%22]} (involving applicants who were denied access to the Witness Protection Program).

[80] D. v U.K., App. No. 30240/96 at ¶¶ 55–59 (claim was brought but the Court determined it unnecessary to go through the analysis); ECtHR Article 2 Guide, *supra* note 69, at 18 ("Article 2 of the [ECHR] prohibits the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there."). ECtHR Article 2 Guide, *supra* note 69, at 19 (While Article 2 prohibits deportation in the face of a real risk to the individual's life, it focuses on the applicant facing some form of death penalty or social crucifixion upon his return rather than physical or mental health).

[81] D. v U.K., App. No. 30240/96 at ¶ 58 ("Commission did not find it necessary to decide whether the risk to the applicant's life expectancy created by his removal disclosed a breach of Article 2 (art. 2). It considered that it would be more appropriate to deal globally with this allegation when examining his related complaints under Article 3").

[82] *Id.*

[83] *See* Armani Da Silva v. U.K., App. No. 5878/08, ¶ 229 (Mar. 30, 2016), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Armani%20Da%20Silva%20v.%20United%20Kingdom%22],%22documentcollectionid2%22:[%22JUDGMENTS%22,%22DECISIONS%22],%22itemid%22:[%22001-161975%22]} .

[84] ECHR, *supra* note 1, at art. 8 (also providing exceptions to section 2: "except such as in accordance with the law and is necessary in domestic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.").

[85] ECtHR Guide, *Guide on Article 8 of the European Convention on Human Rights*, (Aug. 20, 2020), https://www.echr.coe.int/documents/guide_art_8_eng.pdf [hereinafter ECtHR Article 8 Guide] at ¶ 1 .

rather than subjecting it to an exhaustive definition or list of acts.[86] However, the scope has been limited by a severity test in some circumstances.[87] "Acts or measures of a private individual which adversely affect the physical or psychological integrity of another," [88] have been included in such circumstances because the ECtHR articulates Article 8 to particularly guarantee "a person's right to physical and psychological integrity."[89] Additionally, Article 8 provides a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.[90] While not all relationships "fall within the scope of private life,"[91] parental and marital statuses have been recognized as falling within the ambit of private and family life.[92] Finally, unlike the absolute rights found in Articles 2 and 3, the analysis of Article 8 involves a weighing of competing interests to find a "fair balance" between the protections of an individual and society.[93]

X and Y v. Netherlands was the first indication by the ECtHR that Article 8 covered the physical and moral integrity of a person.[94] Moreover,

[86] Bensaid v. U.K., App. No. 44599/98 at ¶¶ 46–47; *see also* ECtHR Article 8 Guide, *supra* note 82, at ¶¶ 2-3.

[87] Nicolae Virgiliu Tânase v. Romania, App. No. 41720/13, ¶ 128 (June 25, 2019), http://hudoc.echr.coe.int/eng?i=001-194307 ; *see also* Denisov v. Ukraine, App. No. 76639/11, ¶ 116 (Sept. 25, 2018), http://hudoc.echr.coe.int/eng?i=001-191971 ("If the consequence-based approach was at stake, the threshold of severity with respect to those typical aspects of private life assumed crucial importance. It was for the applicant to show convincingly that the threshold had been attained. The applicant had to present evidence substantiating consequences of the impugned measure. The Court would only accept that Article 8 was applicable where those consequences were very serious and had affected his or her private life to a very significant degree. An applicant's suffering was to be assessed by comparing his or her life before and after the measure in question. In determining the seriousness of the consequences in employment-related cases it was appropriate to assess the subjective perceptions claimed by the applicant against the background of the objective circumstances existing in the particular case. That analysis would have to cover both the material and the non-material impact of the alleged measure. However, it remained for the applicant to define and substantiate the nature and extent of his or her suffering, which had to have had a causal connection with the impugned measure.").

[88] ECtHR Article 8 Guide, *supra* note 82, at ¶ 67; Nicolae Virgiliu Tânase v. Romania, App. No. 41720/13 at ¶ 126 ("The concept of 'private life' is a broad term not susceptible to exhaustive definition.).

[89] N. v. U.K., App. No. 26565/05 at ¶ 26 (Tulkens, J., dissenting).

[90] ECtHR Article 8 Guide, *supra* note 82, at ¶68; *See generally* Pretty v. U.K., App. No. 2346/02, ¶ 61 (April 29, 2002), http://hudoc.echr.coe.int/eng?i=001-60448.

[91] ECtHR Article 8 Guide, *supra* note 82, at ¶ 69.

[92] *Id*. at ¶ 274.

[93] *Id*. at ¶ 140.

[94] X. and Y. v. Netherlands, App. No. 8978/80, ¶ 22 (Mar. 26, 1985), http://hudoc.echr.coe.int/eng?i=001-57603 (This case concerned the sexual assault of a mentally disabled sixteen-year old girl and the absence of legal protection available to her. Following this, the Court has held that "the authorities' positive obligations – in some cases under Articles 2 or 3 of the Convention and in other instances under Article 8 taken alone or in combination with Article 3 (ibid.) – may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals,"); ECtHR Article 8 Guide, *supra* note 82, at ¶ 79.

Article 8 has been invoked in "very exceptional circumstances," specifically when the expelling State either knowingly acted or failed to act on behalf of a person whose life was threatened due to their lack of access to necessary, life-saving treatment.[95] It reasonably follows that Article 3 health cases also frequently involve claims of Article 8 violations, as they often involve a review of the applicant's ties and support system. However, prior to *N. v. U.K.*, the practice of the ECtHR was to recurrently halt analysis on the Article 8 claim after it either accepted or rejected the Article 3 claim, similar to their Article 2 procedure.[96] The dissent in *N. v. U.K.* challenged this procedure based on the understanding of Article 8 outlined directly above, stating that when the Court faces "the situation of a person who will, without doubt, be sent to certain death . . . it could neither legally nor morally confine itself to [conclude] '[no] separate question arises under Article 8 of the Convention'."[97] The one prominent ECtHR case prior to *N. v. U.K.*, which at least reviewed the Article 8 claim, even after dismissing the Article 3 claim, is *Bensaid v. United Kingdom*.[98] This case involved an applicant suffering from a long-term mental illness – schizophrenia – in which the Court found the "real risk" of the removal insufficient to meet Article 3 standards.[99] Rather than stop the inquiry there, however, the Court rightfully assessed the Article 8 claim separately, clarifying that "[m]ental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity."[100] Nevertheless, the Court found no violation of Article 8, as removal of the applicant would comply with the "accordance of the law"

[95] ECtHR Article 8 Guide, *supra* note 82, at ¶ 117; *see also* Mehmet Ulusoy and Others v. Turkey, App. No. 54969/09, ¶ 84 (June 25, 2019), http://hudoc.echr.coe.int/eng?i=001-194325 (the court further found "where a patient did not have access to such treatment because of "systemic or structural dysfunction in hospital services, and where the authorities knew or ought to have known of this risk and did not take the necessary measures to prevent it from being realized.") (citing *Lopes de Sousa Fernandes v. Portugal*).

[96] N. v. U.K., App. No. 26565/05 at ¶¶ 26, 30 (Tulkens, J., dissenting). The later Court called this practice into question. ("Whilst it is understandable that the Court . . . has refrained from examining a second complaint – concerning the same facts – when the first has given rise to a finding of a violation, it is certainly strange for the Court to . . . [do so] after finding there was *no* violation of Article 3 of the Convention", merely proclaiming that "it is not necessary.").

[97] *Id.* at ¶ 26 (internal citations omitted).

[98] Bensaid v. U.K., App. No. 44599/98 at ¶¶ 46–49.

[99] *Id*. at ¶ 40 (noting the "high threshold set by Article 3" and explaining that the applicant's situation would merely be "less favourable" in Algeria and there is still risk for relapse or deterioration in the United Kingdom).

[100] *Id*. at ¶ 46 (specifying that "the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity."). Other important elements of the personal sphere protected by Article 8 include gender identification, name and sexual orientation and sexual life. *See* ECtHR Article 8 Guide, *supra* note 82, at ¶¶ 148-149.

feature of Article 8, Section 2.[101] Regardless of the outcome in this case, it can be said that Article 8 plays a prominent role in at least the Article 3 heath cases involving mental illness.

E. Comparative Analysis: Article 5 and the ACHR

Much can be inferred from the differences between the two torture provisions of the ECHR and the American Convention on Human Rights ("ACHR"). On the face of the two instruments, the ACHR appears to provide greater rights and protections than the ECHR.[102] However, as we have seen through the ECtHR's interpretation of a purposive element in the Article 3 analysis of torture, the ECtHR has begun converging with the American provisions and standards through practice.[103] This suggests that a comparative analysis of the ACHR and the Inter-American Court of Human Rights ("IACtHR") jurisprudence can provide valuable information and spark guidelines for how the European judicial system can clean up the messy Article 3 health case law.

The initial distinction between these two documents lies in the torture provision titles themselves. With the ECHR Article 3 provision entitled "Prohibition of Torture" and the ACHR Article 5 provision designated "Right to Humane Treatment," these articles seem to present both negative and positive rights on their collective states, respectively. To explain, Article 3 of the ECHR focuses on things its member states cannot do, while Article 5 of the ACHR highlights the rights available to member states in its title. This distinction can play a significant role in arguing that the American system has a more lenient Article 5 protection; however, this cannot be determined without first looking to the actual text of the provisions.

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[101] Bensaid v. U.K., App. No. 44599/98 at ¶ 48; *see also* ECtHR Article 8 Guide, *supra* note 82, at ¶ 1 (explaining that section 2 of Article 8 provides that there shall be no interference by a public authority with one's Article 8 rights and furthering that "[i]n order to invoke Article 8, an applicant must show his or her complaint falls within one of the four interests listed above. Upon such a showing, the Court then examines the extent of interference on the individual's life. That said, there are exceptions which allow certain interferences by the State, which include national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Ultimately, limitations are permitted so long as they are in "accordance with the law" and are "necessary in a democratic society" for the protection of one of the objectives set out above. The necessity then requires a balancing test between the conflicting interests.").

[102] For instance, the text of the ACHR's Article 5 more expansively defines humane treatment and creates a positive right to it versus the negative right against torture and inhuman and degrading treatment presented in ECHR Article 3. American Convention on Human Rights "Pact of San Jose, Costa Rica" art. 5, Nov. 22, 1969, 1144 U.N.T.S. 123, *available at*: https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf[hereinafter ACHR].

[103] *See* Selmouni v. France, App. No. 25803/94 at ¶¶ 97–98; *see also* Aktaş v. Turkey, App. No. 24351/94 at ¶ 313; APT Guide, *supra* note 12, at 16.

Vast differences separately exist in the actual language of these torture provisions. As previously articulated, Article 3 of the ECHR is short and simple: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[104] The ACHR, on the other hand, presents a much more in-depth vision for Article 5 protections, with 6 separate provisions referring to its guaranteed rights:

> "1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. 3. Punishment shall not be extended to any person other than the criminal. 4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons. 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors. 6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners."*[105]*

Such an explicitly designed provision suggests that the founders of the ACHR and Article 5, in particular, desired a more protective right against acts of torture than the ECHR provided. In fact, it is clear that Article 5 goes far beyond protections against torture under the ECHR, as the language of Article 3 is merely one of the six provisions.[106]

Similar to the ECtHR's development of its Article 3 analysis, the IACtHR created (i) a threshold which must be passed before finding a violation of Article 5, (ii) distinctions between differing levels of violations, (iii) as well as many other issues relating to how far the Court is willing to go in interpreting the broadly written article. However, *Caesar v. Trinidad and Tobago* presents the comparative case from the IACtHR in Article 3 violations.[107] In this case, the applicant was sentenced to serve 20 years in a penitentiary with hard labor and to receive 15 strokes of the cat-o-nine tails. He had to be spread eagle for the flogging, and the punishment was carried out despite his [deteriorated] physical condition. Six people were present for the punishment. He screamed out in pain and eventually fainted. The

[104] ECHR, *supra* note 1, art. 3.

[105] ACHR, *supra* note 99, art. 5.

[106] ACHR, *supra* note 99, art. 5(2).

[107] Trinidad and Tobago, Inter-Am. Ct. H.R.(Mar. 11, 2005) https://corteidh.or.cr/docs/casos/articulos/seriec_123_ing.pdf.

IACtHR consequently found corporal punishment in the form of flogging as a form of torture.

Despite its scarcer jurisprudence, the IACtHR has indeed reviewed an Article 3 health case under the ACHR – *Andrea Mortlock v. The United States*. In this case, the applicant was a Jamaican national living in the United States where she contracted HIV/AIDS and required aggressive treatment and care.[108] The applicant faced deportation due to her criminal convictions on drug offenses.[109] Upon review, the IACtHR found that the applicant's deportation would violate Article 5, as it would "amount to cruel, inhuman or degrading treatment" when combined with the lack of psycho-social support for her care.[110] What's more, the deportation in this case would have been deemed punishment against the applicant since it was directly linked to her criminal convictions.[111] The ACtHR's finding that the applicant's deportation "may well be fatal" despite the risk of death not being imminent affords protections to citizens of ACHR member states that have yet to firmly develop under the mirroring ECHR torture provision.[112] This shows that the European justice system stands well below the American's more lenient application of Article 5, at least in respect to the protections afforded to sick individuals facing deportation to countries with inadequate health care. In fact, the ECtHR referenced this itself, in *S.J. v. Belgium*, when the dissent celebrated the ACtHR's finding in *Andrea* and embraced the rejection of *N. v. U.K.* for a more liberal standard.[113]

II. ANALYSIS

This section focuses on answering the broad question of whether the deportation of a person to a place where she or he will not receive adequate health care should constitute a violation of ECHR Article 3. In doing so, it addresses the two following sub-questions: First, is it an Article 3 violation to deport someone to a country with inadequate health care under the ECHR and at what point should the deportation constitute an Article 3 violation under the ECHR? Second, how can the ECtHR and national courts better review such cases in order to provide more meaningful protections to those

[108] Andrea Mortlock v. The United States, Case 12.534, Inter-Am. Comm'n H.R., Report No. 63/08, OEA/Ser.L./V/II.98, doc. 7 rev. ¶ 16 (2009).

[109] *Id*. at ¶ 20.

[110] *Id*. at ¶ 90 (finding that her state of health was presently stable but that her deportation would nevertheless result in a premature death due to a "revival of the symptoms" given the lack of treatment available.).

[111] *Id*. at ¶ 24.

[112] *Id*. at ¶ 90.

[113] S.J. v. Belgium, App. No. 70055/10, ¶ 1 (Mar. 19, 2015), http://hudoc.echr.coe.int/eng?i=001-153361 (Pinto de Albuquerque, J., dissenting).

inflicted? Both questions require an in-depth review of the background information provided above to determine which approach is the correct to take in Article 3 health cases. The second question requires identifying concepts that the ECtHR should consider in promulgating a more definitive standard for determining whether the deportation of a sick individual to a State with inadequate health care violates Article 3. For the purpose of clarity, this section will be organized similarly to the background sub-sections above: (i) Article 3 today and its application in health cases; (ii) other legal implications in Article 3 health cases, including ECHR Articles 2 and 8; and (iii) Article 5 of the American Convention on Human Rights.

A. Article 3 Today and its Application in Health Cases

In considering the background information on Article 3 and its application in health cases from above, it follows that the ECtHR has been incorrectly applying Article 3 to deportation cases involving sick applicants and is still in a state of confusion e following *Paposhvili*'s more lenient application of a slightly relaxed standard. Additionally, the national courts are improperly refusing to apply *Paposhvili* over the long-established legal analysis from *N. v. U.K.* Given this, the ECtHR needs to go further than it did in *Paposhvili* in clarifying an appropriate and irrefutable standard to use in such Article 3 health cases.

The ECtHR incorrectly applied Article 3 to these particular cases of deportation, as it demoted the absolute nature of the Article's protections by approaching each of these cases in such a way that essentially no protection could be afforded. It is true that Article 3 is known to contain a high entry-level threshold for the severity of suffering incurred; however, it is also true that this Court has afforded Article 3 protections in analogous situations outside of the health and deportation context. For instance, in *Saadi* and *Soering*, the challenged State did not directly inflict harm onto the applicants and the applicants regularly conducted crimes which make their deportation personally justified.[114] However, the ECtHR has strictly forbidden the consideration of such arguments in Article 3 analyses, in favor of a broader approach to the absolute right, holding that potential harm is sufficient to find an Article 3 violation and the wrongdoings of an applicant are irrelevant.[115] Yet, the mere fact that no cases have reached the potential harm threat to Article 3 alone suggests that the Court is improperly weighing the facts of these cases. It is no coincidence that the more tenuous the link between the alleged ill-treatment and the conduct of State authorities, the

[114] *See* Saadi v. Italy, App. No. 37201/06 at ¶¶ 120–122 ; Soering v. United Kingdom, App. No. 14038/88 at ¶ 12.

[115] *Id.*

higher the threshold of risk assessment applied by the Court for the purposes of establishing the responsibility of the returning State under Article 3.[116]

This argument is furthered by the fact that the ECtHR has continually taken other improper considerations into account during their Article 3 analysis. *N. v. U.K.* itself serves as one of many examples of this, as the Majority in this case factored into its decision the burden on the health care systems of expelling states in Article 3 health cases.[117] Evidently, the ECtHR is incorrectly conducting more of an Article 8 balancing test rather than appropriately awarding the absolute rights promulgated in Article 3.[118] A more suitable analysis of Article 3 as an absolute right, however, should not consider the cost or burden to the Expelling State. In nevertheless doing so, the Dissent acknowledged that the Majority was relying on a principle to Article 3 case law that had since been overturned.[119] The Majority referenced *Soering*'s finding that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights [. . .]."[120] However, this balancing of States' economic interests against an individual's rights was overruled in *Saadi v. Italy*.[121] The

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[116] Andrea Saccucci, *The protections from removal to unsafe countries under the ECHR: not all that glitters is gold*, QIL (July 14, 2014),http://www.qil-qdi.org/the-protection-from-removal-to-unsafe-countries-under-the-echr-not-all-that-glitters-is-gold/.

[117] The dissent in *N. v. U.K.* pointed to this same problem in the case law, in stating "the view expressed by the majority that such a finding "would place too great a burden on the Contracting States" . . . reflects the real concern that they had in mind: if the applicant were allowed to remain in the United Kingdom to benefit from the care that her survival requires, then the resources of the State would be overstretched." N. v. U.K., App. No. 26565/05 at ¶ 8 (Tulkens, J., dissenting)*; see also* S.J. v. Belgium, App. No. 70055/10 at ¶ 7 (Pinto de Albuquerque, J., dissenting) (similarly alluding to the improper consideration of the financial burden of the expelling State in holding, "[*N*] clearly distorts the reasoning behind Article 3 of the Convention, by watering down the legal force of that provision on the basis of purely speculative assumptions regarding both the future care and support that seriously ill persons will receive from the national authorities in the receiving State and the economic burden they represent for the Contracting Parties to the ECHR. Its reasoning is an argumentum ad consequentiam, which considers that the disadvantages of a course of action based on a certain legal solution outweigh its advantages.").

[118] ECtHR Article 8 Guide, *supra* note 82, at ¶¶ 7, 100, 120.

("When it comes to access to health services, the Court has been cautious to extend Article 8 in a manner that would implicate extensive State resources because in view of their familiarity with the demands made on the healthcare system as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court."); *See, e.g.*, Pentiacova and Others v. Moldova, App. No. 14462/03, 15 (April 1, 2005), http://hudoc.echr.coe.int/eng?i=001-67997.

[119] N. v. U.K., App. No. 26565/05 at ¶ 7 (Tulkens, J., dissenting) ("we also strongly disagree with the highly controversial statement made by the majority in paragraph 44 of the judgment in the context of the non-derogable right of Article 3[. . .]").

[120] *Id.* at ¶ 44.

[121] *Id.* at ¶ 7 (Tulkens, J., dissenting) ("the balancing exercise in the context of Article 3 was clearly rejected by the Court in its recent *Saadi v. Italy* [. . .], confirming the *Chahal* judgment [. . .]").

courts' continued reliance on outdated principles suggests that its overly stringent application of Article 3 to cases of deportation arises from a general consideration of improper factors. There can be no derogation to the protections afforded by Article 3, period.[122] If the court does take social and economic factors into account, it may only do so in its attempt to make the safeguards of Article 3 both "practical and effective" for the applicant by considering the social and environmental factors giving rise to the risk of ill-treatment, as was seen in *B.B. v. France*.[123] Thus, given this well-established Article 3 case law, continuing to follow the outdated approach to Article 3 health cases would be contrary to the absolute nature of Article 3.[124]

Finally, and most importantly, the ECtHR improperly ignored half of the reasoning provided by the Court in *D. v. U.K.* For years, the ECtHR's application only gave substantial weight to the "very exceptional circumstances" language provided in the 1997 opinion. However, *D. v. U.K.* also stipulated in the very same sentence that the "compelling humanitarian considerations at stake" assisted the Court in arriving at its conclusion.[125] Therefore, the ECtHR in *D. v. U.K.* was clearly attempting to provide broader protections than what was afforded to applicants in subsequent cases.

Following this, it makes sense that national courts subsequently applied the incorrect Article 3 health standard for many years. However, these courts separately erred in refusing to apply the appropriately slackened *Paposhvili* standard. First and foremost, sticking with *N. v. U.K.* fails to recognize the establishment of the ECHR as a "living document."[126] Despite the language

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[122] ECHR, *supra* note 1, at art. 15(2).

[123] B.B. v. France, App. No. 47/1998/950/1165, at ¶¶ 37–39.

[124] Saccucci, *supra note 112*, at 17-18 ("One may arguably wonder how an absolute prohibition can be guaranteed only in 'exceptional circumstances' and how the higher evidentiary threshold required in cases where the source of the risk is not directly attributable to the authorities of the receiving State can be considered in line with the alleged non-derogability of the protection against removal as conceived by the Court in *Saadi* (where it stated that the protection afforded by Article 3 ECHR does not allow for a higher standard of proof to be required in order to establish the risk of ill-treatment in case of removal)"); ECHR Article 3 Fact Sheet, supra note 2, at ¶ 4.9 (Recall that the absolute nature of Article 3 has been seen as an essential "safety net" particularly in cases of deportation.).

[125] D. v. U.K., App. No. 30240/96 at ¶ 54. This is especially true considering the structure of the relevant sentence, in that there is an 'and' between the two individual reasonings prior to a comma. This suggests that the court considered both the "very exceptional circumstances of this case" *and* "the compelling humanitarian considerations at stake" to factor into their decision that removing the applicant would be a violation of Article 3.

[126] Selmouni v. France, App. No. 25803/94, (July 28, 1999), at ¶ 101(finding "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future."); APT Guide, *supra* note 12, at 41 (Thus, the Court is not bound to follow its previous decisions, but is free to re-evaluate case law and extend the scope of Article 3 to acts which had not previously been regarded as torture or ill-treatment.).

of their domestic law,[127] national courts cannot just allude to a domestic provision to avoid applying a new standard from the ECtHR. The ECtHR's holding in *Paposhvili* presented the United Kingdom with a relaxed standard to follow and a more lenient application, which was more aligned with the intentions of the "humanitarian considerations" of *D. v. U.K.* in Article 3 health cases.[128] The national courts are thus required to abide by this. Separately, the U.K. national courts reason that *N. v. U.K.* is the "clear and constant line" drawn by the ECtHR; however, *N. v. U.K.* was arguably not clear at all considering that the ECtHR in *Paposhvili*, and many scholars since, explained why the previous Article 3 health case law (i.e. the "deathbed analysis") is actually inconsistent with the earliest decisions.[129] By undermining the justifications arising from the early ECtHR Article 3 health cases, the Court in *Paposhvili* inserted doubt as to whether the subsequent case law was clear on this matter,[130] and it is thus unlikely that such a stream of case law could meet the level of clear and constant required by the United Kingdom national statute. *Paposhvili*, on the other hand, did outline factors for national courts to weigh in applying Article 3 to deportation cases of persons in poor health,[131] which better align with the original relaxation of Article 3 in *D. v. U.K.* and *B.B. v. France*. Still, the ECtHR needs to move beyond *Paposhvili*'s slight relaxation of the actual language used in the *N. v. U.K.* standard to create a standard that better reflects the lenient application found in *Paposhvili*.

In further clarifying the Article 3 health standard, the ECtHR should take the following suggestions into consideration. First, while the case law popularly suggests that there are only two groupings consisting of (1) torture and (2) inhuman or degrading treatment, there is in fact reason to believe that these groupings should be analyzed as three separate items.[132] While the practice of Article 3 indicates we should treat these as two separate components, the language of the provision itself suggests we treat them as three separate features, each with their own minimum level of suffering to

[127] N. v. Sec'y of State for the Home Dep't, [2003] EWCA Civ 1369 at 8 ("in the absence of some special circumstances, [it seems to me that the court should] follow any clear and constant jurisprudence of the [European Court of Human Rights.]").

[128] This has since been affirmed in *Savran v. Denmark*, as well.

[129] Paposhvili v. Belgium, App. No. 41738/10 at ¶¶ 181–82; *see, e.g.*, Virginia Mantouvalou, *N v U.K.: No Duty to Rescue the Nearby Needy?,* 72 Mod. L. Rev. 815 (2009).

[130] Paposhvili v. Belgium, App. No. 41738/10 at ¶¶ 181–82.

[131] *Id*. at ¶¶ 189-90.

[132] *See, e.g.*, Soering v. U.K., App. No. 14038/88 at ¶ 100 ("Treatment has been held by the Court to be both "inhuman" because it was premeditated, was applied for hours at a stretch and "caused, if not actual bodily injury, at least intense physical and mental suffering", and also "degrading" because it was "such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.").

be met. Specifically, the word "or" between "inhuman" and "degrading" suggests that there are two different standards, whereas the inclusion of 'and' there instead would have grouped these two together. This diction was intentional and indicates there are actually three categories referenced in ECHR Article 3, with different thresholds. . In recognizing this and broadening what constitutes torture, "inhuman or degrading treatment or punishment" the Court would not only provide better protection in Article 3 health cases but more adequate protections across the board. It would follow from this adjustment that any Article 3 health case that doesn't meet the necessary requirements for the high threshold of torture would most definitely meet either a standard of "inhuman" *or* "degrading" treatment. Additionally, this degradation moves beyond one's deathbed. Ultimately, pairing these two together does the ECHR provision a disservice by raising the level of suffering necessary to meet both of those prohibited treatments. Even if one argues that the effect is the same, it definitely would not be in cases of poor health, as sick people are already in a most vulnerable state. Not allowing individuals the treatment necessary and forcing them to live a life deprived of the little dignity they may possess would likely be inhuman *or* degrading.

The Court in *Paposhvili* also added that if there remains "serious doubts" regarding the impact of removal following the States' assessment, then the returning State "must obtain *individual and sufficient assurance* from the receiving State that appropriate treatment will be available and accessible on return."[133] The Court should clarify two points on this portion of the standard, though: first, it should explain what it means by "individual and sufficient assurance," and second, it should declare whether such assurance constitutes a mere factor or an end to the matter. In regard to the appropriate assurances, this essay recommends referring to *Saadi v. Italy* and *Savran v. Denmark*.[134]

B. Other Legal Implications: ECHR Articles 2 and 8

This subsection addresses the application of ECtHR Articles 2 (right to life) and 8 (right to privacy and family life) to Article 3 health cases, arguing that the ECtHR needs to explore all claims presented in these cases involving

[133] Paposhvili v. Belgium, App. No. 41738/10 at ¶ 191 (emphasis added).

[134] Saadi v. Italy, App. No. 37201/06 at ¶ 124–27, 148 ("even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention . . . The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time."); *see also* Savran v. Denmark, App. No. 57467/15 at ¶¶ 43–67 (dealing with the sufficient assurance issue from *Paposhvili*.).

sick individuals facing deportation, as these claims present different and separate protections.

1. Article 2 and the Right to Life

To begin, the ECtHR's regular dismissal of Article 2 claims by dealing with them under the structure of Article 3 is improper, despite the courts' supposed inability to "dissociate" the two claims from one another.[135] The right to life in Article 2 implicates a number of distinct notions from Article 3, including a stronger connection to Article 15 in its explicit prohibition of the death penalty across international law.[136] Guidelines on the interpretation of Article 2 state that unless during wartime, a sentence having the effect of the death penalty would be in violation of Article 15.[137] Presented with this understanding, Article 2 may prove useful in cases where a claimant can argue that the "serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or . . . a significant reduction in life expectancy" standard from *Paposhvili* essentially results in a death sentence upon deportation.[138] Considering any sentence *having the effect of the death penalty* violates Article 15 and one's right to life, accordingly, the dismissal of Article 2 out of pure convenience is improper.

Similarly, the case law of Article 2 presents a separate basis for not deporting individuals of Article 3 health cases. For instance, combining the concepts found from *Oyal* and *McCann*, an applicant of an Article 3 health case can separately argue that the expelling State's intentional act of deporting a seriously ill individual, knowing that doing so will risk the life of the individual, is "beyond that which was absolutely necessary."[139] While *Oyal* referred to omissions of the offending State, the ECtHR has found both

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[135] S.C.C. v. Sweden, App. No. 46553/99 at 6 ("The Government consider that there is nothing to indicate that the expulsion of the applicant would amount to a violation of Article 2 of the Convention. In any event, the Government find it difficult to dissociate the complaint raised under Article 2 from the substance of her complaint under Article 3. They therefore deal with the substance of her complaints under the latter provision."); *see also* Giuliana and Gaggio v. Italy, App. No. 23458/02, ¶ 174 (Mar. 24, 2011), https://www.legal-tools.org/doc/0363c3/pdf/ ("Article 2 ranks as one of the most fundamental provisions in the Convention, one which in peace time, admits of no derogation under Article 15.").

[136] ECHR, *supra* note 1, art. 15; Protocol 13, *supra* note 72; ECtHR Article 15 Guide, *supra* note 72, at ¶¶ 28-30.

[137] ECtHR Article 2 Guide, supra note 69, at ¶¶ 2, 72-75.To provide a brief background, Article 15 did away with death penalty sentences outside of wartime and then ECHR Protocol 13 established the complete abolition of the death penalty. In doing so, it strengthened the absolute nature of Article 2's right to life, which, much like Article 3, was founded in Article 15. *See* ECHR, *supra* note 1, art. 15(2) ("No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.").

[138] Paposhvili v. Belgium, App. No. 41738/10 at ¶ 183.

[139] McCann v. U.K., App. No. 18984/91, ¶ 148-175 (Sept. 27, 1995), http://hudoc.echr.coe.int/eng?i=001-57943.

acts and omissions to apply to States' obligations under Article 2.[140] Finally, Article 2 can at the very least separately support an argument that ECHR violations involving potential risks, which have not yet materialized, equate to a finding where the violating harm had indeed surfaced.[141] Ultimately, a separate review of Article 2 may stand as a significant safety net for ECHR protection in Article 3 health cases, especially considering the recent broadening of the right to life in the international dimension.[142]

On the other hand, the distinctions between Article 2 and Article 3 are not the only reasons why the ECtHR should undergo a full analysis regardless of its Article 3 finding. Article 3 does not need to be completely removed from a proper analysis of Article 2, as "[t]ogether with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe."[143] In fact, pairing these two Articles with Article 15 helps uphold the true purpose of their existence, which underlies the ECtHR's clear respect for an individual's dignified life. Therefore, rather than severely limiting the applicability of Articles 2 and 3, individuals are deserving of the most available protections from them. In cases of any doubt, such as the ones presented in the ECtHR's Article 3 health cases, courts should err on the side of caution for an individual's life. With this said, the ECtHR's dismissal of Article 2 suggests that such an argument would not stand in the Court.

2. Article 8 and the Right to Privacy and Family Life

While the ECtHR most often considers Article 8 in connection with Article 3 health cases, it almost always comes to the same conclusion it finds in the Article 3 analysis and presents little substantive analysis on the matter. This suggests that the ECtHR is currently misrepresenting the unique contributions that an Article 8 claim can play in these cases.[144] From the plain language of the protections of Article 8 alone, it appears incredibly relevant in Article 3 health cases, as they involve impediments on an individual's

[140] ECtHR Article 2 Guide, *supra* note 69, at ¶ 36.

[141] R.R. and Others v. Hungary, App. No. 19400/11 at ¶¶ 28-29 .

[142] U.N.H.R. Comm., *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, UN Doc. CCPR/C/GC/36 (Oct. 30, 2018); Lucy McKernan and Bret Thiele, *UN Human Rights Committee Brings New Vitality to the Right to Life*, OpenGlobalRights (Feb. 13, 2019), https://www.openglobalrights.org/un-human-rights-committee-brings-new-vitality-to-the-right-to-life/ (ensuring the protection of a right to enjoy a life with dignity).

[143] Giuliana and Gaggio v. Italy, App. No. 23458/02 at ¶ 174.

[144] *See, e.g.*, N. v. U.K., App. No. 26565/05 at ¶ 26 (Tulkens, J., dissenting) ("While it is understandable that the Court, in its case-law, has refrained from examining a second complaint – concerning the same facts – when the first has given rise to a finding of a violation, it is certainly strange for the Court to be using the laconic form of words 'it is not necessary to examine the complaint under Article 8 of the Convention' after finding that there was *no* violation of Article 3 of the Convention.").

"right to physical and psychological integrity" and often affect one's right to personal development and the development of certain relationships falling within the protected "sphere."[145] That said, Article 8's strongest distinction from Article 3 is the significant role it can play in the protections of one's *quality* of life, especially considering other articles are specifically unconcerned with this.[146]

While *Pretty v. United Kingdom* – the case announcing Article 8's devotion to the quality of life – was about medical futility, it is similar in nature to many of the Article 3 health cases whose applicants are also "suffering from the devastating effects of a degenerative disease which will cause [his or] her condition to deteriorate further and increase [his or] her physical and mental suffering."[147] Recognizing this, it would follow that Article 8 could serve as a valuable tool to argue that the ECtHR's reasoning in *Pretty* similarly applies in Article 3 health cases, in that "the way [the applicant] chooses to pass the closing moments of [his or] her life is part of the act of living, and [thus, applicants have] a right to ask that this be respected."[148] Ultimately, Article 8 warrants a separate, in-depth review, regardless of any prior finding on Article 3.

C. Article 5 and the ACHR

The final conclusion drawn from the research above relates to this article's attempt to propose a more appropriate standard for the ECtHR's application to Article 3 health cases. As such, this section recommends that the ECtHR shift closer toward the ACHR approach to the corresponding Article 5 health cases. In doing so, the ECtHR will merely further its initial stride toward the ACHR standards by reintroducing a purposive element into

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[145] *Id.*

[146] Pretty v. U.K., App. No. 2346/02 at ¶ 65 ("The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance."); Pretty v. U.K., App. No. 2346/02 at ¶ 39. ("Article 2 of the Convention is phrased in different terms. It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life."); *see also* H.R. Comm., *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, UN Doc. CCPR/C/GC/36 (Oct. 30, 2018);McKernan & Thiele, supra note 138.

[147] Pretty v. U.K., App. No. 2346/02 at ¶ 64.

[148] *Id.* at ¶ 64. While this case used the medical technology argument to develop a case against remaining alive, it can be argued in the reverse to show that people should be allowed the chance to utilize this medical technology for the advancement of their physical or mental state. However, this argument is admittedly rather weak. *Id.* at ¶ 65 (the court also provided, "In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.").

a finding of torture through practice.[149] Applied in the context of Article 3 health cases specifically, this essay recommends making the distinction between treatment and punishment, as was seen in *Andrea*. Doing so would likely allow the comparable case law in the ECtHR to more accurately apply the court's recognition of an applicant's criminal convictions. While increasing the protections available to ECHR Article 3 applicants, it provides more specificity for the *Paposhvili* guidelines. Furthermore, the courts' finding that the deportation "may well be fatal" supports the arguments presented in Article 2 and Article 8's application regarding the death sentence.[150] Finally, doing so will better align with the European policies on the right to health.[151]

III. RECOMMENDATIONS FOR FUTURE RESEARCH

There are many potential areas to expand upon from this article since this topic is relatively unexplored in the legal arena today. To start, in future research, it is recommended that scholars further expand the comparative analysis in this essay to include the case law of the African Court on Human and Peoples' Rights. Doing this will allow for a better understanding of the impact that an explicitly recognized right to health can have on a society, as Africa also recognizes a right to health in Article 16 of its actual convention. Second, following the ECtHR's hopeful adjustment in fully analyzing all claims presented in Article 3 health cases, scholars can begin to analyze the true effect that Articles 2 and 8 have on these cases. It would also be helpful to explore the potential role of Article 14[152] regarding non-discrimination in such cases since health has been deemed a "status" subject to nondiscrimination protections[153] and these cases often involve HIV positive individuals, whom have been declared a vulnerable group in society.[154]

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[149] *See* Selmouni v. France, App. No. 25803/94 at ¶¶ 97–98; *see also* Aktaş v. Turkey, App. No. 24351/94 at ¶ 313; APT Guide, *supra* note 12, at 16.

[150] For instance, they may prove useful in cases where a claimant can argue that the "serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" standard from *Paposhvili* essentially results in a death sentence upon deportation. Paposhvili v. Belgium, App. No. 41738/10 at ¶ 183.

[151] Charter of Fundamental Rights of the European Union, art. 35, 2007 O.J. C 303/01 [hereinafter Charter of Rights] (stating "Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities).

[152] ECHR, *supra* note 1, art. 14.

[153] V.A.M. v. Serbia, App No. 39177/05, ¶ 114 (Mar. 13, 2007), http://hudoc.echr.coe.int/eng?i=001-79769.

[154] Kiyutin v. Russia, App. No. 2700/10, ¶ 64 (Mar. 10, 2011), http://hudoc.echr.coe.int/eng?i=001-103904 (finding a violation of Articles 14 and 8 when an applicant was refused residency due to his HIV diagnosis, taking into account the applicant's membership of a "particularly vulnerable group"); I.B. v.

Eventually, this will adjust the analysis from the other legal implications section above to include Article 14 alongside Articles 2 and 8. This is a favorable development, considering **"**[h]ealth-related cases brought before the [ECtHR] have most frequently been argued under Articles 2, 3, 8 and 14 of the Convention."[155]

Finally, it would be helpful to broadly explore the ECtHR's role in supporting the progression of the European right to health through its case law.[156] In doing so, legal scholars should more closely explore the different health distinctions created in the Article 3 health cases. For one, an examination of the role that mental health plays in ECtHR decisions and how the court's treatment of mental health has changed over the years, might help expose the type of illnesses and treatments the ECtHR is looking to protect over others. Given that nearly forty percent of all Europeans today suffer from mental health illnesses, Europe's cultural perspectives on and social commitments to mental healthcare have drastically changed.[157] Even the European Commission has recognized this clear shift to focusing on mental health by requesting that "mental health . . . be considered as a public health priority due to the heavy burden it places on the EU and its Member States".[158] Following this declaration, major policies were implemented for the recognition and improvement of mental health issues.[159] Determining what roles this might play in ECtHR case law could further the analysis of this essay. Additionally, there might be a stronger argument available after a

Greece, App. No. 552/10, ¶ 80 (Mar. 10, 2013), http://hudoc.echr.coe.int/eng?i=001-127055 (recognizing that "people with HIV have to face a whole host of problems, not only medical but also professional, social, personal and psychological, and to confront deeply rooted prejudice even from among highly educated people [. . .]. The prejudice was born out of ignorance about the routes of transmission of HIV/Aids, and has stigmatised and marginalised those who live with the virus. Consequently, the Court has held that people living with HIV are a vulnerable group and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on account of their health status.").

155 Thematic Report, *supra* note 66, at 5.

156 *See generally* ANNIEK DE RUIJTER, EU HEALTH LAW & POLICY : THE EXPANSION OF EU POWER IN PUBLIC HEALTH AND HEALTH CARE (2019); Charter of Rights, supra note 147, at art. 35, (stating "Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities).

157 Kate Kelland, *Nearly 40 percent of Europeans suffer mental illness*, Reuters (September 4, 2011), available at https://www.reuters.com/article/us-europe-mental-illness/nearly-40-percent-of-europeans-suffer-mental-illness-idUSTRE7832JJ20110904.

158 European Commission, *The State of Mental Health in the European Union* (2004), available at https://ec.europa.eu/health/archive/ph_projects/2001/monitoring/fp_monitoring_2001_frep_06_en.pdf.

159 European Commission, *Policies and practices for mental health in Europe* (2008), available at http://www.euro.who.int/__data/assets/pdf_file/0020/280604/WHO-Europe-Mental-Health-Acion-Plan-2013-2020.pdf.

more in-depth study of the different types of physical illnesses (e.g. chronic versus fatal illnesses of AIDS, cancer, kidney disease, etc.) and their various treatments (e.g. minimally versus highly invasive procedures, medicine versus machinery). Providing actual data on how the court has ruled in these cases and what they have specifically said about the illnesses and treatments at hand might support a more specific and clear approach to Article 3 health cases which differentiates according to the disease at issue.

CONCLUSION

In the end, *Paposhvili* shows that the ECtHR once again appears to be loosening its standard for Article 3 health cases in attempting to provide greater protections to those threatened with deportation to a State where he or she would receive inadequate health care.[160] This article shows the need for the court to adjust this standard in a consistent and lenient manner. Given its historical application of Article 3 as an absolute right, the additional protections provided by Articles 2 and 8 in these cases, and the comparably greater protection provided by the IACtHR under the ACHR, the ECtHR and the national courts bound by its decisions should be encouraged to actually provide the absolute protection to its citizens from torture, inhuman or degrading treatment or punishment that Article 3 alludes to. Nevertheless, the aforementioned courts, through their precedent, have instead effectively narrowed the initially protective standard created in *D.v. U.K.* – and now clarified in *Paposhvili* – so extensively that the limitations on the protective standard have begun to swallow the overall intentions of the rule, which was meant to protect sick and vulnerable individuals under "very exceptional circumstances" with "compelling humanitarian considerations at stake" from inhuman treatment.[161]

This essay concludes that (i) the ECtHR has incorrectly applied Article 3 to cases of poor health and deportation in the past, (ii) the ECtHR still needs to further clarify an appropriate standard for these cases, (iii) the national courts, particularly in the United Kingdom, are incorrectly following old precedent, (iv) the ECtHR needs to explore all claims presented to it in Article 3 health cases, especially claims of Article 2 and 8 violations, and (v) the ECtHR should shift more toward the American Convention on Human Rights approach to Article 3 health cases in better aligning with the European policies on the right to health. Ultimately, in addressing these concerns, the referenced courts might finally fill the vast protection gap that exists in Article 3 health cases today.

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[160] With the first time this occurred being the D. v. U.K. case in 1997.

[161] D. v. U.K., App. No. 30240/96 at ¶ 54. Consider, for instance, the fact that the ECtHR has only provided protection in two cases over the course of twenty years.