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THE FUTURE OF CLAIMS TO RESIST REMOVAL
BY NON-NATIONALS SUFFERING FROM HIV/AIDS

ABSTRACT. The focus of this article is to consider the difficulties facing non-nationals suffering HIV/AIDS to resist removal to their countries of origin where there is no or inadequate medical treatment. The link between HIV/AIDS and migration will be explored illustrating the vulnerability of displaced people to the virus. The current UK legal position for those attempting to resist removal in such circumstances will be explored. The article will explore two potential avenues that may prevent removal of non-nationals with HIV/AIDS to countries with limited access to the necessary treatment. In the first instance consideration of Article 3 European Convention on Human Rights (ECHR) will be made with particular emphasis on mother and child claims. The second argument will examine the potential for refugee claims under Article 1A (2) Refugee Convention 1951 where an applicant may be able to demonstrate a well-founded fear of persecution because of membership to a particular social group. The authors will particularly emphasise the argument that in certain countries sufferers will experience ostracism and victimisation where its severity may amount to treatment contrary to Article 3 ECHR and persecution under the Refugee Convention.

KEY WORDS: Article 3 of the European Convention on Human Rights, HIV and inadequate medical treatment, immigration and asylum, membership of a particular social group, refugee status

The HIV epidemic has the greatest impact on those who are most vulnerable. It has been said that there is a clear relationship between the factors that cause migration and the conditions where the spread of HIV/AIDS thrive. Given the enormity of the HIV issue it is arguable that governments need to seek to protect and prevent the spreading of this virus both in external and internal terms. The opportunity to do so arises in the migration context where sufferers have left their countries of origin either because of the circumstances that led to their condition or for other factors which may be exacerbated by their condition. The relationship

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between migration and HIV/AIDS is expressed by Dr Mary Haour-Knipe,

HIV thrives in situations of powerlessness, poverty, exploitation and social exclusion. The factors that drive migration are the same as those behind the AIDS epidemic: Social inequalities, economic imbalances and non respect of rights – factors that push people to migrate also make migrants vulnerable to HIV.¹

This suggests that certain migrants are more vulnerable to exposure of HIV/AIDS either as the reason for their flight or as a consequence of their flight. In particular the spread of HIV/AIDS in sub-Saharan Africa and its rise amongst women in particular is an increasing global concern.² However, in the United Kingdom efforts to combat HIV/AIDS in Africa extends to providing aid in these countries. While the government appears satisfied to help from a distance, there is more reluctance to do so when migrants reach our shores as is encapsulated in the House of Lords decision in N v Secretary of State for the Home Department [2005] 4 All ER 821.

It is not unusual for foreign nationals with HIV who arrive in the UK to be unaware of their HIV status. This is not restricted to nationals of sub-Saharan states and their displaced. For example, it was estimated that 510,000 people with HIV in China (out of 650,000 acknowledged by the Chinese Government) are unaware of their status.³ Individuals are often reluctant to attend testing centres in their communities for fear of discovering they have contracted the virus. Their reasons can reflect their fear of the community reaction towards them, the shame it may bring to their family. Such knowledge forces the reality that they will eventually be unable to work and need to depend on their family to care for them with limited means.