CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 13669/03
by Francisco J. ARCILA HENAO
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 24 June 2003 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 25 April 2003,

Having deliberated, decides as follows:

THE FACTS

The applicant, Francisco Javier Arcila Henao, is a Colombian national, who was born in 1970 and currently resides in Amsterdam. He is represented before the Court by Mr R. Bosma, a lawyer practising in Assen.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

In its judgment of 21 July 1997 the Haarlem Regional Court (*arrondissementsrechtbank*) convicted the applicant of carrying drugs when he tried to enter the Netherlands via Schiphol airport on 7 May 1997. He was sentenced to fifteen months' imprisonment. The applicant did not appeal.

On 22 October 1997, on the basis of the conviction, the State Secretary of Justice (*Staatssecretaris van Justitie*) declared the applicant an undesirable alien (*ongewenstverklaring*), entailing an exclusion order valid for 10 years. The applicant again did not appeal. On 3 March 1998, after having served his sentence, the applicant was expelled to Colombia.

On 10 December 1998, the applicant travelled back to the Netherlands, where he was arrested for carrying drugs. On 31 March 1999, the Hague Regional Court convicted him of offences under the Opium Act (*Opiumwet*) and sentenced him to two years' imprisonment. The applicant did not appeal. Whilst serving his sentence, the applicant was found to be HIV-positive for which he was given treatment in the form of antiretroviral medication as from September 1999.

On 3 February 2000, in view of his imminent release from prison, his medical condition and the allegedly prohibitive costs of antiretroviral medication in Colombia, the applicant requested the Minister of Justice to lift the decision of 22 October 1997 in which he was declared an undesirable alien.

On 3 April 2000 the applicant further applied for a residence permit for the purpose of medical treatment. The State Secretary of Justice rejected this request on 6 April 2000. The State Secretary noted that the decision of 22 October 1997 declaring the applicant an undesirable alien had obtained the force of *res iudicata*. Consequently, as long as this decision was valid, the applicant was ineligible for a residence permit. However, in view of the fact that the applicant had filed a request to lift the decision of 22 October 1997 in respect of which the State Secretary intended to seek the views of the Medical Advice Bureau (*Bureau Medische Advisering*) of the Ministry of Justice before deciding on this request, the applicant was granted a stay of expulsion.

On 7 April 2000, after having served his sentence, the applicant was released from prison but was immediately placed in aliens' detention (*vreemdelingenbewaring*) for expulsion purposes as he did not hold a residence title, had been declared an undesirable alien and did not have sufficient financial means to provide for his subsistence or to finance the journey to his country of origin. The applicant's lawyer filed an appeal against this placement.

On 12 April 2000, having noted that appeal, the State Secretary informed the applicant's lawyer that the applicant would be released from aliens' detention on the same day and, as his placement in aliens' detention had been unlawful from the outset given the decision of 6 April 2000 to stay the applicant's expulsion, he would be awarded compensation for the time spent in such detention, as well as compensation for the legal costs incurred.

On 19 April 2000, the applicant's lawyer withdrew the appeal against the applicant's placement in aliens' detention. On the same day, the applicant's lawyer filed an objection (*bezwaar*) with the State Secretary against the negative decision on the applicant's request for a residence permit on medical grounds.

According to a report dated 17 October 2000 of the Medical Advice Bureau of the Ministry of Justice, the applicant was HIV-positive and suffering from Hepatitis B. His continuous treatment with antiretroviral medication had resulted in an improvement of his immune system. It further stated that the applicant was fit to travel. In a supplementary report of 27 December 2000, the Medical Advice Bureau informed the State Secretary that, if the applicant's treatment were to be stopped, it could be expected that his health would relapse (reduced immunity and opportunistic infections), giving rise to an acute medical emergency which, failing treatment, would be of a permanent character.

On 11 January 2001, the State Secretary put additional questions to the Medical Advice Bureau, which included questions about the possibilities for treatment in the applicant's country of origin. On 31 January 2001, the Medical Advice Bureau informed the State Secretary that treatment for HIV/AIDS was in principle possible in Colombia both in private and public health care institutions, but that there could be delays in the delivery of medication. Moreover, in public health care institutions it was possible to face a waiting list of one year.

On 15 February 2001 the State Secretary rejected the applicant's request to lift the decision declaring him an undesirable alien, holding that this was only possible after the person concerned had resided outside the Netherlands for a period of ten years and had not re-offended. As the applicant did not comply with these conditions, his request could not be met. As to the applicant's arguments based on his medical condition, the State Secretary noted that treatment was available in Colombia and that it was therefore possible to pursue the applicant's medical treatment there. The State

Secretary considered that it was the applicant's own responsibility to continue his medical treatment in Colombia and thus to prevent an acute medical emergency from arising. The State Secretary concluded, therefore, that there was no life-threatening situation outweighing the public interests of the Netherlands in protecting public order. In this respect, the State Secretary also took into account that the applicant's mother, sister and three brothers were living in Colombia, and it had not been shown that they would be unable to provide the applicant with the necessary care and support. The State Secretary further decided not to allow the applicant to remain in the Netherlands pending the outcome of possible further proceedings on his request to lift the decision declaring him an undesirable alien and, consequently, issued an order for his expulsion.

Also on 15 February 2001, the State Secretary rejected the applicant's objection to the negative decision of 6 April 2000 on his request for a residence permit for medical treatment. As the applicant had been declared an undesirable alien and as his request to lift this decision was rejected, the applicant was ineligible for a residence permit. Insofar as the applicant relied on Article 3 of the Convention, the State Secretary held the applicant had not demonstrated any concrete reasons or established that, if expelled to Colombia, he would face a real risk of treatment contrary to this provision. The mere reliance on the applicant's illness was found insufficient, as he could be expected to make the necessary effort to continue his medical treatment in Colombia. The State Secretary further decided that the applicant was not allowed to remain in the Netherlands pending possible appeal proceedings against this decision, and issued an order for the applicant's expulsion.

On 6 March 2001 the applicant, via a pastoral organisation in Amsterdam, informed his lawyer that his mother had died in Colombia on 26 May 1999, that his 72 year-old father has no income and that he had five brothers, respectively 22, 18, 17, 13 and 8 years old, and one 13 year-old sister. His father and six siblings were all residing in Colombia and were maintained by his 22 year-old brother.

On 14 March 2001, the applicant's lawyer filed an objection against the State Secretary's refusal on 15 February 2001 to lift the decision declaring the applicant an undesirable alien. On the same day, the applicant's lawyer filed an appeal with the Hague Regional Court against the State Secretary's refusal on 15 February 2001 to grant the applicant a residence permit on medical grounds. The applicant's lawyer further requested the Regional Court to issue an interim measure to allow the applicant to stay in the Netherlands pending the outcome of these appeals and the proceedings concerning his objection filed with the State Secretary on 14 March 2001.

On 18 September 2001 the State Secretary rejected the applicant's objection filed on 14 March 2001, in respect of the decision to reject the applicant's request to lift the decision to declare him an undesirable alien,

and upheld the decision of 15 February 2001. On 12 October 2001, the applicant's lawyer filed an appeal against this decision with the Hague Regional Court.

On 16 August 2002, a hearing on the two appeals filed by the applicant was held before the Hague Regional Court sitting in Almelo. In the course of this hearing, the Regional Court heard the applicant who stated that he currently felt well although he was tired and sometimes had problems with eating, which were the side effects of his medication. He further stated, *inter alia*, that he had worked as a cleaner. The Regional Court also heard an official from the competent Ministry, as well as a co-ordinator of Sida Vida, a Dutch support group for Spanish and Portuguese speaking persons suffering from HIV/AIDS.

In its decision of 29 October 2002 the Hague Regional Court rejected both appeals. Insofar as the applicant relied on Article 3 of the Convention, the Regional Court held that only in cases where an appellant finds himself in an advanced and directly life-threatening stage of an incurable disease, where there are no medical facilities and social care in the country of destination and where an appellant was been dependent to a large extent on the facilities and care from which he has benefited in the Netherlands for a considerable period of time, an expulsion could be regarded as being contrary to Article 3.

However, it appeared from the statements given by the applicant and the co-ordinator of Sida Vida that the applicant's expulsion to Colombia would not immediately result in an acute medical emergency, as the applicant's current condition was good and he was capable of working. On the basis of the medical evidence submitted about the applicant's medical condition and the likely consequences of an interruption of his medical treatment, the Regional Court did not find the applicant to be at an advanced and directly life-threatening stage of his disease. Considering that the applicant could fall back on the moral support of his family, the Regional Court held that the risk of relapse and less favourable circumstances did not warrant another finding. It therefore concluded that the refusal to lift the decision declaring the applicant an undesirable alien and the refusal to grant him a residence permit for medical reasons were not contrary to Article 3 of the Convention.

As to the question whether the State Secretary had justly rejected the applicant's request to lift the decision declaring him an undesirable alien, the Regional Court noted that it was not in dispute that the applicant had not complied with the requirement of living abroad for ten years.

As to the question whether the State Secretary, in the determination of the question whether there were compelling reasons of a humanitarian nature for lifting the decision, had correctly balanced the interests involved, the Regional Court noted that the applicant had never lawfully resided in the Netherlands and that, after he had been declared an undesirable alien in 1997, he had again been convicted of drug trafficking. It further noted the

undisputed fact that the applicant had no ties with the Netherlands other than those directly flowing from his arrest and conviction.

The Regional Court agreed with the State Secretary that the Netherlands' interest in excluding the undesirable alien outweighed the limited possibilities of medical treatment in Colombia. It further found that the State Secretary had correctly considered that the applicant was in no different position than other HIV-positive Colombian nationals who were also affected by the problems of the Colombian health care system and who were also not admitted to the Netherlands. This was all the more so since the applicant's disease had manifested itself in the Netherlands solely on his arrest and conviction. Had the applicant not been arrested and pursued his journey as planned, he would – like his HIV-positive compatriots – have had to rely on treatment in Colombia.

The Regional Court held that, in these circumstances, the fact that the applicant's disease manifested itself in the Netherlands did not give rise to an obligation for the Netherlands' authorities to care for his health. It therefore rejected as ill-founded the applicant's appeal against the refusal to lift the decision declaring him an undesirable alien. As this decision rendered him ineligible for a residence permit, it also rejected the applicant's appeal against the refusal to grant him one for medical reasons.

On the same day and in view of its decision on the applicant's two appeals, the Hague Regional Court sitting in Almelo also dismissed the applicant's request for an interim measure pending the outcome of the proceedings on these two appeals.

In a letter of 23 December 2002, an intern at the Amsterdam Academic Medical Centre (AMC) informed the applicant's lawyer that the applicant was currently receiving treatment for an HIV-infection at the AMC policlinic. His treatment had started with a CD4 level of less than 100/m2 and, under the influence of the treatment, this level had risen since. If the applicant remained under medical control and continued to take medication, his short and medium term prognosis was reasonable. However, past experience had shown that about 90% of patients whose treatment had started with a CD4 level under 100, like the applicant, and who stopped taking medication, died within a year, usually from an opportunistic infection such as pneumonia or toxoplasmosis.

COMPLAINT

The applicant complained that his expulsion to Colombia would amount to treatment contrary to Article 3 of the Convention as it would reduce his life expectancy because he would be unable to continue the medical treatment required by his condition.

THE LAW

The applicant claimed that, being HIV-positive and given the practical difficulties he would face in Colombia in obtaining the required medical treatment, his expulsion to Colombia would be in violation of his rights under Article 3 of the Convention. This provision reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Court reiterates at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies.

It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question.

While it is true that Article 3 has been more commonly applied by the Court in contexts where the risk to the individual of being subjected to ill-treatment emanates from intentionally inflicted acts by public authorities or non-State bodies in the receiving country, the Court has, in the light of the fundamental importance of Article 3, reserved to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not, therefore, prevented from scrutinising an applicant's claim under Article 3 where the risk that he runs of inhuman or degrading treatment in the receiving country is due to factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances of the case to rigorous scrutiny, especially the applicant's personal situation in the expelling State (see *Bensaid v. the United Kingdom*, no. 44599/98, §§ 32 and 34, ECHR 2001-I).

According to established case-law aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State. However, in exceptional circumstances an implementation of a decision to remove an alien may, owing to compelling humanitarian considerations, result in a

violation of Article 3 (see *D. v. the United Kingdom*, judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III, p. 794, § 54). In that case the Court found that the applicant's deportation to St. Kitts would violate Article 3, taking into account his medical condition. The Court noted that the applicant was in the advanced stages of AIDS. An abrupt withdrawal of the care facilities provided in the respondent State together with the predictable lack of adequate facilities as well as of any form of moral or social support in the receiving country would hasten the applicant's death and subject him to acute mental and physical suffering. In view of those very exceptional circumstances, bearing in mind the critical stage which the applicant's fatal illness had reached and given the compelling humanitarian considerations at stake, the implementation of the decision to remove him to St. Kitts would amount to inhuman treatment by the respondent State in violation of Article 3 (see *D. v. the United Kingdom*, cited above, pp. 793–794, §§ 51–54).

The Court has therefore examined whether there is a real risk that the applicant's expulsion to Colombia would be contrary to the standards of Article 3 in view of his present medical condition. In so doing, the Court has assessed the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on the applicant's state of health (see *S.C.C. v. Sweden* (dec.), no. 46553/99, 15 February 2000, unreported).

The Court notes that the applicant stated on 16 August 2002 that he felt well and had worked, although he did suffer from certain side-effects of his medication. The Court further notes that, according to the most recent medical information available, the applicant's current condition is reasonable but may relapse if treatment is discontinued. The Court finally notes that the required treatment is in principle available in Colombia, where the applicant's father and six siblings reside.

In these circumstances the Court considers that, unlike the situation in the above-cited case of *D. v. the United Kingdom* or in the case of *B.B. v. France* (no. 39030/96, Commission's report of 9 March 1998, subsequently struck out by the Court by judgment of 7 September 1998, *Reports* 1998-VI, p. 2595), it does not appear that the applicant's illness has attained an advanced or terminal stage, or that he has no prospect of medical care or family support in his country of origin. The fact that the applicant's circumstances in Colombia would be less favourable than those he enjoys in the Netherlands cannot be regarded as decisive from the point of view of Article 3 of the Convention.

Although the Court accepts the seriousness of the applicant's medical condition, it does not find that the circumstances of his situation are of such an exceptional nature that his expulsion would amount to treatment proscribed by Article 3 of the Convention.

It follows that the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

S. DOLLÉ	J.-P. COSTA
Registrar	President