IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Before:
LORD JUSTICE AULD
LORD JUSTICE SEDLEY
and
LADY JUSTICE SMITH

Between:
KR (IRAQ) Appellant
- and -
SECRETARY OF STATE FOR THE HOME DEPARTMENT Respondent

[2007] EWCA Civ 514

Mr E Nicholson (instructed by Messrs Wilson & Co) for the Appellant
Ms J Collier (instructed by Treasury Solicitors) for the Respondent

Wednesday 18 April 2007

Lord Justice Sedley:

1. The appellant is an Iraqi Kurd, now in his early forties. He was a lieutenant in the state police under Saddam Hussein's regime but acted as an informer for the separatist PUK movement. In 1987 his clandestine activity was suspected. He was detained and tortured but the following year was released and resumed work as a police officer. In 1991 he defected to the Kurdish Autonomous Authority and continued to work as police officer in Irbil until, in 1994, the KDP (PUK's rival) seized and tortured him. He was released after about three months and resumed work, but in 1996 fled to Sulaymania, where he married a woman from an orthodox Muslim family which disapproved of the liaison.

2. Although the fact-finder did not accept that she had been murdered, it was accepted that in 2002 news of his wife's death reached the appellant. Two years or so later news reached him that his brother too had been killed. The appellant was by then in the UK awaiting a final decision on his asylum claim. He had fled here October 2001 and claimed asylum on arrival. The Home Secretary refused his application, but his initial appeal succeeded. The adjudicator's decision was,

however, overset by the IAT on the Home Secretary's appeal. On remission, an immigration judge in June 2004 dismissed the appeal, but on appeal the AIT found errors in the determination and adjourned the case for reconsideration on the factual basis which I have summarised.

3. The relevance of this assumed state of fact is that the case before us turns on the appellant's psychiatric state. The medical report on which he relied cited the news of his wife's death as the factor which precipitated a suicidal depression requiring in-patient treatment. The second-stage tribunal said:

> "We are prepared to approach our evaluation of the appellant's claim on the basis that the appellant did receive news of his wife's death, whether murdered by IMIK or not, in March 2002 and that on 13 January 2004 he learned that his brother had been killed."

4. They nevertheless dismissed his appeal, holding that the claim had to succeed under ECHR art.8 or not at all, and that the facts did not reach the threshold of exceptionality required to engage art.8. Alternatively, they held that if art.8 were engaged it would be proportionate to remove the appellant in the interests of immigration control.

The medical evidence

5. The psychiatric evidence before the AIT came solely from the appellant's side. Its substance was carefully distilled by them in the following passage:

> 7. … The report of Dr Omotayo states that the appellant had a diagnosis of Post-Traumatic Stress Disorder. He initially started to experience symptoms whilst in Iraq as long as 1987 following his first period of imprisonment. Dr Omotayo reported that the appellant's torture took a number of forms including flogging, the application of electric shock to his genitalia, being suspended from the ceiling for long periods of time from handcuffs and starvation. He also had various objects introduced into his anal and rectal canal. In dealing with the appellant's past psychiatric history Dr Omotayo said that he was seen by a psychiatrist in Baghdad in 1987 who commenced him on Amitriptylin and Thioridazine (anti-depressant and anti-psychotic). He made progress but seemed to have major relapses when he was re-imprisoned in 1994 and 1997. The appellant's first contact with the Mersey Care NHS Trust was in February 2001 when he was seen by a consultant psychiatrist. He then reported symptoms including early morning awakening, poor appetite, tearfulness, periods of intense anger, flashbacks and nightmares. He described being in a state of constant autonomic hyper arousal with hyper vigilance. He suffered from insomnia, anxiety and depression. Suicidal ideation was not infrequent and he

occasionally drank excessive amounts of alcohol. His symptoms were then found to be consistent with the diagnosis of Post-Traumatic Stress Disorder. He was then commenced on medication and follow-up at the Out-Patient Department. His symptoms had, however, proven largely resistant to treatment despite regular reviews of medication. A clear maintaining factor in his illness would appear to be the uncertainty of his future. The appellant was turned down for psychotherapy because it was felt that the uncertainty about his immigration status would interfere with his progress and treatment. Dr Omotayo made mention of the event in March 2002 to which we have referred and stated that March 2003 was a particularly difficult time as well while the Iraq war was on. A more recent blow was when he visited relatives in London, only to learn that his brother was murdered in Iraq over a year ago. His current medication at the date of the report consisted of Amitriptylin and Chlorpromazine (anti-psychotic and calming agent). He had a PPS counsellor and attended the Umbrella Centre for anxiety management. He also received out-patient support on an average of once every three months from Dr Omotayo.

8. The opinion reached by Dr Omotayo was that the appellant suffered from a form of mental disorder, namely Post-Traumatic Stress Disorder. He required treatment in the form of out-patient care, medication, psychotherapy. His response had been generally poor. The illness was precipitated initially in 1987 by extreme ill-treatment when he was a captive in Iraq. Despite that he had made a concerted effort to settle in the country learning English and IT skills to improve himself. He was quite fearful of being sent back to Iraq and impressed on Dr Omotayo that his life might be in danger. There was a small but significant risk of precipitous reactions such as severe self-harm or suicide if the appellant was turned down on this occasion. Dr Omotayo thought that the disappointment at this time would only reinforce his chronic sense of hopelessness and helplessness which were major risk indicators for suicide.

9. In her report dated 24th July 2006 Dr Craig stated that the major symptoms that the appellant experienced were anxiety and heightened arousal, instability of mood including periods of depression, avoidance of reminders of his traumatic experiences and intense flashbacks of his past trauma. His avoidance was severe, for example he was unable to watch Kurdish TV and avoided any references in the media to Iraq as these triggered severe anxiety and flashbacks. In addition he isolated himself socially, was irritable and low in mood and had difficulty concentrating. He had recurrent thoughts of self-harm which at times were intense. They had seen no significant improvement in his mental state in the years that he had been under the care of the

mental health services in Liverpool. At the time Dr Omoytayo had prepared his report the appellant was engaged in some English classes and computer classes but since then had become more withdrawn and although he did have friends locally he saw little of them. He spent a great deal of time alone in his flat and as a result his symptoms had worsened somewhat. On a positive note his grasp of English had improved a great deal. He continued to be prescribed a high dose of anti-depressant medication and anti-psychotic medication of the type mentioned by Dr Omotayo but there had been no recent change in his medication which did bring about some improvement of his symptoms, although they persisted. Dr Craig expressed the view that they would see a significant improvement in his mental state if he were granted asylum but a complete resolution of his symptoms was not anticipated and he would require ongoing support from mental health services whatever the outcome. In a paragraph numbered 3 in the report Dr Craig expressed the view that were the appellant to be forced to return to Iraq and in the process was unable to continue with his medication he would anticipate a severe deterioration in his mental state with very high levels of anxiety, depressed mood and a very high risk of self-harm or suicide. In the paragraph numbered 5 Dr Craig stated that it was conceivable that the appellant might be able to access the medications that he was currently prescribed as both of these had been available worldwide for many years. Dr Craig thought it was very unlikely that the appellant would be able to access a psychiatrist and thought it all but impossible that he would be able to access the kind of psychological work that their psychotherapy service in Liverpool would be able to offer him. The respondent has not taken issue with the opinions expressed in either of these reports save that Mr Blundell did suggest that the appellant's account of his symptoms as time went on was exaggerated.

10. In the addendum to Dr Craig's report dated 1st August 2006, Dr Craig painted a much bleaker picture than had been evident in the report dated 24th July 2006, which had suggested that it was only if the appellant were unable to continue with his medication that there would be a severe deterioration in his mental state. The addendum suggested that if the appellant were forced to return to Iraq he would be exposed to a great number of triggers for his distress, so that the effect of a return to Iraq would be a very predictable and severe deterioration in his mental state. It is difficult to see why if the effect of a return to Iraq would be a very predictable and severe deterioration in his mental state, Dr Craig had not expressed that view in the report dated 24th July 2006. It is clear from the introduction to that report that Dr Craig knew that the report was to be used in connection with the appellant's claim

> for asylum in respect of which there was to be a hearing on 13.05.2004 and the issue was the effect of a return to Iraq on his mental condition. In the addendum Dr Craig went on to say that he was not sure that the appellant could cope with the severity of distress and would consider him a very high risk of self-harm or suicide.

The law

6. Since the AIT's determination, the House of Lords has delivered judgment in *Huang* [2007] UKHL 11. Although Edward Nicholson for the appellant submits that the AIT might well have reached a different view had they had their Lordships' restatement of principle before them, he has not been able to show with any specificity how this might have come about. What seems more relevant is to use *Huang* as an additional touchstone for deciding issues which we would previously have answered, as the AIT did, by reference principally to *Razga*r [2004] UKHL 27, but nothing in this appeal turns upon it. I agree nevertheless with Auld LJ that the essential change in our approach following *Huang* will be that, rather than take the threshold of entry into art. 8(1) to be some exceptionally grave interference with private or family life, tribunals and courts will take the language of the article at face value and, wherever an interference of the kind the article envisages is established, consider whether it is justified under art. 8(2). In the great majority of cases it will be, because immigration controls are established by law and their operation ordinarily meets the criteria of proportionality which, in the Strasbourg jurisprudence, measure what is necessary in a democratic society for such prescribed purposes as the economic wellbeing of the country. While therefore there is no need to apply a formal test of exceptionality, it will be only rarely in practice that an otherwise lawful removal which disrupts family or private life cannot be shown to be compliant with art. 8.

The findings

7. The IAT, concluded its otherwise carefully reasoned determination with a contingent alternative finding:

> "Even if … we were obliged to consider the question of proportionality, we are satisfied that the appellant's circumstances for the reasons which we have given do not amount to the most compelling humanitarian considerations which should prevail over the legitimate aims of immigration control."

8. It is necessary to say that, if art 8(2) were to be in issue, this perfunctory reasoning would be unacceptable. The courts have said more than once, and evidently we need to say again, that proportionality calls for a structured examination starting from the fact (actual or assumed) that the potential impact of

removal on the applicant is so serious as to have engaged art. 8(1). It cannot be dealt with in a throwaway line. As Lord Bingham said in *Razgar* §20, the severity and consequences of an established interference with the primary art. 8 right, despite the strong imperative of immigration control, "call for careful assessment" case by case. As Mr Nicholson observes, there is as yet no case which holds that if a person were to commit suicide as a result of removal, this would be proportionate to the interests of immigration control.

9. In the event, Jane Collier for the Home Secretary does not seek to hold this limb of the decision. She does not accept that it is intrinsically deficient (though I venture to doubt whether the Home Office would be quite so sanguine about a comparably laconic finding that removal was disproportionate) but submits that, if the appeal were to succeed on art 8(1), it would call for reconsideration in the light of *Huang*.

10. For the reasons I have given, if the case on analysis reaches the art 8(1) threshold, I would have no hesitation in requiring a proper – meaning a full - consideration of the question of proportionality under art. 8(2). The single substantial question for this court is accordingly whether the IAT was entitled to conclude that the case did not reach the threshold of real risk in the first place.

11. As to this, the IAT set out their reasons with great care. Having reminded themselves of the law as it then stood they accepted Mr Nicholson's submission that the risk to the appellant stood at its highest, on the evidence, not on the receipt of an adverse decision or on removal but following return. As to this, their findings need to be set out in full:

> 15. It is significant in our view that at the time in March 2002 that the appellant became severely depressed and suicidal he was admitted to hospital for a period of two weeks under close observation. It is significant in our view that when he learned that his brother was murdered he did not require admission to hospital. It is also significant in our view that despite the opinion of Dr Omotayo that there was a small but significant risk of the precipitous reactions such as severe self-harm or suicide if the appellant were turned down on the occasion of his appeal to the Adjudicator, there is no evidence that he attempted any form of self harm following the dismissal of his appeal. It is also significant in our view that although the appellant has received bad news in relation to his claim for asylum on a number of occasions there has been no incident of self-harm of any sort or any attempt at suicide. In any event we are satisfied that there are in place effective measures that would effectively prevent a successful attempt at suicide both stage (i) and stage (ii).
> 16. The question remains therefore whether there is a real risk that the appellant would kill himself in Iraq. In this connection,

notwithstanding that Mr Blundell conceded that there was a risk of suicide, it is necessary to evaluate the degree of risk. It is significant in our view that Dr Omotayo, being one of the consultant psychiatrist involved in the care of the appellant since December 2000 and therefore could be expected to have an intimate knowledge of his circumstances, expressed the view in his report that there was only a small, albeit significant, risk of a precipitous reaction if the appellant's appeal failed at that time. Dr Omottayo found no evidence of psychotic symptomatology, neither did the appellant harbour thoughts of self harm or suicide when he saw him. He found no abnormalities of perception in the appellant. Cognitively he was oriented in time, place and person. He displayed normal attention and concentration. In relation to return to Iraq he merely commented in paragraph 5 of his opinion that he had his doubts if he would be able to access good quality psychiatric care as was available in the UK. In paragraph 4 of his opinion he stated that the appellant was quite fearful of being sent back to Iraq and impressed on him that his life might be in danger. It is clear, however, that the Adjudicator rejected the appellant's claim to fear serious harm at the hands of Ansar al Islam (ex IMIK) and that finding has not been challenged. In these circumstances, insofar as the risk of suicide may be based upon the appellant's fear of ill-treatment in the receiving state, it cannot be said to be objectively well-founded in accordance with the fifth factor identified in the case of **J**.

17. It is also significant in our view in this connection that, as indicated above, although in March 2002 the appellant became suicidal and required hospital admission for a period of two weeks under close observation, he has not actually made any attempt at self-harm or suicide, particularly on those occasions when he received bad news about his asylum claim. Dr Craig relates that the appellant has recurrent thoughts of self harm which at times were intense, but she does not refer to any specific occasion on which she appellant has gone so far as to attempt self harm of any kind. It is also the case that the appellant exhibited similar symptoms if not identical ones to those that he exhibits now when he was in Iraq. No attempt at suicide in Iraq has been reported. According to Dr Omotayo he was seen by a psychiatrist in Baghdad when he was prescribed the same anti-depressant drug that he is now receiving. Dr Craig made the point in the report dated 24th July 2006 that both of the medications that the appellant was currently prescribed had been available worldwide for many years. In these circumstances we are not satisfied that despite her view about "triggers" the risk of suicide upon return to Iraq is as high as stated by Dr Craig in the addendum report.

18. Mr Blundell on behalf of the Secretary of State accepted that mental health services were consistently reported as poor as set out in the IAS research analysis dated 31st July 2006. That analysis reported a press release from Kurdistan Development Corporation dated May 2004, which is a little out of date, reporting that the picture in Kurdistan was no different to the rest of Iraq with drugs and equipment shortages. It states that a March 2005 report on psychiatric care in Iraq does nothing to dispel the grim view of Iraqi healthcare generally and paints a frightening picture of limited mental healthcare drugs, treatment and expertise and a society that is not tolerant of mental illness. Although it may be the case that mental healthcare drugs are limited, given that those that the appellant needs have been available worldwide for many years we are not satisfied that those drugs which the appellant does need would not be available to him in Iraq to treat his condition.

19. Mr Nicholson relied upon a passage in the judgment of Buxton LJ in paragraph **[39]** of the report of the decision of the Court of Appeal in **ZT v Secretary of State for the Home Department [2005] EWCA Civ 1421** in which he said he could envisage a case where humiliation, ostracism and deprivation of basic rights, on top of the burden of being HIV positive, created a situation of exceptionality under the jurisprudence of *N v SSHD*. Mr Nicholson suggested that the stigma of mental illness would be an additional burden which would make the appellant's case exceptional. He relied upon a passage in the IAS research analysis which stated that people with psychiatric illnesses such as depression or acute anxieties would often be told to read the Qur'an or pray more, or would be threatened by a husband, father or family members. The position, however, in the appellant's case is that he does not come from a strict Muslim family and there is no evidence that he was rejected by his family on the previous occasions when he exhibited symptoms of mental illness, and indeed when he sought treatment from a psychiatrist in Baghdad. As indicated above we accept the evidence which demonstrates that the provision of mental healthcare in Iraq is extremely poor as indicated not only in the IAS research analysis document but also in the documents placed before us by Mr Blundell. It is significant, however, in our view that since the appellant has been in the UK he has managed to live without any medical treatment other than the mediation that he is currently receiving, leaving aside the relatively brief period spent as an in-patient. Dr Craig's opinion as indicated above in paragraph 2 of the report dated 24th July 2006 was that his medication did bring about some improvement in his symptoms.

20. A further important factor which relates to the question of risk is that we are satisfied that the appellant's parents are alive and

> well in Iraq. Dr Omotayo stated that the appellant presumed that that was the case. Although Mr Nicholson suggested that this might not be the case, given that the appellant claimed to know about the death of his wife and the death of his brother as a result of being supplied with their death certificates through relations, if it were the case that his parents had died, then we are satisfied that the appellant would have learned about it, particularly since before the Adjudicator the appellant claimed that he had been in touch with an aunt in Holland who had been in touch with his parents. We are not satisfied that they would refuse to provide the appellant with such support and assistance as he needed. As well as the matters mentioned above it is significant in our view that Dr Omotayo that after the appellant's first episode of imprisonment in 1987 he had developed difficulties controlling his temper, resulting in explosive outbursts towards family members. To calm him down he would express considerable remorse and regret and would admit that his behaviour had been inappropriate. There is no evidence that his family rejected him as a result of his behaviour. There is every reason to believe, therefore, that they would co-operate in any measures deemed necessary by the respondent under the IDI mentioned above, in relation to ensuring that adequate reception arrangements were made to obviate any risk that there might be after removal.

12. The IAT summarised their conclusion in these words:

> "We are not satisfied, having regard to the factors mentioned above, that in relation to the appellant's psychiatric condition generally or in relation to any risk of suicide specifically that the appellant's return to Iraq would amount to a flagrant or fundamental breach of article 8. We are not satisfied that the evidence demonstrates a real risk that the appellant would commit suicide either in the UK, en route to Iraq or in Iraq."

The arguments

13. Mr Nicholson's case, as developed in argument, is that the effect of the AIT's reasoning was unfairly to devalue Dr Craig's written evidence of the risk of the appellant's taking his own life if he is returned to Iraq. One aspect of this complaint was the tribunal's failure to give Dr Craig an opportunity to respond to its critique by asking for her to be called. For my part I do not think Dr Craig's evidence was mishandled. The remark made by the AIT in §10 about the starker picture painted in her follow-up report, while perhaps not a just criticism, does not the form the basis of any dismissal or devaluation of her evidence.

14. For the rest, nothing in the AIT's appraisal of Dr Craig's evidence was such as to require her to have an opportunity to respond orally to it. The real issue, as it

emerged in argument, was not the nature or degree of risk of self-harm described by Dr Craig but the AIT's findings in §17-18 as to the likelihood of the risk eventuating in the present situation in Iraq, where mental health services and supplies are rudimentary or non-existent. The AIT did not cast doubt on the psychiatric evidence that, without medication and support, there was a high risk that the appellant would take his own life: but they were not satisfied that he would find himself without these.

15. Ms Collier's case on this critical issue is that it was for the appellant to show on the balance of probabilities that the want of medication for him in Iraq was such as to engage art 8. The AIT had not been satisfied that this would be the case, and there was sufficient evidence for them legitimately to reach that conclusion. There was also, she accepted, sufficient evidence for them to have reached the opposite conclusion.

Dr Craig's report

16. The passages which I have cited from the AIT determination set out or reflect much of the material medical evidence. But it is appropriate to set out verbatim these passages from Dr Craig's principal report, written on 24 July 2006:

> "Mr [KR] has a diagnosis of the post-traumatic stress disorder. He initially started to experience symptoms whilst in Iraq as long ago as 1987 following his first period of imprisonment. The majority of symptoms that [KR] experiences are anxiety and heightened arousal, instability of mood including periods of depression, avoidance of reminders of his traumatic experiences and intense flashbacks of his past trauma. His avoidance is severe … In addition he isolates himself socially, is irritable and low in mood and has difficulty concentrating. He has recurrent thoughts of self-harm which at times are intense.
> ……
> Unfortunately [his] mental health problems are severe and so far appear intractable.
> …….
> [He] continues to be prescribed a high dose of anti-depressant medication (Amitriptyline 200 mg nocte) and an anti-psychotic medication to help reduce his agitation (Chloropromazine 50 mg three times a day. There has been no recent change to his medication which in my view does bring about some improvement in his symptoms although of course they persist.
> ……
> With regard to the question of the impact on [KR's] mental state if the above treatment were to be stopped, of course this entirely depends on the other circumstances prevailing at the time. Were [KR] to be forced to return to Iraq and in the process was unable to continue with his medication, I would anticipate a severe deterioration in his mental state

with very high levels of anxiety, depressed mood and a very high risk of self-harm or suicide."

17. No doubt is cast by the AIT on the soundness of Dr Craig's opinion in this report. But the report required them to evaluate the likelihood that the risks she described would eventuate. This led them, in §17, to note that there had apparently been no attempt, even while in Iraq, at actual self-harm; to note, however, that he had throughout been medicated; but to regard as overstated the passage in Dr Craig's addendum of 1 August 2006. As can be seen, the prognosis in that addendum that return would provoke "a very predictable and severe deterioration" in the appellant's mental state, carrying "a very high risk of self-harm and suicide" reproduced almost verbatim the principal report, which had attracted no criticism at all from the AIT. This is puzzling, although it does not form a distinct ground of appeal.

Discussion

18. I have set out in full the material passages of the AIT's considered determination on the issue of risk. The primary question of law was whether return would violate the appellant's right under art 8(1) to the protection of his mental stability, this being in law an aspect of his right to respect for his private life. Although there is a significant body of case-law on this question, it does not in my judgment affect the issue we have to decide. If there is an error in the AIT's determination, it is in the way they (a) asked and (b) answered the question I have identified.

19. One sees at the end of §18 that the question the AIT asked themselves was whether they were satisfied "that those drugs which the appellant does need would not be available to him in Iraq to treat his condition". Mr Nicholson submits that to approach the issue in this way is to place a burden of proof on the appellant which is both too onerous and too specific.

20. It is too onerous, in his submission, because it seemingly requires the lack of medication to be demonstrated at least on a balance of probability, whereas all an appellant has axiomatically to show is a real risk: see in relation to art 3 *R (Bagdanavicius) v Home Secretary* [2005] UKHL 38; in relation to art 8, *Razgar* (above) the same standard is connoted by "foreseeability". Ms Collier has helpfully drawn our attention to the judgment of Hughes LJ in *AJ (Liberia) v Home Secretary* [2006] EWCA Civ 1736, which derives from *Bensaid v UK* (2001) 33 EHRR 10 a risk test in relation to reactive suicide which, albeit related there to art 3, cannot logically be different for art 8 cases.

21. The AIT's test, secondly, is said to be too specific because, instead of making a rounded appraisal of the appellant's actual and prospective situation, it singles out one element of it and demands proof that it represents a specific risk. I accept that it is not right for tribunals to subject each element of a case to discrete appraisal: that was made clear by this court in *Karankaran v Home Secretary* [2000] 3 All

ER 449. The task is to give each element of evidence the weight it merits in coming to a single rounded appraisal of risk, whether in relation to asylum or to human rights protection.

22. Dr Craig's evidence made it necessary for the tribunal to determine whether there was a real risk that the appellant, if returned to Iraq, would find himself without medication or support. Their finding in §20 that there was likely to be familial support is not contested but equally is only a partial answer. In the course of reaching a rounded conclusion they had also to address the evidence about the availability of named psychotropic drugs in Iraq. I do not think therefore that they can be properly criticised for over-specificity.

23. But I do not consider, with respect, that they have got the standard of proof right. Nobody could possibly be satisfied on the evidence described by the AIT that the needed drugs are likely to be available in Iraq, and the AIT do not make any such finding. Instead they find that they "are not satisfied that those drugs … would not be available" to the appellant. In my judgment it was not necessary for the AIT, if they were to find for the appellant, to be satisfied that drugs would be unavailable. The question for them was whether a lack of available medication, in the context of their other findings, would raise to a level which engaged art 8 the risk that the appellant would be driven to kill himself. The factual element of this question – access to medication – had to be appraised as an aspect of that risk: it did not have to be negatived in order to count. The right question, in my view, albeit not the only one, was simply the degree of likelihood that the appellant, if returned, would find himself without the medication needed to control his self-destructive impulses. This question was not answered by the AIT's delphic finding.

24. Let me assume, however, that the AIT's approach was a legally proper one. Could they reasonably have arrived at the answer they reached on the evidence before them? In my respectful judgment they could not. The data assembled in §18 demonstrate an overwhelming unlikelihood of obtaining any, let alone a regular supply of, amitriptyline or chlorpromazine, whether in the Kurdish area or any other part of Iraq.

25. Ms Collier, however, draws attention to the citation at the end of §17 of Dr Craig's evidence that both drugs "had been available worldwide for many years". This is not evidence that they were continuously available everywhere, and the summary which follows in §18 makes it clear that in war-torn Iraq, at least up to 2005, they were not. We have been shown by Ms Collier a number of passages in the IAS and CIPU reports which were before the tribunal, although not quoted by them. Most of these add to the bleak picture of mental healthcare in collapse (hospitals looted, no psychiatric beds, critical staff shortages, no drugs or even food), but two cite a WHO report of 31 July 2005 which recorded that a number of mental healthcare units were being constructed or rehabilitated, at least one in the Kurdish region.

26. It is not this court's task, however, to marshal for the AIT the evidence which it could have but has not relied on. Moreover, we cannot say what the AIT would have made of the material. They would have needed to acknowledge, for example, that there was no way of knowing how many, if any, of the building projects had got off the ground since 2005. And they would have noted that much of the further material reinforces the bleak picture painted in §18.

Conclusion

27. The AIT has in my respectful view erred in law (a) in its evaluation of the availability in Kurdish Iraq of the psychotropic drugs needed by the appellant to control his depressive and suicidal impulses and (b) in its contingent finding that return would be consistent with art 8(2). It does not follow that a correctly made determination cannot reach the same conclusion, but neither does it follow that it will necessarily do so. Although we have been addressed on the content of the threshold test for art 8(1), the present appeal does not depend on it or therefore require a ruling on it.

28. For my part I would allow the appeal to the extent of remitting the case to the AIT.

Lady Justice Smith:

29. I have had the advantage of reading the judgments of Auld and Sedley LJ in draft. For reasons which I shall explain, I agree with the judgment of Auld LJ. However, I agree with and gratefully adopt Sedley LJ's exposition of the background, the AIT's decision, the medical evidence and the submissions advanced before us.

30. At paragraph 21 of its determination, the AIT directed itself that, based on the House of Lords Decision in *Razgar*, it would only be in exceptional circumstances, amounting to a flagrant or fundamental breach (in effect a complete denial of his rights), that article 8 would be engaged. Auld LJ has raised the interesting question of whether, in the light of *Huang*, this is the right approach to article 8(1). I agree with his observations. However, it was not suggested to this court that the AIT had misdirected itself by setting the threshold for engagement of article 8(1) too high. The question which the AIT posed for itself, as the test for engagement of article 8(1), was whether, if he were refused permission to remain in the UK, there was a real risk that the appellant would commit suicide either in the UK, en route to Iraq or in Iraq. No one has suggested that that was too high a threshold. Accordingly, the only question for this court is whether, on the facts of this case, the AIT's conclusion could be justified, that there was no such real risk. Sedley LJ found that it could not be; Auld LJ said that it could.

31. As Sedley LJ has acknowledged, the AIT approached its assessment of the evidence with great care. There were three strands of evidence which it regarded as important and relevant to the threshold question. The first of these was the appellant's psychiatric history as it related to the history of his misfortunes and the setbacks to his claim for asylum. The AIT noted in particular the absence of any past attempt at self harm, notwithstanding the tragedies that had befallen him. Of course much of this history related to times when the appellant was being treated with appropriate medication. It is clear that the AIT was of the view that, while on medication in the UK or en route to Iraq (at which time he would in any event be under supervision), there was no real risk that he would commit suicide. However, it seems to me that the AIT was entitled to take this history into account, as it did, when assessing the magnitude of the risk of suicide if and when the appellant was returned to Iraq.

32. The second strand of relevant evidence was consideration of the degree of family support which the appellant would receive on his return to Iraq. Although his wife and one brother had been killed, his parents were still alive and well. They had supported and assisted him in the past when he had had psychiatric problems following his imprisonment and torture. There was no reason to think that they would not do so now if he returned.

33. The third strand of evidence related to the availability of psychiatric treatment and medication. It was accepted by the Secretary of State that mental health services in Iraq were poor. The material before the AIT showed that there was a shortage of drugs and equipment. However, the only psychiatric treatment the appellant had in fact received in this country was medication and it was the availability of that in Iraq which was the AIT's main concern. After noting that there was a shortage of drugs in Iraq but observing that the drugs which the appellant needed had been available worldwide for many years, the AIT declared that 'it was not satisfied that' those drugs would not be available. It is this finding that founds the main challenge to the AIT's decision. Plainly this was an important issue because Dr Craig had said that, without drugs, the appellant would be at high risk of suicide.

34. As Sedley LJ observed, Mr Nicholson submitted that the way in which the AIT dealt with this issue showed that it had imposed a burden of proof on the appellant to show on the balance of probabilities that the drugs would not be available. Sedley LJ rejects that submission, pointing out that the AIT was saying only that it was not satisfied that the drugs would not be available.

35. Sedley LJ's criticism of the AIT's determination is that its finding in respect of the likely availability of the needed drugs is 'delphic'. It does not assess the risk of non-availability sufficiently explicitly. However, I cannot agree. It is plain from the in-country material that it would not be possible to hold that the drugs probably would be available. But that does not mean that they definitely would not be. Where a civil court makes a finding of fact on the balance of probabilities,

that fact is taken as established for the purposes of that action. In a civil action in which the availability of drugs in Iraq were an essential finding, a holding that the court was 'not satisfied that they would not be available' would be taken as a finding that they would probably not be available and would equate to a finding that there were not in fact available. However, where the court's task is to make a rounded assessment of risk, based on consideration of several different elements, each of which may depend upon uncertain facts, it is entirely legitimate to provide a more nuanced (or delphic) assessment of the chance or possibility or probability or near certainty of the relevant facts. I think that, by saying that it was not satisfied that the drugs would not be available, the AIT was saying that they might be available. It could not sensibly be expected to put a percentage chance upon that possibility. But the chance that they might be available is relevant to the rounded assessment of the risk that, if returned to Iraq, this appellant will be driven to commit suicide.

36. Thus, the final assessment of risk brings together the various factors or evidential strands previously discussed. The AIT took together the absence of any actual attempt at suicide in the past, the (highly probable) availability of parental support and the possible availability of drugs. In my view, in doing so, it properly took a rounded view of the question of risk. I would hold that, notwithstanding its 'less than probable' holding in relation to the important issue of the availability of drugs, it was entitled to conclude that there was no real risk of suicide on return to Iraq. This process of assessment is essentially a matter for the AIT, which is an expert tribunal and, in my view, this court should be slow to interfere with such an assessment. Although I myself might have reached a different conclusion, I do not think that it can be said that the AIT's conclusion was irrational or clearly wrong or insufficiently founded in evidence. That being so, I would hold that the AIT was entitled to conclude that the appellant had failed to demonstrate an interference with his personal and private life as protected by article 8.

37. I would agree with both Auld LJ and Sedley LJ that, if the threshold of article 8(1) were reached in this case, the AIT's treatment of the question arising under article 8(2) would have to be rejected as inadequate and the case would have to be remitted. However, as, in my view, the AIT's decision on article 8(1) cannot be impugned, I would dismiss the appeal.

Lord Justice Auld:

38. An interesting question, underlying the AIT's reasoning and the submissions on both sides on this appeal is how and where in Article 8, the notion of "exceptionality" derived from *R (Razgar) v SSHD* [2004] AC 368, HL, operates in its application to cases of this sort where the Article 8(1) interference relied upon by a claimant is a feature or consequence of removal to another country. In the end it was a side issue in the appeal, but, if left unresolved, could lead to a misunderstanding of the state of the law as I believe it now to be.

39. In *SSHD v Huang* [2007] UKHL 11 the Appellate Committee have made clear that the notion is not a threshold or criterion for the engagement of Article 8(1) in asylum or extradition cases; it is an "expectation" that it will be exceptional for recourse to Article 8, read as a whole, to overcome the otherwise lawful removal of a claimant from the jurisdiction. It is plain from the Committee's reasoning that such expectation turns on the relative weight of Article 8(1) interference against that of relevant factors that go to justification under Article 8(2), including, in particular, the public interest in maintaining an effective system of immigration control.

40. The Appeal Committee in *Huang*, began their discussion of exceptionality in this context by saying, at paragraph 16:

> "The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under Article 8(2). ..."

The Committee then set out a series of Article 8(2) factors by way of illustration of that general proposition, and, in paragraphs 18 and 19, of proportionality, citing from *Razg0ar*, at para 20, that:

> "the severity and consequences of the interference will call for careful assessment at this stage"

They continued in the same vein in paragraph 20:

> "In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* above, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test."

41. Such an approach, and explanation of it, is, with respect, entirely logical, given the structure of Article 8 in, and the relationship of, its two parts. First, Article

8(1) describes, albeit loosely, the right protected, the right to respect for … private and family life …". Why the *threshold* for interference with such a sensitive right should rise to exceptional heights simply because it is engendered by a threat of removal of the claimant from the jurisdiction as distinct from a less draconian interference – but interference nonetheless - solely within the jurisdiction, it is hard to see. On any set of facts Article 8 is engaged or it is not.

42. Exceptionality, to the extent that it survives as an expectation, comes in at the Article 8(2) stage in drawing the balance between, on the one hand the severity in the nature and consequences of the facts constituting the Article 8(1) interference, and on the other the importance in the circumstances of the countervailing Article 8(2) factors present going to justification. If the interference so exceeds the Article 8(1) threshold as, say, to justify the description "flagrant and fundamental breach", it is more likely - depending, of course, always on the circumstances - to prevail over the Article 8(2) justification in play.

43. Reading the AIT's determination as a whole, it seems to me that it did not, in determining whether there was an Article 8(1) interference, set a higher than normal threshold, whether of exceptionality or otherwise. However, there remains the question whether it adopted the correct approach in law to determining whether Article 8(1) was engaged on the facts before it. This was for KR to establish.

44. The AIT clearly regarded as the critical question whether returning KR to Iraq would put him at a real risk of committing suicide, and, as an important, but not determinative, contributor to answering that question, the likelihood of the availability there of suitable medication to treat his psychiatric condition. Looking at its conclusion in paragraph 21 of determination, in which it stated that it was not satisfied that there was a real risk of suicide, it appears to have equated such a risk, if it had existed, with "a flagrant or fundamental breach of Article 8". Nevertheless, regardless of the recent clarification by the Appellate Committee in *Huang* as to the role of "exceptionality" in this context, the AIT appears to have applied the correct real risk test. This is how it put it:

> "We are not satisfied, having regard to the factors mentioned above, that in relation to the appellant's psychiatric condition generally and or in relation to any risk of suicide specifically that the appellant's return to Iraq would amount to a flagrant or fundamental breach of article 8. We are not satisfied that the evidence demonstrates a real risk that the appellant would commit suicide either in the UK, en route to Iraq or in Iraq."

45. It is in the context of the availability of the medication that the AIT made the more focused observations at the end of paragraph 18 of its determination, to which Mr Nicholson took exception and on which Sedley LJ, in paragraph 23 of his judgment, has focused criticism, as an improper reversal of the burden of proof:

> "Although it may be the case that mental healthcare drugs are limited, given that those that the appellant needs have been available worldwide for many years we are not satisfied that those drugs which the appellant does need would not be available to him in Iraq to treat his condition."

46. However, the AIT's consideration of that matter, though important, was part of a wider exercise it had to undertake, namely a single rounded appraisal of risk of the sort indicated by this Court in*Karankaran v SSHD* [2000] 3 All ER 449, in particular by Sedley LJ at 479b-e. It is plain from its appraisal that it consisted of three main components. The first, which it regarded as "significant", was, as it recorded in paragraphs 15 and 17 of the determination, the absence of any attempt at suicide or other self-harm over a period of many years in the course of which he had undergone periods of high stress. The second was its acknowledgement, in paragraphs 17 and 18, of the possibility that he might not be able to obtain on return to Iraq the medication he is presently taking, medication that was at one time prescribed for him in Iraq and which is available world-wide. The third, which the AIT described in paragraph 20 as "[a] further important factor", was the presence of KR's parents in Iraq and the likely support they could give "to obviate any risk that there might be after removal".

47. Thus, as the AIT made plain in expressing its conclusion, it relied on a number of factors, not just the likelihood or otherwise of the availability of medication to KR in Iraq, to which it referred in paragraph 18 of its determination. Looking at the evidence and the AIT's analysis of it as a whole, I am of the view that it was fairly capable of supporting its finding that KR had not established a real risk of committing suicide if returned to Iraq, and that he had not, therefore, established the claimed interference with his Article 8(1) right to respect for his private life. I would, accordingly, dismiss the appeal on that basis.

48. If I am right in that view, Article 8(2) does not arise for consideration. If I am wrong, I respectfully agree with Sedley LJ's strictures in paragraphs 8 – 10 of his judgment as to the inadequacy of the reasoning of the AIT in reaching its contingent alternative finding as to justification under Article 8(2). On that view of the case, it would have to be remitted to the AIT under for reconsideration of that issue.