HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

Regina v. Secretary of State for the Home Department (Appellant) **ex parte Razgar (FC)** (Respondent)

[2004] UKHL 27

Thursday 17 June 2004

The Appellate Committee comprised:
Lord Bingham of Cornhill
Lord Steyn
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Carswell

LORD BINGHAM OF CORNHILL

My Lords,

1. Mr Razgar is an asylum seeker from Iraq whom the Secretary of State proposes to remove to Germany under the provisions of the Dublin Convention. Mr Razgar resists such removal on the ground that it would violate his rights under article 8 of the European Convention on Human Rights. The Secretary of State does not accept that removal would violate Mr Razgar's rights under article 8, and has certified under section 72(2)(a) of the Immigration and Asylum Act 1999 that the claim is manifestly unfounded. The consequence of that certification, if it stands, is to preclude any appeal by Mr Razgar against his removal from within this country. In these proceedings Mr Razgar has challenged the Secretary of State's certification and has succeeded before Richards J ([2002] EWHC 2554 (Admin) and the Court of Appeal (Judge and Dyson LJJ and Pumfrey J: [2003] EWCA Civ 840, [2003] Imm AR 529). In this appeal by the Secretary of State two main questions arise, one of pure principle and one directed to the facts of this case so far as they are now known and the process of review. The question of principle is agreed to be:

> "Can the rights protected by article 8 be engaged by the foreseeable consequences for health or welfare of removal from the United Kingdom pursuant to an immigration decision, where such removal does not violate article 3?"

The second issue is whether the judge was right to quash the Secretary of State's certification of Mr Razgar's claim as manifestly unfounded.

The principle

2. This appeal was heard immediately following the appeals in *R (Ullah) v Special Adjudicator* and *Do v Immigration Appeal Tribunal*. The opinions of the House in those appeals are directly germane to the issue of principle in the present case (see [2004] UKHL 26 and should be read, to the extent that they are relevant, as incorporated in this opinion. In this appeal it is, however, necessary to give more detailed consideration to article 8 of the Convention.
3. In the course of argument both sides made generous reference to authority, but each side relied on one authority in particular as encapsulating the pith of its argument. For the Secretary of State, the Attorney General placed strong reliance on a recent admissibility decision of the Strasbourg court in *Henao v The Netherlands* (Application No 13669/03, 24 June 2003, unreported). The applicant was a Colombian national who was arrested, tried and imprisoned for carrying drugs into the Netherlands. While serving his sentence he was found to be HIV-positive and received appropriate treatment. He resisted deportation to Colombia at the end of his sentence on the ground that he would face difficulties in obtaining treatment for his condition in Colombia, placing reliance on article 3 of the Convention. In holding that the application was manifestly ill-founded, the Court said:

> "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."

4. As is clear from this judgment, the applicant in *Henao* placed reliance on article 3 alone. Read in isolation, the judgment might suggest that only article 3 can be relied on to resist a removal decision made by the immigration authorities. But the House has held in *Ullah* and *Do* that that is not so, and it seems clear that the Court confined its attention to article 3 because that was the sole ground of the application. The case does however illustrate the stringency of the test applied by the Court when reliance is placed on article 3 to resist a removal decision. It also shows, importantly for the Secretary of State, that removal cannot be resisted merely on the ground that medical treatment or facilities are better or more accessible in the removing country than in that to which the applicant is to be removed. This was made plain in *D v United Kingdom* (1997) 24 EHRR 423, paragraph 54. Although the decision in *Henao* is directed to article 3, I have no doubt that the Court would adopt the same approach to an application based on article 8. It would indeed frustrate the proper and necessary object of immigration control in the more advanced member states of the Council of Europe if illegal entrants requiring medical treatment could not, save in exceptional cases, be removed to the less developed countries of the world where comparable medical facilities were not available. I do not understand the Court of Appeal to have proposed a test based on relative standards of treatment, when it said in paragraph 22 of its judgment, with reference to article 8:

> "22. We prefer a somewhat different test. We suggest that, in order to determine whether the article 8 claim is capable of being engaged in the light of the territoriality principle, the claim should be considered in the following way. First, the claimant's case in

> relation to his private life in the deporting state should be examined. In a case where the essence of the claim is that expulsion will interfere with his private life by harming his mental health, this will include a consideration of what he says about his mental health in the deporting country, the treatment he receives and any relevant support that he says that he enjoys there. Secondly, it will be necessary to look at what he says is likely to happen to his mental health in the receiving country, what treatment he can expect to receive there, and what support he can expect to enjoy. The third step is to determine whether, on the claimant's case, serious harm to his mental health will be caused or materially contributed to by the difference between the treatment and support that he is enjoying in the deporting country and that which will be available to him in the receiving country. If so, then the territoriality principle is not infringed, and the claim is capable of being engaged. It seems to us that this approach is consistent with the fact that the ECtHR considered the merits of the article 8 claim in *Bensaid.* It is also consistent with what was said in paragraphs 46 and 64 of *Ullah*[2003] 1 WLR 770."

If there is any doubt on this point, it should be dispelled. The Convention is directed to the protection of fundamental human rights, not the conferment of individual advantages or benefits.

5. The bedrock of Mr Razgar's case was the decision of the Court in *Bensaid v United Kingdom* (2001) 33 EHRR 205. This authority featured largely in the decisions of the judge and the Court of Appeal and must be considered in a little detail. The applicant was an Algerian national who entered the United Kingdom in 1989 and was permitted to remain for a period which expired in 1992. In 1993 he married a United Kingdom citizen and was in due course granted indefinite leave to remain as a foreign spouse. In 1996 he left the United Kingdom for a month to visit Algeria, and following his return was refused leave to enter on the ground that his indefinite leave to remain had been obtained by deceptively entering into a marriage of convenience. It was proposed to remove him. Before this, he had been diagnosed as a schizophrenic suffering from psychotic illness of such severity that compulsory detention in a psychiatric hospital was considered. In the event, he responded to treatment and his illness was successfully managed out of hospital save for one brief period. The applicant relied on articles 3 and 8 of the Convention to resist removal. He contended that the nearest hospital at which his psychiatric illness could be treated in Algeria was some 75-80 km from his home village, and adduced evidence that there was a high risk of his suffering a relapse of psychotic symptoms on returning. He had lost all insight into the fact that he was ill and believed the persecutory delusions and abuse which he experienced, including voices telling him to harm other people. He had previously felt so hopeless and depressed as to contemplate suicide. In the opinion of a

psychiatrist, there was a substantial likelihood that forcible repatriation would result in significant and lasting adverse effect.

6. In its judgment the Court first considered the applicant's claim under article 3 and concluded that implementation of the decision to remove him to Algeria would not violate article 3 of the Convention. As in *Henao*, the case was contrasted with the exceptional facts of *D v United Kingdom* (1997) 24 EHRR 423(see paragraph 40, page 218):

> "40. The Court accepts the seriousness of the applicant's medical condition. Having regard however to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. It does not disclose the exceptional circumstances of the D case …. where the applicant was in the final stage of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St. Kitts."

7. The Court then turned to consider the applicant's complaint based on article 8. For the applicant it was submitted (paragraph 44, page 219) that

> "withdrawal of that treatment [NHS treatment since 1996] would risk a deterioration in his serious mental illness, involving symptoms going beyond horrendous mental suffering - in particular there would be a real and immediate risk that he would act in obedience to hallucinations telling him to harm himself and others. This would plainly impact on his psychological integrity. In addition to the ties deriving from his eleven years in the United Kingdom, the treatment which he currently receives is all that supports his precarious grip on reality, which in turn enables some level of social functioning".

The Government (paragraph 45) did not accept that the removal of the applicant from the United Kingdom, where he was illegally, to his country of nationality, where medical treatment was available, would show any lack of respect for his right to private life. Even if there was an interference, such would be justified under article 8(2) on the basis that immigration policy was necessary for the economic well-being of the country and the prevention of disorder and crime.

8. The Court concluded that implementation of the decision to remove the applicant to Algeria would not violate article 8 of the Convention, for reasons set out in paragraphs 46-48 of its judgment:

> "46. Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private

> life guaranteed by Article 8. However, 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.
>
> 47. Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.
>
> 48. Turning to the present case, the Court recalls that it has found above that the risk of damage to the applicant's health from return to his country was based on largely hypothetical factors and that it was not substantiated that he would suffer inhuman and degrading treatment. Nor in the circumstances has it been established that his moral integrity would be substantially affected to a degree falling within the scope of Article 8 of the Convention. Even assuming that the dislocation caused to the applicant by removal from the United Kingdom where he has lived for the last eleven years was to be considered by itself as affecting his private life, in the context of the relationships and support framework which he enjoyed there, the Court considers that such interference may be regarded as complying with the requirements of the second paragraph of Article 8, namely as a measure 'in accordance with the law', pursuing the aims of the protection of the economic well-being of the country and the prevention of disorder and crime, as well as being 'necessary in a democratic society' for those aims."

The Court then went on to consider the applicant's complaint under article 13 of the Convention that he had no effective remedy against the expulsion. In its judgment on this point the Court described the applicant's article 3 complaint as "arguable" (paragraph 54) and found (paragraph 58) that in judicial review the applicant had available to him an effective remedy in relation to his complaints under articles 3 and 8 of the Convention concerning the risk to his mental health of being expelled to Algeria.

9. This judgment establishes, in my opinion quite clearly, that reliance may in principle be placed on article 8 to resist an expulsion decision, even where the

main emphasis is not on the severance of family and social ties which the applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving country. The threshold of successful reliance is high, but if the facts are strong enough article 8 may in principle be invoked. It is plain that "private life" is a broad term, and the Court has wisely eschewed any attempt to define it comprehensively. It is relevant for present purposes that the Court saw mental stability as an indispensable precondition to effective enjoyment of the right to respect for private life. In *Pretty v United Kingdom* (2002) 35 EHRR 1, paragraph 61, the Court held the expression to cover "the physical and psychological integrity of a person" and went on to observe that

> "Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world."

Elusive though the concept is, I think one must understand "private life" in article 8 as extending to those features which are integral to a person's identity or ability to function socially as a person. Professor Feldman, writing in 1997 before the most recent decisions, helpfully observed ("The Developing Scope of Article 8 of the European Convention on Human Rights", [1997] EHRLR 265, 270):

> "Moral integrity in this sense demands that we treat the person holistically as morally worthy of respect, organising the state and society in ways which respect people's moral worth by taking account of their need for security."

10. I would answer the question of principle in paragraph 1 above by holding that the rights protected by article 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal does not violate article 3, if the facts relied on by the applicant are sufficiently strong. In so answering I make no reference to "welfare", a matter to which no argument was directed. It would seem plain that, as with medical treatment so with welfare, an applicant could never hope to resist an expulsion decision without showing something very much more extreme than relative disadvantage as compared with the expelling state.

The Secretary of State's certification

A The facts

11. Mr Razgar is aged 26 and is an Iraqi of Kurdish origin. He says that in about 1995 his father was hanged as a communist opponent of the Ba'athist regime then in power and he himself was arrested, imprisoned and tortured for two and a half years. These facts have not been tested, but his body is said to bear marks consistent with severe flogging. At the end of 1997 (he says) he bribed his way out of prison and travelled via Turkey to Germany. On arrival in Germany he

claimed asylum but his claim was refused. He remained in Germany for over a year, during which he says that he was detained, subjected to racist abuse and told he would be returned to Iraq. He arrived in the United Kingdom on 22 February 1999 and at once claimed asylum. In April 1999 the German authorities accepted responsibility for examining his asylum claim under article 8 of the Dublin Convention and in May the Secretary of State decided to certify the claim on safe third country grounds. For reasons which need not be explored the relevant notice was not served until May 2000 and the removal directions given in May 1999 did not come to Mr Razgar's notice. In November 1999 he had started to undergo treatment from a consultant psychiatrist of high standing, Dr Sathananthan, whose report dated 16 May 2000 (based on an examination on 29 February 2000) was forwarded to the Secretary of State following service of the safe third country notice. The report described Mr Razgar as suffering from severe depression although not at that time thinking of self-harm. He had nightmares not only of Saddam Hussein's security men trying to torture him but also of the German police. The psychiatrist considered that:

> "Incarceration and custody is likely to cause a relapse on the progress he has made so far. Given Mr [Razgar's] subjective fear of ill-treatment in Germany, I feel that he would not make any progress there in rehabilitating from Post Traumatic Stress Disorder, or indeed from his depression."

The Secretary of State at once rejected the representations made by Mr Razgar's solicitors and declined to defer his removal directions. In a letter dated 23 May 2000 Dr Samananthan reported to Mr Razgar's solicitors that he (now in custody) had telephoned "and appeared to be in great distress. He said that he did not want to return to Germany where he had experienced racist attacks, he said he would kill himself if he was sent back there . . . From what he said over the telephone his score would now be 29 [on the Beck's Depression Inventory whereas it had been 26] indicating a worsening of his depressive mood complicating Post Traumatic Stress Disorder . . . I feel incarceration has caused a setback from the progress Mr [Razgar] has made so far, and this is detrimental to his mental health. One cannot rule out the possibility that he might carry out his threat to commit suicide."

12. Mr Razgar applied for permission to seek judicial review of the Secretary of State's decision to remove, but permission was refused by the judge and an application for permission to appeal was in the end discontinued. In response to Mr Razgar's application a detailed letter dated 4 July 2000 was written on behalf of the Secretary of State, in the course of which it was said:

> "13. The Secretary of State accepts that both the prospect and the actual removal of your client to Germany may have a negative impact upon him. In view of your client's mental health problems the Secretary of State has carefully considered whether there are substantial grounds for believing that your client's proposed and/or

> actual removal to Germany would be a sufficiently compelling, compassionate factor such as to cause him to depart from his normal policy and practice. Although your client may be exposed to psychological stress as a result of his removal to Germany, the Secretary of State does not accept, on all the evidence submitted to him, that the risk to your client reaches that level of severity of physical or mental suffering as to warrant departing from his usual practice in this case. He takes the view that there are adequate, appropriate and equivalent psychiatric facilities in Germany which will be available to your client upon his return to that country.
>
> 14. The Secretary of State has also given very careful consideration to Mr Razgar's ties with the United Kingdom, but he is not persuaded that there are sufficient grounds for allowing your client to remain in this country for such compassionate reasons. Mr Razgar does not, in fact, have any family or other close ties with the United Kingdom."

Further representations were made to the Secretary of State on 2 October 2000 on the coming into force of the Human Rights Act 1998, when Mr Razgar became entitled to appeal on human rights grounds under section 65 of the 1999 Act. These were supported by a report by Mr Stefan Kessler, the effect of which was helpfully summarised by Richards J in paragraphs 24 and 25 of his judgment:

> "24. Mr Kessler in his first report dated 19 September 2000 stated that he had worked as a refugee adviser for 15 years and had other substantial credentials in the refugee field in Germany. In his view there was little chance of the claimant gaining refugee status in Germany. His legal status, if returned, was that he would receive a 'Duldung', a form of tolerated status giving temporary protection from prosecution for remaining in Germany, though the stay would still be technically illegal. It was not the same as a residence permit. It did not carry with it the normal rights to live and work in Germany and it resulted in restrictions on residence and freedom of movement. The claimant's mental condition would be considered a 'chronic condition' rather than acute and the claimant would therefore have no right to medical treatment by a psychiatrist, nor would he have any right to treatment by a psychotherapist. The relevant authorities would have a discretion to pay for treatment but would be very reluctant to pay for psychiatric or psychotherapeutic treatment save in case of very urgent need, that is to say immediate danger.
>
> 25. Mr Kessler also stated that other aspects of the German system might cause stress for the claimant's mental health, namely that the place where he would be allowed to reside might be quite remote,

> as well as the fact that his freedom of movement could be restricted and there could be limitations on benefits and on the right to work."

In a letter dated 7 February 2001 the Secretary of State maintained his decision to remove, and in a further letter of 9 April 2001 he communicated the decision which is now the subject of challenge:

> "4. The Secretary of State has noted that Germany is a full signatory to the Geneva Convention of 1951 and to the ECHR. He routinely and closely monitors the practice and procedures of Member States, including Germany, in the implementation of the ECHR in order to satisfy himself that its obligations are fulfilled. He is satisfied that your client's human rights would be fully respected in Germany and that your client would not be subjected to inhuman or degrading treatment or punishment if removed there. He is also satisfied that your client will be able to raise any continuing protection concerns that he may have under the provisions of the ECHR with the authorities in Germany. In the circumstances, the Secretary of State does not accept that your client's removal to Germany would be in breach of his human rights. Indeed, he regards your continued assertion to this respect, particularly following the consideration already given to the matter which has been supported by the Court, to be merely a device to prevent further your client's proper return to Germany under the terms of the Dublin Convention.
>
> 15. In the light of the above, the Secretary of State hereby certifies the allegation of a breach of your client's human rights under the ECHR as being manifestly unfounded. Your client has a right of appeal against this decision under section 65 of the Immigration and Asylum Act, but under section 72(2)(a) of the Act this may only be exercised from abroad. Arrangements for your client's removal to Germany on 12 April 2001 therefore remain in place."

13. Mr Razgar then initiated the present application to quash the Secretary of State's certification. In the course of those proceedings Mr Razgar relied on two further reports by Dr Sathananthan. The earlier of these, dated 18 July 2001, was to much the same effect as the earlier reports but recorded that Mr Razgar had been living with his family in Greenford and Ealing Broadway, who gave him meals and accommodation. His opinion was:

> "Incarceration and custody is causing a relapse on the progress Mr [Razgar] had made during treatment. He would be deprived of his support network from family (cousin and friends), when he is removed to Germany. He would not have access to medication or

> Cognitive Behaviour Therapy as he would only be given temporary immigration status by the authorities. His accommodation in a refugee camp will cause flashbacks of his incarceration in prison in Iraq and worsen his depressive mood and sense of despair. I feel that sending him back to Germany or even to Iraq would be very detrimental to his mental and physical well-being. I think he would make a serious attempt to kill himself."

The later report, dated 24 September 2002, made reference to two abortive attempts by Mr Razgar to kill himself in 2000 and 2001. His opinion was:

> "Mr Razgar still suffers from Depressive illness, Pain Disorder and Post Traumatic Stress Disorder. He finds himself to be safe living in this country and is afraid of being sent back to either Germany, or even Iraq where he had been harassed. He finds support from his friends who live with him. Whenever the Court case comes up in conversation his whole mood changes, he looks very anxious and quiet. He has decided that he would rather die than go back to Germany or Iraq. He is afraid of being put in detention again, which brings back memories and feelings of hopelessness. He has seen other young men kill themselves, and at times has suicidal ideation himself."

Mr Razgar also relied on further letters from Mr Kessler. The Secretary of State did not submit evidence relating to Mr Razgar's mental condition, but did at a later stage submit evidence challenging some aspects of Mr Kessler's account of how Mr Razgar would be treated if returned to Germany. The judge concluded, rightly in my opinion, that in the absence of any contrary opinion the Secretary of State could not discount the professional judgment of Dr Sathananthan. He also concluded that there was a real risk that Mr Razgar, if returned to Germany, would not receive appropriate treatment there, such treatment being assured only if he became a suicide risk, and that he was likely to be placed in an accommodation centre with substantial restrictions on his liberty. On this basis Richards J held (in paragraph 51 of his judgment) that Mr Razgar's case would not clearly fail before an adjudicator, and the Court of Appeal (in paragraph 64) agreed. The court made no ruling on the effect of article 8(2), which had not featured in the Secretary of State's evidence or in the argument before the judge. At no stage during the correspondence did the Secretary of State accept that article 8 could apply in a case such as this, and in this appeal (as in *Ullah* and *Do*) the Attorney General argued that it could not.

B The legislation

14. Section 65 of the 1999 Act, so far as relevant for present purposes, provided:

"65. (1) A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, acted in breach of his human rights may appeal to an adjudicator against that decision unless he has grounds for bringing an appeal against the decision under the Special Immigration Appeals Commission Act 1997.

(2) For the purposes of this Part, an authority acts in breach of a person's human rights if he acts, or fails to act, in relation to that other person in a way which is made unlawful by section 6(1) of the Human Rights Act 1998.

(3) Subsections (4) and (5) apply if, in proceedings before an adjudicator or the Immigration Appeal Tribunal on an appeal, a question arises as to whether an authority has, in taking any decision under the Immigration Acts relating to the appellant's entitlement to enter or remain in the United Kingdom, acted in breach of the appellant's human rights.

(4) The adjudicator, or the Tribunal, has jurisdiction to consider the question.

(5) If the adjudicator, or the Tribunal, decides that the authority concerned acted in breach of the appellant's human rights, the appeal may be allowed on that ground."

"Authority" was defined in subsection (7) to include the Secretary of State. Section 72(2)(a) provided:

"A person who … is to be … sent to a member State … is not, while he is in the United Kingdom, entitled to appeal -

(a) under section 65 if the Secretary of State certifies that his allegation that a person acted in breach of his human rights is manifestly unfounded …"

Section 77(3)(b) provided:

"In considering -

(b) any question relating to the appellant's rights under Article 3 of the Human Rights Convention,

the appellate authority may take into account any evidence which it considers relevant to the appeal (including evidence about matters

arising after the date on which the decision appealed against was taken)."

This provision was supplemented, in relation to appeals to an adjudicator, by Part III of Schedule 4 to the Act. Relevant for present purposes is paragraph 21 of the Schedule, which so far as relevant provided:

"21. (1) On an appeal to him under Part IV, an adjudicator must allow the appeal if he considers -

(a) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or

(b) if the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently,

but otherwise must dismiss the appeal.

(2) Sub-paragraph (1) is subject to paragraph 24 and to any restriction on the grounds of appeal.

(3) For the purposes of sub-paragraph (1), the adjudicator may review any determination of a question of fact on which the decision or action was based."

15. In the ordinary course of review, the reviewer assesses the decision under challenge on the materials available to the decision-maker at the time when the decision was made. In *Sandralingham v Secretary of State for the Home Department* [1996] Imm AR 97, 112, however, the Court of Appeal held that in asylum cases the appellate structure under the Asylum and Immigration Appeals Act 1993 was to be regarded as an extension of the decision-making process, with the result that appellate authorities were not restricted to consideration of facts in existence at the time of the original decision. This decision was given statutory effect in section 77(3) of the 1999 Act, and was also extended to human rights cases arising under article 3. The restriction to article 3 may well have reflected parliamentary uncertainty whether articles other than article 3 could be engaged in an expulsion case. But there can be no reason for distinguishing article 3 cases from cases arising under other articles of the Convention which (as I have held) are capable of being engaged: see *Macdonald's Immigration Law & Practice*, ed Macdonald and Webber, 5th ed (2001), para 18.150. By section 85(4) of the Nationality, Immigration and Asylum Act 2002 (which did not come into force until 1 April 2003, and does not apply to this case) it is provided that:

> "On an appeal under section 82(1) [immigration decisions] or 83(2) [asylum claims] against a decision an adjudicator may consider evidence about any matter which he thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision."

C The scope of review

16. The parties to this appeal accepted that "manifestly unfounded" bore the meaning given to it by the House in *R (Yogathas) v Secretary of State for the Home Department; R (Thangarasa) v Secretary of State for the Home Department* [2002] UKHL 36, [2003] 1 AC 920, paragraphs 14, 34 and 72 and accepted the Court of Appeal's opinion (in paragraph 30 of its judgment) that those paragraphs called for no gloss or amplification. It was also, inevitably, accepted that on an application for judicial review of the Secretary of State's decision to certify, the court is exercising a supervisory jurisdiction, although one involving such careful scrutiny as is called for where an irrevocable step, potentially involving a breach of fundamental human rights, is in contemplation.
17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:

    (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

    (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

    (3) If so, is such interference in accordance with the law?

    (4) If so, is such interference necessary in a democratic 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?

    (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

18. If the reviewing court is satisfied in any case, on consideration of all the materials which are before it and would be before an adjudicator, that the answer to question (1) clearly would or should be negative, there can be no ground at all for

challenging the certificate of the Secretary of State. Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112. If the reviewing court is satisfied that the answer to this question clearly would or should be negative, there can again be no ground for challenging the certificate. If question (3) is reached, it is likely to permit of an affirmative answer only.

19. Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognised in the Strasbourg jurisprudence (see *Ullah* and*Do,* para 6) and implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively.
20. The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. In *Secretary of State for the Home Department v Kacaj* [2002] Imm AR 213, paragraph 25, the Immigration Appeal Tribunal (Collins J, Mr C M G Ockelton and Mr J Freeman) observed that:

> "although the [Convention] rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate."

In the present case, the Court of Appeal had no doubt (paragraph 26 of its judgment) that this overstated the position. I respectfully consider the element of overstatement to be small. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis.

D The present case

21. It remains to apply the questions outlined above to the present case.
22. In my opinion an adjudicator would, or might properly, answer question (1) in the affirmative. It is quite true, as the Attorney General urged, that Mr Razgar cannot show the long residence and deep social roots found in many of the decided cases. He cannot show nineteen years of residence like the applicant in*Moustaquim v Belgium* (1991) 13 EHRR 802, nor eleven years of residence like the applicant in *Bensaid v United Kingdom* (2001) 33 EHRR 205. He cannot show a disruption

of family life. But he bases his case on the threat to his private life. In this country he is able, with psychiatric help, to enjoy a measure of freedom, independence and autonomy which, arguably, he could not enjoy in Germany, where he knows no one, may not receive needed medical help and may be accommodated in a remote refugee centre.

23. On the facts as presently understood, I consider that an adjudicator would, or might properly, answer question (2) in the affirmative. A decision which, if implemented, might lead to Mr Razgar taking his own life, could scarcely (if that evidence were accepted, and it has not as yet been tested) be dismissed as of insufficient gravity.
24. I have no doubt but that an adjudicator would, and could only, answer questions (3) and (4) in the affirmative. Question (5), being more judgmental, is more difficult and, as already observed, the Secretary of State and the judge did not consider it. The Secretary of State, moreover, failed to direct himself that article 8 could in principle apply in a case such as this. Question (5) is a question which, on considering all the evidence before him, an adjudicator might well decide against Mr Razgar. If, however, his phobia of returning to Germany were found to be genuine (whether well-founded or not), and if his account of his previous experience (including his account of the severe brutality he claims to have suffered) were found to be true, I do not think one can rule out *in limine* the possibility of a finding, properly made, that return to Germany would violate Mr Razgar's rights under article 8. It follows that in my opinion, agreeing with both the judge and all three members of the Court of Appeal, the Secretary of State could not properly certify this claim to be manifestly unfounded.
25. I would dismiss the appeal.

LORD STEYN

My Lords,

26. I have read the opinion of my noble and learned friend Lord Bingham of Cornhill. I agree with it. I would also dismiss the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

27. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. I gratefully adopt his statement of the facts and I am very largely in agreement with him as to the principles to be applied. In particular, I am in full agreement with his analysis of the scope for judicial review of a certificate by the Secretary of State under section 72(2)(a) of the Immigration and Asylum Act 1999 certifying that an appeal (based on breach of human rights) is manifestly unfounded. I have the misfortune to differ, however, as to the application of the principles to the facts of this case. In the circumstances I shall state my reasons as briefly as possible.

28. On the (so far untested) evidence of the appellant Mohammed Ali Razgar and on the medical reports (so far unchallenged) of a distinguished psychiatrist, Dr Sathananthan, the appellant is in a fragile mental state. He claims on grounds which appear credible to have been tortured in Iraq, where his father was hanged. He says that he still suffers pain, insomnia and nightmares when he does sleep. He is described as severely depressed, with feelings of personal worthlessness and hopelessness about the future. He has said that he will kill himself if returned to Germany. When he saw the psychiatrist on 10 September 2002 he spoke of two suicide attempts which he had made in this country, in 2000 and 2001, although neither seems to have been mentioned during his examination (at the Gatwick Detention Centre) on 7 June 2001. The psychiatrist's opinion on 7 June 2001 was that if sent back to Germany or Iraq the appellant would make a serious attempt to kill himself. On seeing the appellant on 15 April 2002 (after his release from custody) the psychiatrist considered that the appellant "was not suicidal, but was determined that he would kill himself if he was sent abroad." After seeing him again on 10 September 2002 the psychiatrist recorded that the appellant had seen other young men kill themselves, and at times had suicidal ideation himself. There is no evidence of his present condition.
29. The evidence as to the appellant's experiences and their effect on his mental and physical condition, if found to be truthful, must provoke deep concern and sympathy. But such experiences and their effects are unfortunately not exceptional. Man's inhumanity to man is all too common. Torture, ill-treatment and imprisonment without trial often produce severe psychiatric problems which may persist throughout the sufferer's lifetime, even with the best psychiatric care. The fact that the appellant's troubles do not seem to be exceptional, deplorable though it is, lies at the heart of the difficulties which I feel about this appeal.
30. In his clear and comprehensive opinion in the linked appeals of *R (Ullah) v Special Adjudicator* and *Do v Secretary of State for the Home Department*[2004] UKHL 26, Lord Bingham has drawn attention to the wholly exceptional nature of a deporting state's responsibility for ill-treatment or harm subsequently suffered in the receiving state. It is unnecessary to repeat all the citations but it is relevant to note that the Strasbourg Court's insistence on the need for "very exceptional circumstances" continues to be maintained in the most recent jurisprudence: see the admissibility decision in *Henao v The Netherlands* (Application No 13669/03) (unreported) 24 June 2003.
31. In *N v Secretary of State for the Home Department* [2003] EWCA Civ 1369 Laws LJ (with whom Dyson LJ agreed, although Carnwath LJ dissented) accepted the submission of counsel for the Secretary of State that the well-known case of *D v United Kingdom* (1997) 24 EHRR 423 was an "extension of an extension" (para 37). He concluded (paras 40 and 42):

> ". . . that the application of article 3 where the complaint in essence is of want of resources in the applicant's home country (in contrast to what has been available to him in the country from which he is to be removed) is only justified where the humanitarian appeal of

> the case is so powerful that it could not in reason be resisted by the authorities of a civilised state."

And

> ". . .that the position regarding article 8 will want some further scrutiny if my view of this case were to prevail."

In my opinion those conclusions are justified by the Strasbourg jurisprudence.

32. In his opinion in *Ullah* and *Do* Lord Bingham approved the formulation of the Immigration Appeal Tribunal in *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1, para 111:

> "The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case—where the right will be completely denied or nullified in the destination country—that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state".

I respectfully agree. I also respectfully agree with Lord Bingham's observation in this appeal (para 10 above) that where the appellant's case is based on his need for medical treatment or on his welfare, he could never hope to resist expulsion without showing "something very much more extreme than relative disadvantage" (as between the deporting state and the receiving state).

33. My problem is with the application of these principles to the facts of this appeal. It is largely attributable to two factors which, although noted in the course of argument, were not to my mind fully explored. That is not a criticism of counsel: it may be that, in the present state of Strasbourg jurisprudence, they cannot be taken much further. There seems to be surprisingly little discussion of the Dublin Convention in judgments of the Strasbourg court.
34. The first difficulty is the abstract and volatile character of article 8 rights so far as they are not firmly linked either to family life or to other particular values such as respect for an individual's personal privacy, his home or his correspondence. The Strasbourg court has clearly recognised that article 8 rights also extend to an individual's sexuality. *Bensaid v United Kingdom* (2001) 33 EHRR 205, para 47 appears to show a further extension (building on rather uncertain footings in earlier cases) in the field of mental health:

> "Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that

> context an indispensable precondition to effective enjoyment of the right to respect for private life".

This language is wide and imprecise and it must in my opinion be treated with some caution. There is no general human right to good physical and mental health any more than there is a human right to expect (rather than to pursue) happiness.

35. My second difficulty is in connection with the Dublin Convention of 15 June 1990 (determining the state responsible for examining applications for asylum lodged in one of the member states of the European Communities) (1997, Cm 3806). Before he arrived clandestinely in the United Kingdom on 22 February 1999 the appellant had already applied for but been refused asylum in Germany. Under the terms of the Dublin Convention the United Kingdom was at liberty to return the appellant to Germany without examining his asylum application on its merits. Indeed the German authorities accepted their responsibility on 29 April 1999, within a few months of the appellant's arrival in this country, and it is only because of determined activity by the appellant and his solicitors, and scrupulous observance of his claims by the United Kingdom authorities, that the appellant has had any sort of private life in this country. He has received skilled psychiatric help since November 1999, but his presence in this country has at all times been on a most precarious footing.
36. The appellant is strongly opposed to being returned to Germany; so strongly that he has threatened suicide if he is returned. But Germany is a full signatory of the European Convention on Human Rights and of the Geneva Convention. In *R (Yogathas) v Secretary of State for the Home Department)* [2003] 1 AC 920, 927, para 9 Lord Bingham drew attention to two important considerations:

> "The first is that the Home Secretary and the courts should not readily infer that a friendly sovereign state which is party to the Geneva Convention will not perform the obligations it has solemnly undertaken. This consideration does not absolve the Home Secretary from his duty to inform himself of the facts and monitor the decisions made by a third country in order to satisfy himself that the third country will not send the applicant to another country otherwise than in accordance with the Convention. Sometimes, as notably in *Ex p Adan* [2001] 2 AC 477, he will be unable properly to satisfy himself. But the humane objective of the Convention is to establish an orderly and internationally-agreed regime for handling asylum applications and that objective is liable to be defeated if anything other than significant differences between the law and practice of different countries are allowed to prevent the return of an applicant to the member state in which asylum was, or could have been, first claimed. The second consideration is that the Convention is directed to a very important but very simple and very practical end, preventing the return of applicants to places where they will or may suffer persecution.

> Legal niceties and refinements should not be allowed to obstruct that purpose. It can never, save in extreme circumstances, be appropriate to compare an applicant's living conditions in different countries if, in each of them, he will be safe from persecution or the risk of it."

The other members of the House expressed similar views. Lord Hope of Craighead gave a valuable account of the background to the Dublin Convention at pp 932-935, paras 26-37. He observed (p 934, para 33):

> "The purpose of the legislation would be frustrated if the asylum seeker could ensure that he remained in this country pending a full review on the merits of an allegation of a breach of his human rights which was clearly without substance".

37. In his clear and thorough judgment in this case Richards J referred briefly to this point but was not impressed by it. He said (para 55):

> "I should also mention that the claimant's case under article 8 was not, in my view, adequately met by the very general proposition upon which the Secretary of State relied that Germany respects human rights. Although true as a general proposition, it is not a sufficient basis for rejecting a reasoned case supported by evidence of the kind submitted here. The United Kingdom respects human rights, but situations can nonetheless arise in which Convention rights are breached. The same must be capable of happening in Germany".

These observations are no doubt true, but they cut both ways. Even in the most enlightened host country asylum seekers often have to deal with bleak accommodation or even loss of liberty, public hostility and material deprivation, and these (on top of their earlier, sometimes horrendous, experiences) naturally lead to anxiety, depression and feelings of hopelessness. But neither the truism of human imperfection, nor the evidence (taken at its highest) of conditions in Germany, leads to the conclusion that the appellant's treatment in Germany would probably be so much worse than his present condition as to amount to a flagrant infringement of his human rights—an infringement so serious as would (in the language used in *Devaseelan*) result in the rights in question being completely denied or nullified. In my view it would need much clearer and more compelling evidence to lead to that conclusion.

38. The Court of Appeal [2003] Imm AR 529 referred to the Dublin Convention but did not discuss its significance. It treated this as a "mixed" case for which it proposed (pp 538-539, para 22) a novel three-stage test requiring the prospect of harm sufficiently serious for article 8 to be engaged, but not (as I read the judgment) anything wholly exceptional. The relevant paragraph is set out by Lord

Bingham in his opinion (para 4 above). Lord Bingham does not consider that the Court of Appeal fell into the error of comparing levels of psychiatric care available in the United Kingdom and Germany respectively. But for my part I cannot avoid the conclusion that that was the Court of Appeal's only or principal concern, and that it did amount to a mistaken approach. On this point I respectfully prefer the analysis of my noble and learned friend Baroness Hale of Richmond, whose opinion I have also had the advantage of reading in draft.

39. Had the Court of Appeal not (as I think) erred in its approach, I would not differ from the experienced judges below in their rejection of the Secretary of State's assessment of the facts and his consequent certificate under section 72(2)(a). As it is, I differ from the courts below and from the majority in this House only with the greatest possible diffidence. I do so because in my opinion (even if it seems callous) this case is simply not exceptional in the way that the Strasbourg Court had in mind in *Bensaid* and *Henao*. It is, sadly, all too common.
40. I would therefore allow this appeal.

BARONESS HALE OF RICHMOND

My Lords,

41. In his opinion in the cases of *Ullah* and *Do*, my noble and learned friend, Lord Bingham of Cornhill, draws a distinction between 'domestic cases' and 'foreign cases'. He defines the former as cases 'where a state is said to have acted within its own territory in a way which infringes the enjoyment of a Convention right by a person within that territory' (paragraph 7). He defines the latter as cases 'in which it is claimed that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory will lead to a violation of the person's Convention rights in that other territory' (paragraph 9). Another way of putting this distinction is that in domestic cases the contracting state is directly responsible, because of its own act or omission, for the breach of Convention rights. In foreign cases, the contracting state is not directly responsible: its responsibility is engaged because of the real risk that its conduct in expelling the person will lead to a gross invasion of his most fundamental human rights. *Ullah* and *Do* were foreign cases which failed to meet that test.
42. The distinction is vital to the present case. In a domestic case, the state must always act in a way which is compatible with the Convention rights. There is no threshold test related to the seriousness of the violation or the importance of the right involved. Foreign cases, on the other hand, represent an exception to the general rule that a state is only responsible for what goes on within its own territory or control. The Strasbourg court clearly regards them as exceptional. It has retained the flexibility to consider violations of articles other than articles 2 and 3 but it has not so far encountered another case which was sufficiently serious to justify imposing upon the contracting state the obligation to retain or make alternative provision for a person who would otherwise have no right to remain within its territory. For the same reason, the Strasbourg court has not yet explored the test for imposing this obligation in any detail. But there clearly is some

additional threshold test indicating the enormity of the violation to which the person is likely to be exposed if returned. *Ullah* and *Do* on their facts came nowhere near meeting that test. It is, for the reasons given both by Lord Bingham and Lord Steyn, extremely unlikely that a failure to respect religious freedom which fell short of persecution within the meaning of the Refugee Convention would do so.

43. This case, however, is concerned with article 8. In that context, Lord Bingham also refers to a third or hybrid category. Here 'the removal of a person from country A to country B may both violate his right to respect for his private and family life in country A and also violate the same right by depriving him of family life or impeding his enjoyment of private life in country B' (paragraph 18). On analysis, however, such cases remain domestic cases. There is no threshold test of enormity or humanitarian affront. But the right to respect for private and family life, home and correspondence, which is protected by article 8, is a qualified right which may be interfered with if this is necessary in order to pursue a legitimate aim. What may happen in the foreign country is therefore relevant to the proportionality of the proposed expulsion.
44. Article 8 cases in the immigration and expulsion context tend to be of two different types. Most commonly, the person to be expelled has established a family life in the contracting state. His expulsion will be an interference, not only with his own right to respect for his private and family life, but also with that of the other members of his core family group: his spouse (or perhaps partner) and his children. The Strasbourg court regards its task as to examine whether the contracting state has struck a fair balance between the interference and the legitimate aim pursued by the expulsion. The reason for the expulsion and the degree of interference, including any alternative means of preserving family ties, will be explored and compared.
45. Sometimes, the reason for expulsion will be immigration control, which is a legitimate aim 'in the interests of the economic well-being of the country'. In*Berrehab v The Netherlands* (1988) 11 EHRR 322 the applicant was a Moroccan who was refused a further residence permit after his divorce from his Dutch wife. This was an interference with his right to respect for his family life with his young daughter, whom he saw four times a week for several hours each day. The interference was disproportionate. The applicant had lived there legitimately for several years, had a home and a job there, and very close ties with his daughter which his expulsion threatened to break. A similar case was *Ciliz v The Netherlands* [2000] 2 FLR 469; the applicant was a Turk who was refused a further residence permit after separating from his Dutch wife, despite the fact that he was still pursuing an application for contact with his son; the expulsion thus interfered with the process which was designed to fulfil the state's positive obligation to enable family ties to develop between father and son. In neither case was there an alternative means of preserving or establishing family ties between father and child.
46. Sometimes, the legitimate aim will be 'the prevention of disorder or crime'. This has arisen in a long line of cases concerning people who have lived in the contracting state since childhood but remain liable to expulsion if they commit

serious crimes. *Moustaquim v Belgium* (1991) 13 EHRR 802 concerned a Moroccan who had lived with or near his family in Liège since he was one year old. *Beldjoudi v France* (1992) 14 EHRR 801 concerned an Algerian born in France before independence who lost his French nationality because his parents failed to make the required declaration but who wanted to resume it, and had married a Frenchwoman; uprooting her would cause her great difficulty so that interference might imperil the unity or even the existence of the marriage. *Nasri v France* (1995) 21 EHRR 458 concerned an Algerian who had lived virtually all his life in France with his parents and siblings, and was deaf and dumb, so that his family was especially important to him. In *Jakupovic v Austria* (2003) 38 EHRR 595 the applicant was a Bosnian who had come to Austria to join his mother and siblings when aged 11 but was only 16 when a residence prohibition was imposed as a result of criminal offences. The Court observed that very weighty reasons would be needed to justify sending a 16-year-old alone to a country which had recently experienced armed conflict and where he had no close relatives. In all these cases the interference was found disproportionate.

47. In contrast, in *Boughanemi v France* (1996) 22 EHRR 228, the applicant was a Tunisian who had lived in France since the age of eight, was deported for serious crimes, but returned illegally and formed a relationship with a Frenchwoman by whom he had a child; the majority did not find his further expulsion disproportionate because of the seriousness of the offences and it was not suggested that he had cut all ties with Tunisia. Judge Martens dissented: he attacked the Court's traditional approach that an integrated alien was not protected from expulsion unless there would be a disproportionate interference with his family life. This had two obvious disadvantages: that not all such aliens had a family life; and it led to uncertainty in assessing and comparing the merits of the individual cases. He thought the time had come to recognise that expulsion of integrated aliens was an interference with their private life, and that it would almost always be disproportionate to expel those who had lived virtually all their lives within the contracting State.
48. These two types of case come together when an adult immigrant establishes family ties in the contracting state and then commits crimes which make him liable to deportation. In *Boultif v Switzerland* (2001) 33 EHRR 1179, an Algerian entered Switzerland as a tourist, married a Swiss the following year, was convicted of serious offences but did not serve his sentence until he had been blamelessly at large for some time. The Court listed the criteria to be taken into account - the nature and seriousness of the offence, his length of stay, the time since the offence and his conduct during that time, his family situation including the length of the marriage, the effectiveness of their family life, whether the spouse knew of the offence when entering a family relationship, whether they had children, and "not least" the seriousness of the difficulties the spouse was likely to encounter in the country of origin or elsewhere. These criteria were repeated in *Amrollahi v Denmark* (Application No 56811/00) (unreported) 11 July 2002, where once again the main obstacle to deporting an Iranian who had committed drugs offences was that his wife could not be expected to follow him to Iran or elsewhere.

49. The recent Grand Chamber case of *Slivenko v Latvia* [2004] 2 FCR 28 is also a domestic case although on its unusual facts it concerned private rather than family life. The applicants were ethnic Russians, the wife and daughter of a former Soviet army officer. The wife, herself the daughter of a Soviet army officer, had lived in Latvia since she was one month old and the daughter had been born there. Following independence in 1991, a treaty between Russia and Latvia provided for Russian officers and their families to leave Latvia. The family was provided with a flat in Russia and the husband went. The wife and daughter resisted joining him as long as they could but eventually did so when the daughter had finished school. This was not an interference with their family life, as the whole family had been deported, but the expulsion of long time residents could also be an interference with their private life, depending upon the degree of social integration. Normally the interests of "national security" in the removal of active foreign servicemen would outweigh this, but the wife's parents remained in Latvia, the husband had retired and so there was no danger to national security in their remaining in Latvia.
50. These were all cases in which deportation would be an interference with the right to respect for the private or family life which the applicant had established in the expelling state. Conditions in the receiving state were relevant only for the purpose of assessing proportionality. Could that family life be established or continue elsewhere? The effect upon the spouse or child left behind had to be considered and might well be determinative. The Court is unsympathetic to actions which will have the effect of breaking up marriages or separating children from their parents.
51. The other type of 'domestic' article 8 case arises where there is no question of expulsion but immigration control prevents other close family members joining a spouse or parents living in the contracting state. The first was *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, in which the argument that Convention rights were not engaged at all in immigration cases was roundly rejected. Husbands and wives have the right to respect for their family life even if they have not yet established a home together. But the Convention does not give them the right to choose where that home shall be. There were no obstacles to these couples establishing their family life in their husbands' countries of origin rather than in the United Kingdom. They knew that the husbands had no right of entry when they married. There was thus no breach of article 8. But there was a breach of article 14. If the sexes had been reversed, the wives would have been allowed to join their husbands here. The different treatment of husbands and wives could not be justified by the differential impact upon the labour market.
52. Other cases have concerned parents who want the children whom they have left behind in their country of origin to join them in the contracting state. Once again, there is no general obligation to authorise family reunion in the contracting state. But the obstacles to developing family life back in the country of origin will be relevant. In *Gül v Switzerland* (1996) 22 EHRR 93, this would not be easy but there were no obstacles to prevent this, whereas in *Sen v Netherlands* (2001) 36 EHRR 81, the Court found that there were major obstacles to doing so.

53. These, too, are 'domestic' cases. There is a technical difference from the expulsion cases, in that the people living in the contracting state are relying on the state's obligation to take positive steps to enable family life to develop between parent and child (an obligation recognised since the ground-breaking case of*Marckx v Belgium* (1979) 2 EHRR 330). But, as Judge Martens observed in his dissenting opinion in *Gül*, the difference is hardly more than one of semantics - it has no bearing on the burden of proof or the standards of assessing a fair balance, in this case between the right to control immigration and 'a fundamental element of an elementary human right, the right to care for your own children'. Once again, the possibilities of doing so in another country are relevant to that balance, but the conduct being assessed is still that of the contracting state in relation to a right being claimed in that state.
54. How then should the health cases be regarded? By a 'health case', I mean one in which the applicant's health needs are being properly or at least adequately met in this country and the complaint is that they will not be adequately met in the country to which he is to be expelled. Thus far, in my view, these have all been regarded as 'foreign' cases. They date back to *D v United Kingdom* (1997) 24 EHRR 423, in which the proposed expulsion of a drug smuggler apprehended on arrival but in the terminal stages of AIDS after serving his sentence was found in breach of article 3:

> "Aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain on 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 during their stay in prison. However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of article 3." (paragraph 54)

55. This principle was repeated in the very similar case of *Henao v The Netherlands* (Application No 13669/03) (unreported) 24 June 2003, where there was no breach because the humanitarian considerations were not as strong. It has also been applied in cases where the applicant has been properly resident for some time but remains subject to expulsion, either because of criminal offences, as in *BB v France* Reports of Judgments and Decisions 1998-VI, p 2595 or because of immigration control, as in *SSC v Sweden* (2000) 29 EHRR CD 245. In all of these the health complaint depended upon article 3, although in *BB v France*, there was also a complaint of potential deprivation of moral support of family and friends.
56. This brings us to *Bensaid v United Kingdom* (2001) 33 EHRR 205. As with the HIV/AIDS cases, this was a case based upon the risk of injury to health in removing someone from a place where his health needs were being adequately addressed to a place where it was alleged that they would not be. As with the HIV/AIDS cases, the main complaint was raised under article 3. The applicant

was a schizophrenic who required medication. Without it, there was a risk of relapse into hallucinations and delusions involving a risk of self harm and harm to others both here and in Algeria. The fact that his circumstances in Algeria would be less favourable than here was not decisive. The risks were speculative. There was a high threshold, especially when the case did not concern the direct responsibility of the state for inflicting harm. It did not fall into the exceptional category covered by *D v United Kingdom*.

57. The court's case law did "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 upon physical and moral integrity" (paragraph 46). "Mental health must . . . be regarded as a crucial part of private life associated with the aspect of moral integrity . . . The preservation of mental stability is . . . an indispensable precondition to effective enjoyment of the right to respect for private life [protected by article 8]" (paragraph 47). But it had not been established that the risk of damage to his health from returning him to his country of origin would substantially affect his moral integrity to a degree falling within the scope of article 8. Even assuming the dislocation caused by his removal could be regarded as affecting his private life - the relationships and support established here - it was justified under article 8(2) (paragraph 48).
58. In my view, the court was here drawing a distinction between the 'foreign' and 'domestic' aspects of the case. The 'foreign' aspect was the difficulty in accessing appropriate psychiatric treatment in Algeria. This fell mainly to be dealt with under article 3, although the court did not rule out that it might be dealt with under article 8 if the threat to moral integrity was sufficiently severe. The court did not in so many words repeat the 'high threshold' point made in relation to article 3 but if it applies to article 3 it ought logically to apply to article 8, unless this is thought unnecessary because the interference will always be justified under article 8(2) unless the high threshold is reached. The 'domestic' aspect might have been the dislocation in his private life here caused by removing him, but that was clearly justified under article 8(2).
59. Although the possibility cannot be excluded, it is not easy to think of a foreign health care case which would fail under article 3 but succeed under article 8. There clearly must be a strong case before the article is even engaged and then a fair balance must be struck under article 8(2). In striking that balance, only the most compelling humanitarian considerations are likely to prevail over the legitimate aims of immigration control or public safety. The expelling state is required to assess the strength of the threat and strike that balance. It is not required to compare the adequacy of the health care available in the two countries. The question is whether removal to the foreign country will have a sufficiently adverse effect upon the applicant. Nor can the expelling state be required to assume a more favourable status in its own territory than the applicant is currently entitled to. The applicant remains to be treated as someone who is liable to expulsion, not as someone who is entitled to remain.
60. I agree that the Secretary of State had to ask himself how an appeal might fare before an adjudicator. He also had to bear in mind that the adjudicator is an integral part of the decision-making process and thus would have to consider the

issue of proportionality on the evidence before him. The Secretary of State had to assume that the evidence put forward on the claimant's behalf might be accepted by an adjudicator. In those circumstances, was he entitled to certify that Mr Razgar's human rights claim was manifestly unfounded? In my view, he was.

61. Mr Razgar's degree of social integration into this country (to adopt the language used in *Slivenko*) is nowhere near strong enough to make this a 'domestic' case. This is a 'foreign' case in which the United Kingdom's responsibility is only indirectly engaged as a result of what might happen to him if removed. The meat of his case, as summed up by Richards J, 'was that the claimant's mental health would suffer a serious decline in Germany by reason, in particular, of the lack of appropriate treatment; it would have to deteriorate to the point where his condition was acute, that is to say where he became a suicide risk, before treatment could be assured. By contrast, if he stayed in the United Kingdom he could expect to receive appropriate treatment and to make progress.' (paragraph 51)
62. Dr Sathananthan had diagnosed post traumatic stress disorder and depression, for which the appropriate treatment was medication and cognitive behavioural therapy. The claimant had been receiving medication and some counselling but not the cognitive behavioural therapy, apparently because his English was not yet good enough. Such therapy is in any event in short supply, so that whether it would actually become available is a matter of speculation. But clearly, he was currently managing without it. Its aim would be to make him better, not to prevent a serious deterioration in his mental state. The fact that it might not be available to him in Germany does not engage his Convention rights under either article 3 or article 8. Nor does the evidence suggest that the medication is essential to prevent a serious deterioration: this is not a case of psychosis in which there is a very real risk of a return to hallucinations if medication is not available.
63. Similarly, the complaints he makes about life in Germany compared with life here cannot be sufficient to engage his Convention rights. The situation he would face in Germany may compare unfavourably with his present life here, although everything of which he complains in Germany could also happen to him here. Regrettably, there is racism here as well as in Germany. People liable to expulsion may be dispersed to remote areas where they would prefer not to be. They may even be held in centres where their liberty is restricted. They are not allowed to work. His status as 'duldung' in Germany is not to be compared with the situation of someone who has been given the long term right to live and work in this country. That is not the issue. The issue is whether his situation in Germany would raise the serious humanitarian concerns raised in *D v United Kingdom* 24 EHRR 423 or otherwise constitute such a serious threat to his physical and moral integrity as to be disproportionate to the legitimate aim which his removal would serve.
64. Dr Sathananthan was of the opinion that 'sending him back to Germany or even to Iraq would be very detrimental to his mental and physical well-being. I think he would make a serious attempt to kill himself.' I accept entirely that the risk of suicide is capable of engaging the claimant's rights under articles 2 and 3 and article 8 and must be given very serious consideration by the decision makers.

There is a positive obligation under the Convention to take reasonable steps to prevent a vulnerable person in custody from committing suicide: see *Keenan v United Kingdom* (2001) 33 EHRR 913. If there were substantial grounds to believe that the authorities responsible for him in Germany would not take such steps, then I would accept that his Convention rights were engaged and that the Secretary of State could not properly certify that his claim was manifestly unfounded, at least without making further enquiries or seeking further assurances from the German authorities. But this is not the case. Mr Kessler's report specifically states that 'your client will only receive medical treatment in case of actual danger to himself or to others'. The Secretary of State is entitled to assume that the German authorities will observe their Convention obligations to the claimant unless there is better evidence than this that they will not.

65. For those reasons, I would hold that the Secretary of State was entitled to reach the conclusion he did on the material before him and would therefore allow this appeal. I appreciate that this may seem a harsh conclusion to draw. But this is a field in which harsh decisions sometimes have to be made. People have to be returned to situations which we would find appalling. The United Kingdom is not required to keep people here who have no right to be here unless to expel them would be a breach of its international obligations. It does the cause of human rights no favours to stretch those obligations further than they can properly go. In my view, those obligations are not such as to require the United Kingdom to refrain from returning Mr Razgar to Germany in accordance with the Dublin Convention.

LORD CARSWELL

My Lords,

66. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill and I am in agreement with him that the appeal should be dismissed.
67. By the letter of 9 April 2001 from the UK Immigration Service to the appellant's solicitors the Secretary of State certified, pursuant to section 72(2)(a) of the Immigration and Asylum Act 1999, that the appellant's allegation that a person acted in breach of his human rights was manifestly unfounded. In consequence the appellant was barred while in the United Kingdom from appealing under section 65 against the Secretary of State's decision to remove him to Germany under the Dublin Convention. The effect of the certificate accordingly is that he could only appeal after his removal to Germany.
68. The appeal before your Lordships' House has been brought against the dismissal by the Court of Appeal of an appeal from the decision of Richards J on an application for judicial review, whereby he quashed the decision of the Secretary of State to certify in this manner that the appellant's case was manifestly unfounded.
69. Your Lordships dealt comprehensively in *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920 with the test which should be applied by

the Secretary of State when considering whether an allegation of breach of human rights is manifestly unfounded. It is unnecessary now to say more than that before certifying he must be reasonably and conscientiously satisfied that the application must fail. As Lord Bingham of Cornhill stated at paragraph 16 of his opinion in this appeal, in considering an application for judicial review of the decision to certify the court is exercising a supervisory jurisdiction, although one calling for the degree of careful scrutiny appropriate to the seriousness of the subject matter. As he also stated, the reviewing court must consider how an appeal would be likely to fare before an adjudicator.

70. The Secretary of State had before him the opinions expressed by Dr Sathananthan in his several reports, and in the absence of any other medical knowledge he was obliged for the purposes of considering the issue of a certificate to accept their correctness. It is common case that the adjudicator, if hearing an appeal now, would be entitled and bound to have regard to any further material evidence produced. Further reports given after the date of the certificate, in July 2001 and September 2002, were before your Lordships. The high water mark of the medical evidence in the appellant's favour was the opinion expressed by Dr Sathananthan in his report of 18 July 2001, based on an examination of the appellant on 7 June 2001, that

> "I feel that sending him back to Germany or even to Iraq would be very detrimental to his mental and physical well-being. I think he would make a serious attempt to kill himself."

The picture painted of the appellant in his report of 24 September 2002 appeared somewhat less sombre, but Dr Sathananthan expressed concern that if he were returned to Germany his mental state would drastically deteriorate. We did not have the benefit of any more up-to-date psychiatric evidence.

71. In paragraph 4 of the decision letter of 9 April 2001 it was stated that the Secretary of State was

> "satisfied that your client's human rights would be fully respected in Germany and that your client would not be subjected to inhuman or degrading treatment or punishment if removed there."

The reference is clearly to the requirements of article 3 of the Convention and there is no indication in the letter that the Secretary of State had regard to the possibility that article 8 might be engaged. Indeed, the Attorney General argued on his behalf at the hearing of this appeal that as a matter of law article 8 could not be engaged in any circumstances. It might be said that this alone constitutes a misdirection of himself by the Secretary of State which is sufficient to vitiate his decision. It was clear, however, from the application for judicial review brought in May 2000 and subsequent correspondence that the applicant's solicitors were relying on article 8 as well as article 3 and a reference to both articles is contained in the letter of 4 July 2000 from the UK Immigration Service. I would therefore

be willing to assume for the purposes of this appeal that the Attorney General's argument had its roots in the decision of the Court of Appeal in *R (Ullah) v Special Adjudicator* [2003] 1 WLR 770 and that the Secretary of State did take article 8 into account as well as article 3.

72. For the reasons given by your Lordships in the appeals of *R (Ullah) v Special Adjudicator* and *Do v Secretary of State for the Home Department* [2004] UKHL 26, it must now be accepted that in principle article 8 could exceptionally be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even though they do not amount to a violation of article 3. In order to bring himself within such an exceptional engagement of article 8 the applicant has to establish a very grave state of affairs, amounting to a flagrant or fundamental breach of the article, which in effect constitutes a complete denial of his rights. It is necessary accordingly to consider the present case in order to determine whether an adjudicator could arguable find that the removal decision is a breach of article 8.
73. I would not regard the conditions in which the appellant may be detained in Germany, taking the case at its height in his favour, as capable in themselves of constituting such a flagrant breach. They may be regarded as somewhat spartan and it would be legitimate to argue that they are repressive, but in my judgment they fall a long way short of a flagrant violation of the appellant's article 8 rights. If he is to make out any case under article 8 I consider that it must be founded on the possible effects on his mental health.
74. The precise extent of the interests which article 8 is capable of protecting still remains to some degree uncertain and, as my noble and learned friend Lord Walker of Gestingthorpe pointed out in his opinion in the present appeal, the language of some of the statements in the Strasbourg jurisprudence must be treated with some caution. It does appear to be clear enough, however, from pp 219 - 220, para 47 of the judgment in *Bensaid v United Kingdom* (2001) 33 EHRR 205 that the preservation of mental stability can be regarded as a right protected by article 8. The issue therefore is whether the removal of the appellant to a third country Germany could arguably be said to amount to a flagrant denial of his article 8 right to the preservation of his mental stability.
75. It is, I think, important to note that the deleterious effects on the appellant's mental health described by Dr Sathananthan appear to stem from his fear that Germany will decide to return him to Iraq. It is to be assumed that Germany will observe its obligations under the Geneva Convention and the European Convention on Human Rights and will properly and conscientiously apply their provisions. If that be so, then the appellant's fears should be regarded as lacking in rational foundation. If they nevertheless exist in an extreme form, sufficient to make him suicidal at the prospect of removal to Germany, even if unjustified or irrationally held, the question has to be considered whether that may arguably be sufficient to found an allegation that his article 8 rights have been violated.
76. In my opinion it could in principle be sufficient on a tenable view of the facts placed before us. It seems to me that the decider, whether it be the Secretary of State, an adjudicator or the court, should base a decision on the actual state in

which the appellant may find himself, whether or not it is rationally justifiable. This appears to be consistent with the emphasis in the judgment of the ECtHR in *Tomic v United Kingdom* (Application No 17837/03) (unreported) 14 October 2003 upon the risk of harm capable of engaging the responsibility of the respondent government. That decision concerned the admissibility of an application founded on a claim that article 3 was engaged, but the principle seems to me to be the same, founded upon the effect of powerful humanitarian considerations. Similarly, in *D v United Kingdom* (1997) 24 EHRR 423 the Court, in admitting a claim under article 3, was concerned with the effects upon the applicant and the certainty that he would suffer severely in the absence of suitable medical facilities in St Kitts to treat his condition. I would mention also that this should not entail the adoption of a process of comparing levels of care in the expelling country and the receiving country, and I fully agree with the observations of my noble and learned friend Baroness Hale of Richmond in that respect in paragraph 63 of her opinion.

77. On the facts which were before your Lordships - which I would emphasise are far from up to date - I am compelled to conclude that an adjudicator might arguably hold that a sufficiently fundamental breach of the appellant's article 8 right to the preservation of his mental stability had been established to engage that article. The adjudicator would then have to consider the effect of article 8(2), which will require the striking of a fair balance, in the manner referred to by Lord Bingham of Cornhill in paragraph 20 of his opinion. This has not received consideration by the Secretary of State or the judge. The factors which would have to be assessed on the application of article 8(2) are potent indicators in favour of upholding the operation of immigration control and affirming decisions to refuse entry to persons such as the appellant. I could not be fully satisfied, however, that the case is so clear in favour of upholding the decision to remove the appellant that no reasonable adjudicator could hold otherwise.
78. I accordingly conclude, not without very considerable hesitation, that for the reasons which I have given the decision of the Secretary of State must be set aside. In so holding, however, I have to emphasise that the decision of the House goes no further than to determine the question of law submitted to it whether the Secretary of State was justified in ruling out an appeal *in limine* on the ground that the appellant's allegation was manifestly unfounded. We cannot attempt to say how the case will appear before an adjudicator who has full information of the current state of the appellant's mental health and the facilities which will be available to him in Germany and is in a position to test the evidence of the appellant and the reliability of any medical opinions adduced. Still less can we give any indication how we think the adjudicator is likely to decide the substantive issue if an appeal is brought from the decision to remove the appellant.
79. I would accordingly dismiss the appeal