Case No: C1/2003/0173: C1/2002/2515: C1/2002/2697:

Neutral Citation No: [2003] EWCA Civ 840
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
Cooke J; Richards J; Stanley Burnton J;

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 19th June 2003

Before :

LORD JUSTICE JUDGE
LORD JUSTICE DYSON
and
MR JUSTICE PUMFREY

- -

Between :

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT	Appellant
- and -	
THE QUEEN ON THE APPLICATION OF RAZGAR	Respondent
(2) THE QUEEN ON THE APPLICATION OF SOUMAHORO	Appellant
-and-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	Respondent
(3) THE QUEEN ON THE APPLICATION OF NADARAJAH	Appellant
-and-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	Respondent

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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Mr Neil Garnham QC, Mr Michael Fordham and Ms Catherine Callaghan (instructed by Treasury Solicitors) for the Secretary of State for the Home Department
Mr Nicholas Blake QC and Mr Tublu Mukherjee (instructed by Messrs Clore & Co) for Mr Razgar
Ms Frances Webber (instructed by Messrs Bindman and Partners) for Ms Soumahoro
Mr Raza Husain (instructed by Messrs Winstanley Burgess) for Mr Nadarajah

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Judgment

Lord Justice Dyson:

This is the judgment of the court.

Introduction

1. These appeals all concern the lawfulness of decisions by the Secretary of State for the Home Department to certify under section 72(2)(a) of the Immigration and Asylum Act 1999 ("the 1999 Act") as "manifestly unfounded" human rights claims raised by asylum seekers whom he has decided to remove to other European Union states under the Dublin Convention. In all the cases, the claimants have sought to challenge their removal to another EU state on the grounds that, if removed, there is a substantial risk that they will suffer a breach of their rights under article 3 and/or 8 of the European Convention on Human Rights ("ECHR").

2. In *Razgar*, the claimant is an Iraqi citizen who was refused asylum in Germany, subsequently travelled to the UK and sought asylum here. The Secretary of State certified the claim on "safe" third country grounds and directed his removal to Germany. He also certified that a claim based on articles 3 and 8 was manifestly unfounded. Richards J quashed the certificate in so far as it was based on article 8. He held that it was arguable that the mental health implications of a return to Germany were sufficiently serious that the Secretary of State was not entitled to certify the claim as manifestly unfounded. The Secretary of State appeals with the permission of the judge.

3. In *Soumahoro*, the claimant is a citizen of the Ivory Coast who sought asylum in the UK. The Secretary of State certified the claim on "safe" third country grounds and directed her removal to France. He certified that her claim based on article 8 (that to return her to France would damage her mental health) was manifestly unfounded. Cooke J rejected the challenge to the certificate (which, before him, was based on article 3). He held that there was insufficient evidence that there was a serious risk that, if the appellant were returned to France, she would suffer serious harm. The claimant appeals with the permission of this court.

4. In *Nadarajah*, the claimant is a Tamil from Sri Lanka whose asylum claim was rejected in Germany. He entered the UK in August 1998 and claimed asylum here. The Secretary of State certified on "safe" third country grounds and directed his removal to Germany. The claimant's wife entered the UK in August 2001. Her claim for asylum was rejected by the Secretary of State. His human rights claim (under articles 3 and 8) was certified as manifestly unfounded. Permission to apply for judicial review was granted only in relation to the certificate in so far as it was based on article 8. The challenge to the certificate was put on the basis that to return the claimant to Germany would violate his article 8 rights because (a) it would separate him from his wife; and (b) it would damage his mental health. Stanley Burnton J rejected both grounds of challenge and upheld the certificate. There were other issues before the judge. The claimant appeals with his permission.

The Statutory Framework

5. Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with an ECHR right.

6. Section 65 of the 1999 Act provides:

> "(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
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> ……
>
> (2) For the purposes of this Part - (b) 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 s.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.
>
> …
>
> (5) If the … adjudicator, or the Tribunal, decides that the authority concerned-
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> …
>
> > (b) acted in breach of the appellant's human rights, the appeal may be allowed on that ground "

7. Section 65 is included in Part IV of the 1999 Act. Schedule 4 Part III of the 1999 Act makes provision with respect to the determination of appeals under Part IV of the Act. Schedule 4 Part III includes paragraph 21 which says:

> " (1) On an appeal to him under Part IV, an adjudicator must allow the appeal if he considers –
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> > (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;

(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 [appeals which must be dismissed] 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."

General legal principles

8. Mr Garnham QC submits that, in the context of immigration control, it is necessary to consider three legal questions when deciding whether the removal of asylum seekers to member states of the EU under the Dublin Convention constitutes a violation of their ECHR rights: (a) to what extent (if at all) is the ECHR right engaged by the removal; (b) what is the threshold of seriousness of harm; and (c) what is the appropriate level of risk of that harm occurring. These questions must be addressed by the Secretary of State when he considers whether to certify that an allegation of breach of human rights is manifestly unfounded. We do not understand this submission to be contested. In our view, it is clearly correct. We shall consider these questions separately in relation to articles 3 and 8. The issues of the threshold of "manifestly unfounded" and the court's scrutiny of certificates under section 72(2)(a) were determined by the House of Lords in *R(Yogathas) v Secretary of State for the Home Department* [2002] UKHL 36, [2002] 3 WLR 1276. But there has been some disagreement before us as to the precise import of that decision. We shall address these points when we have dealt with the three questions that we have identified.

Article 3

(a) Is the right engaged?

9. There is no doubt that article 3 is capable in principle of being engaged when action is taken to remove a person from the UK where there is a real risk that the removal will expose him or her to torture or inhuman and degrading treatment in their home country or a third country. This is now well established: see, for example, *Soering v UK* (1989) 11 EHRR 439 (extradition to the United States where the applicant faced a real risk of the death row phenomenen); *Chahal v UK* (1996) 23 EHRR 413 (removal of a Sikh separatist leader to India where there was a real risk that he would be killed or tortured by security forces); and *D v UK* (1997) 24 EHRR 423 (removal of an AIDS victim to St Kitts where lack of medical treatment would hasten his death).

(b) Seriousness of harm

10. Article 3 provides protection against ill-treatment which attains a "minimum level of severity": see, for example, *Soering* at para 100. In the context of expulsion cases, the ill-treatment "must necessarily be serious" such that "it is an affront to fundamental humanitarian principles to remove an individual to a country where there is a real risk of serious ill-treatment": see *R (Ullah) v Special Adjudicator* [2002] EWCA Civ 1856, [2003] 1 WLR 770 at paras 38-39. As was explained in *Ullah* (para 47), the application of article 3 in expulsion cases is a significant extension of the principle of territoriality expressed in article 1 of the ECHR. Article 3 provides protection only against the most serious ill-treatment.

(c) Risk of harm

11. There must also be substantial grounds for believing that there is a real risk of ill-treatment in the receiving state before article 3 is engaged: see *Soering* para 91 and *Chahal* paras 74 and 80.

Article 8

(a) Is the right engaged?

12. The question of the circumstances in which an article 8 claim is capable of being engaged in expulsion cases is one of considerable importance and some difficulty. It is central to at least one of the present appeals.

13. In *Ullah*, the claimants contended that their rights under article 9 (freedom of religion) would be infringed if they were removed to their countries of origin, because those rights would be infringed in those countries. It was held that a decision to remove an alien to a country that did not respect the right to freedom of religion would not infringe the Human Rights Act 1998 where the nature of the foreseeable interference with that right in the receiving state fell short of ill-treatment within article 3. Giving the judgment of the court, Lord Phillips of Worth Matravers said:

> "62. Mr Blake accepted that the Strasbourg court has not gone this far. He submitted, however, that this court should take the lead in recognising that removal in the interests of immigration control can engage article 9. In our judgment there are compelling reasons why this court should not do so. The Refugee Convention and article 3 of the Human Rights Convention already cater for the more severe categories of ill-treatment on the ground of religion. The extension of grounds for asylum that Mr Blake and Mr Gill seek to establish would open the door to claims to enter this country by a

potentially very large new category of asylum seeker. It is not for the court to take such a step. It is for the executive, or for Parliament, to decide whether to offer refuge in this country to persons who are not in a position to claim this under the Refugee Convention, or the Human Rights Convention as currently applied by the Strasbourg court. There may be strong humanitarian grounds for offering refuge in this country to individuals whose human rights are not respected in their own country, and it is open to the Secretary of State to grant exceptional leave to remain where he concludes that the facts justify this course. There are, however, practical and political considerations which weigh against any general extension of the grounds upon which refuge may be sought in this country. It is not for the courts to make that extension.

Other Articles

63. For these reasons we hold that a removal decision to a country that does not respect article 9 rights will not infringe the 1998 Act where the nature of the interference with the right to practice religion that is anticipated in the receiving state falls short of article 3 ill-treatment. It may be that this does not differ greatly, in effect, from holding that interference with the right to practice religion in such circumstances will not result in the engagement of the Convention unless the interference is "flagrant".

64. This appeal is concerned with article 9. Our reasoning has however, wider implications. Where the Convention is invoked on the *sole* ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage article 3, the English court is not required to recognise that any other article of the Convention is, or may be, engaged. Where such treatment falls outside article 3, there may be cases which justify the grant of exceptional leave to remain on humanitarian grounds. The decision of the Secretary of State in such cases will be subject to the ordinary principles of judicial review but not to the constraints of the Convention (our emphasis)."

14. This reasoning applies in principle to a claim that removal will violate a person's rights under article 8. Some of the Strasbourg jurisprudence on article 8 in the context of expulsion cases was considered in *Ullah* (paras 42-47). At para 42, Lord Phillips observed that article 8 had been quite often invoked in support of the submission that an immigration restriction infringes Convention rights, but that it had only been successfully invoked "where removal or refusal of entry has impacted on the enjoyment of family life of those already established within the jurisdiction". At para 44, he referred to *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471, and commented that in this case, as in all similar cases, the Strasbourg court has been:

> "astute to recognise the right under international law of a state to control immigration into its territory. This right has been weighed against the degree of interference with the enjoyment of family life caused by the immigration restriction often, as we see it, not because this served a legitimate aim under article 8(2) but because it acted as a free-standing restriction on the article 8 right".

15. At para 45, Lord Phillips referred to *Bensaid v UK* (2001) 33 EHRR 205. This is a case which has assumed some importance in the issues that have been debated before us. It is necessary, therefore, to refer to it in a little detail. The applicant was a schizophrenic and an illegal immigrant. He claimed that his removal to Algeria would deprive him of essential medical treatment and sever ties that he had developed in the UK that were important for his well-being. He claimed that his article 3 and 8 rights would be infringed if he were removed to Algeria. His claim focused both on the medical treatment in the UK of which he would be deprived and the lack of such treatment in Algeria. The ECtHR held that his case under article 3 was not made out: the risk that the applicant would suffer a deterioration in his condition if he were returned to Algeria was "speculative". As for the article 8 claim, the court said this:

> "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 none the less breach article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity.
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> 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 of origin 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 11 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."

16. In relation to *Bensaid*, Lord Phillips said this in *Ullah*:

"46. Part of the reasoning of the Strasbourg court suggests that the treatment that a deportee is at risk of experiencing in the receiving state might so severely interfere with his article 8 rights as to render his deportation contrary to the Convention. The more significant article 8 factor was, however, the disruption of private life within this country. There is a difference in principle between the situation where article 8 rights are engaged *in whole or in part* because of the effect of removal in disrupting an individual's established enjoyment of those rights within this jurisdiction and the situation where article 8 rights are alleged to be engaged *solely* on the ground of the treatment that the individual is likely to be subjected to in the receiving state. In *Bensaid v United Kingdom* the Strasbourg court considered that the right to control immigration constituted a valid ground under article 8(2) for derogating from the article 8 rights of the applicant in that case (our emphasis)..

47. We shall now set out our conclusions in relation to the Strasbourg jurisprudence that deals with the apprehended treatment of a deportee in the receiving state. The application of article 3 in expulsion cases is an extension of the scope of the Convention and one that is at odds with the principle of territoriality expressed in article 1. That extension has occurred because the Convention is a living instrument. The extension no doubt reflects the fact that it would affront the humanitarian principles that underlie the Convention and the Refugee Convention for a state to remove an individual to a country where he or she is foreseeably at real risk of being seriously ill-treated. To date, with the possible exception of *Bensaid v United Kingdom*, the application of this extension has been restricted to article 3 cases. To apply the principle to other articles where the apprehended treatment would fall short of that covered by article 3 would be likely to constitute a further extension. While the Strasbourg court has contemplated the possibility of such a step, it has not yet taken it. The obligations in sections 3 and 6 of the 1998 Act do not require this court to take that further step. We now turn to consider the approach that has been taken by the English courts."

17. The territoriality principle referred to in *Ullah* can be applied without difficulty in many cases. It will often be plain that an allegation that expulsion will cause a violation of an ECHR right is directed exclusively at what it is claimed is likely to happen in the receiving state. Thus, claims that the receiving state will detain the person contrary to Article 5 or conduct a trial in breach of article 6 are not capable of engaging those articles in expulsion cases. So too in cases such as those considered in *Ullah* itself. Where a person alleges that his or her rights under article 9 will be infringed by reason solely of what will happen in the receiving state, the claim that the deporting state is in acting in breach of article 9 is not capable of being engaged unless it is shown that there is a real risk of serious ill-treatment which meets the article 3 threshold.

18. But article 8 claims are sometimes more difficult to analyse. Where the claim is that an expulsion will interfere with a person's family life in the deporting state, there is no problem. Article 8 is in principle capable of being engaged: see *Ullah* para 46. But where the claim is based on an alleged breach of the right to private life in the broader sense referred to, for example, in *Bensaid* para 47, the position is more difficult. The preservation of mental stability is "an indispensable precondition to effective enjoyment of the right to respect for private life". Let us consider two paradigm cases. In case A, the person is in good health in the UK, but he says that, if he is deported to a "safe" third country, there is a real risk that he will suffer a serious decline in his mental health, because he has a fear (admittedly irrational) that he will be returned to face persecution in his country of origin. In case B, the person is already suffering from mental ill-health for which he is receiving treatment in the deporting country. His case is that, if he is deported, his mental condition will become significantly worse because in the receiving state he will not be given the treatment that he has previously enjoyed.

19. It is clear that case A is not capable of engaging article 8: the territoriality principle is decisive. But what about case B? The allegation is that the expulsion will cause a significant deterioration in the claimant's mental health. But will it be as a result of the cessation of treatment in the deporting country, or will it be because the treatment previously enjoyed will not be replicated by the receiving country? On an application of the "but for" test, both will be effective causes. The deterioration in the claimant's mental health will not occur if the deporting state does not disrupt the treatment being given by it. But equally it will not occur if the receiving state continues the treatment previously enjoyed. So how should the territoriality principle be applied in a "mixed case" where the allegation of interference with private life contains two elements, one relating to the deporting country, and the other to the receiving country?

20. Although the territoriality principle was not discussed in *Bensaid*, it is clear that the ECtHR considered that article 8 was engaged on the facts of that case. In *Ullah* (para 46), it was said that the "more significant factor" in *Bensaid* was the disruption of the claimant's private life in the deporting country. But *Ullah* was not an article 8 case, and the court did not have to grapple in detail with the problem that arises in a mixed case, although the problem was touched on in paragraphs 46 and 64 of the judgment.

21. Mr Garnham submits that in a mixed case, for the purposes of deciding whether the claim is capable in principle of being engaged, the relevant test is whether the allegation is "substantially" one of a risk of interference with the claimant's private life in the receiving country. Or, putting the test slightly differently: do the matters relied on relate "essentially" to what it is alleged the claimant will experience in the receiving country? We do not find this a particularly helpful test. How is it to be applied in case B? It may be that the answer is that it cannot be said that case B is substantially or essentially an allegation of interference in the receiving country, since the removal of the treatment in the deporting country is no less significant and causatively potent than the failure to treat in the receiving country.

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*.

(b) Seriousness of harm.

23. The degree of harm must be sufficiently serious to engage article 8. There must be a sufficiently adverse effect on *physical and mental integrity*, and not merely on health (*Bensaid* paras 46-48).

(c) Risk of harm

24. There must be substantial grounds for believing that the claimant would face a real risk of the adverse effect which he or she claims to fear: see, for example, *Kacaj v Secretary of state for the Home Department* [2001] INLR 354 at para 12. I would accept the submission of Mr Garnham (not disputed) that the degree of likelihood of the adverse effect occurring is no less than that required to establish a breach of article 3.

Article 8(2)

25. Even if a removal case engages article 8(1), there is article 8(2) to consider. As already noted, at para 48 of the judgment in *Bensaid*, the ECtHR said that even if the dislocation caused to the applicant by removal was to be considered by itself as affecting the claimant's private life, the interference was justified under article 8(2). In *Kacaj* (para 26), the IAT said that in deportation cases: "it will be virtually impossible for an applicant to establish that control on immigration was disproportionate to any breach". In *Ullah* (para 24), it was said that, where the ECtHR finds that removal engages the EHCR, the court "will often treat the right to control immigration as one that outweighs, or trumps, the Convention right".

26. We are in no doubt that in *Kacaj*, the IAT overstated the position. Paragraph 24 of *Ullah* reflects the situation more accurately. That this is so has been shown by a number of recent decisions of the ECtHR. In *Boultif v Switzerland* (2000) 22 EHRR 50, the Swiss authorities refused to review the applicant's residence permit. He complained that his article 8 rights had been infringed in that, as a result of the action of the authorities, he had been separated from his wife who could not be expected to follow him to Austria. It was held by the court that there had been a violation of article 8. The judgment contains an important passage on the nature of the balancing exercise that has to be performed when a decision is made as to whether the interference with a right under article 8(1) is proportionate to the legitimate aim being pursued:

> "46. The Court recalls that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.
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> 47. Accordingly, the Court's task consists in ascertaining whether the refusal to renew the applicant's residence permit in the circumstances struck a fair balance between the relevant interests, namely the applicant's right to respect for his family life, on the one hand, and the prevention of disorder and crime, on the other.
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> 48. The Court has only to a limited extent decided cases where the main obstacle to expulsion is the difficulties for the spouses to stay together and in particular for a spouse and/or children to live in the other's country of origin. It is therefore called upon to establish guiding principles in order to examine whether the measure was necessary in a democratic society.
>
> In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the

> length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed as well as the applicant's conduct in that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion."

27. Having weighed all the relevant considerations, the court decided (para 55) that "the interference was not proportionate to the aim pursued". It is true that in that case, (a) the interference was with the right to family life, and not private life in the extended sense explained in the Strasbourg jurisprudence, and (b) the legitimate aim being pursued was the prevention of crime and disorder, not the maintaining of an effective immigration policy. But these differences are immaterial for present purposes. The importance of *Boultif* is twofold: first it provides a guide as to the criteria that are relevant to the article 8(2) exercise; and secondly, it shows that the court is willing to find a breach of article 8 after having itself conducted a careful review under article 8(2). Other similar recent decisions of the ECtHR are *Jacupovic v Austria* App No 36757/97 and *Yildiz v Austria* App No 37295/97. For a recent example in our domestic courts, we may refer to the decision of this court in *Shala* [2003] EWCA Civ 233.

Certificate under section 72(2)(a) of the 1999 Act

The role of the Secretary of State

28. As the House of Lords explained in *Yogathas*, the Secretary of State is entitled to certify a claim as manifestly unfounded if, after carefully considering the allegation, the grounds on which it is made and any material relied on in support of it, "he is reasonably and conscientiously satisfied that the allegation must clearly fail" (Lord Bingham, para 14), or the allegation is "so clearly without substance that the appeal [to the adjudicator] would be bound to fail" (Lord Hope para 34), or "it is plain that there is nothing of substance in the allegation" (Lord Hutton para 72). Lords Millett and Scott agreed with the reasoning of Lords Bingham, Hope and Hutton. The test to be applied by the Secretary of State in certifying a claim as "manifestly unfounded" is a "screening process" rather than a "full blown merits review" (paras 14 and 34).

29. In *Razgar*, Richards J sought to amplify and explain what the House of Lords meant in their interpretation of the phrase "manifestly unfounded" and what they said about the role of the court. He said this:

> "13. What those passages make clear is that the Secretary of State is entitled to certify the case as manifestly unfounded if, but only if, he is satisfied on reviewing the material before him that the human rights allegation must clearly fail. Where the lawfulness of the Secretary of State's decision is challenged on judicial review, the court's role, as it seems to me, is to determine whether the decision was reasonably open to the Secretary of State applying, in effect, the Wednesbury test but exercising the anxious scrutiny called for in all cases of this kind.
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> 14. In practice, however, I accept Mr Blake's submission that this comes down to much the same thing as determining whether, on the material before the Secretary of State, the claimant had an arguable case that removal would be in breach of his Convention rights. If the claimant does on proper analysis have an arguable case, then no reasonable Secretary of State could properly conclude that the case must clearly fail. For this purpose, the Secretary of State is entitled to look at all the material before him, including that produced by his own officials, as well as that submitted on behalf the claimant, but he is not engaged in a full determination on the merits; and where, for example, there has been a material factual dispute about the claimant's circumstances, or about the nature of the regime operating in the third country, the Secretary of State cannot simply rely on his own resolution of that dispute but must consider, for the purposes of certification, whether it is possible that the claimant might prevail on the point on an appeal before an Adjudicator. This accords with what Scott Baker J said in Ahmadi at paragraph 48:
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> "Where the Secretary of State is faced with conflicting evidence from reputable doctors and there is no obvious reason why the evidence of one should be preferred to the other, it seems to me that any decision that the human rights claim is manifestly unfounded can only proceed on the basis of the medical evidence most favourable to the claimant."
>
> Of course, if there is an obvious reason why the claimant's material should be rejected, or if the evidence could not sustain the human rights claim, even if accepted, it will be open to the Secretary of State reasonably to conclude that the claim is clearly bound to fail. But if there is no obvious reason why the claimant's evidence should be rejected and, if on that evidence the claimant has an arguable case that removal would be in breach of his Convention rights, then the Secretary of State cannot reasonably certify the claim as manifestly unfounded."

30. This passage gave rise to a dispute before us as to whether it is consistent with what was said in *Yogathas*. In our view, it is consistent, although we do not consider that it is necessary to gloss or amplify the very clear statements made in *Yogathas* as to the meaning of "manifestly unfounded". There is no difference between the various formulations suggested by Their Lordships.

31. An issue arose before Stanley Burnton J as to whether, once an applicant establishes that his rights under article 8(1) are engaged, the Secretary of State may take article 8(2) into account in deciding whether or not to certify a claim as manifestly unfounded under section 72(2)(a). Stanley Burnton J said: "in very many circumstances, article 8 rights are obviously and unarguably defeasible under article 8.2". We agree that the Secretary of State is entitled to certify in any case in which he reasonably concludes that there is no arguable case that the interference with an applicant's article 8 rights is not justified under article 8(2). This is analogous to the Strasbourg admissibility procedure. The ECtHR will declare inadmissible cases where interference with human rights is justified and proportionate: see *Poku v UK* (1996) 22 EHRR CD 94 at para 3 where the Commission said:

> "there are no elements concerning respect for family or private life which in this case outweigh the valid considerations relating to the proper enforcement of immigration controls. It concluded that the removal does not disclose a lack of respect for the applicants' rights to family life as guaranteed by Article 8(1) of the Convention".

32. As the authors of Sweet and Maxwell's *Human Rights Practice* point out:

> "The second limb of Article 35(3) requires the court to declare inadmissible any application that is manifestly ill-founded. This has been interpreted as a test of prima facie arguability. In principle it applies to cases where the facts do not disclose an interference with a protected right, *where the interference is plainly justified*…." (emphasis added).

33. We discuss article 8(2) further at paras 36-41, 65 and 109 below.

The role of the court

34. In *Yogathas*, it was made clear by the House of Lords that the court's role is to exercise a function of supervisory review, rather than to engage in a merits review. As Lord Hutton states at para 70: "the question is whether the Secretary of State was entitled to certify that the appellant's allegation was manifestly unfounded", rather than "the substantive one whether the removal of the appellant to Germany would breach his human rights under article 3". But the court, when reviewing the decision of the Secretary of State, is required to subject the decision to "the most anxious scrutiny" (Lord Hope para 58) and "rigorous examination" (Lord Hutton para 74)

35. The court is familiar with the concept of giving anxious scrutiny to decisions of the Secretary of State in immigration cases. If the issues are ones of fact on which the court has all the material that was available to the Secretary of State, there will be little scope for deference by the court in determining those issues. Let us take a case where a section 72(2)(a) certificate has been issued in relation to a claim that a deportation will infringe a person's right to private life because there is a real risk that, if deported, he will suffer serious injury to his mental health. The court will often be in as good a position as the Secretary of State to decide whether the claim of interference with the person's article 8(1) rights would be bound to fail on an appeal before an adjudicator. In such a case, the medical reports assume great importance, and they can be assessed by the court as well as by the Secretary of State.

36. But what is the position in relation to the balancing exercise called for by article 8(2)? When an adjudicator considers the application of article 8(2) to an appeal against a refusal of a claim based on article 8, does he carry out the balancing exercise for himself, starting from scratch, or does he merely review the balancing exercise carried out by the Secretary of State? This is obviously an important question which goes to the nature of the adjudicator's jurisdiction. It is also relevant to the lawfulness of certificates under section 72(2)(a) in all those cases where the proportionate balancing of competing interests comes into play.

37. In *Ala v Secretary of State for the Home Department* [2003] EWCA 521 (Admin), Moses J held that, in a case "where there is no issue of fact" and where the only question is "whether the Secretary of State has struck the right balance between the need for effective immigration control and the claimant's rights under Article 8", it was not open to the adjudicator to substitute his own decision for that of the Secretary of State unless the latter was "outwith the range of reasonable responses" (para 47). He said:

> "44. It is the Convention itself and, in particular, the concept of proportionality which confers upon the decision maker a margin of discretion in deciding where the balance should be struck between the interests of an individual and the interests of the community. A decision-maker may fairly reach one of two opposite conclusions, one in favour of a claimant the other in favour of his removal. Of neither could it be said that the balance had been struck unfairly. In such circumstances, the mere fact that an alternative but favourable decision could reasonably have been reached will not lead to the conclusion that the decision maker has acted in breach of the claimant's human rights. Such a breach will only occur where the decision is outwith the range of reasonable responses to the question as to where a fair balance lies between the conflicting interests. Once it is accepted that the balance could be struck fairly either way, the Secretary of State cannot be regarded as having infringed the claimant's Article 8 rights by concluding that he should be removed.

> 45. So to conclude is not to categorise the adjudicator's appellate function as limited to review. It merely recognises that the decision of the Secretary of State in relation to Article 8 cannot be said to have infringed the claimant's rights merely because a different view as to where the balance should fairly be struck might have been reached."

38. Mr Husain submits that the reasoning of Moses J is wrong. But since the hearing of the present appeals, judgment has been given by this court in *Blessing Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716. Simon Brown LJ gave the leading judgment. At para 20, he said that he found Moses J's analysis "entirely convincing", and added:

> ".. and in the result conclude that, in cases like the present where the essential facts are not in doubt or dispute, the adjudicator's task on a human rights appeal under s65 is to determine whether the decision under appeal (*ex hypothesi* a decision unfavourable to the appellant) was properly one within the decision maker's discretion, ie was a decision which could reasonably be regarded as proportionate and as striking a fair balance between the competing interests in play. If it was, then the adjudicator cannot characterise it as a decision "not in accordance with the law" and so, even if he personally would have preferred the balance to have been struck differently (ie in the appellant's favour), he cannot substitute his preference for the decision in fact taken."

39. Mr Garnham submits that the same approach should be applied, however difficult that may be, even where the facts are in dispute. Mr Husain submits that, at any rate in a case where the facts are in dispute, the function of the adjudicator is to decide for himself whether the decision is proportionate, but according deference to the decision of the Secretary of State in so far as the facts found by the adjudicator permit him to do so.

40. We note that both Moses J and Simon Brown LJ were careful to limit what they said to cases where there is "no issue of fact" (Moses J) and "the essential facts are not in doubt or dispute" (Simon Brown LJ). We recognise that, if the adjudicator finds the facts to be essentially the same as those which formed the basis of the Secretary of State's decision, there will be no difficulty in adopting the approach enunciated by Moses J and Simon Brown LJ. But what if the adjudicator finds the facts to be materially different? In such a case, the adjudicator will have concluded that the Secretary of State carried out the balancing exercise on a materially incorrect and/or incomplete factual basis. There is no power in the adjudicator to remit the case to the Secretary of State for a reconsideration of the balancing exercise on the facts as found by the adjudicator. There will, therefore, be cases where it is not meaningful to ask whether the decision of the Secretary of State was within the range of reasonable responses open to him, because his determination was based on an accurate analysis of the facts. But even if the adjudicator were to conclude that the Secretary of State's analysis was wrong, it would not necessarily follow that the Secretary of State acted in

breach of a claimant's ECHR rights in such a case. It would remain open to the adjudicator to decide that the conclusion reached by the Secretary of State was lawful (and did not breach the claimant's human rights) because it was in fact a proportionate response even on the facts as determined by the adjudicator.

41. Where the essential facts found by the adjudicator are so fundamentally different from those determined by the Secretary of State as substantially to undermine the factual basis of the balancing exercise performed by him, it may be impossible for the adjudicator to determine whether the decision is proportionate otherwise than by carrying out the balancing exercise himself. Even in such a case, when it comes to deciding how much weight to give to the policy of maintaining an effective immigration policy, the adjudicator should pay very considerable deference to the view of the Secretary of State as to the importance of maintaining such a policy. There is obviously a conceptual difference between (a) deciding whether the decision of the Secretary of State was within the range of reasonable responses, and (b) deciding whether the decision was proportionate (paying deference to the Secretary of State so far as is possible). In the light of *Blessing Edore*, we would hold that the correct approach is (a) in all cases except where this is impossible because the factual basis of the decision of the Secretary of State has been substantially undermined by the findings of the adjudicator. Where (a) is impossible, then the correct approach is (b). But we doubt whether, in practice, the application of the two approaches will often lead to different outcomes.

The Appeal of Mohammed Ali Razgar

42. The appellant is an Iraqi Kurd who claimed that he had fled Kurdistan in November 1997 after having been detained and tortured for two and a half years on the grounds of his membership of the Iraqi Communist Party. He arrived in Germany where his claim for asylum was refused. He travelled from Germany to the United Kingdom by lorry, arriving here on the 22 February 1999, and he immediately claimed asylum on the grounds of his alleged fear of persecution if he were returned to Iraq. On 29 April 1999, the German authorities accepted responsibility for the appellant's asylum claim pursuant to the Dublin Convention. On 6 May, the Secretary of State refused the appellant's claim for asylum on the grounds that Germany was a "safe" third country, and therefore without considering the merits of the claim.

43. The appellant instructed his present solicitors in January 2000. On 17 May, they sent the Secretary of State a medical report by Dr Sathananthan, a Consultant psychiatrist who had been treating the appellant since November 1999. On the strength of this report, the appellant's solicitors asked the Secretary of State to consider the merits of the asylum claim. The report stated that the appellant was suffering from severe depression, and concluded:

> "I respectfully recommend to Court that Mr Ali be permitted to stay in this country, as otherwise it would be detrimental to his mental and physical wellbeing. Incarceration and custody is likely to cause a relapse on the

progress he has made so far. Given Mr Ali'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. I am happy to continue with his psychiatric treatment if the Courts agree with my request."

44. The Secretary of State rejected the solicitors' representations on the same day, and declined to defer removal directions. On 23 May, Dr Sathananthan submitted a further report in which he recounted that the appellant had telephoned him on 19 May and appeared to be in great distress. He had told the doctor that he did not want to return to Germany where he had experienced racist attacks, and that he had said that he would kill himself if he was returned to that country. Dr Sathananthan said that what the appellant had said over the telephone indicated a worsening of his depressive mood complicating Post Traumatic Stress Disorder. He added:

> "I feel incarceration has caused a setback from the progress Mr Ali 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. In my opinion Mr Ali should be allowed to continue with the treatment that I have provided".

45. On 25 May, the appellant started judicial review proceedings on the grounds, inter-alia, that the decision of the Secretary of State to remove the appellant to Germany was a breach of his obligations under articles 3 and 8 of the ECHR.

46. The Secretary of State gave his initial response in a letter dated 4 July 2000. He said that he was satisfied that removal of the appellant to Germany would not be in breach of the United Kingdom's obligations under the ECHR. Germany was a signatory to the ECHR, and he had no reason to believe that Germany would fail to honour its obligations under the convention. He considered the medical reports from Dr Sathananthan in relation to the exercise of his discretion whether or not to allow the appellant to remain in the United Kingdom. At paragraph 13 of his letter, he said:

> "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."

47. On 2 October 2000, the appellant's solicitors made further representations to the Secretary of State in support of the appellant's application that the Secretary of State should exercise discretion in his favour and consider his case substantively in the United Kingdom. The material enclosed in support of these further representations included a report by Mr Stefan Kessler which, it was argued, showed that if returned to Germany the appellant would be unable to benefit from a "modicum of security or psychiatric treatment". Mr Kessler is an independent expert in German refugee affairs. His report stated that the appellant would not be granted refugee status by the German authorities: at best he would receive the "tolerated" status of Duldung. Mr Kessler said that, as the holder of a Duldung, the appellant would be entitled to medical aid and assistance only if he required treatment for "acute illnesses and pains". Mr Kessler's reading of the documents suggested to him that the appellant's current mental illness would be recognised by the German authorities as being "chronic", so that he would not have a right to medical treatment by a psychiatrist. He would not in any event be entitled to treatment by a psychotherapist. He concluded that to return the appellant to Germany would have a "very negative impact on his mental health".

48. In a response dated 7 February 2001, the Secretary of State maintained his decision to remove the appellant. On the following day, the appellant's solicitors replied saying that the appellant now exercised his right of appeal under section 65 of the 1999 Act against the decision of 7th February 2001 to refuse representations made on the basis that it would be a breach of articles 3 and 8 of the ECHR to remove him to Germany.

49. The Secretary of State replied on 9 April saying:

> "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 in 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.

5. 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 S.65 of the Immigration and Asylum Act, but under S.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."

50. On 11 April, the appellant sought judicial review of the Secretary of State's decision to certify under section 72(2)(a) of the 1999 Act.

51. On 18 July, Dr Sathananthan produced an updated psychiatric report. He stated that the appellant suffered from Post Traumatic Stress Disorder. He needed pharmacotherapy and cognitive behavioural therapy, and a happy and safe environment in which to do this. He concluded:

"Incarceration and custody is causing a relapse on the progress Mr Ali 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."

52. On 13 August the Secretary of State wrote his final decision letter to the appellant's solicitors:

"You claim in your letter that removal of your client to Germany would be dangerous to your client's mental state. The Secretary of State is however satisfied that there will be appropriate, adequate and at the least equivalent medical facilities available for your client to use on his return to Germany."

53. The appellant was granted permission to apply for judicial review by Kay LJ on 14 December 2001, permission having been refused by Silber J on 30 July. Further evidence was placed before Richards J at the hearing of the application for judicial review on the 20 November 2002. This comprised the following. First a letter dated 21 May 2002 by Mr Kessler, in which he maintained the advice that he had previously given that being the holder of a Duldung, the appellant would not be entitled to medical treatment by a psychiatrist or psychotherapist. Secondly, an additional medical report by Dr Sathananthan dated 24 September 2002. The report referred to the fact that, when the appellant talked about his prison life, he felt very stressed and anxious: on two occasions in the past (in 2000 and 2001) he had tried to kill himself while in prison. The report stated that the appellant scored "severe depression subjectively", and "moderate depression objectively". He had suicidal ideation at times. Dr Sathananthan expressed his opinion as follows:

> "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.
>
> Superficially Mr Razgar presents in a friendly, good humoured manner, but when you talk to him in depth all his underlying unhappiness, sense of hopelessness and anxiety about the Court case become evident. Even though he has medication and had supportive psychotherapy at the Day Hospital, there was not enough time or access to Cognitive Behaviour Therapy, which is very necessary for his treatment. In my experience they have been able to arrange such treatment for refugees who have been given status to stay in this country, so that they didn't worry about their future and were able to respond to the therapy.
>
> …..
>
> If Mr Razgar were returned to Germany where he was imprisoned as before, his mental state would drastically deteriorate back to the depth it was when I first assessed him in the Detention Centre at Gatwick Airport.
>
> …..
>
> I would respectfully recommend to Court that Mr Razgar is allowed to stay in this country, so that he would have the support network from his family, cousin and friends. Once he is reassured about his status here it will be much easier and appropriate to arrange Cognitive Behaviour Therapy,

which will help to improve him from his symptoms of Post Traumatic Stress Disorder. He is intelligent, was hard working and no doubt would become a useful and productive citizen in this country."

54. Thirdly, there was a statement by Richard Pulham, a Higher Executive Officer in the Immigration Service of the Home Office. Mr Pulham stated (paragraph 6) that he had discussed the appellant's case with Mr Braeunlein of the Federal Office for the Recognition of Foreign Refugees, and understood that, immediately after the appellant's arrival in Germany, he would be invited to attend a medical assessment. Any necessary treatment would be given to the appellant, and "such treatment would not be at a basic level to enable the claimant to survive, but in order to enable him to lead a normal life". Mr Pulham also stated (paragraph 7) that he believed it to be "overwhelmingly likely" that the appellant would be granted Duldung: "as such he will not be held in a detention/accommodation centre in which those claiming asylum are held: if he is, this will only be for a very short time until his longer term needs are assessed". Fourthly, in a letter dated 12 November 2002, Mr Kessler responded to Mr Pulham's statement expressing disagreement with substantial parts of it. In particular, he said that Mr Pulham was wrong in stating that the appellant would not be held in a detention/ accommodation centre because of his status as the holder of a Duldung. "Aliens who do not have a formal residents permit and are obliged to leave the country but not deported can be ordered to live in an accommodation centre. Those centres are usually located in remote areas which makes access to counselling, medical treatment etc quite difficult".

The Judgment

55. After summarising the effect of *Yogathas* in the way that I have set out at paragraph 29 above, the judge made some observations about *Bensaid*, and then turned to consider the evidence. He decided that he ought to consider all the evidence that had been filed, and not merely that which had come into existence before the Secretary of State's letter of 9 April 2001. In our judgment, he was plainly correct to do so.

56. The judge expressed his conclusions at paragraphs 43 to 56 of the judgment. He started (paragraph 43) by saying that, for the purposes of certifying, the Secretary of State had to proceed on the basis that Dr Sathananthan's psychiatric assessment of the appellant might be accepted in full by an adjudicator. There was no proper basis for concluding otherwise, since the Secretary of State had no other psychiatric reports. Two assumptions underpinned the opinion of Dr Sathananthan, and both were criticised by the Secretary of State in the course of the hearing before the judge. These were: (i) the appellant would be denied access to relevant medical facilities if he were returned to Germany; and (ii) he would be incarcerated or in custody or accommodated in a refugee camp if he were returned.

57. As regards (i), the judge held that the Secretary of State had no material upon which to take a different view from that expressed by Mr Kessler as to the availability of psychiatric treatment in Germany to the appellant, or to justify his own conclusion that adequate, appropriate and equivalent psychiatric facilities would be available to the appellant if he were returned. There was nothing to counter the evidence of Mr Kessler. It followed that the only basis upon which the Secretary of State could properly proceed was that there was a real risk that the appellant would not receive appropriate treatment in Germany, or at least that there was a real possibility of an adjudicator so finding on an appeal.

58. As regards (ii) the only evidence that the Secretary of State had before him as to where the appellant would be accommodated on his return was that of Mr Kessler, who stated that if, as was very likely, the appellant received a Duldung, he would be placed at an accommodation centre with substantial restrictions on his liberty. The Secretary of State did not specifically take issue with that at the time; and there was nothing to show that he considered Mr Kessler's evidence to be obviously wrong, or to show the basis upon which he reached any such conclusion.

59. It was for these reasons that the judge held that the Secretary of State had to proceed on the basis that the psychiatric assessment made by Dr Sathananthan in respect of the appellant might be accepted in full by an adjudicator. Nor did the recent evidence cause the judge to take a different view, even leaving out of account the fact that it was not available at the time of the decision. He said (paragraph 50):

> "…I accept Mr Blake's submission that the Secretary of State's evidence must be examined with particular caution given its extreme lateness and the fact that it even post-dated the claimant's original skeleton argument. In those circumstances, as it seems to me, a high degree of specificity is called for if it is to be relied on as rebutting the claimant's evidence. As it is, what Mr Pulham says in his witness statement on the basis of a conversation with a German official about the treatment that would be given to the claimant does not, in my view, engage sufficiently with the specifics in Mr Kessler's evidence about the lack of any right to such treatment unless and until the condition is acute, and about the risk that discretionary funding would not be available for the provision of treatment. So too what is said by Mr Pulham about the nature of the claimant's accommodation if returned does not accord with the picture painted by Mr Kessler on the basis of his experience and independent material, and again there is no real attempt to address the specifics in Mr Kessler's evidence head on. The fact that a similar position was adopted by the Secretary of State on the question of accommodation in Ahmadi, and was shown to be wrong on the facts, simply underlines one's concern. In any event, I am satisfied that on each of these matters there was and is a real factual issue that might be decided against the Secretary of State on appeal. So far as concerns Dr Sathananthan's recent report, that serves to underline the psychiatric concerns if the claimant were returned to Germany."

60. It followed that it could not be said that the appellant's human rights case was clearly bound to fail even if Dr Sathananthan's psychiatric assessment was accepted. "The meat of the case 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". The judge held, therefore, that the Secretary of State could not reasonably conclude that the appellant's case under article 8 was clearly bound to fail. The case under article 3 was "far more difficult" (paragraph 56). The judge did not, however, need to reach a final conclusion on that issue in the light of his decision in relation to article 8.

Discussion

61. Mr Garnham submits that the judge reached the wrong conclusion because (a) the article 8 claim was not capable of being engaged, since it breached the territoriality principle; and (b) even if the claim was capable of being engaged, the reasons given by the judge did not justify his conclusion that the Secretary of State was not reasonably entitled to certify that the claim was manifestly unfounded. The first of these points was not advanced in the court below, since the hearing before Richards J took place before judgment was given in *Ullah*.

62. We shall deal with the territoriality point first. This is what we have earlier in this judgment referred to as a "mixed case". The alleged interference with private life that it is claimed is likely to occur if the claimant is deported to Germany will result from the loss of certain treatment and support in the UK, and from the fact that it will not be replicated in Germany. The evidence of Dr Sathananthan shows that the claimant has been on medication for depression since November 1999, has had supportive psychotherapy and, once he has been reassured about his status in the UK, will be able to receive Cognitive Behaviour Therapy which is "essential" for his treatment. In addition, he has the support of cousins and friends in the UK. As against that, if he were removed to Germany, he would be subject to the status of Duldung. On the evidence of Mr Kessler, this means that he would only be entitled to medical assistance if his condition were considered to be acute. He would, therefore, not be entitled to psychiatric treatment, nor would he in any event be entitled to psychotherapy. Nor would he have the support of family and friends that he enjoys in this country. As we have already stated, much of the evidence of Mr Kessler is disputed by Mr Pulham. In our judgment, on the claimant's case, the removal of the support and treatment for his mental condition would make a material contribution to the drastic deterioration in his mental health that Dr Sathananthan predicts will occur if he is removed to Germany. Unless that case would itself be bound to fail on appeal to an adjudicator, the Secretary of State could not lawfully certify the claim as manifestly unfounded on the grounds that it breached the territoriality principle.

63. We turn, therefore, to the question whether the claim of interference with the claimant's article 8 rights would be bound to fail before an adjudicator. The judge's starting point was that the Secretary of State had to proceed on the basis that Dr Sathananthan's assessment might be accepted in full by an adjudicator, since there was no proper basis for concluding otherwise. Mr Garnham submits that the judge was wrong to say (para 47) that the Secretary of State had no material on which to take a different view as to the availability to the claimant of psychiatric treatment in Germany, and that there was nothing to counter the clear and specific evidence of Mr Kessler. As Mr Garnham point out, there was the evidence of Mr Pulham. But the judge gave cogent reasons (para 50) for treating the evidence of Mr Pulham with caution. It is true that the Secretary of State did have *some* evidence to counter that of Mr Kessler. But it lacked the clarity and specificity of Mr Kessler's evidence. More importantly, there was nothing in it to justify the conclusion that an adjudicator was bound to reject the opinion of Mr Kessler. As for the criticism that the opinion of Dr Sathananthan was based on the premise that the claimant would be held in detention if he were removed to Germany, and that this was a false premise, as the judge pointed out, Mr Kessler said that the claimant would be placed in an accommodation centre with substantial restrictions on his liberty.

64. We therefore agree with the judge that this was not a case in which the Secretary of State could reasonably conclude that the allegation that the claimant's article 8 rights would be infringed if he were removed to Germany was bound to fail before an adjudicator.

65. Article 8(2) did not feature in the evidence of the Secretary of State or the argument before the judge. Mr Garnham seeks to raise it before this court. He submits that the Secretary of State would have been justified in certifying that the claim was manifestly unfounded on the grounds that, even if there was an arguable case of infringement of the right to private life under article 8(1), that claim would be bound to be trumped under article 8(2). We accept that an article 8 claim will often be trumped by article 8(2). But as was made clear in *Boultif*, even article 8(2) issues are fact-sensitive. There will undoubtedly be cases where the Secretary of State will reasonably be entitled to certify under section 72(2)(a) on the grounds that an article 8 claim would be bound to fail before an adjudicator by reason of article 8(2). We have in mind cases where the claim of infringement under article 8(1) is weak, but just arguable, and where a weighting of the factors that are relevant to the article 8(2) exercise leans heavily in favour of interference with the right. There will also be, however, cases where, at the end of the day, article 8(2) is likely to trump the claim, but where it is not possible to say at the outset that it is bound to do so. In our judgment, the present case is not one where it is so plain that article 8(2) is bound to trump the article 8(1) claim that it is possible to certify the claim as manifestly unfounded. We would add that we would be especially reluctant to allow this appeal on the basis of article 8(2) when the point has, apparently, never even been considered by the Secretary of State.

66. For the reasons that we have given, therefore, we would dismiss this appeal.

The Appeal of Tenin Soumahoro

67. On the 17 April 2000 the appellant arrived in the United Kingdom from Ivory Coast and claimed asylum. She was detained, but released from detention in June 2000 after doctors had recognised that she had serious psychological problems and that her continued detention would have a detrimental effect on her mental health. On 3 October 2000 France accepted responsibility under the Dublin Convention for the examination of her claim. In the light of that acceptance, the Secretary of State refused the claim on 11 October without a consideration of its merits, and issued a certificate under section 11(2) of the 1999 Act.

68. The appellant appealed on the grounds that it would be a breach of article 3 of the ECHR to remove the appellant to France, since the psychiatric evidence indicated that her subjective fear of being returned by the French authorities to Ivory Coast was such that her removal to France would lead to a real risk of suicide. On 4 June 2001, the adjudicator allowed her appeal.

69. The Secretary of State appealed. On 29 August 2001, the IAT allowed the appeal. The decision by the adjudicator had been substantially based on the evidence of Dr Bell, a Consultant Psychiatrist, who had stated that the removal of the appellant to France would significantly increase the possibility of a completed suicide. The IAT decided that Dr Bell's assessment, made after one examination only in November 2000, was based on the premise set out in his report that, to the appellant, return to France meant return to the Ivory Coast, and therefore return to persecution. This premise was ill founded, and had no realities save in the appellant's mind. As the IAT pointed out, it remained uncontradicted by anything the appellant's solicitors had told her. At paragraph 12 of their decision, the IAT said:

> "12. If the asylum-seeker were now to be returned to France without any attempt to explain to her that her case would properly be considered there, then it may well be that the risk of self-harm described by Dr Bell could be described as real, and not speculative: though it must be said that it could be minimized by detaining her from the moment when fresh removal directions were served, and keeping her under close observation till handed over to the French authorities, who could be advised to observe similar precautions. However, that way of dealing with the case would be a rather blunt instrument, and by no means the best. There is nothing to suggest that this asylum-seeker would not, in suitable circumstances, be capable of taking in what people tell her in her best interests: see the relationships she has established with her solicitor and voluntary agencies. Miss Cohen may have had difficulties getting through to her, through an interpreter, but there is nothing to show that she has tried to do so, on what we consider the crucial point, let alone enlisting suitable help. To say that removal to France would result in self-harm, and that the necessary trust

> for longer-term psychiatric treatment could not be established there, because of the fears the asylum-seeker has of onward return to the Ivory Coast, without dealing with the possibility of reassuring her against those fears while still here, is in our view to engage in speculation as to the result of not doing what clearly ought to be done. We do not think that represents a real risk of return to France resulting in "inhuman or degrading treatment" contrary to art.3."

70. The appellant did not seek to challenge the decision of the IAT. Instead, her solicitors made further representations on the basis that removal to France would constitute a breach of article 8 of the ECHR.

71. Further representations were made by the appellant's solicitors in their letter dated 7 February 2002, enclosing a report by Dr Huang which concluded:

> "Ms Soumahoro is suffering from a psychiatric disorder, as described. This condition was clearly exacerbated by her numerous traumatic events in the Ivory Coast, but has improved since her arrival in the UK. It is clear that if she were deported to the Ivory Coast, her mental state would rapidly deteriorate and she would be at high risk of suicide. I gather that she may be deported to France and in her mind this would clearly mean that she would be returned to the Ivory Coast and be at serious risk of self-harm as her psychological state will rapidly deteriorate."

72. The Secretary of State responded by his letter dated 9 March 2002. He noted that there was no suggestion that facilities in France to treat her for her psychiatric problems were not every bit as good as those in the UK. He continued:

> "The Secretary of State notes that Ms Huang in paragraph 14 of her report states that the subject is suffering from a "moderately severe depressive episode". In paragraph 16 Ms Huang again mentions that it is associated that return to France in the mind of your client equates to return to Ivory Coast. It again seems that no effort has been made to assuage these fears as suggested in the last paragraph of the Tribunal judgment."

73. The Secretary of State then considered the allegation that article 8 would be breached by a removal of the appellant to France. Having referred to the decision of the ECtHR in *Bensaid*, he

certified that the appellant's further allegation of a breach of her human rights was manifestly unfounded in accordance with section 72 (2)(a) of the 1999 Act. Removal directions were issued.

74. On 26 March 2002, the appellant's solicitors wrote again, stating that the Secretary of State should not have certified that the claim under article 8 was manifestly unfounded. Removal to France would be disproportionate. The appellant had a "strong belief that the implications of such removal will lead to her ultimate removal to the Ivory Coast". They enclosed a supplementary psychiatric report by Dr Huang, which stated that the issue of removal directions for 2 April gave rise to "a high risk of her suffering a relapse from her depression, putting her at serious risk of committing suicide". The removal directions were re-fixed for the 12 April. On 6 April, the appellant was admitted to St Ann's Hospital, Haringey, having taken an overdose of her medication for acute depressive disorder. The appellant's solicitors submitted further representations to the Secretary of State on 11 April. They maintained that the appellant's fear of removal to France persisted despite reassurances that had been given to her that her asylum claim would be properly considered in France. On 13 April, the Secretary of State replied that no new issue had been raised, and he maintained his previous position. A further supplementary report by Dr Huang dated 24 April 2002, was sent to the Secretary of State on 26 April. In this report, Dr Huang said that she tried to reassure the appellant about the safety of France, but that the appellant could not be convinced. She said:

> "My impression is that she has suffered a relapse of her depressive episode as a result of the imminent deportation date. Ms Soumahoro is fixated on the idea that removal to France means that she will be returned to the Ivory Coast. Dr Kinloch and I have tried to reassure her that her case will be fairly considered in France and she should not fear removal to France on the basis that she will be returned to the Ivory Coast. Despite numerous reassurances Ms Soumahoro has an irrational fear of removal that cannot be assuaged. This compulsive fixation is leading to deterioration of her mental health. Thus I have no doubt in concluding that on receipt of Removal Directions to France, her irrationality is likely to lead to a suicide attempt".

75. The Secretary of State responded by a letter dated 29 April. He said:

> "The Secretary of State again notes the expressed fear that Ms Soumahoro may attempt suicide should removal to France be attempted, but remains of the view that attempted suicide does not concern the direct responsibility of the Secretary of State for the infliction of harm and that the high threshold set by Article 3 ECHR is not engaged. The Secretary of State again notes that in it(s) judgement the Tribunal has stated that any real or speculative risk of suicide from your client's alleged tendencies could be minimised by placing her in detention once removal became imminent and

notifying the French authorities of this alleged tendency. He further notes that Ms Soumahoro is currently only being prescribed small amounts of medication to minimise this risk.

The Secretary of State again notes that your enquiries of various organisations in France have revealed that your client would be entitled to medical treatment regarding her HIV status as soon as she arrives in France and that, although difficult (your phrase), she could obtain access to psychiatric services. The Secretary of State remains satisfied that your client would be accommodated and not left destitute, and you have now stated that her first month's accommodation will in all likelihood be met by a charity. Although the accommodation may not be what your client would like, it cannot be said that there would be no accommodation available, nor that the accommodation would be so poor as to seriously jeopardise your client's health or to be construed as inflicting inhuman and degrading treatment upon your client.

The Secretary of State is satisfied that all issues pertaining to his legal obligations under the Human Rights Act 1998 and the European Convention on Human Rights have been fully examined both by the Tribunal and the Secretary of State in his later correspondence, and that there is no new issue regarding a breach of your client's human rights should she be returned to France.

The Secretary of State remains of the view that the proper course of action in the case of your client is to remove her to France, where, whatever your client may claim to believe, her application for asylum will be considered in accordance with France's international obligations, as would any claim that her human rights would be breached by returning her to Ivory Coast."

76. By their letter dated 1 May, the appellant's solicitors took issue with the Secretary of State. They said that any action by the Secretary of State to detain the appellant before she was removed would exacerbate her mental anguish, and would result in a breach of article 3. They asked him to reconsider his decision to set removal directions. On 11 May, the Secretary of State maintained his previous position, upholding his certificate under section 72(2)(a) of the 1999 Act. On 19 May, removal directions were set for 10 June.

77. On 24 May, the appellant started proceedings seeking judicial review of the decisions of 29 April and 11 May 2002 and the subsequent removal directions on the grounds that they violated the appellant's article 3 rights.

78. The application was dismissed by Cooke J on 21 November 2002. The psychiatric evidence that was produced at the hearing was as follows: (i) the reports by Dr Bell dated 28 November 2000 and 14 May 2001; (ii) the reports by Dr Huang dated 7 January, 25 March and 24 April 2002; (iii) a report by Dr Baggaley dated 24 October 2002; (iv) a letter dated 14 November 2002 from Dr Lloyd. We have already sufficiently referred to the reports by Dr Bell and Dr Huang. Dr Baggaley was instructed by the Secretary of State. His view was that the appellant was suffering from a moderately depressive episode, F32.1 as defined by the International Classification of Diseases, version 10 of the WHO. He made no mention of removal to France as a trigger for attempts at self-harm or suicide, although his prognosis was that she needed to continue with her psychiatric treatment, and to resolve her uncertain immigration status. It was regrettable that she had voluntarily disengaged from treatment. He said, however, that the treatment in France would be just as good, and that there were advantages in her going to France where the language and culture was one to which she was more accustomed.

79. In his letter dated 14 November 2002, Dr Lloyd said that he agreed with Dr Baggaley's assessment as to the cause of the appellant's depression. He added, however:

> "My own view is that the threat of sending her to France will increase her risk of suicide and episodes of self-harm. If she did actually move to France the risk of suicide attempts would remain high although there is a prospect that her mental state would improve if she realises she is not going to be deported to the Ivory Coast. If the Home Office were to make a decision that she could remain in the United Kingdom I believe the risk of suicide would be reduced almost immediately".

80. There was also evidence before the judge that the appellant had been admitted as an in-patient to the Chase Farm Hospital on 13 November, as a result of taking an overdose of medication. On the day before she took the overdose, she had received a letter from her solicitors regarding her final hearing for deportation. She was said to be extremely distressed by that information, and anxious that she would be deported shortly.

81. Finally, there was also before the judge a witness statement dated 19 November 2002 from the appellant's solicitor Julie Cornes, which stated that the appellant's decision to cease treatment was an irrational decision taken by her. She described how the appellant had told her that she could not bear to see the psychiatrist again because she (the psychiatrist) kept telling her that it was safe in France, something that she did not believe.

The Judgment

82. At the hearing before Cooke J, the allegation of breach of article 8 was not pursued. The case was advanced on the basis of article 3. In his careful judgment, the judge set out the facts which we have just summarised. He then referred to a number of domestic and ECtHR authorities, to some of which we have already referred. He said (paragraph 27) that the evidence disclosed that the appellant had an irrational fixated idea that removal to France would mean removal to the Ivory Coast, when it was clear, on an objective basis, that the French authorities would take full account of her ECHR rights in any decision they made on her application for asylum. Having referred to the medical evidence, he said that the issue was "the degree of risk involved in relation to the increased likelihood of suicide" (paragraph 28). He resolved that issue in the following way:

> "29.The point where the risk is highest, to judge from past attempts of self-harm or suicide, is the point at which the fear of removal is most acute, either before any decision is made, or in the time after the decision is made before removal. The risk will continue during removal and, it appears, will continue when first in France. Once, however, the Claimant settles into a waiting period in France of the duration to be expected as an asylum applicant, which is no doubt little different from the waiting period here of which the Claimant has some two and a half years' experience, Dr Lloyd recognises the prospect of improvement in her mental state. Evaluating the expert evidence and bringing to bear on it the other evidence of what has actually occurred, and dealing with the matter on the basis, also, of common sense, in my judgment there is a real risk of self-harm for only a limited period, and even that risk may not be a genuine risk of suicide. The fact that the Claimant has taken steps to avoid the effects of overdosing is, in my judgment, highly significant, on the two occasions when she has indeed overdosed.
>
> 30. The period in question between an order for removal and the removal itself need only be one of three days. The flight itself to France is only one hour. With accommodation available for this first month regardless, as now appears to be the case, within that period it will become apparent even to someone whose current irrationality prevents her now accepting the reality of the position, that the reality in France is that there will be no immediate deportation to the Ivory Coast. That, it seems to me, cannot but impinge itself upon her consciousness over a period in France of that kind.
>
> 31. Precautions can and indeed should be taken to supervise the Claimant from the moment she is notified of this decision and the order to remove her, so that the risk of any self-harm or attempted suicide can be minimised. Likewise for the duration of the flight and by notification to the French authorities, so that when she arrives there, adequate steps are taken to safeguard her position. Given the comparatively short-term nature of the higher element of risk which, as I say, is by no means established as a high risk of suicide, on the psychiatric evidence, I do not consider that the expulsion of the Claimant can be considered as inhuman treatment and

there is, therefore, no basis for quashing the decisions made by the Secretary of State.

32. It is, of course, the case that prior to removal, the Claimant must be ascertained to be in a fit state to be transported; that goes without saying. But the Secretary of State will, of course, have to take the necessary steps for ascertainment and safeguarding the Claimant as soon as this decision is published, as soon as any order is made, and from then on until handover to the French authorities, who must be fully appraised of the position so that any risk is indeed minimised to the maximum possible extent."

Discussion

83. The judge referred (para 25 of his judgment) to paragraph 14 of the speech of Lord Bingham in *Yogathas,* and at paragraph 26 said that he bore in mind that, where the Secretary of State was faced with a conflict of evidence between reputable doctors, the right approach was to take the evidence at its most favourable to the claimant. It seems to us that, when he came to address the issues in the passage at paragraphs 29-32, he sought actually to determine the issue of whether there would actually be a serious risk of self-harm or suicide if the appellant were removed to France, rather than whether the appellant's case that there would be such a risk would be bound to fail before an adjudicator. It is true that at paragraph 31, the judge said that he did not consider that the expulsion of the claimant *"can* be considered as inhuman treatment"(our emphasis). But reading the passage as a whole, we think that there are clear signs that he failed to apply the test that he had set for himself.

84. But whether or not we are right about that, it is necessary for this court to examine the material that was before the Secretary of State to see whether the claim being advanced on behalf of the appellant, that, if she were removed to France, there was a real risk that her article 3 rights would be violated, was bound to fail. The article 3 case was based substantially on the evidence of Dr Huang and Dr Lloyd that the issue of removal directions would give rise to a serious risk of the appellant committing suicide, and the evidence of Dr Lloyd that, if she were removed to France, the risk of suicide would remain high, although it would reduce in time. There was no medical evidence from the Secretary of State to counter these opinions: Dr Baggaley did not say that he disagreed with them. The only relevant response from the Secretary of State on the issue of suicide is to be found in his letter dated 29 April, where he said that the fear of suicide did not concern his direct responsibility, and that the high threshold of article 3 was not engaged. He also said that he noted that the IAT had stated that any risk of suicide could be minimised by placing her in detention once removal became imminent, and by notifying the French authorities of her alleged tendency.

85. This appellant is a person who is suffering from depression and has on two occasions taken overdoses of medication which have required her to be admitted to hospital. There is

uncontroverted evidence that, if she is removed to France, there is a real risk that she may commit suicide, and that this risk is likely to subsist until she realises that the French authorities do not intend to send her back to the Ivory Coast (assuming this to be the case). We agree with the judge that the issue was the degree of risk that there would be an increased likelihood of suicide. If it was arguable on the evidence that there was a real risk of a significantly increased risk that, if she were removed to France, the appellant would commit suicide, then in our view her claim based on article 3 could not be certified as manifestly unfounded.

86. The evidence did not disclose that the appellant was a suicide risk except in the context of her possible removal to France. The main question, therefore, (as the judge recognised) was whether the possibility that the risk could be minimised by protective measures such as detention and warning the French authorities of her tendency was such as to render unarguable what would otherwise clearly be an arguable claim. The judge decided that, in view of the comparatively short-term nature of the enhanced risk of suicide, and the effect of the precautionary measures that could and should be taken, the claim failed. If he had focused on the question whether the claim was arguable, he ought in our view to have decided that it was. There was no evidence as to what precautions would be taken to minimise the risk of suicide, and in particular what measures the French authorities would take, and for how long; and how effective they would be. Without a clear understanding of what precautions would be likely to be deployed, and how effective they would be likely to be, we do not see how the Secretary of State could have been satisfied that this claim would be bound to fail. He seems to have relied on the fact that the IAT had said that the alleged risk of suicide could be minimised by detention and *notifying* the French authorities. The IAT had indeed said this, but they had not said anything about what measures the French authorities would adopt, or how effective they would be. The IAT did not even know how long the appellant might be a suicide risk. It may be inferred that they thought that the risk would be very short-lived, because their main concern was that no attempts had been made to assuage the appellant's irrational fears. It is reasonable to assume that the IAT would have thought that her fears would dissipate once she was given the necessary assurances. In other words, we do not consider that the remarks of the IAT provided a secure foundation for the Secretary of State's conclusion.

87. For these reasons, we allow this appeal.

The Appeal of Kalaichelvan Nadarajah

88. The appellant is a Sri Lankan Tamil asylum seeker. He was born on 26 February 1962, and married his wife in 1991. He claims that he was forced to help the LTTE (The Tamil Tigers), and in consequence was harassed by Government forces. In late 1995 he fled Sri Lanka to Germany, having refused a request by the LTTE to carry arms. He claimed asylum in Germany. His claim was rejected in March 1996. He claims that he returned to Sri Lanka in late 1997 using a false name. He says that he did this because he saw large numbers of Sri Lankan asylum seekers being forcibly returned to Sri Lanka from Germany, and considered that a voluntary return on a false document was safer than an enforced return with his true identity being revealed. He says that his plan was to

meet his wife and baby daughter in Sri Lanka and flee to India. He says that on his return, he was arrested and detained for about six months, forced to sign a statement that he had engaged in fund raising in Germany for the LTTE, and had been tortured between fifteen and twenty times. His release in mid 1998 was organised through the intervention of a Tamil MP. Five days after his release, he again fled Sri Lanka.

89. He arrived in the United Kingdom clandestinely in a container on 21 August 1998. He did not disclose to the Secretary of State the fact that he had previously claimed asylum in Germany. This was because he thought that if he stated that he had previously claimed asylum in Germany, he would be sent back to that country.

90. On 19 January 1999, the Secretary of State refused the asylum claim on "third country grounds" under section 2 of the Asylum and Immigration Act 1996. Germany had accepted responsibility for the appellant's asylum claim.

91. On 8 February 1999, the appellant commenced judicial review proceedings, challenging the decision of 19 January 1999 on the grounds that Germany was not a "safe" third country. The evidence submitted on behalf of the appellant in support of the claim for judicial review included a report dated 17 May 2000 by a consultant psychiatrist, Dr Gorst-Unsworth. This report described what was said to be the appellant's current symptoms and psychological problems: the symptoms were said to be typical of a chronic post-traumatic stress disorder. Dr Gorst-Unsworth said:

> "In this case the obvious precipitating factors were his maltreatment during his detention in Sri Lanka but the perpetuating factors include his current uncertainty regarding his legal status in the UK and his fears for his family's safety who remain in the troubled area of northern Sri Lanka".

92. The appellant's wife arrived clandestinely in the United Kingdom on 5 August 2001 and claimed asylum. Her claim was rejected on 2 October 2001. Her appeal was heard by an adjudicator who, in a decision promulgated on 6 May 2003, dismissed her appeal. She found the heart of her story credible, but dismissed her appeal on the grounds that no objective risk of ill-treatment had been shown. The evidence tendered by the appellant and his wife to the adjudicator included part of the narrative that has been rejected by the Secretary of State in the present proceedings as manifestly untrue. This narrative concerned the appellant's account of his voluntary return from Germany to Sri Lanka in December 1997, and his arrest, detention and ill treatment there by the Sri Lankan authorities. The adjudicator said that he was satisfied that "there is a reasonable degree of likelihood that the kernel of the (wife's) account is intact in most respects, even allowing for a degree of exaggeration….She came to the notice of the authorities after she made a prison visit to the husband in 1997".

93. On 23 January 2002, the claim for judicial review was withdrawn in the light of developments in the case-law. On 21 February 2002, the appellant's solicitors wrote to the Secretary of State asking him to consider the asylum claim domestically, saying that a failure to do so would involve a breach of the appellant's rights under articles 3 and 8 of the ECHR. They referred to medical evidence supporting his case that he had been tortured, and to psychiatric evidence of the damage to his health that would be caused by his return to Germany. They said:

> "We wish to stress that it is our primary contention that Mr Nadarajah should not be returned to Germany because of the experiences that flowed from that country's consideration of his refugee status".

94. This was, of course, a reference to the torture that he claimed he had suffered when he returned to Sri Lanka after the rejection of his asylum claim in Germany. In addition, the solicitors relied on the presence of the appellant's wife in the United Kingdom. Although her asylum claim had been rejected by the Secretary of State, she had appealed and her appeal had not yet been determined. The solicitors stated that the removal of the appellant to Germany would separate him from his wife, and would raise issues under article 8. They stated:

> "Our client's wife has joined him in the United Kingdom and made an asylum claim. We do not act for our client's wife, who is represented by Messrs M.K. Sri & Co. We understand that our client's wife is under refusal. However she has appealed and as yet no hearing date has been set. We would submit that this would further affect any decision on whether or not our client should be removed to Germany. If he is removed to Germany then it may be, notwithstanding our client's fears and the trauma of such return, that our client would not be removed from Germany. Of course it remains our primary contention that our client should not be removed to Germany at all. However whether or not our client might remain for any length of time in that country, this would necessarily separate him from his wife, which in turn raises Article 8 issues.
>
> We should stress that if the Secretary of State refuses to substantively consider our client's asylum claim then it would be our client's intention to lodge an appeal under S.65. If the Secretary of State determines to certify as manifestly unfounded the claim that removal would breach our client's ECHR rights, then that certification would be the subject of a further judicial review.
>
> We would be most grateful if as a matter of urgency you would confirm receipt of this letter and its enclosure. Please also confirm that either the

appointment on 27 February is deferred or alternatively advise us what the purpose of that interview will be, given the representations now made."

95. The Secretary of State responded by a letter dated 25 February 2002. He said:

"9. You allege that your client's removal to Germany would be in breach of Article 8 of the ECHR as his wife also an asylum seeker has now joined him in the United Kingdom. You have provided no information regarding your client's wife such as when she arrived in this country or even her name.

10. The Secretary of State would normally consider the substance of a potential third country case where: the applicant's spouse is in the United Kingdom; the applicant is an unmarried minor and a parent is in the United Kingdom, or when the applicant has an unmarried minor child in the United Kingdom. In all cases "in the United Kingdom" is to be taken as meaning with leave to enter or remain or on temporary admission as an asylum seeker. (Emphasis added in original).

11. The Secretary of State is satisfied that your client's case falls outside of his above stated policy. Your client's wife is not present in this country as an asylum seeker; indeed, her asylum application has been refused outright and she is appealing against that decision. Neither your client nor his wife has been granted refugee status in the UK nor has either of them been granted leave to enter or remain in the UK within the meaning of such terms under the Immigration Act 1971. Furthermore, your client has been aware since his arrest as a clandestine illegal entrant on 22 August 1998 that his immigration position in this country was, at best, extremely precarious, depending as it does on the outcome of his judicial review application.

12. The Secretary of State is confident that his above stated policy is compliant with the UK's obligations under Article 8 of the ECHR. The Secretary of State has considered all the evidence and representations made on behalf of your client. The question for the Secretary of State is whether the undoubted interference with your client's right to respect for his family life, if he were to be returned to Germany, would be proportionate and commensurate when balanced against his legitimate concerns in the public interest to maintain a credible and effective immigration control to the United Kingdom, and to deter abuse of the asylum system.

13. The Secretary of State notes that your client arrived in the United Kingdom travelling alone on 22 August 1998 having prior to this lived in Germany since 1995. The Secretary of State does not know when your client's wife arrived here but he is satisfied that your client and his wife had been separated due to their own actions for some considerable period of time before either of them arrived in the United Kingdom. The Secretary of State is satisfied in this particular case that the need to maintain the effectiveness of the control of entry to this country for settlement outweighs the interference with your client's Article 8 rights.

14. In all the circumstances and having given the most careful consideration to all the matters raised on behalf of your client, the Secretary of State concluded that the allegation that your client's return to Germany would breach his human rights is manifestly unfounded. He accordingly certifies to that effect pursuant to Section 72(2)(a) of the Immigration and Asylum Act 1999."

96. Judicial review proceedings were commenced on 28 February. An order was sought quashing, inter-alia, the decision of 25 February 2002 to certify the appellant's human rights allegations as manifestly unfounded. Dr Gorst-Unsworth saw the appellant again on 7 March 2002, and prepared a second report. She concluded that the appellant had chronic post traumatic stress disorder which had deteriorated over the last week since he had heard that there was a possibility of his return to Germany. She stated:

"Since Mr Nararajah's symptoms are closely related to an intense fear of return to Germany, it is likely that deportation to Germany would cause a sudden and intense deterioration in his condition. He states that "Going to Germany is the equivalent of dying" and that if he felt all hope had been lost, then he would rather make an attempt on his life than face the chances that he would be returned to Sri Lanka from Germany.

In terms of his treatment, he appears to have set up a network of support in the UK from his GP, Social Services and recent counselling and I would recommend that these should be continued. Although all of these above services would be available in Germany, it is highly unlikely that Mr Nadarajah would be able to make use of them due to his heightened anxieties of deportation to Sri Lanka which would significantly impair his response to treatment.

In summary if Mr Nadarajah is allowed to stay in this country he has some prospects of his chronic PTSD improving over time. However if he were separated from his pregnant wife, or if he were returned to Germany, it is

highly likely that his condition would rapidly deteriorate. In my opinion, the sense of hopelessness that this would precipitate would increase the risk of self-harm, as it is known that hopelessness is a key indicator for completed suicide."

97. On 15 March 2002, His Honour Judge Wilkie QC granted the appellant permission to apply for judicial review of the decision to certify under section 72(2)(a) of the 1999 Act on the grounds that it was arguable that the Secretary of State had acted unlawfully in relation to the allegation of breach of article 8. He considered it to be "simply unarguable" that removal to Germany "even in the particular circumstances of this claimant, would infringe article 3".

98. The substantive hearing of the judicial review proceedings was due to be heard in July 2002. A few days before the hearing date, the Secretary of State served evidence in the form of statements from Ian Taylor and Alan Kittle. For the first time, the Secretary of State indicated his view that the appellant had never returned from Germany to Sri Lanka after his asylum claim had been rejected in Germany. The reasons given by Mr Taylor were: (i) it was not credible that a person, who had pursued an asylum claim in Germany for more than two years, would voluntarily return to the state where he maintained that he had a well-founded fear of persecution, in the absence of Germany taking positive steps to enforce his return, and at a time when the final outcome of his asylum appeal had not been decided; and (ii) the German authorities confirmed to the Secretary of State that they did not accept that the appellant had voluntarily returned to Sri Lanka in December 1997 as he claimed, and they were satisfied that the appellant was properly re-admissable to Germany under the provisions of the Dublin Convention.

99. In relation to the alleged interference with the appellant's private life, Mr Taylor made the point that Germany has an advanced health care system to which the appellant would have access on his return (para 32); and that the Secretary of State was satisfied that the removal of the appellant would not interfere with his moral integrity to such an extent that it would fall within article 8. Alternatively, any interference was justified by article 8(2).

100. Mr Taylor accepted that the removal would entail an interference with the appellant's family life, but it would only be temporary because (a) if his wife's appeal were unsuccessful, there was a presumption that she would return to Sri Lanka; (b) if her appeal were successful, then the appellant could apply through the proper channels for the prior entry clearance which would permit him to return lawfully to the UK; and (c) if the appellant made a further application for asylum in Germany and was successful, his wife could apply to join him lawfully in Germany. There was, therefore, no insuperable impediment to the appellant and his wife resuming their family life at a time and place where they were lawfully entitled to do so: see paras 37-45 of Mr Taylor's statement.

101. Before Stanley Burnton J, the principal basis for the challenge to the Secretary of State's refusal to consider the claimant's appeal in the UK was that the Secretary of State had failed to apply his own stated policy to the claimant's case. That policy was summarised at paragraph 10 of the letter dated 25 February 2002 (see para 95 above). The Secretary of State contended that, on its proper construction, the policy applied only to asylum seekers whose claims had not been rejected by him. The judge disagreed. He held that the policy also applied to a person who was appealing against the dismissal of his claim by the Secretary of State. The judge held further that the Secretary of State was not entitled to interpret the policy contrary to what he held to be its true meaning. But he refused to quash the decision because he held that the Secretary of State was entitled to apply his new policy to this case. The new policy applied only to asylum seekers whose claims had not been rejected by the Secretary of State. In the course of his decision on the policy issue, Stanley Burnton J said this at paragraph 29:

> "In paragraph 13 of his letter of 25 February 2002, the Secretary of State gave a further justification for his proposed separation of the Claimant and his wife, namely that he was satisfied that they had been separated for some considerable period of time previously by their own actions. Whether their separation was voluntary is disputed by the Claimant. However, in my judgment it is clear that the Secretary of State had substantial grounds for believing that the Claimant had never left Germany, as he asserted, but remained in Germany for the whole of the period between 1995 and his entry into the United Kingdom on 21 August 1998. The grounds for that belief are set out in paragraphs 6 to 8 of Mr Taylor's witness statement of 2 July 2002. The matters referred to there must be considered in the light of the fact that, as a result of the Claimant's deliberate concealment of his asylum claim in Germany, the Secretary of State reasonably regarded him as a person whose statements could not necessarily be given credibility. In my judgment, in these circumstances the Secretary of State might reasonably have concluded that his normal policy should not apply; and that the need to maintain the effectiveness of control of entry into this country outweighed the interference with the Claimant's Article 8 rights."

102. Turning to section 72(2)(a) issue, the judge noted that the appellant contended that his article 8 rights were engaged by the decision to deport him to Germany in two ways: (i) his right to respect for his family life (infringed by his enforced separation from his wife and the baby who was born to himself and his wife on 27 August 2002); and (ii) his right arising from the vulnerable state of his mental health, and the injury to his mental health that he would suffer if he returned to Germany. At paragraph 36, the judge summarised the approach that the Secretary of State was required to follow in certifying under section 72(2)(a) of the 1999 Act in the following terms:

> "In considering the certification of a claim for the purposes of section 72(2)(a) of the 1999 Act, the Home Secretary must take into account that the power is to be exercised only in clear cases. It is not sufficient for the Home Secretary to believe that the facts asserted by an asylum seeker are false: he must reasonably consider the assertion to be manifestly unfounded."

103. He dealt with the first way in which the appellant put his article 8 case in the following terms:

> "38. In my judgment, in the present case the Home Secretary was entitled to consider that there was no arguable claim that the removal of the Claimant to Germany would unlawfully interfere with his right to respect for his family life under Article 8.1. The interest of the State in maintaining effective immigration control is recognised as justifying interference with rights under Article 8.1 : see *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840. As Dyson LJ said in *Samaroo and Sezek v the Secretary of State for the Home Department* [2002] UKHRR 1150 CA at paragraph 36:
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> "The right to respect for family life is not regarded as a right which requires a high degree of constitutional protection."
>
> The evidence and considerations that led the Home Secretary to conclude that the Claimant and his wife had been apart as a result of their own actions were sufficiently strong for him reasonably to consider that there was no good argument to the contrary. The other matters taken into account as set out in the decision letter (including the Claimant's lack of credibility) were considerations that the Home Secretary was entitled to take into account. Overall, the Home Secretary could reasonably have concluded that the argument that the interference with the Claimant's family life was not justified under Article 8.2 was manifestly unfounded.
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> 39. Mr Husain took issue with the Home Secretary's assumptions that the Claimant's separation from his wife might be only temporary. However, the Home Secretary was correct to assume that if the Claimant's wife's asylum application is ultimately successful, he would normally be permitted to join her here. So far as Germany is concerned, Mr Taylor stated no more than that if the Claimant's application for asylum there is successful, his wife can apply to join him there. Mr Husain complained that no material had been put before the Court to make good this statement. However, the Claimant's evidence in reply did not take issue with it, and in those circumstances I accept Mr Taylor's evidence."

104. As regards the second way in which the article 8 case was advanced, the judge concluded that the Secretary of State was entitled to maintain his certificate because (i) the medical reports were based on the information that the appellant had been deported from Germany to Sri Lanka where he had been tortured, but it was common ground that he was never deported (the appellant's case was that he had returned voluntarily); (ii) the Secretary of State was entitled to reject the appellant's credibility and his assertion that he had returned to Sri Lanka from Germany, and to conclude that that account was manifestly untrue, so that he was entitled to conclude that there was no arguable basis for the opinion of Dr Gorst-Unsworth; (iii) in any event Dr Gorst-Unsworth had not been able to quantify or qualify the deterioration in the appellant's condition which she anticipated if he were returned to Germany, and the increased risk of self-harm had not been quantified; (iv) Dr Gorst-Unsworth had not expressed a view as to the likely prognosis for the appellant if he were to remain in the United Kingdom; and (v) accordingly the evidence of the risk that the appellant would suffer deterioration in his mental condition if he were returned to Germany was merely "speculative".

Discussion

105. We shall start with the case based on the alleged interference with the appellant's family life (ie the first way the case was put). It was rightly accepted by the Secretary of State that the removal of the appellant to Germany would interfere with his right to family life: see para 36 of Mr Taylor's statement. The question was whether it was justified under article 8(2). It is clear that two important considerations that led the Secretary of State to conclude that the interference was justified were (a) the fact that the appellant's wife did not come within the policy, and (b) the appellant lacked credibility.

106. As regards (a), the old policy was not replaced until 22 July 2002. The wife's claim was made on 5 August 2001, and rejected by the Secretary of State on 2 October 2001. She appealed, but her appeal had not been heard by 25 February 2002 when the certificate was issued under section 72(2)(a). In our view, it was at least arguable that at the date of the certificate the policy applied in principle to the appellant's wife. Indeed, the judge has since held that it did apply to her.

107. As regards (b), it is clear that the Secretary of State took an adverse view of the appellant's credibility. Of particular significance was the fact that he did not believe that the appellant had returned to Sri Lanka after his claim had been rejected in Germany. Stanley Burnton J held that the Secretary of State had "substantial grounds for believing that the claimant had never left Germany" (para 29), and that the matters taken into account by the Secretary of State (including the appellant's lack of credibility) were considerations that he "was entitled to take into account. Overall, the Home Secretary could reasonably have concluded that the argument that the interference with the claimant's family life was not justified under article 8.2 was manifestly unfounded" (para 38).

108. We accept that the Secretary of State is entitled in appropriate cases to reject a claimant's account as incredible, and to conclude that the account would be bound to be rejected by an adjudicator on appeal. But in view of the high threshold of the manifestly unfounded test, the Secretary of State should be very cautious before doing so. The present case illustrates the dangers of concluding that an account is so incredible as to be without foundation. The Secretary of State concluded that it was incredible that the appellant returned to Sri Lanka after his claim had been rejected in Germany, and Mr Taylor gave two compelling reasons for this conclusion. But Mr Taylor had not subjected the appellant or his wife to cross-examination. His conclusion was based on essentially a priori reasoning. The adjudicator reached a different conclusion on the wife's appeal, having heard evidence from the appellant and his wife. This is by no means uncommon. We would echo what was said by this court in *R (L) v Secretary of State for the Home Department* [2003] EWCA Civ 25, [2003] 1 All ER 1062, para 60:

> "[60] As we shall explain, an issue of credibility arose in this case in relation to ZL. The Secretary of State gave her the benefit of the doubt and his decision did not turn on credibility. Where an applicant's case does turn on an issue of credibility, the fact that the interviewer does not believe the applicant will not, of itself, justify a finding that the claim is clearly unfounded. In many immigration cases findings on credibility have been reversed on appeal. Only where the interviewing officer is satisfied that nobody could believe the applicant's story will it be appropriate to certify the claim as clearly unfounded on the ground of lack of credibility alone."

109. In our opinion, this was not a case where article 8(2) was bound to trump the appellant's claim that his removal to Germany would interfere with his right to family life. Mr Garnham makes a number of powerful points in support of the argument that the appellant's family life was somewhat tenuous. For example, the appellant did not make his article 8 claim at the earliest opportunity; when it was made, no mention was made of the fact that his wife was pregnant; he and his wife had been apart from each other for much of the time since he left Sri Lanka in 1995. Mr Garnham also relies on the fact that, if he is removed to Germany, his separation from his wife might well only be for a temporary period. We acknowledge the force of these points, and they might well carry the day on an appeal. But the question is whether an appeal is bound to fail. We do not consider that this high threshold is passed on the facts of this case. We feel reinforced in this view by the fact that, for the reasons we have given, two of the factors strongly relied on by the Secretary of State in support of his justification of the interference under article 8(2) raise arguable issues. It seems to us that this is a case in which an adjudicator might conclude that his view of the essential facts is so different from that which informed the decision of the Secretary of State as substantially to undermine the basis on which the Secretary of State performed the article 8(2) exercise (see paras 40 and 41 above). But whether he were to adopt approach (a) or (b) (see para 41 above), we are satisfied that an adjudicator would not be bound to conclude that article 8(2) necessarily trumps the appellant's claim.

110. For these reasons, we would allow the appeal on the certification issue. In view of our conclusion on the first way in which the article 8 claim is advanced, we do not find it necessary to express a view about the alternative case under article 8, or about the article 3 case which the appellant has sought to resurrect before this court.

Conclusion

111. For the reasons that we have given, the certificates issued under section 72(2)(a) in all three of these cases have been successfully challenged. We recognise that, to put the matter at its lowest, there is a very real possibility that the appeals of each of the three claimants will fail before the adjudicator. But Parliament has set a very high threshold as a condition for the issue of certificate under section 72(2)(a). The Secretary of State cannot lawfully issue such a certificate unless the claim is *bound* to fail before an adjudicator. It is not sufficient that he considers that the claim is likely to fail on appeal, or even that it is very likely to fail. Moreover, as the House of Lords explained in *Yogathas*, the court will subject the decision of the Secretary of State to "the most anxious scrutiny". That is what we have attempted to do, and for the reasons that we have sought to explain, we have concluded that the certificate does not pass the statutory threshold in any of these cases.