# HOUSE OF LORDS

## OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

## IN THE CAUSE

## Regina v. Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant)

## Do (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)

[2004] UKHL 26

SESSION 2003-04
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*on appeal from: [2002] EWCA Civ 1856*

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**Do (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)**

ON

THURSDAY 17 JUNE 2004

The Appellate Committee comprised:

Lord Bingham of Cornhill

Lord Steyn

Lord Walker of Gestingthorpe

Baroness Hale of Richmond

Lord Carswell

**LORD BINGHAM OF CORNHILL**

My Lords,

1. The primary issue in these appeals, brought by leave of the Court of Appeal, is agreed to be:

> Whether any article of the European Convention on Human Rights other than article 3 could be engaged in relation to a removal of an individual from the United Kingdom where the anticipated treatment in the receiving state will be in breach of the requirements of the Convention, but such treatment does not meet the minimum requirements of article 3 of the Convention.

Although the issue is expressed in this general way, the specific right in question in these appeals, which were heard together, is the right to freedom of thought, conscience and religion guaranteed by article 9 of the Convention and in particular the freedom "either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance".

2. Mr Ullah is a citizen of Pakistan and an active member of the Ahmadhiya faith. He arrived in this country from Karachi in January 2001 and applied for asylum, claiming to have a well-founded fear of persecution in Pakistan as a result of his religious beliefs. The Secretary of State dismissed his claim for asylum and held that Mr Ullah had not qualified for permission to remain in this country by reason of any article of the European Convention. Mr Ullah's appeal to an adjudicator was dismissed. The adjudicator found that he did not have a well-founded fear of persecution. She also found that although articles 9, 10 and 11 of the Convention could be engaged in a situation of this kind, Mr Ullah would suffer no serious infringement of these rights in Pakistan; the Secretary of State was acting lawfully in pursuance of the legitimate aim of immigration control; and his decision to remove Mr Ullah to Pakistan was proportionate to any difficulties he might face on his return. An application for judicial review of this decision was dismissed by Harrison J, who recognised the importance of the issues and gave permission to appeal.

3. Miss Do is a citizen of Vietnam and entered this country in November 2000. She applied for asylum, based on her fear of persecution as a practising Roman Catholic in Vietnam. The Secretary of State refused her application and concluded that she did not qualify for protection under any article of the Convention. On appeal an adjudicator upheld the dismissal of Miss Do's asylum claim and found that it would not be a breach of articles 3 and 5 of the Convention to remove her to Vietnam. The Immigration Appeal Tribunal dismissed an appeal against this decision, going on to hold that any interference there might be with Miss Do's activities as a religious teacher would not amount to a violation of her rights under article 9. She applied for, and was granted, permission to appeal to the Court of Appeal.

4. The Court of Appeal (Lord Phillips of Worth Matravers MR, Kay and Dyson LJJ) heard the appeals of Mr Ullah and Miss Do together and dismissed them: [2002] EWCA Civ 1856, [2003] 1 WLR 770. The court did not disturb the findings of fact made in either case. The importance of the decision lies in the court's statement of principle in paragraphs 63 and 64 of the judgment:

"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 practise 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 practise religion in such circumstances will not result in the engagement of the Convention unless the interference is 'flagrant'.

*Other articles*

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."

5. Counsel for both appellants sought to persuade the House that the interference with their article 9 rights which the appellants would suffer if returned to Pakistan and Vietnam respectively would be more serious than the adjudicators had found. I do not for my part accept this submission. I am not persuaded that the adjudicators erred in the facts they found or the inferences they drew. It follows that even if the legal question raised at the outset were resolved in favour of the appellants, this ruling would not prevent the removal of the appellants. To that extent the question raised is academic. But it is a question of legal and practical importance. It has been fully argued, with the benefit of valuable interventions on behalf of JUSTICE, Liberty and the Joint Council for the Welfare of Immigrants. The House should give such assistance as, on the present state of the Strasbourg authorities, it can. For this purpose it is necessary to return to first principles.

6. As Lord Slynn of Hadley recorded in *R (Saadi) v Secretary of State for the Home Department* [2002] UKHL 41, [2002] 1 WLR 3131, paragraph 31:

"31. In international law the principle has long been established that sovereign states can regulate the entry of aliens into their territory. Even as late as 1955 the eighth edition of *Oppenheim's International Law*, pp 675-676, para 314 stated that: 'The reception of aliens is a matter of discretion, and every state is by reason of its territorial supremacy competent to exclude aliens from the whole, or any part, of its territory.' Earlier in *Attorney General for Canada v Cain* [1906] AC 542, 546, the Privy Council in the speech of Lord Atkinson decided:

'One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order, and good government, or to its social or material interests: *Vattel, Law of Nations,* book I, s 231; book 2, s 125.'

> This principle still applies subject to any treaty obligation of a state or rule of the state's domestic law which may apply to the exercise of that control. The starting point is thus in my view that the United Kingdom has the right to control the entry and continued presence of aliens in its territory. Article 5(1)(f) seems to be based on that assumption."

This is a principle fully recognised in the Strasbourg jurisprudence: see, for example, *Vilvarajah v United Kingdom* (1991) 14 EHRR 248, paragraph 102; *Chahal v United Kingdom* (1996) 23 EHRR 413, paragraph 73; *D v United Kingdom* (1997) 24 EHRR 423, paragraph 46; *Bensaid v United Kingdom* (2001) 33 EHRR 205, paragraph 32; *Boultif v Switzerland* (2001) 33 EHRR 1179, paragraph 46. As these statements of principle recognise, however, the right of a state to control the entry and residence of aliens is subject to treaty obligations which the state has undertaken. Obviously relevant in this context are the 1951 Geneva Convention relating to the status of refugees and the 1967 Protocol to that Convention, giving a right of asylum to any person who

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."

That provision has, of course, been the subject of much detailed examination. But such examination is not called for here, since it has been held that the appellants do not fall within the provision, and the correctness of those decisions is not in issue before the House. It is enough to note that the focus of the Geneva Convention is on those who are not citizens of the country in which they seek asylum and who have no right to enter it or remain there save such as that Convention may give them.

7. By article 1 of the European Convention the contracting states undertook to secure "to everyone within their jurisdiction" the rights and freedoms defined in section 1 of the Convention. The corresponding obligation in article 2 of the International Covenant on Civil and Political Rights 1966 extends to all individuals within the territory of the state and subject to its jurisdiction, but the difference of wording is not significant for present purposes. Thus the primary focus of the European Convention is territorial: member states are bound to respect the Convention rights of those within their borders. In the ordinary way, a claim based on the Convention arises where a state is said to have acted within its own territory in a way which infringes the enjoyment of a Convention right by a person within that territory. Such claims may for convenience be called "domestic cases".

8. The European Convention as originally drafted made no express reference to immigration or extradition save in sanctioning (in article 5(1)(f)) "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition". Those who negotiated the European Convention may have contemplated that member states' decisions on immigration and extradition would fall outwith the scope of the Convention. Such an argument on immigration was indeed put forward by Her Majesty's Government in *Abdulaziz, Cabales and Balkandali v United*

*Kingdom* (1985) 7 EHRR 471: see paragraph 59. But the Commission rejected this interpretation, and so did the Court, which held in paragraph 60:

> "Thus, although some aspects of the right to enter a country are governed by Protocol No 4 as regards States bound by that instrument, it is not to be excluded that measures taken in the field of immigration may affect the right to respect for family life under Article 8. The Court accordingly agrees on this point with the Commission."

The Commission had held (paragraph 59) that

> "immigration controls had to be exercised consistently with Convention obligations, and the exclusion of a person from a State where members of his family were living might raise an issue under Article 8."

As this quotation makes plain, however, this was a domestic case: the applicants were wives settled here; they complained that their husbands had been refused leave to enter or remain; they alleged an interference with their family life here.

9. Domestic cases as I have defined them are to be distinguished from cases in which it is not claimed that the state complained of has violated or will violate the applicant's Convention rights within its own territory but in which it is claimed that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory will lead to a violation of the person's Convention rights in that other territory. I call these "foreign cases", acknowledging that the description is imperfect, since even a foreign case assumes an exercise of power by the state affecting a person physically present within its territory. The question was bound to arise whether the Convention could be relied on to resist expulsion or extradition in a foreign case. It is a question of obvious relevance to these appeals, since the appellants do not complain of any actual or apprehended interference with their article 9 rights in the United Kingdom.

10. A clear, although partial, answer to this question was given in *Soering v United Kingdom* (1989) 11 EHRR 439, a case in which the applicant resisted extradition to the United States to stand trial in Virginia, contending that trial there would infringe his right to a fair trial under article 6 of the European Convention and that his detention on death row, if convicted and sentenced to death, would infringe his rights under article 3. Neither the conduct of the trial nor the conditions of detention would, of course, be within the control or responsibility of the United Kingdom. The Court did not reject the applicant's complaint under article 6 as ill-founded in principle, but dismissed it on the facts in paragraph 113 of its judgment:

> "113. The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk."

11. The applicant's complaint under article 3 was discussed by the Court at much greater length, in paragraphs which call for citation:

> "85. As results from Article 5(1)(f), which permits 'the lawful … detention of a person against whom action is being taken with a view to … extradition,' no right not to be extradited is as such protected by the Convention. Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee. What is at issue in the present case is whether Article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State.
> 86. Article 1 of the Convention, which provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I,' sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('*reconnaître'* in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 in particular … These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction.
> 87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.'
> 88. Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency. This absolute prohibition on torture and on inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.

The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that 'no State Party shall … extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture.' The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.

89. What amounts to 'inhuman or degrading treatment or punishment' depends on all the circumstances of the case. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

90. It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article.

91. In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the

> requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."

This is an important authority, strongly relied on by the appellants, first, for its statement of principle and, secondly, as showing that article 3 of the Convention at least can, on appropriate facts, be relied on in a foreign case.

12. The principle in *Soering* was followed in *Chahal v United Kingdom* (1996) 23 EHRR 413, a foreign case in which it was sought to deport an Indian citizen, believed to be a Sikh separatist, on grounds of his threat to national security. The Strasbourg court upheld the applicant's complaint, and held:

> "80. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.
> 81. Paragraph 88 of the Court's above-mentioned *Soering* judgment, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged.
> 82. It follows from the above that it is not necessary for the Court to enter into a consideration of the Government's untested, but no doubt *bona fide*, allegations about the first applicant's terrorist activities and the threat posed by him to national security."

The *Soering* ruling was also followed in *D v United Kingdom* (1997) 24 EHRR 423, another foreign case and a strong decision, since the substantial treatment found to be capable of violating article 3 was neither the responsibility of the United Kingdom authorities (save for implementation of the decision to expel) nor of any intentional conduct on the part of the state to which he was to be deported. The *Soering* ruling has also been recognised, with differing outcomes on the facts, in foreign cases such as *Cruz Varas v Sweden* (1991) 14 EHRR 1, *Vilvarajah v United Kingdom* (1991) 14 EHRR 248, *HLR v France* (1997) 26 EHRR 29, *Gonzalez v Spain* (Application No 43544/98, 29 June 1999, unreported), *Dehwari v Netherlands* (2000) 29 EHRR CD 74

and *Hilal v United Kingdom* (2001) 33 EHRR 31. Given this weight of authority, the respondents have accepted that reliance may be placed on article 3 of the Convention in a foreign case, and the agreed issue stated at the outset of this opinion reflects that acceptance.

13. The respondents drew attention in argument to substantive differences between expulsion and extradition: such differences plainly exist, and may affect the application of the *Soering* principle. But the Strasbourg court has held the principle to be potentially applicable in either situation. In *Cruz Varas v Sweden* (1991) 14 EHRR 1, paragraph 70, it said:

> "Although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above [*Soering*] principle also applies to expulsion decisions and *a fortiori* to cases of actual expulsion ."

The Court has relied on this paragraph, directly or indirectly, in a series of later cases, among them *Vilvarajah v United Kingdom* (1991) 14 EHRR 248, paragraph 103; *Chahal v United Kingdom* (1996) 23 EHRR 413, paragraph 74; *HLR v France* (1997) 26 EHRR 29, paragraph 34; *Ahmed v Austria* (1996) 24 EHRR 278; *Jabari v Turkey* (2000) 9 BHRC 1, paragraph 38; and *Hilal v United Kingdom* (2001) 33 EHRR 31, paragraph 59.

14. The Strasbourg court has taken account of this jurisprudence when ruling on the territorial scope of the Convention. In *Loizidou v Turkey* (1995) 20 EHRR 99, paragraph 62, it said:

> "62. In this respect the Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention. In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory."

This ruling was elaborated in *Bankovic v Belgium* (2001) 11 BHRC 435, where a Grand Chamber of the Strasbourg court said, in paragraphs 67-68 of its judgment:

> "67. In keeping with the essentially territorial notion of jurisdiction, the court has accepted only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of art 1 of the convention. 68. Reference has been made in the court's case law, as an example of jurisdiction 'not restricted to the national territory' of the respondent state (*Loizidou v Turkey* (preliminary objections) (1995) 20 EHRR 99 at para 62), to situations where the extradition or expulsion of a person by a contracting state may give rise to an issue under arts 2 and/or 3 (or, exceptionally, under arts 5 and/or 6) and hence engage the responsibility of that state under the

convention (*Soering v UK* [1989] ECHR 14038/88 at para 91, *Cruz Varas v Sweden* ECHR 15576/89 at paras 69 and 70, and *Vilvarajah v UK* [1991] ECHR 13163/87 at para 103).
However, the court notes that liability is incurred in such cases by an action of the respondent state concerning a person while he or she is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a state's competence or jurisdiction abroad (see also *Al-Adsani v UK* [2001] ECHR 35763 at para 39)."

15. The crucial issue dividing the parties is, therefore, whether, in a foreign case, reliance may be placed on any article of the Convention other than article 3, and in particular whether reliance may be placed on article 9. It is convenient to start with article 2, the right to life. The applicant in *D v United Kingdom* (1997) 24 EHRR 423 based his claim on article 2 as well as article 3: neither the Commission nor the Court rejected this claim as untenable in principle, but neither found it necessary to review the article 2 complaint separately from that under article 3. In *Gonzalez v Spain* (Application No 43544/98, 29 June 1999, unreported) the applicant's complaint under article 2 was rejected on the facts, as was his complaint under article 3. In *Dehwari v Netherlands* (2000) 29 EHRR CD 74, a foreign case concerned with expulsion to Iran, the applicant's claim based on article 2 failed on the facts. But the claim was not rejected in principle, and having referred to the case law on article 3 the Commission said:

"59. The Commission has previously examined the question whether analogous considerations apply to Article 2, in particular whether this provision can also engage the responsibility of a Contracting State where, upon expulsion or other removal, the person's life is in danger. To this end the Commission reiterated that Article 2 contains two separate though interrelated basic elements. The first sentence of paragraph 1 sets forth the general obligation that the right to life shall be protected by law. The second sentence of this paragraph contains a prohibition of intentional deprivation of life, delimited by the exceptions mentioned in the second sentence itself and in paragraph 2 (*Bahaddar v Netherlands* (1998) 26 EHRR 278).
60. The Commission finds nothing to indicate that the expulsion of the applicant would amount to a violation of the general obligation contained in the first sentence of paragraph 1 of Article 2 of the Convention.
61. As to the prohibition of intentional deprivation of life, including the execution of a death penalty, the Commission does not exclude that an issue might arise under Article 2 of the Convention or Article 1 of Protocol No. 6 in circumstances in which the expelling State knowingly puts the person concerned [at] such high risk of losing his life as for the outcome to be a near-certainty. The Commission considers, however, that a 'real risk' — within the meaning of the case law concerning Article 3 (see para 58 above) — of loss of life would not as such necessarily render an expulsion contrary to Article 2 of the Convention or Article 1 of Protocol No. 6, although it would amount to inhuman treatment within the meaning of Article 3 of the Convention (*cf. Bahaddar v Netherlands, op. cit*., para 78).
62. The Commission has examined the applicant's allegations but finds it insufficiently substantiated that his expulsion would disclose such a high risk

> of loss of life as to trigger the applicability of Article 2 of the Convention or Article 1 of Protocol No. 6."

These statements must, I think, be taken to establish the possibility in principle of relying on article 2 in a foreign case, if the facts are strong enough. Given the special importance attached to the right to life by modern human rights instruments it would perhaps be surprising if article 3 could be relied on and article 2 could not.

16. Authority on the applicability in a foreign case of article 4 of the Convention (the right not to be held in slavery or servitude, and not to be required to perform forced or compulsory labour) is scant. The House was referred only to one admissibility decision: *Ould Barar v Sweden* (1999) 28 EHRR CD 213. The Court found the applicant's complaint under article 4 (as well as his complaints under articles 2 and 3) to be inadmissible on the facts, although it was recognised

> "that the expulsion of a person to a country where there is an officially recognised regime of slavery might, in certain circumstances, raise an issue under Article 3 of the Convention."

The respondents are probably right to submit that a claim under article 4, if strong enough, would succeed under article 3. But it would seem to be inconsistent with the humanitarian principles underpinning the Convention to accept that, if the facts were strong enough, a claim would be rejected even if it were based on article 4 alone.

17. There is more Strasbourg authority on the potential applicability of articles 5 and 6 in foreign cases, although it remains somewhat tentative. In *Soering* the Court did not exclude the applicability of article 6: see paragraph 113, quoted in paragraph 10 above. In *Bankovic* such an exceptional case was recognised as possible: see paragraph 68 of the Court's judgment quoted in paragraph 14 above. *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745 was not, within my definition, a foreign case. It involved no removal. The applicants complained of the fairness of their trial in Andorra (which the Court held it had no jurisdiction to investigate) and of their detention in France, which was not found to violate article 5. The case is important, first, for the ruling (in paragraph 110 of the Court's judgment) that member states are obliged to refuse their co-operation with another state if it emerges that a conviction "is the result of a flagrant denial of justice". Secondly, the case is notable for the concurring opinion of Judge Matscher, who said (page 795):

> "According to the Court's case law, certain provisions of the Convention do have what one might call an indirect effect, even where they are not directly applicable. Thus, for example, a State may violate Articles 3 and/or 6 of the Convention by ordering a person to be extradited or deported to a country, whether or not a member state of the Convention, where he runs a real risk of suffering treatment contrary to those provisions of the Convention; other hypothetical cases of an indirect effect of certain provisions of the Convention are also quite conceivable."

In *MAR v United Kingdom* (1996) 23 EHRR CD 120, an expulsion case, the applicant's complaints under articles 5 and 6 of the Convention, as well as those under articles 2 and 3, were found to be admissible and to call for examination on the merits.

The case was settled. In *Dehwari v Netherlands* (2000) 29 EHRR CD 74 the Commission (in paragraph 86) echoed the observation of the Court in paragraph 113 of its judgment in *Soering*: see paragraph 10 above. The applicant in *Einhorn v France* (Application No 71555/01, 16 October 2001, unreported) sought to resist extradition to the United States. One of his complaints related to the fairness of the trial he would undergo there. The Court held in paragraph 32 of its judgment

> "that it cannot be ruled out that an issue might exceptionally be raised under Article 6 of the Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of justice in the requesting country …."

The Court added (in paragraph 33) that:

> "The extradition of the applicant to the United States would therefore be likely to raise an issue under Article 6 of the Convention if there were substantial grounds for believing that he would be unable to obtain a retrial in that country and would be imprisoned there in order to serve the sentence passed on him *in absentia*."

The applicant failed on the facts. In *Mamatkulov v Turkey* (2003) 14 BHRC 149 a retrospective complaint of extradition to Uzbekistan was made. It was not established that the applicants had been denied a fair trial, and accordingly no issue was held to arise under article 6(1) of the Convention. *Tomic v United Kingdom* (Application No 17837/03, 14 October 2003, unreported) was the most recent authority on articles 5 and 6 cited to the House. It was an expulsion case. The Court ruled (in paragraph 3 of its judgment):

> "The Court does not exclude that an issue might exceptionally be raised under Article 6 by an expulsion decision in circumstances where the person being expelled has suffered or risks suffering a flagrant denial of a fair trial in the receiving country, particularly where there is the risk of execution …. Whether an issue could be raised by the prospect of arbitrary detention contrary to Article 5 is even less clear. However, the applicant's submissions do not disclose that he faces such a risk under either provision."

Both sides drew comfort from this body of authority. The respondents pointed out that in no foreign case had either the Commission or the Court found a violation of article 5 or article 6. The appellants pointed out that while certain complaints under these articles had failed for want of proof, neither the Commission nor the Court had rejected a complaint under these articles as inadmissible in principle. Both contentions, as it seems to me, are correct.

18. As observed in paragraph 8 above, *Abdulaziz* was not a foreign case since the applicants' complaint related not to the violation of their Convention rights under article 8 which would occur if they were removed to another country but to the violation of those rights which they would suffer here if their husbands were refused entry or leave to remain. Several authorities cited fell into the same category. But some did not, and were of a hybrid nature. The removal of a person from country A to country B may both violate his right to respect for his private and family life in

country A and also violate the same right by depriving him of family life or impeding his enjoyment of private life in country B. The applicant in *Moustaquim v Belgium* (1991) 13 EHRR 802 was a Moroccan national who arrived in Belgium in 1965 when he was aged under 2. In 1984, nineteen years later, after a career of juvenile crime, he was deported, but the deportation order was suspended in 1989 and he returned to Belgium. He complained that his deportation had violated his right to private and family life under article 8. The Court held (paragraph 36 of its judgment) that there had been interference by a public authority with his right to family life guaranteed in article 8(1) and (paragraph 46) that this was not justified under article 8(2). In *Bensaid v United Kingdom* (2001) 33 EHRR 205 the applicant was an Algerian national who had arrived in this country in 1989 as a visitor, married a United Kingdom citizen in 1993 and was given notice of intention to deport him in 1997. He was suffering from a psychotic illness and sought, unsuccessfully, to contend that his removal to Algeria would violate his rights under article 3 because of the lack of psychiatric facilities there. He also complained that his removal would breach his rights under article 8. The Court held (in paragraph 46 of it judgment):

> "Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity."

The claim failed because the interference was found (paragraph 48) to be justified. I would here refer to, but need not repeat, the more detailed analysis I have made of this case in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27. The applicant in *Boultif v Switzerland* (2001) 33 EHRR 1179 entered Switzerland in 1992, married a Swiss wife and was imprisoned for crime. In 1998 the Swiss authorities refused to renew his residence permit. The Court's approach was expressed in paragraphs 39 - 41 of its judgment:

> "39. The Court recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8(1) of the Convention.
> 40. In the present case, the applicant, an Algerian citizen, is married to a Swiss citizen. Thus, the refusal to renew the applicant's residence permit in Switzerland interfered with the applicant's right to respect for his family life within the meaning of Article 8(1) of the Convention.
> 41. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 8. It is therefore necessary to determine whether it was 'in accordance with the law', motivated by one or more of the legitimate aims set out in that paragraph, and 'necessary in a democratic society'."

The Court found that the interference was not justified under article 8(2), and the complaint therefore succeeded. This authority compels the conclusion that reliance may be placed on article 8 in a foreign case where the applicant can show that

removal will seriously interfere with his rights guaranteed by article 8 and such interference is not shown to be justified.

19. The House was referred to one case only in which the Strasbourg court had considered article 9 of the Convention in a foreign case: *Razaghi v Sweden* (Application No 64599/01, 11 March 2003, unreported). The applicant resisted expulsion to Iran on a number of grounds arising from his adultery in Iran and his conversion to Christianity. He relied on article 2 and article 1 of the Sixth Protocol, on article 3, on article 6 and on article 9. The Court accepted that the complaint under article 3 raised issues which required examination on the merits but rejected the complaint under article 6 on the facts. The Court added:

> "As regards the applicant's right to freedom of religion, the Court observes that, in so far as any alleged consequence in Iran of the applicant's conversion to Christianity attains the level of treatment prohibited by Article 3 of the Convention, it is dealt with under that provision. The Court considers that the applicant's expulsion cannot separately engage the Swedish Government's responsibility under Article 9 of the Convention."

It seems that the focus of the application was on article 3. It is not clear whether (as the respondents contended) the Court held that article 9 could never apply in a foreign expulsion case, or whether (as the appellants contended) the Court regarded the article 9 complaint as so inextricably linked with the article 3 complaint as to raise no separate issue.

20. In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, paragraph 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.

21. Seeking to perform that duty, I consider that the only possible answer to the question posed at the outset of this opinion is Yes. I have accepted the possibility of relying on article 2 in paragraph 15 above. I have questioned in paragraph 16 whether a claim based on article 4 alone might not succeed. The authority cited in paragraph 17 shows that the Court has not excluded the possibility of relying on article 6, and even article 5, while fully recognising the great difficulty of doing so and the

exceptional nature of such cases. I do not think, on authority briefly cited in paragraph 18 and more fully discussed in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, that reliance on article 8 can be ruled out in principle. I find it hard to think that a person could successfully resist expulsion in reliance on article 9 without being entitled either to asylum on the ground of a well-founded fear of being persecuted for reasons of religion or personal opinion or to resist expulsion in reliance on article 3. But I would not rule out such a possibility in principle unless the Strasbourg court has clearly done so, and I am not sure it has. It is unnecessary for present purposes to consider other articles of the Convention. I would be inclined to accept, as the Court of Appeal decided in *R (Holub) v Secretary of State for the Home Department* [2001] 1 WLR 1359 and as Mr Blake QC conceded, that reliance could not in this context be placed on the right to education protected by article 2 of the First Protocol to the Convention, but this conclusion was resisted by Mr Rabinder Singh QC and it is unnecessary to decide the point.

22. In answering the agreed issue as I do in the foregoing paragraph, I differ from the conclusion of the Court of Appeal expressed in paragraph 64 of its judgment quoted in paragraph 4 above. That conclusion does not in my opinion reflect the current effect of the Strasbourg jurisprudence. The basis upon which a state may be held liable in a foreign case was explained by the Strasbourg court in the context of article 3 in *Soering v United Kingdom* (1989) 11 EHRR 439, paragraph 91, quoted in paragraph 10 above, and this explanation has been relied on by the Court in later cases such as *Cruz Varas v Sweden* (1991) 14 EHRR 1, paragraph 69, and *Vilvarajah v United Kingdom* (1991) 14 EHRR 248, paragraph 103. It is essentially the basis for which Mr Blake QC and Mr Gill QC for the appellants contended, and which they called the causation principle.

23. In resolving the issue expressed at the outset of this opinion, the primary source must be the Strasbourg jurisprudence. It is reassuring that the Human Rights Chamber for Bosnia and Herzegovina understood the effect of that jurisprudence much as I do: *Boudellaa v Bosnia and Herzegovina* (2002) 13 BHRC 297, paragraph 259. A similar approach was adopted by the Human Rights Committee of the United Nations, interpreting the International Covenant on Civil and Political Rights in *ARJ v Australia* (Communication No 692/1996, 11 August 1997, unreported), when it ruled:

> "6.8 What is at issue in this case is whether by deporting Mr J to Iran, Australia exposes him to a real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the Covenant. States parties to the Covenant must ensure that they carry out all their other legal commitments, whether under domestic law or under agreements with other states, in a manner consistent with the Covenant. Relevant for the consideration of this issue is the State party's obligation, under article 2, paragraph 1, of the Covenant, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most fundamental of these rights.
> 6.9 If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant."

This is also the approach which the Supreme Court of Canada adopted when it said in *Suresh v Minister of Citizenship and Immigration* [2002] 1 SCR 3, paragraphs 53-54 (a torture case):

> "53. We discussed this issue at some length in *Burns* [2001] 1 SCR 283. In that case, the United States sought the extradition of two Canadian citizens to face aggravated first degree murder charges in the state of Washington. The respondents Burns and Rafay contested the extradition on the grounds that the Minister of Justice had not sought assurances that the death penalty would not be imposed. We rejected the respondents' argument that extradition in such circumstances would violate their s.12 right not to be subjected to cruel and unusual treatment or punishment, finding that the nexus between the extradition order and the mere possibility of capital punishment was too remote to engage s.12. We agreed, however, with the respondents' argument under s.7, writing that '[s]ection 7 is concerned not only with the act of extraditing, but also the potential consequences of the act of extradition' (para. 60 (emphasis in original)). We cited, in particular, *Canada v Schmidt* [1987] 1 SCR 500, at p 522, in which La Forest J. recognized that 'in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances'. In that case, La Forest J. referred specifically to the possibility that a country seeking extradition might torture the accused on return.
> 54. While the instant case arises in the context of deportation and not extradition, we see no reason that the principle enunciated in *Burns* should not apply with equal force here."

24. While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment: *Soering*, paragraph 91; *Cruz Varas*, paragraph 69; *Vilvarajah*, paragraph 103. In *Dehwari*, paragraph 61 (see paragraph 13 above) the Commission doubted whether a real risk was enough to resist removal under article 2, suggesting that the loss of life must be shown to be a "near-certainty". Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: *Soering*, paragraph 113 (see paragraph 10 above); *Drodz*, paragraph 110; *Einhorn*, paragraph 32; *Razaghi v Sweden*; *Tomic v United Kingdom*. Successful reliance on article 5 would have to meet no less exacting a test. The lack of success of applicants relying on articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance is placed on articles such as 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown. This is not a balance which the Strasbourg court ought ordinarily to strike in the first instance, nor is it a balance which that court is well placed to assess in the absence of representations by the receiving state whose laws, institutions or practices are the subject of criticism. On the other hand, the removing

state will always have what will usually be strong grounds for justifying its own conduct: the great importance of operating firm and orderly immigration control in an expulsion case; the great desirability of honouring extradition treaties made with other states. The correct approach in cases involving qualified rights such as those under articles 8 and 9 is in my opinion that indicated by the Immigration Appeal Tribunal (Mr C M G Ockelton, deputy president, Mr Allen and Mr Moulden) in *Devaseelan v Secretary of State for the Home Department* [2002] IAT 702, [2003] Imm AR 1, paragraph 111:

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

25. I have largely accepted the appellants' arguments on principle. But even if it were assumed that article 9(1) of the Convention could be relied on to resist the appellants' expulsion to Pakistan and Vietnam respectively, they fall far short of showing facts capable of supporting such a claim, as I have held in paragraph 5 above. For these reasons, and also for those given by Lord Steyn and Lord Carswell, I would therefore dismiss both appeals.

**LORD STEYN**

My Lords,

26. In my view the Court of Appeal was right to dismiss the appeals of Mr Ullah, an Ahmadi preacher from Pakistan, and Miss Do, a Roman Catholic from Vietnam. Both entered the United Kingdom and claimed that they feared persecution if returned to their own countries. The Secretary of State refused their asylum claims. While there is discrimination on the ground of religion in Pakistan and Vietnam, I am satisfied that the lower courts were entitled to find that the threshold of what constitutes persecution under the terms of the United Nations Convention and Protocol on the Status of Refugees (1951) (Cmnd 9171) and (1967) (Cmd 3906) ("the Refugee Convention") was not satisfied by either appellant. They appealed to immigration adjudicators on the alternative ground that their removal to their own countries would constitute a breach of article 9 of the European Convention on Human Rights. Article 9 contains guarantees of freedom of thought, conscience and religion. The adjudicators and first instance judges decided that on the facts these alternative claims failed. In the case of Mr Ullah it was found that his preaching in Pakistan did not cause serious problems for him. In the case of Miss Do the circumstances in which she practised her faith in Vietnam did not differ significantly from those encountered by the other eight million Catholics in that country. In my view on the facts found by the adjudicators neither appellant came within a measurable distance of establishing that article 9 was engaged. The two cases were wholly unmeritorious.

*The principal question of law*

27. The starting point of the legal analysis of the Court of Appeal was that in making a decision to expel an alien account must be taken of article 3 of the ECHR. Article 3 contains the guarantee that no one shall be subjected to torture or to inhuman or degrading treatment. Using the two cases before it as the basis for a wide-ranging enquiry, the Court of Appeal then posed for itself the question whether a decision to expel an alien need ever be tested against any other guarantees contained in the ECHR: *R (Ullah) v Special Adjudicator* and *Do v Immigration Appeal Tribunal* [2003] 1 WLR 770. This was an ambitious undertaking requiring the Court of Appeal to focus on a number of fundamental rights under the ECHR which were not in issue without having before it the spectrum of circumstances which could arise in different contexts. The judgment of the court is, however, a comprehensive and careful one. It must be analysed in detail.

*The conclusion of the Court of Appeal*

28. The Court of Appeal came to the following conclusion (p 791, para 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."

The Court of Appeal ruled out as a matter of law the possibility that any article other than article 3 could ever be engaged. It will be necessary to examine whether the principles of the ECHR, and the evolving jurisprudence of the ECtHR, justified this conclusion.

*Uncontroversial matters*

29. There is much in the legal analysis of the Court of Appeal which is uncontroversial. The Court of Appeal emphasised the principle of territoriality expressed in article 1 of the ECHR: p 785, para 47. The notion of jurisdiction is essentially territorial. However, the ECtHR has accepted that in exceptional cases acts of contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of article 1 of the ECHR: *Öcalan v Turkey* (2003) 37 EHRR 238, 274-275, para 93; *Bankovic v Belgium* (2001) 11 BHRC 435. The effect of the decision of the ECtHR in *Soering v United* Kingdom (1989) 11 EHRR 439 was that the extraditing or deporting state is itself liable for taking actions the direct consequence of which is the exposure of an individual abroad to the real risk of proscribed treatment. The Court of Appeal rightly stated that *Soering* is an exception to the essentially territorial foundation of jurisdiction. It is important, however, to bear in mind that apart from specific bases of jurisdiction such as the flag of a ship on the high seas or consular premises abroad, there are exceptions of wider reach which can come into play. Thus contracting states are bound to secure the rights and freedoms under the ECHR to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad: *Cyprus v Turkey* (1976) 4 EHRR 482, at p 586, para 8. Moreover, the doctrine of positive obligations under certain guarantees of the ECHR

may in exceptional cases require states to protect individuals from exposure to foreseeable flagrant risks of violations of core guarantees caused by expulsions: *D v United Kingdom* (1997) 24 EHRR 423.

30. The Court of Appeal stressed the public importance of maintaining immigration control in the United Kingdom. The Court of Appeal was right to do so. As a matter of international law states have the right to control the entry, residence and expulsion of aliens. This right is, however, subject to the treaty obligations under the Refugee Convention and the ECHR: *Henao v The Netherlands*, ECtHR (Application No 13669/03) (unreported) 24 June 2003. A consequence of this general principle is that, except in wholly exceptional circumstances (such as was visualised in *D v United Kingdom*, aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a contracting state in order to benefit from medical, social or other forms of assistance provided by the expelling state: *Henao's* case.

31. The Court of Appeal explained why article 3 of the ECHR could become engaged. The rationale is 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": p 785, para 47. As far as it goes this proposition is unassailable. The Court of Appeal contented itself with saying that article 3 provides the test of such treatment. The potential scope of article 3 was helpfully explained by the ECtHR in *Henao* as follows:

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

*The Refugee Convention*

32. Three related matters were not discussed by the Court of Appeal but were raised in oral argument. The first was the link between what could constitute persecution under the Refugee Convention and fundamental rights under the ECHR. Specifically, a question was raised about the extent to which human rights may inform the meaning of persecution. In an illuminating analysis Professor Hathaway (*The Law of Refugee Status* (1991)) summarised the position as follows (at page 112):

> "In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community."

This view has already been approved by the House on two previous occasions: *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495, per Lord Hope of Craighead; *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856, 862, para 7, per Lord Bingham of Cornhill. I would respectfully also endorse it.

*Extradition and expulsion*

33. The second point related to the distinction between extradition and expulsion. Undoubtedly the purpose of the two procedures is different. The procedures serve different public interests. But in the context of the possible engagement of fundamental rights under the ECHR the Strasbourg court has not in its case law drawn a distinction between cases in the two categories: see *Cruz Varas v Sweden* (1991) 14 EHRR 1, 34, para 70. For my part I would also not do so.

*Positive obligations*

34. The third point is that nowhere in the judgment is there any direct discussion of the development by the ECtHR of positive obligations under the ECHR. The Convention is mainly concerned with what a state must not do. But for the purpose of rendering fundamental rights under the ECHR more effective, the ECtHR has developed certain positive obligations viz obligations which require states to take action. Professor Mowbray (*The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, 2004, p 2) gave the following examples of recognised categories:

> "examples include to investigate a killing, to protect vulnerable persons from serious ill-treatment inflicted by others, to provide arrested persons with a prompt explanation of the reasons for their arrest, to provide free legal assistance for impecunious criminal defendants, to provide legal recognition of the new gender acquired by transsexuals who have successfully completed gender re-assignment treatment and to deploy reasonable police resources to protect media organisations from unlawful violence directed at curbing the legitimate exercise of free expression."

It is not possible to consider whether articles other than article 3 may become engaged without taking into account the possible impact of positive obligations under the ECHR on immigration decisions. It is a large subject, and one that was only briefly touched on in oral argument. I will, however, have to make some reference to it. A comprehensive discussion of the subject will have to await another day.

*Precedent*

35. In its review of the decisions of the ECtHR the Court of Appeal observed "While the Strasbourg court has contemplated the possibility of such a step [viz the extension of the *Soering* principle to articles other than article 3] it has not yet taken

it"(p 785, para 47). I understand this to be a view that even where the ECtHR ruled that other articles are engaged or may become engaged this does not amount to an authoritative precedent in the absence of a finding of a violation in the particular case. In my view this is too narrow an approach to the evolving jurisprudence of the ECtHR. Where it concludes that there was no breach of a convention right, the ECtHR may nevertheless rule on the reach of the right.

*Three critical decisions*

36. It will be useful as a starting point to examine how the Court of Appeal analysed three critical decisions. The Court of Appeal categorised *Abdulaziz* as follows (p 783, para 43):

> "In the leading case of *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471 applicants living within this jurisdiction complained that their article 8 rights were infringed because their husbands were not permitted entry in order to join them. The United Kingdom argued that neither article 8 nor any other article of the Convention applied to immigration control. *In rejecting this argument the Strasbourg court remarked that the applicants were not the husbands but the wives and that they were not complaining of being refused leave to enter or remain in the United Kingdom, but as persons lawfully settled in the country of being deprived or threatened with deprivation of the company of their spouses."*
> (Emphasis added)

The fact that the applicants were wives rather than husbands was one basis of the decision. The ECtHR observed (7 EHRR 471, 495, para 60):

> "The applicants are not the husbands but the wives, and they are complaining not of being refused leave to enter or remain in the United Kingdom but, as persons lawfully settled in that country, of being deprived (Mrs Cabales), or threatened with deprivation (Mrs Abdulaziz and Mrs Balkandali), of the society of their spouses there.
> *Above all*, the Court recalls that the Convention and its Protocols must be read as a whole; consequently a matter dealt with mainly by one of their provisions may also, in some of its aspects, be subject to other provisions thereof. Thus, although some aspects of the right to enter a country are governed by Protocol No 4 as regards states bound by that instrument, it is not to be excluded that measures taken in the field of immigration may affect the right to respect for family life under article 8. The Court accordingly agrees on this point with the Commission."

(Emphasis added)

It is clear, therefore, that the over-arching basis for the conclusion was that decisions in the field of immigration must respect fundamental rights under article 8.

37. The next case is *Soering v United Kingdom* (1989) 11 EHRR 439. Directly at issue was the question whether the extradition of the applicant to Virginia on a charge of capital murder could engage article 3. The ECtHR held (p 469, para 91):

> "In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing contracting state by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."

The Court of Appeal analysed *Soering* as if it provided no authority that articles other than article 3 may be engaged. That is, however, not correct. The following passage in the judgment of the ECtHR, which was not cited or referred to by the Court of Appeal, demonstrates this:

> "85. As results from article 5(1)(f), which permits 'the lawful . . . detention of a person against whom action is being taken with a view to . . . extradition,' no right not to be extradited is as such protected by the Convention. Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a contracting state under the relevant Convention guarantee. What is at issue in the present case is whether article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing state as a result of treatment or punishment administered in the receiving state."

There is a footnote (86) to the second quoted sentence. It states: "See, *mutatis mutandis, Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, paras 59-60 - in relation to rights in the field of immigration." The right engaged in *Abdulaziz* was, of course, article 8. In other words, the ECtHR made clear again that articles other than article 3 could be engaged. The issue identified in the third quoted sentence was answered in the affirmative in *Soering*: pp 467 - 468, para 88.

38. The consideration of *Bensaid v United Kingdom* (2001) 33 EHRR 205 by the Court of Appeal also needs to be examined. The court held that the removal to Algeria of a person suffering from schizophrenia involving a psychotic illness would not violate article 3 because it had not been shown on the facts that adequate healthcare was not available in Algeria. Dealing with the possible application of article 8 the ECtHR held (p 219, para 46):

> "Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by article 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of article 3 treatment may nonetheless breach article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity."

The Court of Appeal said (pp 784 - 785, para 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."*
> (Emphasis added)

The distinction in the last sentence is not founded on Strasbourg jurisprudence. In both cases, if the high threshold of showing a real risk of a flagrant breach is satisfied on the facts, the engagement of article 8 could in principle be based on the expulsion from the United Kingdom. In any event, the Court of Appeal doubted that article 8 could be engaged by referring to the *possible* exception of *Bensaid v United Kingdom*: p 785, para 47 with emphasis added. The doubt was not justified. Indeed, a differently constituted Court of Appeal in *R (Razgar) v Secretary of State for the Home Department* [2003] EWCA Civ 840; [2003] Imm AR 529, 538, para 20 held that "it is clear that the ECtHR considered that article 8 was engaged on the facts of that case [*Bensaid*] ".

39. Simply on the basis of the three decisions discussed so far there was, contrary to the Court of Appeal's view, a significant body of decisions of the ECtHR which demonstrate that in respect of immigration decisions articles other than article 3 may be engaged.

*Other articles of the ECHR*

40. It may now be useful if I embarked on my own brief tour d'horizon on the question whether in principle articles other than article 3 could become engaged in immigration decisions on the expulsion of aliens. Article 2(1) provides:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Like article 3 this provision is absolute and not subject to derogation in time of war or public emergency under article 15. The Court of Appeal underlined the central importance of article 3 in the scheme of the ECHR. But the right to life under article 2 is also of fundamental importance. If article 3 may be engaged it is difficult to follow why, as a matter of logic, article 2 could be peremptorily excluded. There may well be cases where article 3 is not applicable but article 2 may be: see *Secretary of State for the Home Department v Kacaj* [2002] Imm AR 213 (a decision of the Immigration Appeal Tribunal), per Collins J. The positive obligation on member states to provide individuals with suitable protection against immediate threats to their lives from non-state actors abroad may be relevant, in exceptional circumstances, to an immigration decision: *Osman v United Kingdom* (1998) 29 EHRR 245. Another example could be *D v United Kingdom* (1997) 24 EHRR 423, which was admittedly a wholly exceptional case. It concerned the proposed expulsion to St Kitts of a person suffering from AIDS in an advanced degree. The ECtHR found that his expulsion would amount to a breach of article 3. It is, however, clear that but for this decision, the applicant would have succeeded under article 2: p 450, para 59. There are principled grounds for not drawing a bright-line between articles 2 and 3.

41. Article 4 provides:

> "(1) No one shall be held in slavery or servitude.
> (2) No one shall be required to perform forced or compulsory labour."

Article 4(1) is absolute and not subject to derogation in time of war or public emergency. It is no doubt right that in the modern world a case alleging slavery is perhaps a little unlikely. A case asserting forced labour is less unlikely but, if it arises, would no doubt fall under article 3. But what if the applicant relied only on article 4? Is he to be turned away on the basis that article 4 cannot as a matter of legal principle be engaged? Surely that would be contrary to the spirit of a human rights convention.

42. Article 5(1) provides:

> "Everyone has the right to liberty and security of person."

Then follows a list of cases in which a person may be deprived of his liberty, eg after conviction. For present purposes article 5(4) is also relevant. It provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

These are qualified guarantees and they are subject to derogation in times of war and public emergency.

43. In terms of the maintenance of the rule of law, which underlies all human rights instruments, article 5 is of great importance. Imagine a case of intended expulsion to a country in which the rule of law is flagrantly flouted, *habeas corpus* is unavailable and there is a real risk that the individual may face arbitrary detention for many years. I could, of course, make this example more realistic by citing the actualities of the world of today. It is not necessary to do so. The point is clear enough. Assuming that there is no evidence of the risk of torture or inhuman or degrading treatment, is the applicant for relief to be told that the ECHR offers in principle no possibility of protection in such extreme cases? I would doubt that such an impoverished view of the role of a human rights convention could be right.

44. Article 6(1) provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

This is a qualified right and it is subject to derogation in time of war or public emergency. Moreover, in deciding what amounts to a fair trial the triangulation of interests of the accused, the victim and the public interest may require compromises, eg to protect children in abuse cases, women in rape cases, and national security. On the other hand, there are universal minimum standards. It is important to bear in mind the status of the right to a fair trial. It is a universal norm. It requires that we do not allow any individual to be condemned unless he has been fairly tried in accordance

with law and the rule of law. The guarantee of a fair trial is a core value under the ECHR. In *Einhorn v France* (decided by the ECtHR (Application No 71555/01) (unreported) 16 October 2001) which was not cited in the Court of Appeal, the Strasbourg court summarised the position. It observed (para 32):

> " … the Court reiterates that it cannot be ruled out that an issue might exceptionally be raised under article 6 of the Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of justice in the requesting country (see the *Soering* judgment cited above, p 45, § 113, and, *mutatis mutandis,* the *Drozd and Janousek v France and Spain* judgment of 26 June 1992, Series A no 240, p 34, para 110)."

This was said in the context of extradition but, on the principles laid down by the ECtHR, the same would apply in an expulsion case. In *Einhorn,* as in the earlier cases, no violation was found established. That cannot, however, affect the binding force of the Strasbourg jurisprudence on the point. It can be regarded as settled law that where there is a real risk of a flagrant denial of justice in the country to which an individual is to be deported article 6 may be engaged.

45. Article 7 provides:

> "(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
> (2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

This is among the first tier of core obligations under the ECtHR. It is absolute and non derogable. It is not likely to arise often in the context of immigration decisions to expel aliens. It could, however, arise. Bearing in mind the principles laid down by the ECtHR in respect of extradition and expulsion involving a real risk of a flagrant violation of fair trial rights, the same must be the case in respect of this obligation.

46. Article 8 provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 8 contains qualified guarantees, which are derogable in time of war and public emergency. On the other hand, the European jurisprudence make clear that it enshrines core values.

47. It has already been explained how in the important decisions of *Abdulazziz* and *Bensaid* the ECtHR accepted that extradition and expulsion may in cases of a real risk of a flagrant violation of the guarantee of family or private life engage article 8. *Moustaquim v Belgium* (1991) 13 EHRR 802 involved an application of these principles. *Boultif v Switzerland* (2001) 33 EHRR 1179 was decided after *Bensaid.* An Algerian had entered Switzerland in 1992. In 1993 he married a Swiss citizen. In 1997 he was sentenced to two years imprisonment for robbery. In 1998 the Swiss authorities refused to renew his residence permit. He was expelled. He brought a claim under article 8. The ECtHR held:

> "39. The Court recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in article 8(1) of the Convention.
> 40. In the present case, the applicant, an Algerian citizen, is married to a Swiss citizen. Thus, the refusal to renew the applicant's residence permit in Switzerland interfered with the applicant's right to respect for his family life within the meaning of article 8(1) of the Convention.
> 41. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of article 8. It is therefore necessary to determine whether it was 'in accordance with the law', motivated by one or more of the legitimate aims set out in that paragraph, and 'necessary in a democratic society'".

Perhaps a little surprisingly the ECtHR found a violation of article 8 and ordered a modest sum to be paid by way of just satisfaction. Another possible field of application could be the expulsion of an alien homosexual to a country where, short of persecution, he might be subjected to a flagrant violation of his article 8 rights. In *Z v Secretary of State for the Home Department* [2002] Imm AR 560 this point came before the Court of Appeal. Schiemann LJ (with whom the other members of the court agreed) was not prepared to rule out such an argument. In my view he was right not to do so. Enough has been said to demonstrate that on principles repeatedly affirmed by the ECtHR article 8 may be engaged in cases of a real risk of a flagrant violation of an individual's article 8 rights.

48. Now I turn to a cluster of qualified guarantees, viz article 9 (Freedom of thought, conscience and religion), article 10 (Freedom of expression), article 11 (Freedom of assembly and association) and article 14 (Prohibition of discrimination). It is easy to see how these articles could be relevant to the question of what may constitute persecution under the Refugee Convention. Beyond such cases it is less easy to visualise the application of any of these articles to a decision to expel an alien. The jurisprudence of the Strasbourg court does not provide much help. On the other hand, the possible engagement of these articles has not been ruled out. I would also not rule out their possible application in the field of immigration decisions. Saying

never in law often requires courts to swallow their words in circumstances not previously contemplated.

*Conclusion*

49. It follows that the ruling of the Court of Appeal that an English court is entitled to proceed on the basis that, except for article 3, articles of the ECHR can never be engaged in respect of immigration decisions to expel an alien was wrong.

50. It will be apparent from the review of Strasbourg jurisprudence that, where other articles may become engaged, a high threshold test will always have to be satisfied. It will be necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other articles could become engaged.

*Disposal*

51. I have read the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Carswell. I agree with their opinions and conclusions. I would also dismiss the appeals.

LORD WALKER OF GESTINGTHORPE

My Lords,

52. I have had the great advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. I agree that these appeals should be dismissed for the reasons given by Lord Bingham. The difficulties which I perceive in this area are centred on article 8 of the European Convention on Human Rights and are better addressed in my opinion on the appeal in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, on which the House heard argument immediately after these appeals.

BARONESS HALE OF RICHMOND

My Lords,

53. I have had the advantage of reading the opinions of my noble and learned friends, Lord Bingham of Cornhill, Lord Steyn and Lord Carswell. For the reasons they give, I agree that these appeals should be dismissed. In common with my noble and learned friend, Lord Walker of Gestingthorpe, I believe that the application of article 8 in this difficult area requires further analysis. This is addressed in my opinion in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, where it arises directly.

LORD CARSWELL

My Lords,

54. The appeal before the House furnishes a good illustration of the extent of the changes made to our domestic law by the incorporation by the Human Rights Act

1998 of provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), the enlargement of the source material which has to be taken into account by the courts of the United Kingdom and the way in which they have to approach the issues before them where Convention rights come into play. Before the Act came into operation, the sole legal issue in an asylum case was whether the applicant came within the protection of the 1951 Geneva Convention and 1967 Protocol relating to the Status of Refugees (1951 (Cmd 9171) and 1967 (Cmnd 3906)), by establishing that he or she had a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion. The Secretary of State for the Home Department retained a residual discretion to grant the applicant exceptional leave to remain in the United Kingdom on compassionate or humanitarian grounds, even though that legal condition had not been satisfied, and adopted policies to govern the grant of such leave. Since the Human Rights Act came into operation public authorities (including the courts) may not act in a way which is incompatible with a Convention right (section 6) and the courts must by section 2 take into account the body of material commonly known by the convenient term of "Strasbourg jurisprudence". The differences which the Act has made in the approach to the issues in asylum appeals such as those before the House, in the material put before the courts and in the content and reasoning of decisions are profound, as may be seen from the opinions given by your Lordships.

55. Ahsan Ullah is a citizen of Pakistan who is an active member of the Ahmadiyya faith. He has been an Ahmadi all his life, as have all the members of his family. Members of his faith, according to the undisputed evidence before the adjudicator, suffer from a degree of religious persecution from Muslim extremists, who are opposed to the Ahmadiyya faith, and Mr Ullah claimed that he was subjected to a variety of restrictions of religious freedom and social discrimination. He also claimed that he had suffered harassment and attacks on himself and his family since he began preaching his faith in December 1998.

56. Mr Ullah entered the United Kingdom on false documents in January 2001 and claimed asylum. The Secretary of State refused asylum and certified the claim under paragraph 9 of Schedule 4 to the Immigration and Asylum Act 1999. The adjudicator dismissed Mr Ullah's claim to be entitled to asylum under the Geneva Convention and upheld the certificate, with the consequence that he was not entitled to appeal to the Immigration Appeal Tribunal. Mr Ullah also alleged under section 65 of the 1999 Act that the Secretary of State in taking his decision to refuse him asylum had acted in breach of his human rights and appealed on this ground also to the adjudicator. She dismissed Mr Ullah's claim under each of the articles of the Convention on which he relied. She held that articles 2 and 3 were not engaged, as the appellant had not established that there were substantial grounds that his life would be at risk or that he would suffer any of the treatment prohibited by article 3. She held that articles 6 and 7 were not engaged. In relation to articles 9, 10 and 11 she held that although they might be engaged, each of them was a qualified provision and the Government's action in seeking to remove the appellant to Pakistan in pursuance of the need for proper immigration control was proportionate.

57. Mr Ullah sought to bring an application for judicial review of the adjudicator's decision and was given permission limited to the ground which he advanced under article 9 of the Convention, which provides:

> "(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> (2) Freedom to manifest one's religion shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The application was dismissed by Harrison J, who was prepared to accept that article 9 could in principle be engaged but held that only a flagrant denial of the rights contained in that article would suffice to enable the appellant to resist being returned to Pakistan, a test which was not satisfied on the facts of the case.

58. Thi Lien Do is a citizen of Vietnam, who entered the United Kingdom clandestinely on 20 November 2000 and shortly thereafter claimed asylum on the ground of her fear of persecution as the result of her religious beliefs as a Roman Catholic. She practised her religion in Vietnam and taught the elements of her faith to children. She claimed that she suffered from discrimination and experienced difficulties in following her faith. There was evidence to support Miss Do's claim that her freedom to practise her religion was circumscribed in a number of respects and it was not in dispute that although she could return to Vietnam and practise her religion there, she would have to do so in reduced circumstances.

59. The Secretary of State refused Miss Do's claim for asylum, on the ground that she had not established a well-founded fear of persecution, and certified the claim under paragraph 9(4)(a) of Schedule 4 to the Immigration and Asylum Act 1999. Miss Do appealed to the adjudicator against the Secretary of State's decision relating to persecution and also under section 65 of the 1999 Act, on the ground of breach of her Convention rights. At the hearing her counsel relied on articles 3 and 5 of the Convention, but not on articles 8 and 9. The adjudicator dismissed the asylum claim and the human rights appeal.

60. Miss Do appealed with leave to the Immigration Appeal Tribunal, which upheld the adjudicator's conclusion on the asylum claim. The Tribunal considered the issue of the engagement of article 9 of the Convention, although it had not been relied upon before the adjudicator, and held that having regard to the adjudicator's findings on the evidence there was no infringement of this article.

61. Mr Ullah appealed, with the judge's permission, to the Court of Appeal against the dismissal of his application for judicial review. Miss Do appealed, with permission granted by Tuckey LJ, and the appeals were conjoined. The court held that the adjudicator and the IAT were correct to dismiss Miss Do's appeal on the asylum issue. The argument before the court and the thrust of its judgment were accordingly directed almost wholly to consideration of the engagement of article 9 of the Convention, the issue on which the appeal to this House turned.

62. The Court of Appeal dismissed both appeals on the ground that article 9 was not engaged: [2003] 1 WLR 770. At p 791, paras 63 and 64 of its judgment, which have been quoted in full in the opinion of my noble and learned friend Lord Bingham of Cornhill, it committed itself firmly to the proposition that the only article of the Convention which could be engaged in cases such as those of the present appeals is article 3. It stated categorically in para 64:

> "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".

This conclusion was strongly attacked by counsel for the appellants and the interveners. For the reasons set out in the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Steyn, I agree that it cannot be upheld, and I propose to explore fairly shortly some aspects of the grounds for so deciding.

63. It is not in dispute that sovereign states are entitled to regulate the entry of aliens into their territory, a principle, as Lord Bingham of Cornhill has set out in paragraph 6 of his opinion, which is fully recognised in the Strasbourg jurisprudence. The primary focus of the Convention is territorial, but, as examination of the Strasbourg jurisprudence shows, it cannot now be said that persons seeking asylum in a member state of the Council of Europe are unable to invoke any of the provisions of the Convention when resisting an expulsion decision. I do regard it as important, however, that member states should not attempt to impose Convention standards on other countries by decisions which have the effect of requiring adherence to those standards in those countries.

64. The Court of Appeal accepted the correctness of the argument advanced on behalf of the Secretary of State, which was the cornerstone of the Attorney General's argument in this House, that an exception to the territoriality principle exists when there is a real risk that an applicant for asylum will be ill-treated in his own country in a way which would constitute a serious breach of article 3 of the Convention, but that the exception is limited to that article. It held at p 783, para 39 of its judgment that the underlying rationale is 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, even though such ill-treatment may not satisfy the criteria of persecution under the Refugee Convention. Article 3 provides the test of such treatment".

65. As authority for the existence of this exception the Court of Appeal recognised the weight to be given to the decision of the European Court of Human Rights (ECtHR) in *Soering v United Kingdom* (1989) 11 EHRR 439, whose correctness has been accepted in a series of subsequent decisions (a number of which are listed in paragraph 12 of the opinion given by Lord Bingham of Cornhill). *Soering* was a case of extradition rather than refusal of asylum, but although the two classes of case raise different issues, those differences are not material for present purposes and the principle laid down can be taken to apply with equal validity to expulsion cases, as the

ECtHR held in *Chahal v United Kingdom* (1996) 23 EHRR 413 at p 457, para 80. Lord Bingham of Cornhill has in paragraph 11 of his opinion set out extensive quotations from the decision in *Soering*, and it is not necessary to repeat them again. It is sufficient to say that the basis for the Court's decision was that to return an applicant for asylum in such circumstances would conflict with "one of the fundamental values of the democratic societies making up the Council of Europe". This approach finds an echo in the phrase adopted by the Supreme Court of Canada in *Suresh v Canada* [2002] 1 SCR 3, at p 32, para 49, describing it as conduct that would "shock the Canadian conscience."

66. The issue is whether this exception is confined to cases falling within the bounds of article 3, as the Court of Appeal concluded, or whether it is capable of being of wider ambit, as the appellants and interveners contended. One might indeed have preferred, if the matter were *res integra*, to see the exception expressed in terms of general humanitarian considerations, which could be applied flexibly throughout the states which are parties to the Convention, rather than being tied to specific articles of the Convention. The risk in defining it by reference to the latter is that courts of law will tend to fit expulsion cases into a Procrustean bed of legal categories. The matter is not, however, *res integra*, as examination of the Strasbourg jurisprudence shows, for the ECtHR has approached it by reference to the individual articles of the Convention. It is to be hoped that the courts which have to apply the principles will be able to retain a substantial degree of flexibility in order to fulfil the humanitarian objectives of the Convention in such cases, while upholding the proper rights of states to decline to admit aliens.

67. The Court of Appeal concluded its review of the Strasbourg jurisprudence by stating at p 785, para 47 of its judgment that:

> "To date, with the possible exception of *Bensaid v United Kingdom*, the application of this extension has been restricted to article 3 cases".

It was correct to state that the only actual decisions applying the extension were *Soering v United Kingdom* and *Chahal v United Kingdom*, both article 3 cases. But there is a strong current of authority contained in statements made by the ECtHR to the effect that other articles could be engaged. Lord Bingham of Cornhill has set out in his opinion the roll-call of Strasbourg cases in which this possibility has been accepted by the Court, and I gratefully adopt this without repeating it. Both Lord Bingham and Lord Steyn have set out reasons why in principle articles 2, 4, 5, 7 and 8 could be engaged in appropriate cases, and I respectfully agree with their reasons and conclusions. I am myself satisfied that a fair reading of the Strasbourg cases requires a national court to accept that these articles could possibly be engaged and that the exception to the territoriality principle is not confined to article 3. There does not appear to be any conceptual reason why article 9 should not be capable in principle of engagement, although I find it difficult to envisage a case, bearing in mind the flagrancy principle to which I am about to refer, in which there could be a sufficient interference with the article 9 rights which does not also come within the article 3 exception. It may be for this reason that the ECtHR appeared in *Razaghi v Sweden* (Application No 64599/01) (unreported) 11 March 2003 to reject the possibility of engagement of article 9, although, as Lord Bingham of Cornhill has pointed out, the

basis of the Court's ruling concerning article 9 is not entirely clear. For present purposes I think it sufficient to say that I would not rule it out.

68. The ECtHR has consistently stated that before any article of the Convention other than article 3 could be regarded as engaged, it would require an extremely serious breach of the provisions of that article. In *Soering v United Kingdom* it said at p 479, para 113 of its judgment:

> "The Court does not exclude that an issue might exceptionally be raised under article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country."

69. The adjective "flagrant" has been repeated in many statements where the Court has kept open the possibility of engagement of articles of the Convention other than article 3, a number of which are enumerated in paragraph 24 of the opinion of Lord Bingham of Cornhill in the present appeal. The concept of a flagrant breach or violation may not always be easy for domestic courts to apply - one is put in mind of the difficulties which they have had in applying that of gross negligence - but it seems to me that it was well expressed by the Immigration Appeal Tribunal in *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1 at p 34, para 111, when it applied the criterion that the right in question would be completely denied or nullified in the destination country. This would harmonise with the concept of a fundamental breach, with which courts in this jurisdiction are familiar.

70. If it could be said that in principle article 9 is capable of engagement, it does not seem to me that the case of either appellant comes within the possible parameters of a flagrant, gross or fundamental breach of that article such as to amount to a denial or nullification of the rights conferred by it. I accordingly agree that both appeals should be dismissed.