Case No: CO/54/02

NEUTRAL CITATION NUMBER: [2003] EWHC 207 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 14 February 2003

Before :

THE HONOURABLE MR JUSTICE SILBER

- -

Between :

THE QUEEN ON THE APPLICATION OF N	Claimant
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	Defendant

- -
- -

Ms. Stephanie Harrison (instructed by Tyndallwoods of Birmingham) for the Claimant
Mr. Sean Wilken and Ms. Susan Chan (instructed by The Treasury Solicitor) for the Defendant

- -

Judgment
As Approved by the Court

Mr Justice Silber:

The Immigration Authorities

Overview

1. On 1 February 2000, N ("the claimant"), a national of Libya arrived in the United Kingdom and he claimed asylum. His application was dealt with by the Home Office who, as I will explain, sent a Statement of Evidence form ("SEF") to him for completion but the envelope containing it was incorrectly addressed with the result that the claimant did not receive it. Indeed, the envelope containing the SEF was returned to the Home Office on 7 June 2000 with the Post Office explaining to the Home Office that the address on the envelope was incomplete. As the claimant had not received the SEF, he was unable to complete and return it to the Home Office with the result that his asylum application was refused by a letter dated 11 December 2000 but it was only on 14 February 2001 that this refusal letter was received by the claimant together with directions for his removal to Libya "at a time and a place to be notified". In consequence, he was deprived of benefit and he also became liable to repay the benefit that he had previously received. Removal directions were served on the claimant even though the Home Office was then well aware that failed asylum seekers from Libya were subject to serious ill-treatment on their return to Libya so that in 2001 the Home Office policy was to give failed asylum seekers leave to remain in this country, which was a right that was not given to the claimant, who remained under threat of removal to Libya until 2002. There was an exception to that policy for those ordered to be deported by the courts, but the claimant did not fall into that category.

2. When the claimant instituted an appeal against the refusal of his asylum application in January 2000, the Home Office should have processed it but for no apparent or good reason it did not do so for the remainder of 2001. According to their letter of 25 June 2001, the claimant's solicitors were told by the Immigration Inspectorate at the Home Office May 2001 that the claimant's documents had been in "lay-by" since 11 January 2001 and therefore it appeared that they had not received the notice of appeal which should have been forwarded to them by the Immigration Service. According to the same letter, the claimant's solicitors contacted the Immigration Services at Terminal 1 on the same day and they were informed that "our client's appeal had been forwarded to the Home Office on 8 March 2001" but "unfortunately it does not appear to have been linked to the claimant's file". The writer of the letter recorded that she had subsequently tried on "a number of occasions since then to make inquiries but had not got through".

3. Judicial review proceedings were instituted on 3 January 2002. The Home Office subsequently agreed to consider the claimant's asylum claim substantively. Eventually, on 3 May 2002, the claimant was granted refugee status and indefinite leave to enter the United Kingdom. The claimant contends that if his application had been considered substantively as it should have been in 2000 or early 2001, he would have been given precisely those rights. The conduct of the Home Office officials has led to this claim because evidence from the claimant and supported by a witness statement from a consultant psychiatrist shows that as a consequence, the claimant has suffered long periods of serious worry and what the consultant psychiatrist describes as "symptoms of major depressive disorder"; this medical evidence is not disputed by the Home Office at present. The claimant also claims that he has suffered financial loss.

4. The claimant now brings a claim against the Secretary of State for the Home Department ("the Secretary of State") for declaratory relief and for damages under the Human Rights Act 1998 ("HRA") contending that his rights under Articles 3 and 8 of the European Convention on Human Rights ("the Convention") have been infringed. The Secretary of State denies that these Convention rights have been infringed or that he had a *positive duty* to prevent those breaches. In any event, he contends that the claimant is not entitled to damages.

5. The case for the claimant is based on the acts and omissions of a number of officials, who dealt with his asylum application and with his benefit payments and application; it is common ground that these officials were working for the Secretary of State and it is not contended that he is not liable for their acts or omissions. Therefore, I shall therefore regard their acts and omissions as being those of the Secretary of State, who I shall refer to as "the defendant". I gather that no decision has yet been given on a claim against the Secretary of State arising out of his department's handling of an immigration or an asylum issue under the HRA. Thus, there are a number of important but unresolved issues to be resolved on this application. This claim arises because of a series of very unusual and very regrettable errors culminating in the Home Office failing to process the claimant's appeal for more than ten months. Perhaps the most glaring of these were first, the failure to send a SEF to the claimant's proper address either originally or when told of his proper address, second, the failure to serve the refusal letter promptly, third the failure to consider the material furnished by the applicant in January 2001 before serving the letter of refusal and finally, the failure to process the claimant's appeal for over a year. On 7 February 2002, the Home Office wrote to the claimant's solicitors stating that they were "very sorry for

any confusion caused for our administrative error and for any inconvenience this may have caused your client". In order to understand the claim, it is first necessary to appreciate the dangers encountered by failed Libyan asylum seekers on their return to Libya and the Home Office's attitude towards Libyan asylum seekers at the time when the claimant was seeking asylum. It is these factors which have caused this claim to be brought and so I will explain them before turning to the chronology and then I will consider in greater detail the issues raised on this application.

Attitude of Home Office to Libyan asylum seekers in 2000 and 2001

6. On 11 May 2001, the Home Office issued a CIPU Bulletin ("the CIPU Bulletin"), which deals with the treatment that failed asylum seekers then received on their return to Libya. It noted that in April 2000, Amnesty International had made representations to the United Kingdom Government about the treatment in Libya of a returned Libyan asylum seeker, who had been arrested and imprisoned with the result that the United Kingdom Government placed "a temporary hold on further removals while we make further enquiries". Amnesty International also produced a report in 2000 in which they stated, according to the CIPU Bulletin, that "in addition to being detained, several returned asylum seekers have been subjected to serious human rights violations including torture".

7. As a result of this information from Amnesty International, the United Kingdom Government noted in the CIPU Bulletin that the UNHCR in material dated 2 October 2000 had "urged caution in returning failed asylum seekers to Libya" and they also pointed to an incident in March 2000 "when seven Libyan nationals .. were extradited from Jordan to Libya, at least three of them were killed on arrival at Tripoli Airport".

8. The CIPU Bulletin noted that the Foreign and Commonwealth Office in London had advised that "any Libyans returning to that country after an absence of six months or more are subject to an interrogation by Libyan security authorities" and that "failed asylum seekers are routinely imprisoned by administrative as opposed to judicial" order for "having shown disloyalty to the State". It is significant that when the refusal of asylum letter and the removal directions were served on him in February 2001, the claimant had already been in this country for more than a year and thus he would have been subject to the treatment on return to Libya as a failed asylum seeker in relation to whom warnings had been given by the Foreign and Commonwealth Office. This information about the treatment in Libya of failed asylum seekers was known to the Home Office before the claimant received on 4 February 2001 the letter refusing his asylum claim.

9. The CIPU Bulletin stated that in the light of that information it was not believed that the United Kingdom Government "can at present safely enforce the removal of failed asylum seekers to Libya" as "any representation made under Article 3 of the HRA (sic) against a removal to Libya of a refused asylum applicant based on information currently available in the public domain is likely to succeed".

10. The CIPU Bulletin recorded that the Foreign and Commonwealth Office in London had said that they did not expect a significant change in the human rights position in Libya within the period up until May 2002. The CIPU Bulletin also noted that a limited exceptional leave policy for failed asylum seekers from Libya would be introduced by which refused asylum seekers would be granted six months exceptional leave to remain in this country, although the position of those convicted of serious crimes and those subject to recommendation to deportation by the courts would be subject to ministerial consideration.

11. The decision to refuse the application of the claimant to remain in England and to serve the removal notice on him have to be considered in the light of first, the information in the possession of the Home Office and second, the warnings about the treatment in Libya of returned asylum seekers set out in the CIPU Bulletin as well as the other information and the knowledge, which had by then been acquired by the Home Office. This, together with the subsequent treatment of the claimant constitute some of the exceptional and more worrying features in this case. I must now set out the chronology in some detail so as to enable the issues raised on this application to be understood.

Chronology

12. After the claimant, who was born in Libya on 27 December 1970, arrived in the United Kingdom on 1 February 2000, he sought protection under the Refugee and Human Rights Conventions from the UK authorities on arrival and he was granted temporary permission to live in a specified area. He claimed, as he was entitled to,

and he duly received income support and other attendant welfare benefits to meet his subsistence and accommodation needs, which included housing and council tax benefits. These benefits enabled him to meet the costs of private rented accommodation. On 5 June 2000, a temporary admission form and a SEF were sent to the claimant, but the envelope was not properly addressed. It is clear from later correspondence from a Home Office Minister that the envelope containing the SEF that had been sent to the claimant was returned to the Immigration and Nationality Department at the Home Office by the Post Office on 7 June 2000. The Post Office then explained to that Department that it had to be returned because the address on the envelope containing the SEF was incomplete. On 8 June 2000, the claimant's solicitors Tyndallwoods, who had only been instructed by the claimant on 5 June 2000, wrote to the Immigration Service at the Home Office confirming the claimant's new address of which they had previously been notified by the claimant and they stated that they intended to submit on behalf of the claimant a statement of claim to asylum. Thus, the Home Office must have known from about 8 June 2000 that the claimant had not received the SEF. The claimant had previously notified the Immigration Services of his new address but he had not received a new temporary admission form.

13. On 19 June 2000, Tyndallwoods telephoned the Immigration Services to state that the claimant had not received the new temporary admission form. A new form was subsequently sent out to the claimant.

The non-compliance refusal of the asylum claim

14. On 11 January 2001, the Immigration Service wrote to the claimant and to Tyndallwoods informing them that a SEF had been sent to the claimant on 5 June 2002 and giving him until 19 January 2001 to submit any further information as to why he should be given leave to enter *other than* as an asylum seeker. On 17 January 2001, Tyndallwoods wrote to the Immigration Office and they explained, as they had also done in a telephone call on that day, first that the SEF had not been received that they had asked the Home Office to provide another SEF as the address to which the original had been sent was incomplete and second, that they had requested the Home Office to withdraw the refusal of asylum on non-compliance grounds. On 17 January 2001, full details of the claimant's asylum claim were duly submitted, together with a supporting statement of claim and an introduction prepared by the claimant. The Home Office by this time and in fact on 11 December 2001 had completed and signed a notice of refusal letter, but for some unexplained reason they did not then send it to the claimant until just before 14 February 2001. The claimant had not previously known of this decision.

15. Despite this correspondence in January 2001, on 14 February 2001 the claimant received the Home Office letter dated 11 December 2000, refusing his asylum claim on the grounds of the claimant's failure to return within 14 days the SEF sent to him on 5 June 2000 but which, as I have explained, had not been received by him. The letter stated that the claimant had "failed without reasonable explanation to make a prompt and full disclosure of the facts of your claim". Removal directions dated 14 February 2001 were given to the claimant for his return to Libya "at a time and place to be notified". Despite intervention by a Member of Parliament acting on behalf of the claimant and letters from the claimant's solicitors, the Home Office thereafter continued to refuse the claimant leave to enter on the grounds that the claimant had not returned his completed SEF within the time stipulated. Even following the institution of these judicial review proceedings on 3 January 2002, the claimant was not recognised as a refugee until 3 May 2002, which was two years and three months after his arrival in this country, as well as being almost seventeen months after the Home Office had refused his asylum application and a year after publication of the CIPU Bulletin.

The Appeal

16. On 21 February 2001, a notice of appeal was lodged on behalf of the claimant against the decision to refuse him leave to enter. This appeal had not been passed on to the appellate authorities by the Home Office officials by early 2002 and I have already explained in paragraph 2 above what the claimant's solicitors had been told about this.

17. On 11 May 2001, the Home Office issued the CIPU Bulletin and I have already explained the salient points of it in paragraphs 6 to 10 above. The appeal was not progressed or adjudicated upon prior to the withdrawal of the non-compliance refusal and the decision to consider the claimant's application substantively one year later in February 2002, even though first, the Home Office had received chasing letters by Tyndallwoods and second, the present judicial review proceedings had been instituted in January 2002. The appeal against the refusal of asylum was of obvious importance to the claimant as it was the appropriate method by which he could challenge the decisions to refuse him asylum and by which he could thereby obtain leave to enter this country; in addition, if his appeal had been successful, it would have had the effect of restoring his entitlement to benefit.

18. Tyndallwoods asked the claimant's Member of Parliament to obtain permission from the Home Office for the claimant to remain here in the light of the CIPU Bulletin by a letter dated 21 November 2001. In response, it was explained by the Home Office Minister that the claimant could not benefit from this policy in the CIPU Bulletin as his application had been refused for non-compliance reasons, which was that he had not received the inadequately addressed SEF.

Claim for assistance

19. The Secretary of State must have appreciated that when he refused his claim for asylum, the claimant's entitlement to income support and other related benefits would cease with effect from the date of the refusal of the asylum claim, even though that decision had not been notified in writing to the claimant or to the Department of Social Security ("DSS") on that date. Thus, if any payment of income support and associated benefits is made and received even in good faith by the asylum seeker after his claim is refused, then this sum is repayable by the DSS from the asylum seeker, even though at the time of payment it was not known to the DSS or by the recipient that the asylum claim had been refused (Saleem v SSHD [1999] QB 805 C.A). It follows that any payments of housing and council tax benefits made to the claimant between first, the time when the Secretary of State records that the asylum claim is refused and second, the date when the paying agencies and the claimant are told of this may give rise to first, claims for repayments, as well as second, enforcement proceedings against the claimant by the asylum seeker's landlord for possession of his or her accommodation and third, by the local authority for council tax that had previously been rebated.

20. On 9 April 2001, the claimant was notified by the DSS that his entitlement to income support had ceased with effect from 11 December 2000, which was the date of the letter refusing the claimant asylum. Rent was not paid for the claimant from 13 March 2001 but income support did not cease until 9 April 2001. On 30 April 2001, the claimant was notified in a letter from the DSS that he had been overpaid benefits from 12 December 2000 when his asylum claim had been refused and in consequence he was required to repay £798.60 to the DSS.

21. The claimant then ceased to be entitled to housing and council tax benefit so that in consequence he inevitably went into arrears with both payments. On 7 June 2001, his landlords, the Family Housing Association served on the claimant a notice to quit his accommodation on account of his arrears. The claimant was thus threatened with homelessness.

22. Indeed, the Family Housing Association issued proceedings against the claimant for possession of his home on 7 September 2001. On 21 August 2001, the Magistrates Court issued a summons requiring the claimant to attend court on 13 September 2001 for non-payment of council tax. As I will explain, orders were subsequently made against the claimant on both of these claims.

National Asylum Support Service ("NASS")

23. In or about April 2001, following the termination of his income support, the claimant applied to NASS for assistance and this application was received on 8 May 2001. In a letter received on 4 June 2001 but dated 14 May 2001, NASS first replied to that request and it sought confirmation that the claimant's income support had been stopped. On 25 June 2001, this information was provided to NASS and a request was made for the claimant's application to be dealt with speedily, as well as for his support to be backdated to 11 December 2000 so that it would cover the arrears of income support and his accommodation costs, which were then being claimed against him. NASS were also informed first, that the claimant had a medical condition which required him to remain for treatment in his existing area and second, that he had accommodation difficulties as a result of his inability to pay rent.

24. On 20 July 2001, the claimant was provided with assistance from NASS for the first time in the form of an emergency voucher and this continued until late February 2002; on that occasion in July 2001, the claimant was also told that accommodation had been reserved for him in Birmingham. He was informed that no alternative accommodation would be provided and he was also provided with a coach ticket to Birmingham for 26 July 2001. On 24 July 2001, Tyndallwoods wrote to NASS referring again to his medical condition and the fact that the claimant had an appointment for an operation on his throat at the local hospital on 30 July 2001. On 26 July 2001, NASS telephoned Tyndallwoods and they said that the claimant would not have to move to Birmingham on 26 July 2001. On 13 August 2001, NASS wrote to the claimant requiring him to move to a different address in his existing area but he refused it as he was still recovering from his operation. On 17 August 2001, Tyndallwoods apparently received a letter from a Home Office Minister to the claimant's Member of Parliament

stating that the Minister was not prepared to intervene as the claimant had an outstanding asylum appeal but I have not seen a copy of this letter.

25. The claimant received vouchers amounting to slightly in excess of £36 per week to meet all of his subsistence and other needs since about 3 September 2001. Prior to that he had received two emergency payments in August.

26. On 22 August 2001, Tyndallwoods requested that the claimant be allowed to remain at his current address because of his state of health following the operation with a letter of support from the claimant's GP. On 3 September 2001, NASS indicated that on the basis of advice received from their medical adviser, they accepted that relocation of the claimant to other accommodation "was not necessary". Tyndallwoods have sought clarification of the position and confirmation that the claimant could continue to reside at his premises. There was no response to this request and they later made further unsuccessful requests for clarification. NASS failed to make any single payment for the accommodation at which he has been living. As I have explained, both the claimant's landlord and the City Council had issued proceedings against him for arrears. On 13 September 2001, the Magistrates Court made a liability order in favour of the City Council against the claimant for non-payment of £618.45 Council Tax. On 5 December 2001, a possession order was made in the County Court against the claimant, but it was suspended, provided that that the claimant paid first £2.70 per week towards the arrears of rent and costs of £1,690.04 and second, the current rent of £47.39 per week.

27. The claimant had no means available to him to meet the debts accrued and outstanding against him including the liability orders imposed by the courts and which have arisen as a result of the system devised and/or operated by the Home Office which precluded him receiving assistance. He has sold most of his possessions while his health and well-being were both adversely effected.

28. On 19 December 2001, NASS informed the claimant that the accommodation offered to him was on a "no choice basis" and that "NASS does not pay rent on property occupied by an asylum seeker, therefore, we cannot offer a backdated payment to [the claimant]". NASS maintained the decision to require him to leave his accommodation despite their own medical advice to the contrary. The asylum appeal of the claimant still had not been processed. On 3 January 2002, the claimant issued the claim form on the present application in which he challenged, among other things, the decisions of the Secretary of State to refuse the asylum claim on non-compliance grounds and to fail to process the claimant's appeal. He also sought to quash the decision of the Secretary of State to refuse to consider the application for exceptional leave to remain and to apply his policy in respect of Libyan National asylum seekers; a declaration was also sought that because of his stated policy in respect of Libyans, claims were also made to recover sums due for asylum assistance. On 7 February 2002, the Home Office withdrew the non-compliance refusal and agreed to give the claimant's asylum claim substantive consideration by an interview in the near future. As I will explain in paragraph 117, this was coincidentally the day on which the Immigration Appeal Tribunal held that in the light of the CIPU bulletin, a Libyan asylum seeker "had inevitably to be treated as a refugee".

Effect of the Grant of Asylum

29. Following the grant of asylum, the claimant's entitlement to income support was restored in or about June 2002 and he has been paid the outstanding back payments. In respect of the housing benefit, this too has been repaid but there is still an outstanding balance of £567.63, which is being deducted from his income support. The possession order has not been set aside and the claimant still has a County Court Judgment against his name and he owes £1,607.44.

The effect on the claimant of his treatment by the Home Office

30. The claimant was forced to sell his possessions during the period. He still owes some money to those whom he borrowed from during the same period. He has other unpaid debts arising from his inability to meet basic costs of living.

31. During the period following the wrongful refusal of his asylum claim, the claimant suffered a serious deterioration in his mental and physical well being which was exacerbated by his living conditions. I will summarise the details at this stage and described them in greater detail in paragraphs 85 to 94 below. He became extremely fearful, there was a radical change in his personality and he became clinically depressed to the point of "thinking about killing himself". The claimant has been treated by his GP for depression and proscribed anti-depressant medication.

32. Dr. Yasin, a Consultant Psychiatrist has diagnosed him as suffering from "a major depressive disorder", "precipitated by the life events and the fear for his life if he is deported" with his assessment being that "on balance of probability, his depression is most likely precipitated by the events which occurred to him following the Home Office decision not to grant him a visa". He concluded that:-

> "The risk of him harming himself remains significant. Due to the severity of depression and his loss of self-confidence, he does not see any future and he feels that he has lost more than a year of his life …".

33. Dr. Yasin has concluded that the claimant "became depressed when he was notified by the Home Office that his visa would not be extended and on hearing that he was to be deported, he became very frightened for his life. Those feelings were compounded by what he perceived as the lack of support and his benefits [being] stopped".

34. This evidence has not been disputed or challenged by the Secretary of State. It is the claimant's case that the Secretary of State for the Home Department is responsible for the circumstances and/or through NASS, the Secretary of State has caused if not contributed to those conditions which have induced in the claimant fear, anguish and distress and so they have reduced his conditions of existence as to amount to degrading treatment contrary to Article 3 of the Convention and/or a violation of his moral and physical integrity, contrary to Article 8 of the Convention.

The nature of the claim and the defences

35. The claimant is seeking damages under the HRA against the Secretary of State on the grounds that the actions or omissions or those of agencies or officials, for which he was responsible have subjected the claimant to humiliating and degrading circumstances contrary to Article 3 of the Convention and/or interfered with his private life, including his moral and physical integrity, contrary to Article 8 of the Convention. He also claims declaratory relief that a number of acts or omissions of the Secretary of State were unlawful.

36. The claimant bases these claims for damages and for declarations on allegations that the Secretary of State or his agents acted unlawfully (1) in refusing the claimant's asylum claim on non-compliance grounds, although the claimant had not received the SEF as it had been sent to him in an envelope, which had been wrongly addressed, (2) in maintaining that decision and in not withdrawing it when he knew that the ground relied on by him for refusing the asylum application was incorrect as the claimant had not received the SEF, (3) in not notifying the Department of Social Security ("DSS") promptly that the claimant's asylum claim was determined on 11 December 2000, with the result that the claimant became liable to repay benefits from that date, even though he did not know of that decision, (4) in maintaining this decision and/or in failing to notify the DSS that the claim was still under consideration and/or that the initial decision was withdrawn, (5) in not processing the claimant's asylum appeal and not transferring it to the appellate authorities promptly or at all, (6) in not meeting the claimant's reasonable accommodation and other expenses and needs and (7) by not considering the application of the claimant to be given exceptional leave remain in the United Kingdom in accordance with his established policy to permit Libyan nationals to remain in this country because of the dangers confronting failed asylum seekers on their return to Libya.

37. The scheme of the HRA means that to succeed on a claim of the kind made by the claimant who is a "victim" within the meaning of the Act, it has to be shown first, that the subject-matter of the complaint falls within the scope of Articles 3 or 8 of the Convention and second, that there has been an interference in the form of an actionable act or omission committed by a public authority, which in this case, was the defendant.

38. This second requirement necessitates finding a breach of an obligation owed by the defendant to the claimant. As I will explain, this is a matter of some complexity where as here the matters complained of comprise largely of omissions because it becomes necessary to identify a positive obligation on the defendant's part. Indeed, insofar as the claimant relies on acts of the defendant, his claim is in essence for an omission as when complaints are made about the defendant committing an act which infringes Convention rights, such as by sending the asylum refusal letter, the basis and thrust of the complaint is a failure by the defendant to realise that the claimant had not received the SEF or to consider the claimant's representations. Thus these matters have to be considered as omissions. There is no specific positive duty imposed on the defendant in the Convention in relation to these matters and so it becomes necessary to ascertain if such a duty can be implied.

39. In response to these claims, the Secretary of State contends first, that the claimant's rights under Articles 3 and 8 of the Convention have not been engaged as the matter complained of did not fall within the ambit of Articles 3 or 8. Second, it is submitted that even if the complaints did fall within Articles 3 or 8, then the claimant can only succeed in obtaining relief in respect of the omissions if, which is not the case here, he could establish that there had been a breach of a *positive* obligation (and not merely a *negative* obligation) owed to him by the Secretary of State. Third, it is alleged by the Secretary of State that in any event the claimant is not entitled to recover any damages because of the restrictive provisions of section 8 of the HRA.

The Issues

40. There has been no dispute on factual issues, but solely on questions of law. It seems desirable to first consider whether the subject-matter of this claim falls within Articles 3 and 8 of the Convention and if so which Article before determining whether a claim can be brought. The issues raised on this application are: -

    (i) whether the subject matter of the claim falls within Articles 3 and 8 of the Convention ("the Articles 3 and 8 issue") (See paragraphs 80 to 125 below)
    (ii) if the subject matter of the complaint falls within Articles 3 or 8 of the Convention, whether a claim can be brought against the Secretary of State in respect of either claim and in particular, whether a breach of a *positive* duty owed by the Secretary of State to the claimant can be established ("the Secretary of State's positive duty issue") (see paragraphs 126 to 173 below) and
    (iii) if so, what remedies should be granted and in particular, whether damages can be awarded against the Secretary of State ("the remedies issue") (see paragraphs 174 to 204 below.

41. I heard this case at the end of my period in the Administrative Court and in the time available for the hearing, I was unable to hear submissions on the quantification of the damages claim. So it was agreed that if the claimant was entitled to damages, the quantification of them should be considered at a further hearing when I will also consider the claim for special damages for bills that he paid, but which he would have been reimbursed for if, according to the claimant, the Home Office had behaved properly. Unfortunately, in the limited time available many of the complex issues raised on this application had to be dealt with speedily, but I am grateful to counsel for their written and oral submissions.

42. After I reserved judgment in this case, relevant and significant judgments were delivered by the European Court of Human Rights ("the Strasbourg court") in E and Others v. United Kingdom (33218/96), by the Court of Appeal in R (on the application of Ullah) v. Special Adjudicator [2002] WECA Civ 856 and by Newman J in Anufrijeva and Anufrijevas v. London Borough of Southwark (4 December 2002, Case number 01/TLQ/1532, but it apparently has no Neutral Citation Number). At my request, counsel helpfully made useful and detailed written submissions on the relevance of these cases to the present claim. No request was made for a further oral hearing to make submissions on the relevance and applicability of these cases to the present claim.

Preliminary Points

43. Before dealing with each of these issues, it is appropriate to consider three significant submissions made by Mr. Sean Wilken for the Secretary of State which if correct, would seriously undermine the claimant's case. First, he contends that principles of English law are relevant in determining the claim for relief of the claimant under the HRA. Second, he alleges that in determining the claim, I should take into account the margin of appreciation allowed to the Secretary of State. Third, he seeks to justify the Secretary of State's actions and omissions under challenge in this case on grounds connected with the allocation of resources. Miss. Harrison for the claimant disputes all these contentions, which I will now consider in turn as well as the issue raised of whether the present claims can be pursued on grounds that they did not arise in the jurisdiction.

(i) Relevance of principles of English Law to the HRA claim

44. Miss. Harrison submits correctly in my view that the HRA creates a new regime for awarding damages in which principles of English common law do not play a definitive part. I do not think that Mr. Wilken disputes that the HRA creates what Stephen Grosz, Jack Beatson QC and Peter Duffy QC describe accurately as "a new statutory right of action" (*Human Rights, the 1998 Act and the European Convention* (2000) paragraph 6.03).

45. This statutory action arises because section 6 of HRA, provides that:-

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right
(6) "An act" includes a failure to act…".

46. This provision has to be read with section 7(1) of HRA which creates, what I will refer to, as "the HRA cause of action" by providing that: -

"A person who claims that a public authority has acted … in a way which is made unlawful by section 6(1) may-

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act".

47. The approach of English courts to Convention rights is dealt with in section 2(1) of the HRA 1998, which provides that: -

" A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any-

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen".

48. I will consider the effect of section 2(1) of HRA in paragraph 56 below, but at this stage it is only necessary to record that although the claims on this application are based on the HRA cause of action, Mr. Wilken has sought to rely on a number of decisions of English courts declaring principles of English municipal law. For example, he cited Bourgoin v Ministry of Agriculture [1986] QB 716 as showing that damages might not be recoverable under the common law for administrative failures. Mr. Wilken also contends that the claimant has a barrier to overcome before recovering damages in the form of the decision of the Court of Appeal in Hatton v. Sutherland [2002] ICR 613, which sets out the limitations under English law of claiming damages for psychiatric harm [21]. Mr. Wilken also sought to derive assistance from W v. Home Office (19 February 1997 C.A. – 96/1105/C), which precludes negligence claims under English law against the Home Office by asylum seekers. Miss. Harrison submits that these authorities on the applicable principles of English law are not relevant to the HRA cause of action, which is based on a separate statutory regime as set out in the HRA.

49. In order to resolve this dispute, "it is the duty of courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed" (Liverpool Borough Bank v. Turner (1860) 30 LJ Ch 379, 381 per Lord Campbell).

50. Applying that approach, it is possible to identify four factors which indicate that the authorities on the applicable principles of English municipal law are not *usually* relevant to the HRA cause of action, which is based on a separate statutory regime set out in the HRA. First, as I have explained, the combined effect of sections 6(1) and 7(1) of the HRA means that the HRA cause of action arises when a public authority has acted or proposes to act in a way *incompatible* with a *convention right*; thus the test for liability is incompatibility with a specified convention right and significantly, the statutory test is not incompatibility with English domestic law. Second, it is difficult to see why English law is relevant when in contrast to section 2(1) of the HRA, which, as I have explained, it specifically requires English courts to take into account convention jurisprudence when considering convention right claims, the HRA does not state that the converse, namely that the English courts, when dealing with Human Rights Act claims are obliged and are required to take account of English case law.

51. Third, the HRA specifically states that when English courts are applying English law, they have to comply with their statutory duty laid down in section 3(1) of the HRA, which is that: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". There is no equivalent or similar provision requiring the English courts to state that convention rights have to be read and to be given effect to in a way which is compatible with English municipal

law. There is no cogent reason why such a provision should be implied and indeed it would be contrary to the purpose of the HRA.

52. The fourth factor of relevance in determining whether HRA claims have to take account of English jurisprudence is that section 8(1) of the HRA claim does, as I will explain in paragraphs 175 and 179 below, require English courts to *specifically* and *expressly* consider if it has power under English law to award damages but that provision would not be necessary if the HRA claims merely applied English law in its entirety

53. Thus, the approach of the English courts to principles of English Law when considering a HRA cause of action must be radically different from that adopted by them on a conventional English law claim because when, as here, the claim under consideration was brought under the HRA cause of action as in that case, the English court is primarily concerned with Convention jurisprudence, in order to see if the Secretary of State has acted "in a way which is incompatible with the claimant's Convention rights" (section 6(1) of HRA). This exercise entails in the first instance looking to Strasbourg jurisprudence but English case law may continue to be of critical importance in limited cases. For example, there might be English cases determining the extent or construction of Convention rights; indeed the recent decision of the Court of Appeal in R (Ullah) v. Secretary of State ([2002] EWCA Civ. 856) is a particularly apposite example as I will explain in paragraphs 76 to 78 below. English law may also be determinative of an aspect of a claim based on the statutory right of action because the HRA specifically provides so. An instance is s8 (2) of the HRA, which provides that damages "may only by a Court who has power to award damages or the power to order the payment of compensation in civil proceedings"; this provision will require the English courts to apply English law to determine if it has such power.

54. Apart from these examples of some exceptions to the general rule, English law is of no binding force because the statutory HRA claim arises under a separate and discreet regime based on Convention jurisprudence. English law precedents may be of interest to courts dealing with Convention rights, but in two cases they will be of no assistance as they are overridden. First, decisions on English law will not be of any relevance where they have been overridden by a statutory provision. Thus, authorities on the liability of the State for administrative errors in English law – such as Bourgoin and W referred to in paragraph 48 above are in any event overridden by sections 6(1) and 7(1) of HRA, which creates liability in suitable cases for acts and omissions of the Home Secretary for administrative errors and so they cover omissions by public authorities.

55. Second, English case law is of no assistance to an English court when there is "clear and constant jurisprudence" of the Strasbourg court "in the absence of some special circumstances". As I have explained in paragraph 47 above, section 2(1) of the HRA requires that English courts "must take into account", among other things, decisions of the Strasbourg court.

56. Lord Slynn of Hadley in R (on the application of Alconbury Developments Limited) v. Secretary of State for the Environment [2001] 2 WLR 1389, stated the well-known principle which I have to and will apply, where he says that:-

> "Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions of the European Court of Human Rights it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court, which is likely in the ordinary case to follow its own constant jurisprudence" [26].

57. The Hatton limitation will not apply if it is inconsistent with "clear and constant jurisprudence" of the Strasbourg court "in the absence of special circumstances". This is an issue which is best determined in the context of the damages issue which I will return to consider in paragraph 181 below.

58. The present claim is based on the HRA cause of action and therefore when considering the requirements of and defences to it, English law is not relevant, except in the way that I have indicated. Many English cases relied on by Mr. Wilken fall into this category and thus they do not assist the defendant's cause. The guiding principles for English Judges in determining HRA causes of action are to be found in decisions of the Strasbourg court and the other bodies referred to in section 2(1) of HRA, especially if there is "clear and constant jurisprudence" from those bodies and none of the exceptions to which I have referred applies.

(ii) Deference

59. Mr. Wilken contends that the concept of deference is now well established in cases before the domestic courts and this means that this court should exercise due deference so as to be slow to impugn the Secretary of State's decisions under challenge in this case. In support of this submission, he relies principally on four factors, namely, first that the administration of asylum decisions raises issues, which are uniquely within the Secretary of State's knowledge and discretionary area of judgment; second, that the allocation of resources is a question of social and economic policy; third, that there is an overlap between social, resource and immigration issues in which the court should be extremely to slow to intervene and finally that these issues are not ones on which the courts do actually have specific expertise unlike, say, the right to fair trial.

60. At the heart of the defendant's case is the submission that this court should show deference to the democratic powers of the State, namely the decisions of the Secretary of State. Mr. Wilken refers to the well-known statement of Lord Hope of Craighead in R v. Director of Public Prosecutions ex parte Kebilelne [2000] 2 AC 326, where he explained that: -

> "In some circumstances, it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention .. It will be easier for it to be recognised where the issues involve questions, a social or economic policy much less so where the rights of high constitution importance or of a kind where the courts especially well placed to assess the need of protection" [page 381 B and D].

61. Mr. Wilken also relies on the analysis of Laws LJ in the International Transport Roth GmbH v. Home Secretary [2002] 3 WLR 344 where he sets out four principles stating how the municipal courts should approach the issues of deference:-

(a) "The first principle .. is that greater deference is to be paid to an Act of Parliament than to a decision of the Executive or subordinate measure" [83].

(b) "The second principle is that there is more scope to deference "where the Convention itself requires a balance to be struck much less when the right is stated in terms which are unqualified"" [84].

(c) "The third principle is that greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility and less when it lies more particularly within the constitutional responsibility of the courts" [85].

(d) "The fourth and last principle is very closely allied to the third … and indeed may be regarded as little more than an emanation of it … It is that greater or lesser deference will be due according to whether the subject-matter lies more readily within the actual or potential expertise of the democratic powers or the courts …In the present case, I have no doubt that the social consequences which flow from the entry into the United Kingdom of clandestine illegal immigrants in significant numbers are far-reaching and in some respects complex…. the assessment of these matters (and therefore of the pressing nature of the need for effective controls) is in my judgment obviously far more within the competence of governments than the courts" [87].

62. Mr. Wilken then submits that these principles lead to the overall conclusion that there must be deference given to the conduct of the Secretary of State of which complaint is made on the present application. I am unable to agree for two reasons. First, deference is shown to a *positive* or *conscious* decision by the Secretary of State not to act, which has frequently been taken after balancing or considering competing interests. I find it difficult to understand how the concept of deference could apply to, say, a claim that a citizen's Article 6 rights had been infringed by an accidental but negligent *failure* to arrange a trial of a criminal charge within a reasonable time as a result of an administrative error of *failing* to enter the name of the case in an appropriate list and then of repeatedly accidentally but negligently failing to check that list.

63. In this case, however, the matters complained of by the claimant are, in the main, omissions of the Home Office, such as the failure of the Home Office officials to send the SEF to the correct address of the claimant, their failure to take into account the matters set out in the CIPU Bulletin relating to the fate of asylum seekers on their return to Libya and their failure to process the claimant's appeal because it seems from a letter from the claimant's solicitor of 25 June 2001, to which I have referred in paragraph 2 above that there had been serious administrative errors to his files. Of course, such omissions can be the result of a balancing exercise but although evidence has been filed by this defendant on other issues, no evidence has been filed on his behalf showing that such a balancing exercise had been carried out save possibly in respect of one possible matter to

which I will refer in the next paragraph. This failure by the defendant to serve evidence on this issue while dealing with other matters is of substantial importance as the Secretary of State would obviously have known if such a balancing exercise had taken place. Thus, I am entitled, if not obliged, to infer from the absence of any such evidence adduced on his behalf that such evidence does not exist and that in fact no balancing took place.

64. I mentioned in the last paragraph that there *might* have been a balancing act carried out by the Home Office as it is to be noted that in a letter to the claimant's Member of Parliament from Ms. Angela Eagle MP, then a Home Office Minister dated 21 November 2001, it was said that the policy in the CIPU Bulletin "was not in place at the time of the [claimant's] application" but that as at the date of that letter the claimant "might be eligible to benefit from the limited exceptional leave policy subject to routine procedural checks". The letter then continues, with my emphasis added, "however a refusal on the grounds of non-compliance would not be affected by such an exceptional leave policy as it *would be considered* that the [claimant] had failed to make a prompt and full disclosure of the facts relating to his asylum application". The letter does not specifically state that a balancing exercise had *actually* been conducted by the Home Office as it uses words such as "would be considered"; in any event the Home Office officials had by the time of sending this letter received the necessary relevant information from the claimant. Indeed, they had received this information ten months earlier as it had been sent on 17 January 2001, as well as having received it in his grounds of appeal sent on 21 February 2001. Nevertheless, I am prepared to assume that a balancing exercise had occurred, although the Home Officials must have known by the time when the refusal of asylum application was communicated to the claimant that he had not received the SEF, but that he had later supplied all relevant information in written form. This indicates that any balancing exercise would be irrational.

65. Second, the four principles set out by Laws LJ do not provide much assistance for the Secretary of State in his claim that his conduct in dealing with this claimant is entitled to judicial deference. He is unable to claim greater deference under the first principle because the complaint of the claimant does not concern an Act of Parliament but a decision of a member of the Executive, namely of the Secretary of State. Nor does the second principle of Laws LJ assist the Secretary of State as he was not required to carry out a balancing exercise insofar as the claim is made under Article 3 which is an unqualified right nor it is suggested here the Secretary of State that he did actually rely on the reservations in Article 8(2). So no balancing was required on the facts of this case under that Article.

66. In addition, I do not think that the Secretary of State's claim for deference can derive much assistance from Laws LJ's third principle because the subject matter in this case is not peculiarly within "a particular minister's" constitutional responsibility, such as defence. Finally, the Secretary of State is unable to benefit from the fourth principle because the subject matter, namely the handling of the asylum support application of the claimant does not lie "more readily within the actual or potential expertise of the democratic powers", as it is more of a quasi-judicial activity.

67. In support of his claim for deference, Mr. Wilken also relies on the approach in R (on the application of Farrakhan) v. Home Secretary [2002] 2 QB 1391, in which the Master of the Rolls giving the judgment of the court agreed with a submission that it was "appropriate to accord a particularly wide margin of discretion to the Secretary of State" [71]. Miss. Harrison says that the reasons relied on by the court in that case do not apply here.

68. The Master of the Rolls had said that:-

> "71. First and foremost is the fact that this case concerns an immigration decision. As we have pointed out, the European Court of Human Rights attaches considerable weight to the right under international law of a state to control immigration into its territory. And the weight that this carries in the present case is the greater because the Secretary of State is not motivated by the wish to prevent Mr. Farrakhan from expressing his views, but by concern for public order within the United Kingdom.
> 72. The second factor is the fact that the decision in question in the personal decision of the Secretary of State. Nor is it a decision that he has taken lightly. The history that we have set out at the beginning of this judgment demonstrates the very detailed consideration, involving widespread consultation, that the Secretary of State has given to his decision.
> 73. The third factor is that the Secretary of State is far better placed to reach an informed decision as to the likely consequences of admitting Mr. Farrakhan to this country than is the court.
> 74. The fourth factor is that the Secretary of State is democratically accountable for this decision. This is underlined by the fact that section 60(9) of the 1999 Act precludes any right of appeal where the Secretary of State has certified that he has personally directed the exclusion of a person on the ground that this is conducive to the public good.

69. Miss. Harrison points out correctly in my view that those four factors do not directly relate to the claimant's complaints raised on this application. The first Farrakhan factor is dependent upon the relevant decision having been made in order to control immigration into its territory but in this case, any decision made to refuse entry and to issue removal directions was not a result of that policy but it was based instead on two serious factual errors, namely that the claimant had received the SEF and that he had not provided information, which he had actually done before the refusal letter and the removal directions were sent to him in February 2001. It is not suggested that the approach of the Home Office on these matters or in respect of its failure to process the claimant's appeal can be justified because of the need to control immigration. Additionally, those decisions were not based on public order considerations.

70. There is no evidence that the Home Secretary himself made the decision relating to the claimant and so the second Farrakhan point does not apply. Although in many cases, the Secretary of State is better placed than the courts to reach an informed decision, this would not appear to be the position here as there was no balancing exercise and, in any event, the court was able to do it as it did not raise any factors requiring his expertise. The fourth Farrakhan factor does not apply as section 60(9) of the 1999 Act is of no relevance to any decision made concerning the claimant.

71. Thus, at best the courts would only have to show very limited deference to the Secretary of State on the particular facts of this application. I ought to add that, as I will explain later, even if I am wrong and a substantial degree of deference has to be given to the Secretary of State's decisions under challenge on this application, this deference will not, in the event, alter the decision at which I would otherwise have arrived.

(iii) Allocation of resources

72. Mr. Wilken frequently submitted that the allocation of resources could and did justify the Secretary of State's conduct of the claimant's applications and of his appeal from conduct in respect of the claimant's application for asylum and his appeal. I have been unable to find any evidence in this case, which explains which resources were restricted or which show that this factor had any effect whatsoever on the way in which he handled the claimant's applications for asylum and other relief. In the absence of any such evidence, this is not a matter in respect of which I can or ought to take judicial notice. Thus, I do not think that it is appropriate to attach any importance to any submission that the conduct of the Secretary of State under challenge can be justified on any ground connected with the allocation of resources. In any event, as I will explain later, even if I am wrong and the allocation of resources might have effected the Secretary of State's conduct, this factor would not alter the decision at which I have arrived.

(v) Territoriality

73. Section 6(1) of the HRA provides, as I have explained, that it is unlawful for a public authority to act in a way, which is incompatible for the Convention rights. This provision has to be read in the light of Article 1 of the Convention, which requires the contracting States to secure to everyone "*within their jurisdiction"* the Convention rights and freedoms. Thus, the question is whether the words "within their jurisdiction" restrict the obligation of the British Government and thus the Secretary of State under the HRA. The importance of this is that the claimant is relying to a limited extent on his rights being threatened or being infringed by the refusal of his asylum application and the implementation of the removal instructions which would have resulted in him being sent to Libya with the result that his rights under the Articles 3 and 8 of the Convention would be infringed. Of course, the main part of the claim is that the claimant has suffered psychiatric injury and financial loss in this country.

74. In Soering v. United Kingdom [1989] 11 EHRR 439, the Strasbourg Court was determining an application by a German national detained in the United Kingdom pending extradition to the United States of America to face charges of murder in the Commonwealth of Virginia; if he had been convicted there, he would have faced the death penalty and the accompanying inevitable rigours and stresses that follow from being placed in "death row". According to the claimant, the prospect was so severe that extradition would violate his Article 3 right not to be subjected to inhuman or degrading treatment.

75. The Strasbourg Court held that where extradition exposes an individual to a real risk of being subjected to inhuman or degrading treatment or punishment prescribed by Article 3, then Article would be violated. It was explained in paragraph 91 that:-

> "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. Insofar 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 a direct consequence the exposure of an individual to proscribed ill-treatment".

76. The effect of this case was recently considered by the Court of Appeal in R (on the application of Ullah) v. Special Adjudicator [2002] EWCA Civ 856, in which Lord Phillips of Worth Matravers MR giving the judgment of the Court of Appeal said [29] of, inter alia, the passage that I have just quoted from in Soering that:-

> "It is often said that the effect of the passages that we have quoted is to give to Article 3 'extra-territorial effect'. This phrase is not wholly apposite. The act, which infringes Article 3, is the act of extradition, which takes place within the jurisdiction in relation to an individual who is within the jurisdiction. But the act of removal does not itself constitute inhuman treatment. It is the foreseeable consequences of the act, which the Court held engage Article 3. It seems to us that this reasoning involved a significant extension of the ambit of the Convention. Had Mr. Soering been extradited, tried and acquitted by the Virginia Court we do not find it easy to see how Article 3 would have been infringed. The principle applied by the Court appears to have been that it is a breach of the Convention to take action in relation to someone within the jurisdiction which carries with it the real risk that it will expose that person to infringement of his Article 3 rights outside the jurisdiction".

77. This approach has the effect of constituting what the Master of the Rolls described in that case as "an extension of the scope of the Convention and one which is at odds with the principle of territoriality expressed in Article 1" ([47]). He explains that the reason for this extension is that the Convention is a "living instrument" and that "the extension no doubt reflects the fact that it would affront the humanitarian principles that underlie the Convention and the Refugee Convention for a State to remove an individual to a country where he or she is foreseeably at a real risk of being seriously ill-treated" (ibid). This means that for the purpose of his Article 3 claim, the claimant can rely on extra-territorial complaints.

78. The Master of the Rolls observed that with the possible exception of Bensaid, this extension of territoriality has been restricted to Article 3 cases and that while the Strasbourg court has contemplated the possibility of further extensions, this has not yet occurred. The Court of Appeal in Ullah did not consider that it ought to take that step but it did acknowledge that "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 the jurisdiction and the situation where Article 8 rights are likely to be engaged solely on the ground of the treatment that the individual is likely to be subjected to in the receiving State" [46].

79. Applying those principles to the present case, the claimant can only rely on Article 8 insofar as it affects his rights within this jurisdiction. The case for the claimant is that he was in this country when he suffered as a result of the defendant's failures in the way alleged in his claim. In his written submissions, Mr. Wilken does not suggest Ullah precludes the claimant from pursuing this case. Thus, insofar as his mental instability in this country is jeopardised, the claimant is able to rely on Article 8 as "the preservation of mental stability is in that context an indispensable pre-condition to an effective enjoyment of the right to respect for private life" (Bensaid v. United Kingdom (2001) 33 EHRR 10 [47]). I now turn to consider whether the claims fall within the ambit of Articles 3 and 8 of the Convention.

I) THE ARTICLES 3 AND 8 ISSUE

80. Before analysing the requirements of Articles 3 and 8, it is appropriate that I should now deal with a further and important submission of Mr. Wilken, which was that there is no decided case that demonstrates that a failure on the part of the decision-maker to change a decision which leads to a depressive illness is a breach of Article 3 or 8 and that therefore the present claim must fail. I am unable to accept that submission because every decision of

the Strasbourg Court on Articles 3 or 8 is fact-sensitive and not surprisingly there is no decision of that Court dealing with the specific treatment accorded to the claimant in this case. Indeed, if there had to be a previously decided case identical to the specific allegation in any particular case before a breach of Convention rights could be established, it is unlikely that there would be many instances in which breaches on Convention rights could be established and thus the Convention would cease to be "a living instrument". The mere fact that there is no precedent for the complaint of the claimant is irrelevant because the critical issue in this case is whether the conduct complained of reaches the threshold to fall within Articles 3 and 8 of the Convention, which is the issue to which I must now turn.

Does the claim fall within Article 3?

The Law

81. Article 3 of the ECHR provides, insofar as is material to the application of the claimant, that "No-one shall be subjected to … inhuman or degrading treatment." It is important to bear in mind a number of relevant established principles determined by the Strasbourg court and accepted by both counsel concerning the ambit of Article 3, which are that:-

(i) the prohibition contained in it is an absolute one, permitting of "no qualification or excuse" (R. (Wilkinson) v. MRO Broadmoor Hospital [2002] 1 WLR 419 [77]).

(ii) "ill-treatment must attain a minimal level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental aspects and, in some circumstances, the sex, age and state of health of the victim" (A v. United Kingdom (1998) 27 EHRR 611 [20])

(iii) in determining whether treatment is "degrading" within the meaning of Article 3, the Court has to have regard to whether its objective is to humiliate and deface the person concerned as that is a factor to be taken into account, but the absence of any such intention "cannot conclusively rule out a violation of Article 3" (Peers v. Greece (2002) 33 EHRR 51 [74])

(iv) treatment can be described as "inhuman" if it "causes intense physical or mental suffering" (Ireland v. United Kingdom (1978) 2 EHRR 25)

(v) the facts constituting violation must be proved beyond a reasonable doubt, but it may be proved by inferences or unrebutted presumptions of fact" (Ireland v. United Kingdom (1978) 2 EHRR 25 [161])

(vi) the "uncertainty, doubt and apprehension" experienced by a close relative of a disappeared person must only reach the minimum level of severity to constitute inhuman treatment (Kurt v. Turkey (1998) 27 EHRR 373 [130 to 134])

(vii) deterioration in the mental health of a person is capable of constituting inhuman or degrading treatment if it reaches the appropriate level of severity. In Arts v. Belgium ((2000) 29 EHRR 50), the European Court did not uphold a finding by the Commission of an Article 3 breach because of the acute anxiety caused by the claimant's conditions or detention expressly on the basis that "there is no proof of deterioration of [the claimant's] mental health" [66]

(viii) the test to be applied before finding a breach of Article 3 is becoming stricter, and significantly the Strasbourg court has observed that:-

> "having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present day conditions", the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably, requires greater firmness in assessing breaches of the fundamental values of democratic societies" (Selmuni v. France (2000) 29 EHRR 403 [101]).

(ix) the kinds of ill-treatment which fall within the scope of Article 3 are very serious as "the [Strasbourg] Court's case law refers to ill-treatment that attains a minimum level of severity and involves actual bodily injury or *intense* physical or mental suffering" (Pretty v. United Kingdom (2002) 35 EHRR 1 [52] with my emphasis added).

82. These principles establish "clear and constant jurisprudence" and as Lord Slynn said as I have already explained in paragraph 56, I should and will apply these cases. It is significant that, unlike in the case of Article 8, there are no reservations in Article 3 of the kind set out in Article 8(2). This indicates clearly that breaches of Article 3 are regarded as being so serious that they cannot be justified or excused with the consequence that Article 3 is

only engaged in exceptional cases in which a claimant has adduced evidence that reaches the required high threshold of inhuman treatment.

83. Three important conclusions emerge about Article 3 and they are that: -

a) the proper approach to Article 3 is to read it so that it is only engaged where there is *so serious* a case of inhuman treatment that, unlike Article 8 breaches, it is incapable of being justified by the State as being in accordance with law and necessary in a democratic society in the interests of national security, public safety or for the well-being of the country, or for the prevention of disorder or crime, for the protection of health or morals or for the protection of rights and freedoms of others.

b) in order to ascertain if inhuman or degrading treatment reaches that threshold entails considering all the circumstances of the alleged inhuman treatment, such as the nature and context of the treatment, its duration, its physical and mental aspects but for this treatment to reach the Article 3 threshold, it is not necessary for a claimant to show an intention by the State to achieve that end. In considering all the circumstances, it is necessary for a balancing operation to be conducted in relation to all elements of the treatment accorded to the claimant to determine whether the treatment complained of reaches the requisite threshold.

c) the focus of the inquiry concerning whether there has been a breach of Article 3 has to be substantially but not exclusively on the *nature* of the treatment suffered by the claimant as the use of the words in Article 3 ("torture, inhuman or degrading treatment") shows the significance of the treatment rather than the consequences for the claimant. This wording is in contrast, as I will explain with the wording of Article 8, which requires significant but not exclusive consideration of the *effect* of the alleged offending conduct on the claimant ("respect for his private and family life, his home and his correspondence").

84. Miss Harrison for the claimant submits that the treatment of the claimant at and after the time when his claim for asylum was refused means that Article 3 is engaged. The factual basis for her submission was to focus not only on the conduct of the Home Office, but also on the evidence relating to the effects on the claimant of the Home Office's treatment. So I turn now to consider the evidence on this issue which I have derived from the witness statement of the claimant and a report of Dr. K.H. Yasin, a Consultant Psychiatrist at Rossendale Hospital, neither of which are at present challenged or are disputed by the defendant. I can and will assume that they are correct.

Effects on the claimant of Home Office's conduct

85. To understand the background, it is necessary to bear in mind the facts that in the two year period before his departure from Libya, the claimant, who had previously worked as a salesman, was in hiding and that he was frightened for his life as he was wanted by the Libyan authorities because of his political views. The claimant has explained that when on 14 February 2001, he received the letter from the Secretary of State of 11 December 2000, stating that he had been refused asylum and that he was going to be deported, he believed that he would be handed over to the Libyan authorities. He became very frightened for his life and he has said that it was difficult to describe the extent of his feelings.

86. The claimant said that after he received those letters from the Home Office, he was unable to get out of bed for the next two weeks because of depression and anxiety. His evidence was that his life changed altogether as a result of that Home Office letter and that he did not eat properly. Apart from not leaving his home after he received the letter, the claimant cried a great deal, slept badly and lost interest in almost everything. The claimant became and continued to be depressed. He had previously enrolled on courses, but after the Home Office's letter, he could not continue.

87. Between February 2001 and December 2001, he lost 8 kilograms of weight because he did not eat properly. His sleep pattern was very irregular and sometimes he lay awake until 4.00 or until 5.00 a.m. because he was unable to sleep and on a number of occasions he would sleep for two hours and then be awake until he could sleep again. The consequence of that was that even if he managed to sleep, on the following day he did not feel fresh and he felt tired and fatigued with loss of energy. In consequence, the claimant had poor powers of concentration and he could not read or work. More importantly, the claimant was ridden with suicidal thoughts and frequently stayed at home for long periods without doing anything. He rarely left his home and even if he did, he felt frightened that someone would pick him up and deport him. The claimant considered that he had lost his drive to do anything and that this was continuing until the time when Dr. Yasin, a consultant psychiatrist, saw him in May 2002.

88. At the end of July 2001, the claimant had an operation on his throat because he had a constant cold for about eight to nine months, which was a problem he had only experienced after he had come to the United Kingdom. The operation has not solved this particular problem and he needed further medical advice on this.

89. In addition, as I have explained, he obtained a one-bedroom flat rented out by the Family Housing Association. As it was unfurnished, the claimant had to buy his own furniture which he did with money that he had borrowed from the community, but when his support stopped, he sold all his furniture in the bedroom and the living room, as well as his fridge, washing machine and cooker. In consequence, the only thing that was left in the claimant's flat was the carpet, on which he slept. As he did not have anything to cook on, he ate cold food. Even though he sold so many of his possessions, he was unable to pay the debts either to friends or organisations to those he owed money.

90. The claimant also owed debts to the Benefits Agency, to the Housing Association, to the Local Authority for Council Tax and to various utility companies. He does not have possessions. Furthermore, because of his inability to concentrate or to pay bus fares, the claimant could not continue with a computer course and an English course that he was doing at college. He describes himself as having lost confidence because of everything that has happened to him in the United Kingdom and that "is completely different to how I used to be".

91. Dr. Yasin, the Consultant Psychiatrist, who examined the claimant, said that there was no family history of mental illness and that the claimant had described himself as having previously been a very successful person who was known locally and who was active and who had close friends. Dr. Yasin came to the conclusion that the claimant's moods considered objectively and subjectively were depressed and he noted that during his examination the claimant was tearful at times. The claimant appeared to Dr. Yasin to be preoccupied by his problems, but there were no hallucinations on the claimant's part evident during the interview.

92. The conclusion of Dr. Yasin was that the claimant had "symptoms of major depressive disorder using the DSM4 Diagnostic Criteria Code 296. He had "depressive moods most of the time" and had " lost pleasure in all day-to-day activities". Dr. Yasin noted that the claimant, who had poor concentration, considered himself worthless and was thinking about suicide. It was pointed out by Dr. Yasin that the claimant had no previously psychiatric history and nor had any of his family and that the symptoms which Dr. Yasin found were precipitated by his fear for his life and being deported.

93. Dr. Yasin thought that the claimant ought to increase the number of anti-depressants he was receiving from his general practitioner and that he ought to receive counselling. He did not believe that medication alone was going to alleviate all the claimant's problems. He believed that if the claimant was deported, his conditions would get worse as the claimant perceives that his life would be in danger, but if his case is looked at favourably, Dr. Yasin did believe that his condition would improve but not suddenly. The view of Dr. Yasin was that on the balance of probabilities, the claimant's depression was most likely precipitated by the events, which occurred following the decision of the Secretary of State not to grant him a visa. He thought that the risk of the claimant harming himself remained significant due to the severity of his depression and his loss of self-confidence, the claimant does not see any future and he felt that he has lost more than a year of his life, as he was unable to study or do anything.

94. It was considered significant by Dr. Yasin was that the claimant became depressed when the Home Office notified him that his visa would not be extended and on hearing that he was to be deported, he became frightened for his life. Those feelings were, according to Dr. Yasin, compounded by what he perceived as lack of support and his benefits being stopped. The claimant continues to be treated for depression and receives anti-depressant medication. He is under the care of a psychiatrist department at a local hospital and he has an appointment there each month. It seems from a witness statement made by the claimant's solicitor in November 2002 that although a long-term prognosis for the claimant has not been obtained, the claimant's GP is hopeful that with appropriate medication and reviews by his General Practitioner and his psychiatrist "that the outlook within the next 10-12 months should be optimistic".

The argument on the claimant's Article 3 claim

95. As I have explained, it is the nature and context of the alleged inhuman treatment which determines whether the matters complained of fall within the ambit of Article 3. The thrust of the case for the claimant is that he was devastated by the news that his asylum application had been rejected as he became fearful for his life because he believed that he would be handed over to the Libyan authorities. His case depends on the refusal of the asylum claim and his right to remain in this country as well as on financial matters.

(i) No right to remain

96. Miss. Harrison contends that the refusal of asylum to the claimant by the letter of 11 December 2001 when considered in the light of the treatment accorded in Libya to failed returned asylum seekers shows that the claim falls within Article 3 or at least Article 8 as the Strasbourg court has determined that "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 [state stipulating the *removal* to safeguard him or her] to safeguard him or her against such treatment is engaged in the event of *expulsion*" (Chahal v. UK (1996) 23 EHRR 413 [80], with my emphasis added). Not surprisingly, she relies on the CIPU Bulletin, which states that an Article 3 claim based on the removal to Libya of a failed asylum seeker "is likely to succeed". The nature of the risk and certainty of the claimant being handed over to Libya is a matter of great importance, which I must now consider.

97. In this case, it is very significant that the claimant was *not* and has *never been* expelled but he was merely notified that his asylum claim had been refused and he was served with removal directions on "at a date and at a time to be notified". Furthermore, he was appealing against that decision, which was not being enforced and no effort was made to remove him from this country. So the claimant was invoking the remedies available to him to challenge the decision to refuse in respect to grant him asylum which was to appeal to the Special Adjudicator. Thereafter he could seek in certain circumstances to challenge that further decision if dissatisfied with it. In addition, the claimant was receiving assistance from his Member of Parliament, who as I have explained was seeking to persuade the relevant Minister at the Home Office to grant asylum to the claimant. So in this case, the claimant is in a different position from a person who has been expelled, as he still retained the prospect that the refusal of his application for asylum would be reversed on appeal or in subsequent legal proceedings or as a result of political pressure from a Member of Parliament. The position of the claimant was not the same or very similar to that of a person who has been expelled and who knows that he will *definitely* have to leave the country and return to Libya where he will be subject to the Libyan regime for seriously mistreating failed asylum seekers. In sharp contrast, the claimant merely had the worry that he *might* suffer this fate. This concern must have been greatly alleviated by the prospect that the refusal of the claimant's application for asylum might be overturned in one of the three ways that I have outlined.

98. To my mind, it was a very regrettable error of the Home Office to refuse the claimant's application and I do not belittle the claimant's worry and concern. Dr. Yasin considers that his depression was most likely precipitated by the events triggered off by the refusal letter and the claimant summarises his claim in paragraph 11 of his witness statement by saying that:-

> "My whole life is on hold at the moment because of the decision to refuse my asylum application and the fact that I cannot do anything about my appeal".

99. In addition, there is the additional and justifiable complaint about the failure of the Home Office to process the appeal. There is clearly a world of difference between, on the one hand, the position of a person who has been refused asylum and whose appeal is being dealt with expeditiously and, on the other hand, the position of somebody like the claimant, whose appeal was lodged in February 2001 and in respect of which nothing had happened 11 months later especially with no acceptable explanation or justification for the delay being put forward by the defendant. I have already explained in paragraph 2 that the claimant's solicitors of 25 June 2001 shows that they were told about why this delay had occurred and that shows serious errors by the Home Office. To my mind, this delay was bound to cause the claimant excessive anxiety, especially when it is combined with the lack of financial help so that, in the words of Dr. Yasin the claimant's "whole life is on hold at the moment .. also because of the lack of support that he had received since he was no longer to benefit". This anxiety and the symptoms of major depressive disorder described by Dr. Yasin in paragraph 92 above are factors in favour of upholding the Article 3 claim, but this point has to be considered in the light of all the circumstances.

(iii) Destitution and financial pressure

100. Clearly, exposure to destitution might in appropriate cases violate a citizen's Article 3 rights and so it is necessary to consider whether this was the claimant's position. In this case, the claimant has obviously had a very difficult time as he had to sleep on his carpet and to eat cold food because he had nothing on which to sleep or to cook. It seems that although the claimant did not receive financial assistance from public authorities, he was able to obtain assistance from friends and from his local community. The claimant also, as I have explained, owed sums to various public bodies and he had two judgments entered against him. These financial problems are mentioned in Dr. Yasin's report as being factors which had affected the claimant or had been responsible for his present condition and I regard them as important. He also had the worry that the refusal of his asylum application might not be reversed.

101. Although this is a very undesirable position in which the claimant was placed, in the light of some factors to which I must now refer, it does not by a small margin in my view either by itself or together with the other factors relied on constitute conduct, which reaches the Article 3 threshold. It must not be forgotten that although the claimant clearly had financial worries and experienced understandably great anxiety about his prospects of being returned to Libya, there are seven additional points to those I have mentioned suggesting that he did not suffer "degrading treatment" of the kind required to reach the Article 3 threshold. First, the claimant did have a home in which to live albeit with no furniture. Second, he had food to eat, albeit that he had to eat it cold. Third, it appears that a significant consequence of the claimant's impecuniosity was that he was unable to buy new clothes for a year, but it is not suggested that he did not have any or any suitable clothes to wear or that he could not buy the food that he needed. Fourth, it is significant that the claimant did not have to endure harassment or pressure of any kind from the British authorities who did not take any steps to deport him. Fifth, the claimant was advised by expert immigration solicitors and so he must have known that he would not be deported until he had exhausted his substantial rights of appeal. Sixth, the claimant must have known from those solicitors about his rights of appeal and the possibility that either the appeals or political pressure would enable him to remain. Finally, there is no evidence of any pressure or threats to the claimant or his family from the Libyan authorities while the claimant was in this country.

102. Mr. Wilken points out that as was explained in Pretty v. United Kingdom (supra [50]), that Article 3 "has been most commonly applied in contexts in which the risk to the individual … emanated from intentionally inflicted acts of State agents or public authorities". In the present case, there is no suggestion that the matters complained of by the claimant arose from any intentionally inflicted acts or omission of the defendant but they are a result of the negligence by the Secretary of State's officials. As I have explained, the absence of such intention does not in itself mean that Article 3 might not be relevant (see paragraph 81 (iii) above) but its absence does not assist the argument for the claimant that his Article 3 rights have been infringed and its absence is a factor to which I can attach some significance. If I had been in any doubt, which I am not, about whether the claimant's Article 3 rights had been infringed, I would in the particular circumstance of this case have regarded the absence of an intentionally intended act by the defendant fatal to the claim that Article 3 rights had been infringed.

103. Anybody who had read the evidence relating to the plight of the claimant between the time he received the refusal of asylum letter on 14 February 2001 and when he was eventually granted the right to enter in May 2002 must feel sympathy for him but for the reasons that I have explained the treatment accorded to him does not quite show that his claim reaches the high threshold needed to show that it falls within the scope of Article 3. I must now consider whether it falls within of Article 8 of the Convention.

Does the claim fall within Article 8?

The Law

104. Article 8 of the Convention provides that: -

> "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 in accordance with the law and necessary in a democratic society in the interests of national security, public safety for 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 rights and freedoms of others".

105. Mr. Wilken does not rely on the reservations in paragraph (2) but he submits that the present claim does not fall within Article 8 as he contends that not granting asylum does not amount to a breach of privacy or interfering with family life. In determining whether the subject matter of the present claims fall within Article 8, it is necessary to refer to a number of "clear and consistent" principles that have emerged from Strasbourg Court decisions and describing the extended meaning of the "right to respect for his private life" and they are that it:-

> "includes a person's physical and psychological integrity: the guarantee offered by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in relation with other human beings" (Botta v. Italy (1998) 26 EHRR 241 [32]).

106. Significantly, more recently it was said that "mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity.. the preservation of mental stability that is in that context an indispensable condition to effective enjoyment of the right to respect for private life" (Bensaid (2001) 31 EHRR 1 [47]). As I explained earlier in paragraphs 59 to 71 above, I do not consider that the defendant was on the facts of this case entitled to a margin of appreciation but nevertheless I will assume in approaching the issue of

whether the claimant's Article 8 rights were contravened that the defendant is entitled to a substantial margin and deference to his decision.

107. There have been two recent decisions of High Court judges when Article 8 claims have been considered relied on by counsel so and it is now necessary to determine if they assist in determining this issue. I will consider first the decision of Sullivan J in Bernard v. London Borough of Enfield ((2002) EWHC 2282 Admin – 25 October 2002) and then that of Newman J in Anufrijeva and Anufrijevas v. London Borough of Southwark (4 December 2002 Case number 01/TLQ/1532 - no Neutral Citation Number has been given).

The arguments on the applicability of Article 8 to this claim

108. Miss. Harrison relies on the recent case of Bernard v. London Borough of Enfield ([2002] EWHC 2282 Admin – 25 October 2002), in which Sullivan J concluded that the unsuitable accommodation in which the claimant lived with her family reduced her conditions of life so as to violate Article 8 because it denied her "dignity as a human being" [33] because she was unable to participate in the life of her family and she was left housebound and lacking privacy, having to endure undignified circumstances. The matters complained of by the claimant were caused by misadministration, rather than being the intended object of the public authority.

109. It follows therefore that, if correct, that case shows that a claim will fall within the ambit of Article 8 if a claimant's mental health or dignity is seriously damaged and Miss Harrison claims that this is what this claimant suffered. Furthermore, in Wainwright v. Home Office [2002] QB 1334, Buxton LJ considered *obiter* that the treatment of the claimants who were strip-searched for drugs without anything being found and had suffered distress and humiliation "would in my view have grounded a right to relief for [the claimants] under section 7(1)(a) of the 1998 Act by reason of the prison authorities' breach of Article 8 of the Convention" [93].

110. Article 8 is expressed in terms of effects on the citizen as it refers to "respect for his private and family life.." and so when considering a breach of this Article has occurred, it is necessary at this stage to focus substantially on the effects on the claimant. As I have explained, the claimant stated that after he had received the letter of refusal from the Home Office on about 14 February 2001, his life changed noticeably and radically because thereafter he suffered from depression and from anxiety which led to him being unable to eat or sleep properly. His account is strongly supported by the uncontested evidence of Dr. Yasin, the Consultant Psychiatrist, who examined the claimant and who reported that the claimant had "symptoms of major depressive disorder", that he had "depressive moods most of the time" and that he had "lost pleasure in all day-to-day activities". He also believed that the risk of the claimant harming himself remained significant.

111. Even assuming that the Home Office is entitled to a wide margin of appreciation then nevertheless in the light of the extended meaning given to Article 8 so that it covers mental health, I consider that the claimant's rights under Article 8 have been contravened as is evidenced by the serious damage to his mental health. Put in another way, by adopting the same approach used by Sullivan J in Bernard's case, I would consider that this claimant had been denied his "dignity as a human being" [33], or adopting some other wording of Sullivan J in that case, the claimant was condemned to conditions "which made it virtually impossible for [him] to have any meaningful private .. life for the purposes of Article 8" ([34]).

112. In Anufrijeva, Newman J held that there was no infringement of the claimant's Article 8 rights. The issue is that case related to the quality of accommodation provided by the defendant and the central complaint was that the claimant was unable to participate in the life of her family to the extent that she would have wished. The Judge found that the accommodation complained of did not have features, which jeopardised the claimant's rights. The actual decision on the facts of that case is of little assistance in determining this case, but the reasoning of Newman J is relied on by the Secretary of State as illustrating the approach that I should adopt in this case.

The test of Newman J in Anufrijeva

113. I have to consider the approach to Article 8 adopted in that case Newman J, who considered that Article 8 rights would be infringed in the case of a breach of statutory duty where "it is likely that the act or acts of the public authority will have so far departed from the performance of the public authority's statutory duty as to amounting to a denial or contradiction of the duty to act" [105(8)]. This case was decided after the conclusion of oral submissions in this case. Although I have had the benefit of helpful written submissions on the effect and on the relevance of Newman J's decision, in the absence of full oral submissions, I do not consider that I am in a position to determine whether I should follow his reasoning or whether I should consider that his approach to Article 8 to be too limited, or not applicable where there is no breach of a specific statutory duty or a specific duty to act. I am content for the purposes of this judgment to assume that his approach is correct so that I should

apply it in determining this claim as an alternative to the approach of Sullivan J that I have adopted in paragraph 111 above.

114. In order to determine if Miss Harrison is correct in submitting that in the present case the defendant's behaviour has been in Newman J's words a "so far departed from the performance of the public authority's duty as to amount to a denial or contradiction", it is necessary to take into account seven factors. First, as is very well known, the defendant has clear and significant duties to perform in determining the issue of whether an asylum seeker is entitled to refugee status in the words of Bingham LJ that "it is plain that asylum decisions are of such moment that only the highest standard of fairness will suffice" (Thirukumar v. Secretary of State for the Home Department ([1989] Imm. A. R 402 at page 414)) and that entails considering any application for refugee status with "the most anxious scrutiny" (per Lord Bridge of Harwich in Bugdaycay v. Secretary of State for the Home Department [1987] AC 514 at page 531 G). Those duties apply to consideration of all material supplied by the claimant and which are relevant to his claim to be entitled to enter and remain in this country.

115. The second factor of importance is that these duties to apply high standards of fairness and scrutiny imposed on the defendant were materially increased by the dangers of continuing to refuse to allow the claimant to remain here because of the prospects of the treatment that the claimant would have been likely to receive on his return to Libya. I have already explained in paragraphs 6 to 8 above that the CIPU Bulletin recorded that by late 2000 and so before the refusal letter to the claimant was signed, the Home Office was well aware that returned asylum seekers were being "subjected to serious human rights violations, including torture" in Libya and that some "were killed on arrival at Tripoli Airport". That approach also shows that asylum seekers from Libya would be likely to be particularly concerned about being refused permission to remain in this country and returned to Libya, as indeed the claimant clearly was. Being aware of this ill treatment awaiting the claimant on return to Libya, the defendant had if anything a higher duty to ensure that the claimant's application for asylum was treated fairly and with reasonable speed because of the consequence of it being refused.

116. Third, in the light of the CIPU Bulletin, the claimant should have been given the right to remain in this country as he should have been regarded as a refugee.

117. As I have explained the CIPU Bulletin shows clearly that the defendant was well aware of the risks confronting failed Libyan asylum seekers on their return in late 2000. The effect of this Bulletin was considered by the Immigration Appeal Tribunal in Ahmed Faraj Hassan v. Secretary of State for the Home Department ([2002] UKIAT 0062) in which its then President, Collins J, giving the determination of the Tribunal explained at paragraph 9 that "the Bulletin itself establishes that the appellant is a refugee…because on return he would face persecution .. [the representative of the Secretary of State] properly accepted that this must follow and that the appellant had inevitably to be treated as a refugee". No cogent reasons were put forward to show that this decision was wrong. It is probably a coincidence that this decision was notified to the parties on 7 February 2002, which was the date on which the claimant was told that the refusal of his asylum claim was withdrawn.

118. I respectfully agree with that reasoning of the Immigration Appeal Tribunal which shows that the defendant should have accorded refugee status to the claimant when he sought asylum. The effect of having refugee status is very considerable as the Refugee Convention requires that refugees are first granted "the most favourable treatment accorded to nationals of a foreign country" as regards employment (Articles 17-19 of the Refugee Convention) as well as second, being given "treatment as favourable as possible as regards housing" (Article 21 of the Refugee Convention) and third, being granted approximately the same treatment as nationals with respect to public relief and assistance (Articles 23 and 24 of the Refuge Convention). Furthermore, the policy of the Convention is that after asylum has been granted, refugees shall so far as possible be integrated into their country of asylum and to that end contracting states, such as the United Kingdom, are urged to expedite naturalisation procedures (Article 34 of the Refugee Convention).

119. Thus if the claimant had been granted refugee status as he ought to have been for the reasons set out by Collins J, then the matters of which complaint is now made would not have arisen as the claimant would then have had the right to remain in this country with financial assistance and with housing provided to him.

120. Fourth, as the Home Office did not consider that there was any urgency about determining the claimant's asylum application, the defendant could and should have sent the claimant another SEF to complete before determining his claim. As I have explained, the defendant did not produce the letter refusing the claimant's application until 11 December 2000, which was more than six months after both the time when the SEF had been returned to it by the Post Office with the explanation that the address was incomplete and also six months after the time when the claimant's solicitors had notified the defendant of the full and complete address of the claimant. In any event, the letter of refusal was only received by the claimant on 14 February 2001 and it is reasonable to assume that the letter was only sent a day or so before that, which would have been more than eight months after the return

by the Post Office of the undelivered SEF and after the receipt by the defendant of the full and correct address of the claimant. Thus, it is correct to conclude that the defendant could and should have sent a further SEF to the claimant before finally determining his asylum application and there was no reason why this could not have been done if the Home Office officials had wished or had wanted to do so. To my mind, the failure of the Home Office officials to do so constituted a serious failure by them to take the steps reasonably open to them to protect the claimant from infringement with his Convention rights. Furthermore if they had taken these steps, there would have been a real prospect that he would have been given at least the right to remain and would probably have been granted asylum, which it is noteworthy was what the claimant was actually granted when the defendant eventually considered his case properly in 2002.

121. Fifth, the defendant failed to consider the comprehensive and clear document entitled "statement of claim to asylum" in which the claimant sets out why he is entitled to asylum. This was submitted to the Immigration Service on 17 January 2001, which was about four weeks before the Home Office served the notice of refusal of asylum. The correspondence from the Home Office does not indicate that they considered it at all and they have not served any evidence to say that they actually did so. The inference to be drawn is that this statement was not considered at all. In the light of the duty to use "most anxious scrutiny" and to ensure that "only the highest standard of fairness will suffice", as I have explained in paragraph 114 above, I am forced to conclude that as with the matter set out in the previous paragraph, the approach of the Home Office in Newman J's words "so far departed from the performance of [its] duty as to amount to a denial or contradiction of the duty to act". Indeed, if I had been in any doubt I would have reached the same conclusion for the sixth and seventh reasons to which I now turn.

122. Sixth, as I have explained in paragraph 14 above, Home Office officials failed to ensure that the claimant was informed of their decision to refuse him asylum as soon as the letter of refusal had been signed because, as I have explained in paragraph 19 above, the claimant would otherwise have become liable to repay any benefits received by him after the date of the refusal letter even though he was unaware of the refusal at the time when he received the benefits. In consequence as I have explained, the claimant became liable to repay these sums.

123. Seventh, the Home Office officials failed to process the claimant's appeal between January 2001 until after December 2001 even though the claimant's solicitors had been corresponding with the Home Office about it. As I have explained in paragraph 2, the appeal documents were apparently mislaid or misfiled. It is important to recall, as I have described in paragraphs 6 to 10 above, what was said in May 2001 in the CIPU Bulletin about the need to allow asylum seekers from Libya to remain in this country because of the treatment awaiting them if they were returned to Libya. This information ought to have required and enabled the Special Adjudicator to make a speedy decision on the claimant' s appeal, especially as the Home Office had received from the claimant the relevant information and they must have been aware of the worry and anxieties confronting the claimant in the light of the information contained in the CIPU bulletin and the documents filed by the claimant, which showed why he would have been of interest to the Libyan authorities.

124. These seven factors individually or cumulatively lead me to the conclusion that in Newman J's words, the Home Office's conduct even with a wide margin of appreciation "so far departed from the performance of [its] duty as to amount to a denial or contradiction of the duty to act" with the result that when considered in the light of the consequences to the claimant which he and Dr. Yasin record they constitute a breach of the claimant's Article 8 rights, even assuming that the defendant is entitled to a wide margin of appreciation.

125. In conclusion, even assuming that the defendant is entitled to such a margin of appreciation the claimant's rights under Article 8 have been contravened as the conduct of the Home Office has damaged or destroyed in the words of the Strasbourg Court in Bensaid his "mental stability" or denied in the words of Sullivan J in Bernard "his dignity as a human being" or been responsible for in the words of Newman J in Anufrijeva a "denial or contradiction of the duty to act". It has not been suggested that the reservations in Article 8(2) are relevant or assist the defendant. I must now consider if the defendant was in breach of an obligation owed by him to the claimant, when his Article 8 rights were contravened.

II) THE POSITIVE OBLIGATION ISSUE

126. As I have explained, the thrust of the claimant's case against the defendant is based on inactivity and omissions by the Home Office officials. As I have explained in paragraph 36 above, it is contended, in particular, that the Home Office failed to process the claimant's appeal against the refusal of his asylum claim and that the defendant failed to give him exceptional leave to remain when other Libyans were accorded that right from May 2001 onwards. Although there are some provisions in the Conventions which impose express positive

obligations, the main object of most of the provisions in the Convention is to protect citizens against positive actions rather than against omissions by the public authority. Thus, Article 3 of the Convention forbids inhuman or degrading treatment, while Article 8 precludes interference with rights to private and family life. The claimant also relies on positive acts by the defendant but for these to be the subject of a HRA cause of action, it has to be shown that they constitute a breach of a duty owed to the claimant.

127. Miss Harrison contends that a claim for the HRA cause of action can be brought for an act or for an omission whenever a convention right of a citizen is infringed irrespective of the conduct of the defendant and for ease of reference I will call this argument "the strict liability approach" although it is not strictly accurate. Mr. Wilken submits that the HRA cause of action is not a matter of strict liability but that it can only be pursued in the case of omissions where there has been a breach of a positive obligation. I must now consider these rival submissions and then if Mr. Wilken is right and the defendant can only be liable if there is a positive obligation imposed on him, I will seek to specify the circumstances in which such a positive obligation can be imposed on the defendant before determining whether on the facts of this case such a duty arises here and, if so, whether it has been broken.

(i) Is the HRA cause of action based on the strict liability approach or has there to be a duty on the part of a defendant?

128. Miss. Harrison's approach to this is simple, as she points to section 6(1) of the HRA, which provides that "it is unlawful for a public authority to act in a way, which is incompatible with a Convention right". There is no dispute that the defendant is a "public authority" for the purpose of this statute and Miss. Harrison then relies on the provision in section 6(6) of the HRA, which says that an "act" has to be interpreted as including "a failure to act". Thus Miss. Harrison says that a claim for a statutory right can be brought whenever there is an interference with a convention right whether such interference is an act or an omission.

129. Mr. Wilken does not accept that contention and he submits that it is not every interference with a Convention right that has the inevitable and automatic consequence that anybody, however remotely responsible for such interference can be held liable under the HRA cause of action. For example, a slight delay in dealing with an asylum claim might result in an unusually disturbed asylum seeker suffering serious psychiatric loss, perhaps damaging himself or herself in circumstances in which the mental health of any other average asylum seeker would not have been adversely affected in any way; in such a case, Mr. Wilken submits the state should not be held responsible.

130. There is no authority, which supports Miss Harrison's submission while there are cases, which show that her bold and simple approach is at variance with the jurisprudence of the Strasbourg Court. Indeed the Strasbourg Court has expressly declined to develop a "general theory of positive obligations which may have to flow from the Convention" [31] (see Platform Ärtze Für das Leben v. Austria (1988) 13 EHRR 204). Furthermore, as I will explain in paragraph 135, there are cases such as E and Others v United Kingdom (26 November 2002 [33218/96]) which show that there are other conditions that have to be satisfied before a defendant can be held liable for an omission. Thus I do not accept Miss Harrison's submission that a defendant is liable for the HRA cause of action irrespective of foreseeability or of any fault on the part of the defendant. Thus I must now consider the circumstances in which a defendant can be held liable in the absence of an express positive obligation on his part.

(ii) In what circumstances can a defendant be liable for a breach of Article 8 of the Convention in the absence of an express positive obligation on his part?

131. Mr. Wilken submits correctly in my view that the claimant in this case insofar as he relies on omissions has to establish a breach of a *positive* obligation imposed on the defendant in relation to the claimant in order to substantiate his claim under the HRA cause of action. It is necessary to analyse the nature of the claimant's case because, as I have explained, the mere fact that the claimant's Convention rights have been infringed does not automatically mean that the defendant is liable. There has to be something additional, which makes the defendant culpable and so liable for the infringement of the claimant's convention rights. Thus it has to be shown that the defendant had as a matter of law a *duty not* to act or not to omit to act in the way complained of. Mr. Wilken contends that it is not possible to formulate such an obligation that the defendant has contravened so I must now turn to consider that the circumstances in which the court can hold that there may be an obligation requiring some form of positive action by the State.

132. Apart from the provisions in the Convention where there are *express positive* obligations on the state, such as its duty to hold elections under Article 3 of Protocol 1 to the Convention, other positive obligations can arise by implication. Three principles emerge from the decisions of the Strasbourg Court on when these implied

obligations arise. First, as I have already explained, the Strasbourg Court has declined to develop a "general theory of positive obligations" (see Platform Ärtze Für das Leben v. Austria ((1988) 13 EHRR 204 [31])). Second, as Kier Starmer Q.C. points out in his essay "Positive Obligations under the Convention" in *Understanding Human Rights (2001)* in relation to such positive obligations on the state "their foundation lies in the recognition that a purely negative approach to the protection of human rights cannot guarantee their effective protection". Third, the approach of the Strasbourg Court is that "in determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interests of the community and the interests of the individual" (Rees v. United Kingdom (1987) 9 E.H.R.R. 56 [37]).

133. So, it becomes necessary to try to extract principles from the jurisprudence of the Strasbourg Court in order to determine what has to be shown before a State owed positive or other obligations to a claimant in respect of Article 8 of the Convention and, if so, in the next section I will determine the precise nature of such obligations. Significantly, in Pretty v. United Kingdom ((2002) 35 EHRR 1), the Strasbourg Court recently stated, with my italicised emphasis added, of Article 3 that: -

> "50. It may be described in general terms as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction. However in the light of the fundamental importance of Article 3, the Court has reserved to itself sufficient flexibility to address the application of that Article in other situations that might arise.
> 51. In particular, the Court has held that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within the jurisdiction the rights and freedoms defined in the Convention taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such treatment administered by private individuals. A *positive* obligation on the State to provide protection against inhuman or degrading treatment has been found to arise in a number of cases".

134. The position appears to be that if a citizen's right under the Convention cannot be effectively protected without the provision of a positive obligation after taking account of the general interests of the community, then such an obligation *might* well be implied. Thus in Airey v. Ireland ((1979) 2 E.H.R.R. 305), it was held by the Strasbourg Court that the right to family life could not be effectively protected without a positive obligation on the part of the State, namely the provision of resources in divorce proceedings in the form of legal assistance given by the State. The Court explained in respect of Article 8 that "there may be positive obligations inherent in an effective respect of private or family life" [32]. It is necessary in each case to ascertain if a fair balance can be achieved between the interests of the claimant and the general interests of the community which would result in a *positive* obligation being imputed to the defendant. So I must now turn to consider what facts have to exist before a positive obligation can be owed by the defendant to the claimant.

135. In order to determine the circumstances in which a positive obligation can arise or can be implied, a useful starting point is the decision given by the Strasbourg Court on 26 November 2002, in the case of E and others v. United Kingdom (33218/96) in which a claim was made against a local authority for failing to protect the applicants against abuse by their step-father. The Strasbourg Court stated in relation to the claim under Article 3 that "the question therefore arises whether the local authority (acting through its Social Work Department) was, or ought to have been, aware that the applicants were suffering or at risk of abuse and, if so, whether they took the steps reasonably available to them to protect them from that abuse" [92]. I agree with Miss Harrison that this test provides a useful starting point for defining the duty of the defendant as does the further statement of the Strasbourg Court in E's case that "a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State" [99].

136. Although the reasoning in E was directed to Article 3 in the light of the complaint in that case concerning "abuse", there does not appear to be any cogent reason why the test in E's case cannot apply with equal force to other complaints, such as those made under Article 8. The Strasbourg Court in E's case was purporting to set out the duties of a defendant when faced with the risk of being held responsible for consequences to a claimant, which would contravene his convention rights.

137. I must now consider how the approach in E's case accords with the approach of the Strasbourg Court in other cases and other authorities, which is that a defendant would be liable for infringement of a convention right such as those set out in Article 3 or Article 8:-

(a) where the defendant was or ought to have been aware that that the claimant was suffering or at risk of abuse or of degrading or of humiliating treatment of the kind necessary to engage Article 3 or of mental illness of the kind necessary to engage Article 8. This provision sets out the circumstances in which a duty on the part of the State arises;

(b) that the defendant then did not take the steps reasonably open to him to protect the claimant from the abuse, degrading or humiliating treatment of the kind referred necessary to engage Article 3 or mental illness of the kind necessary to engage Article 8. This provision specifies that where a duty arises, such a duty can be expressed as a positive duty by the State of a standard of care to take the steps reasonably open to protect the claimant from these matters set out in Articles 3 and 8 and

(c) that those measures could have had a real prospect of altering or mitigating the harm suffered by the claimant. This states the causation requirement.

138. As I have explained in paragraph 56 above, it is first necessary to see if there is, in Lord Slynn's words "clear and constant" jurisprudence of the Strasbourg court supporting this approach, which, as I have explained comprises three limbs. That exercise entails considering how this test is consistent with other decisions of the Strasbourg court and of the English courts. Starting with requirement (a) in the E test, both counsel made submissions on the effect and significance of Osman v. United Kingdom ((1998) 29 E.H. R.R. 245), a decision in which the Strasbourg Court stated in the context of Article 2, with my emphasis added, that where it is alleged that the authorities have violated a *positive* obligation to protect the right to life, then "it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of *a real and immediate risk* to the life of an identified individual or individuals from the criminal acts of a third party and that they have failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk" [116].

139. In Lord Saville of Newdigate v Widgery Soldiers and others ([2001] EWCA Civ. 2048), the Master of the Rolls giving the judgment of the Court of Appeal concluded that [28] "the real and immediate risk" referred to in Osman as being, with my emphasis added, "*well above* the threshold that will engage Article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself". This approach suggests that the Osman test is too high where, as in the present case, the defendant is the party responsible for the acts or omissions of which complaint is made. I conclude that the approach in requirement (a) in E is not susceptible to the same criticism as was made in the Widgery Soldiers case and that, on the contrary, it constitutes the test that I should consider as not being inconsistent with decisions of the Strasbourg Court and the Court of Appeal, even though there is on the authorities cited to me, no "constant" jurisprudence to support it. In any event, I would reach the same conclusion by applying the test propounded in Rees and referred to in paragraph 132 above, because requirement (a) in E provides a fair balance between the general interests of the community and the interests of the individual. I cannot think it to be fair that a public body which knows or ought to know that a citizen is at risk of having his or her rights under Articles 3 or 8 contravened should not then be under a duty to that citizen as otherwise his Convention rights would be deprived of real meaning. In such a case if a duty then arises, the public authority is or may be after all in a position to avoid an infringement with Convention rights by taking proper steps.

140. The test in requirement (b) of the E case is consistent with decisions to which my attention was drawn and in which the issue was the nature of the duty imposed on the state to prevent infringement with a citizen's rights. Thus, in Ignaccolo-Zenide v. Romania [1994] 31 EHRR 212, the Strasbourg Court held that Article 8 included a positive obligation on the part of national authorities to secure the union of parent and child in the case of trans-national abduction cases. Thus, the critical question was "whether the national authorities, all of the measures which they could reasonably be expected to take to secure the enforcement of [an] injunction" [96], requiring the child to be returned to the mother. They were also required to take "such measures as were necessary and relevant to facilitate the enforcement of the injunction" [101] in order to try to secure the reuniting of parent and child. The approach of the Court in that case was that the positive obligation was necessary to ensure that the Convention rights under Article 8 were adhered to and that the nature of it was similar to that set out in sub-paragraph (b) of the test in the E case to which I have already referred in paragraph 137 above.

141. A similar form of reasoning explains the decision of the Strasbourg Court in two environmental cases in which a positive obligation was imposed on the State to take necessary steps to secure the complainant's rights under Article 8. In those cases, the Strasbourg court was only considering the stage reached at sub-paragraph (b) of the test in the E case. Thus, in Guerra and Others v. Italy [1998] 26 EHRR 357, the Strasbourg Court held that once the authorities were aware of dangers of pollution from a chemical factory, they had a duty to provide

assistance and support to individuals at risk. It explained in respect of the claim for a breach of Article 8 that "there may be positive obligations inherent in effective respect for private or family life.. it need only be ascertained whether the national authorities took the necessary steps to ensure protection of the applicants' right…as guaranteed by Article 8" [58]. The European Court did not mention the requirement for the defendant to take "reasonable steps", but it did refer to "necessary steps".

142. More recently in Hatton v. United Kingdom [2002] 34 EHRR 1, the Strasbourg Court has, however, done so in a case in which it held that the United Kingdom had a positive obligation under Article 8 to protect the private and family lives of residents living close to Heathrow airport by carrying out a sufficiently specific and complete study on the impact of flight paths on the rights and qualities of residents as a result of night flights affecting the sleep patterns of residents. The Strasbourg Court was concerned with the obligations of a defendant, who was aware of these complaints. It is noteworthy that that the Strasbourg Court explained, with my emphasis added, that the "complaints fall to be analysed in terms of a positive duty on the *State to take reasonable and appropriate measures* to secure the applicants' rights under Article 8(1) of the Convention" [95]. This reasoning is consistent with the approach in paragraph (b) of the test in the E case to which I have already referred in paragraph 137.

143. Although Mr. Wilken seeks to distinguish those two cases on the basis that they are dealing with environmental issues and therefore they are concerned with "particularly sensitive areas of environmental protection", I am unable to understand why the principles applicable in environmental cases should differ from those in other cases in which Article 8 is relevant, or in other words, why environmental protection is more "sensitive" than asylum, which deals with fundamental rights. No satisfactory reason was put forward for suggesting a different approach and indeed the reasoning of the Strasbourg court does not support such a distinction.

144. In support of his contention that no positive obligation arises in this case, Mr. Wilken also points out that the Commission has rejected arguments that the Convention imposes a positive obligation on State authorities to provide family members with financial assistance to enable one of two parents to stay at home and to take care of their children. Thus, in Andersson and Kullman v. Sweden ([1986] 46DR 251), the Commission rejected as inadmissible the complaint that the Swedish civil authorities had a positive obligation to provide free crèche places to enable the second applicant to work and not merely to make family allowance payments. That decision is understandable on the basis that the Commission took the view that the applicant's rights under Article 8 were not being infringed by being paid family allowances rather than by receiving free crèche places for his children. They explained that the "Convention does not as such guarantee the right to public assistance either in the form of financial support to maintain a certain standard of living or in the form of supplying day home care places, nor does the right under Article 8 of the Convention to respect for family life extend so far as to impose on a State a general obligation to provide for financial assistance to individuals in order to enable one of the parties to stay at home to take care of the children" (page 253 as quoted in Greenfield v. Irwin ([2001] 1 WLR 1278 [36])). This decision and a subsequent decision in the Court of Appeal in Greenfield v. Irwin ([2001] 1 WLR 1278 [36 –37]) merely indicate that the absence of crèche places did not infringe the applicant's Article 8 rights and thus no relevant decision was made or had to be made in those cases on the existence or extent of any positive obligation imposed on the State.

145. This reasoning also explains why I do not accept that Mr. Wilken can derive any support from the decision of the Commission relied upon by him in AP v. Austria ([1995] 20 EHRR CD 63), in which it rejected as inadmissible a complaint under Article 8 of the Convention that the State had an obligation to make long-term payments to enable a father to stay at home and to look after his children in order that his Article 8 rights were not infringed.

146. Mr. Wilken relies on the statement of Newman J in Anufrijeva and Anufrijevas v. London Borough of Southwark (4 December 2002 Case number 01/TLQ/1532 - no Neutral Citation Number has been given) that "it will be rare for an error of judgment, inefficiency or maladministration occurring in the purported performance of a statutory duty.. to give rise to an infringement of Article 8" [105(7)]. Miss Harrison does not dispute this approach, but she points out that Newman J later stated in Anufrijeva (supra) that "it is likely that the circumstances of infringement will be confined to flagrant and deliberate failure to act in the face of obvious and gross circumstances affecting the Article 8 rights of an individual" ([105(8)]). This statement indicates that the positive obligation on a State could only arise in those circumstances and this constitutes a higher threshold for imposing a duty on the State than was set out in the E case namely "obvious and gross circumstances affective the Article 8 rights of an individual". Newman J analysed carefully all the cases cited to him but I infer from the absence of any mention of them that his attention was not drawn to important and relevant cases of Bernard, E, Osman and Widgery Soldiers; the judgments in the first two of these cases were only delivered after argument concluded and before judgment was given by Newman J. If that is so, the comments of Newman J might be

regarded as having been made without the benefit of having all the authorities cited and that might explain why his approach differs from what has been said in the other cases to which I have referred.

147. In the event that I am wrong and the appropriate threshold that has to be satisfied before a positive obligation can be owed by the defendants to the claimant is that there has to be, in Newman J's words "obvious and gross circumstances affecting the claimant", I will consider this test when I deal with sub-issue (iii) in paragraph 161 below.

148. The Strasbourg court's decision also appears to accept that an infringement could only arise if the measures suggested had a real prospect of avoiding or mitigating the harm suffered by the claimant. This seems to be common sense. Thus I conclude that I should adopt the approach suggested in E's case to which I have referred in paragraph 137 above as it is not only the most recent decision of the Strasbourg Court but also because it is consistent with other decisions from the Strasbourg court, to which I have referred. In case I am wrong, I must now consider how I should approach this case by simply applying the test in Rees to which I referred in paragraph 132 above. I consider that the test in that case ensures that a proper balance is achieved between the parties so that the defendant can only be liable first, if he knew or ought to have known that the claimant's rights would be infringed and second, yet he failed to take reasonable steps that would have avoided the interference. I ought to add if a duty could not be implied in the terms set out in E, the Convention rights of citizens would be seriously and unreasonably curtailed as it would be extremely difficult to show breaches. Applying those principles, I now have to consider if, on the facts of this case, the defendant had a positive obligation to the claimant in respect of the matters of which the claimant makes complaint as Miss Harrison submits is the case. The State enjoys what was described in Hatton v. UK (supra) as "a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention" [96]. If the defendant owed such an obligation and in the light of this margin of appreciation, I will then have to proceed to determine if the defendant acted in breaches of these positive obligations.

(iii) Did the defendant in fact in this case have an obligation imposed upon him in relation to his treatment of the claimant on the basis that the defendant through his officials was or ought to have been aware that that the claimant was suffering or at risk?

149. Miss Harrison contends that in the light of the facts in this case, the Secretary of State did have an obligation imposed upon him, which as I have explained in paragraph 137 arose in accordance with the principles set out in E's case in limb (a).

150. In order to determine if this particular obligation existed in this case, it is necessary to consider this matter through the eyes of the defendant's officials, bearing in mind and assuming that the defendant has a "certain margin of appreciation" as referred to in Hatton as the first requirement in E's case is expressed in terms relating to what the State was or ought to have been aware of. The Home Office officials must have appreciated that from the time when he made his application for asylum in June 2000 that the claimant was a vulnerable person, both as an asylum seeker and as a Libyan. As a general starting point, it is necessary to recall that Simon Brown LJ explained in R. v. Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants [1977] 1 WLR 275 at page 283-4 that "a significant number of genuine asylum seekers find themselves faced with a bleak choice; whether to remain here destitute and homeless until their claims are finally determined or whether instead to abandon their claims and return to face the very persecution they have fled". As I have explained in paragraphs 6 to 10 above, the CIPU Bulletin shows that this choice could not have been bleaker for the claimant on account of the treatment that he would have received on return to Libya as a failed asylum seeker, especially as one who had a history of opposition to the Government.

151. I agree with Mr. Wilken that the defendant did not receive a copy of Dr. Yasin's report prior to the commencement of this claim. This suggests that the claimant did not have the actual and precise knowledge of the claimant's suffering, but that fact does not assist the defendants as they had great knowledge of the difficulties facing Libyan asylum seekers, of which they ought to have known. The CIPU Bulletin shows how they were regularly receiving information about the plight of returning Libyan asylum seekers and so must have been acutely aware of the dangers awaiting him.

152. Indeed, to be more specific in the present case, the plight of the claimant was increased by five factors of which the defendant must have known or of which they ought to have been aware. These matters provide the answer to Mr. Wilken's point that there was insufficient proximity between the defendant and the claimant for a duty to arise. The first factor was that the Home Office official knew that unless the claimant was able to appeal successfully from the refusal letter, he would be returned to Libya because the letter dated 11 December 2000 refusing his claim for asylum and the separate notice dated 14 February 2001 served on the claimant gave him removal directions to Libya "at a time and date to be notified". The letter from the Home Office Minister

referred to in paragraph 64 above shows that as he failed to complete the SEF and so it was said that he had not provided full information even though he had not received the SEF.

153. The second and a very significant aggravating factor was that the defendant was well aware of the treatment that the claimant would receive in Libya as a failed asylum seeker. I will summarise the main aspects which show, as I have already explained in paragraphs 6 to 10 above that the defendant had issued in May 2001 a CIPU Bulletin, which stated that in April 2000, Amnesty International had made representations to the United Kingdom Government about the treatment in Libya of a returned Libyan asylum seeker, who had been arrested and imprisoned with the result that the United Kingdom Government placed "a temporary hold…on further removals whilst we made further enquiries". Amnesty International also produced a report in 2000 in which they stated, according to the CIPU Bulletin that "in addition to being detained, several returned asylum seekers have been subjected to serious human rights violations, including torture". On the basis of this information from Amnesty International, the United Kingdom Government noted in the CIPU Bulletin that UNHCR in material dated 2 October 2000 "urged caution in returning failed asylum seekers to Libya" and they also pointed to an incident in March 2000 "when after seven Libyan nationals…. were extradited from Jordan to Libya, at least 3 of whom were killed on arrival at Tripoli Airport".

154. The CIPU Bulletin then also records that the Foreign and Commonwealth Office advised that "any Libyans returning to that country after an absence of six months or more are subject to an interrogation by the Libyan security authorities" and that "failed returned asylum seekers are routinely imprisoned by administrative (as opposed to judicial) order 'for having shown disloyalty to the state'". It was also stated in the CIPU Bulletin that in the light of this information, it was not believed that the United Kingdom Government "can at present safely enforce removals of failed asylum seekers to Libya" as "any representation made under Article 3 of the Human Rights Act (sic) against the removal to Libya of a refused asylum applicant and based on information currently available in the public domain is likely to succeed".

155. The CIPU Bulletin also noted that the Foreign and Commonwealth Office had concluded that they did not expect a significant change in the human rights position in Libya within the next twelve months i.e. the period up to May 2002. On the basis of that material, the CIPU Bulletin recorded that a limited exceptional leave policy for failed asylum seekers from Libya would be introduced by which refused asylum seekers would be granted six months exceptional leave to remain in this country although the position of those convicted of serious crime and those subject to a recommendation to deport by the courts would be subject to ministerial consideration.

156. The effect of this material was that officials at the Home Office were well aware by October 2000 that if the claimant was returned to Libya, he would have been subject according to the CIPU Bulletin to "serious human rights violations, including torture". They must also have appreciated that by refusing his asylum application and by serving a removal direction on him, this would, or at least could, have had a very serious effect on the claimant who would be at risk of damage to his mental health. This is so especially as the claimant was in a particularly vulnerable position as he had explained with supporting information why he believed in his statement to the Home Office of 16 October 2000 that "I have no doubt that if I return to Libya I will be killed by the authorities".

157. This statement was consistent with what is stated in the CIPU Bulletin to which I have already referred and which was supported by detailed information about how the claimant whilst still in Libya had helped to found a charitable organisation that was established to provide financial and other support to those detained by the Libyan authorities. His fellow founders were then detained in prison. The claimant also wrote poetry, which was critical of the current Libyan Government and his home had been destroyed by the Libyan authorities. The claimant went into hiding for a period of about 19 months before he left Libya under a subterfuge. These facts which the defendant knew before the letter of refusal was sent to the claimant by the Home Office indicated that the Libyan authorities and the Home Office must have appreciated, hostile to him and that he would be of particular interest to the Libyan authorities.

158. All this material shows that the Home Office officials must have realised that the claimant would have been seriously and adversely affected by the removal directions and by the refusal of his asylum application as until they were reversed, he could at very short notice have been returned to Libya in circumstances in which a claim under Article 3 was, in the words of the CIPU Bulletin, "likely to succeed". In this case, the claimant was not removed from the United Kingdom but the very imminent threat of such return which could take place in the words of the removal direction "at a time and place to be determined" showed that the claimant was at risk of treatment which would constitute infringement with his Convention rights. Dr. Yasin points out the claimant "on hearing that he was to be deported, he became very frightened for his life".

159. A third and particularly important factor would have been the totally justifiable and regrettable failure of the Home Office to process the claimant's appeal for at least ten months in 2001 and to consider his documents submitted in support of his claim which are described in paragraph 14 above. These three factors and in particular the delay in processing the appeal ought to have made the defendant aware of the risk of contravening the claimant's rights under Article 8. Even if I am wrong, the remaining factors show that this is clear. The fourth aggravating factor that has to be considered is that, as the Home Office officials must have appreciated that the claimant did not have any income support, whether in the form of housing benefits, council tax refund or subsistence costs after the refusal of his claim for asylum which was communicated to him on 9 April 2001. He would in consequence have been unable to pay for accommodation or food for himself unless and until his appeal was determined. Indeed, as I have explained, the claimant very predictably soon accrued arrears with both his rent and his council tax payments. Finally, as I have explained, on 30 April 2001 the claimant was facing claims for repayment of social security payments and other benefits received by him between the refusal of his asylum application on 11 December 2000 and the date when he was belatedly notified of this decision. Thus court orders for £618.45 and £1,690.04 referred to in paragraph 26 above were being pursued.

160. The defendant's officials must have known that without housing benefits, council tax refund and subsistence payments, the claimant would have experienced very great difficulties in surviving as he could not afford to pay for accommodation or for food and any other of the necessities of life without any assistance from his friends and colleagues in his community and they did not know that he was to receive this. Further he would not have been in a position to repay the benefits that were being claimed as a result of the refusal of the claimant's asylum application. In those circumstances, the defendant's officials must have known or ought to have known that the claimant was at least at risk of mental anguish or of degrading or humiliating treatment in which no action was being taken to process his appeal or to reconsider his application in the light of the cogent material supplied by him. Thus, I find that there was an obligation imposed on the defendant to protect the claimant from degrading or humiliating treatment and from mental illness of the kind necessary to engage Article 8, because for the reasons that I have stated in the words of E the defendant knew or ought to have been aware that "the [claimant] was suffering or at risk of [degrading or humiliating treatment of the kind necessary to engage Article 8]".

Other tests for imposing a duty on the defendant

161. In case I am wrong and the test in E is not correct, I must consider two other tests for imposing an obligation on the defendant of which the first is that laid down by Newman J and referred to in paragraph 147, (namely "in the face of obvious and gross circumstances affecting the Article 8 rights of an individual), I must also consider the facts on that basis. The matters which I set out in relation to the E test in paragraphs 152 to 160 above apply with equal force to Newman J's test. Those factors individually or cumulatively indicate that the plight of the claimant constituted "gross and obvious" circumstances. Thus, even on the Anufrijeva test, there was a positive obligation of the defendants to protect the claimant from degrading or humiliating treatment. The second test for determining where a duty is owed is that put forward in Rees and set out in paragraph 132 above ("regard must be made to the fair balance that is being struck between the general interests of the community and the interests of the individual") and I believe that this approach leads to a test similar to that in E and so the analysis set out above applies if the Rees criterion is the correct test. The third limb of the testing achieves the aims referred to in Rees as it precludes claims where even with the use of reasonable care by the State, the claimant would have had his Convention rights infringed.

(iv) Did the defendant in this case take the steps reasonably open to him to protect the claimant from infringement with his convention rights and would those measures have had a real prospect of altering or mitigating the harm suffered by the claimant?

162. As I explained in paragraph 137, the second and third limbs of the principle stated in the E case require consideration of whether the defendant took steps reasonably open to protect the claimant from degrading or humiliating treatment and that these measures would have had a real prospect of altering or mitigating the harm suffered by the claimant. Miss Harrison contends that the defendant could and should have taken steps reasonably open to him to protect the claimant from infringement of his convention rights. I will consider some of the steps that the defendant could have taken and they include ensuring that the claimant received a SEF before determining his asylum application, considering his statement of claim form submitted by the claimant before sending the letter refusing asylum and giving the claimant exceptional leave to remain or granting him refugee status.

(a) ensuring that the claimant received a SEF before determining his asylum application

163. As I have already explained the claimant did not receive the SEF sent to him on 5 June 2000 as it was incorrectly addressed and the defendant knew that the claimant had not received it as, according to a letter from Ms Angela Eagle MP who was then a Home Office Minister to the claimant's Member of Parliament dated 21 November 2001, "the SEF was returned to [the Home Office] by the Post Office informing the [Home Office] that the address [to which the SEF had been sent] was incomplete on 7 June 2000". The Immigration Services had been told of the claimant's full and proper address on 8 June 2000. In the letter to the claimant's solicitors of 7 February 2002, the Home Office say that "we are very sorry for any confusion caused for our administrative error and for any inconvenience this may have caused your client".

164. In order to determine whether the defendant took the steps reasonably open to him to protect the claimant from violation of his convention rights, it is necessary to bear in mind three important factors. First, even though is very well known and as I have already explained, it is worthwhile emphasising and repeating that the defendant was obliged in determining the issue of whether an asylum seeker is entitled to refugee status to bear in mind that, "it is plain that asylum decisions are of such moment that only the highest standard of fairness will suffice" (Thirukumar v. Secretary of State for the Home Department [1989] Imm. A. R 402 at page 414 per Bingham L.J.) and that entails considering the application for refugee status with "the most anxious scrutiny" (per Lord Bridge of Harwich in Bugdaycay v. Secretary of State for the Home Department [1987] AC 514 at page 531 G).

165. The second factor of importance is the treatment that the claimant would have been likely to receive on his return to Libya. I have already explained in paragraphs 6 to 10 above that the CIPU Bulletin recorded that by late 2000 and before the refusal letter was signed, the Home Office was well aware that returned asylum seekers were being "subjected to serious human rights violations, including torture" in Libya and that some "were killed on arrival at Tripoli Airport". The claimant, as the Home Office officials knew from the document that they had received from him in January 2001, was well aware of this ill treatment awaiting the claimant on his return to Libya and so the defendant had a higher duty to ensure that the claimant's application was treated fairly and comprehensively.

166. Third, it is clear that the Home Office did not regard the issue of determining the claimant's asylum application as being a matter that necessitated an urgent decision. As I have explained, the defendant did not sign the letter refusing the claimant's application until 11 December 2000, which was more than six months after both the time when the SEF had been returned to it with the explanation that the address was incomplete and also the date on which the claimant's solicitors had notified the defendant of the full and complete address of the claimant. In any event, the letter of refusal was only received by the claimant on 14 February 2001 and it is reasonable to assume that the letter was only sent a day or so before that and that was more than eight months after both the return of the SEF and also the receipt by the defendant of the full and correct address of the claimant.

167. Thus, it is correct to conclude that the defendant could and should have sent a further SEF to the claimant before finally determining his asylum application and there was no reason why this could not have been done if the Home Office officials had wished or had wanted to do so. To my mind, the failure of the Home Office officials to do so constituted a failure to take the steps reasonably open to them to protect the claimant from infringement of his Convention rights. Furthermore if they had taken these steps, then in accordance with the third limb of the test in E as set out in paragraph 137 above, there would have been "a real prospect" of altering or mitigating the harm suffered by the claimant "as he would have been given at least the right to remain and probably asylum", which it is noteworthy that the claimant was actually granted when the defendant finally considered his case properly in 2002. Significantly, this would also have avoided his financial problems. A similar conclusion would have been reached by applying the Rees test set out in paragraph 132.

(c) Considering the statement of claim to asylum form before sending the refusal letter

168. This document was sent to the Home Office in response to the Home Office's letter to him of 11 January 2001 asking him to send within seven calendar days "any information you wish to be considered that may affect your application for leave to enter the United Kingdom other than as an asylum seeker". The claimant sets out in response many cogent reasons why he should be entitled to asylum status or exceptional leave to remain.

169. This important and relevant material supplied by the claimant should have been considered, although the Home Office's letter said that the claimant's "application for asylum had been fully considered and it is now possible to serve you with a decision on your application for leave to enter the United Kingdom". I have already mentioned the highest standards of fairness and "the most anxious scrutiny" required of the Home Office. These duties would have entailed reconsidering the claimant's application. The failure to do so constituted a failure to take the steps reasonably open to the Home Secretary and in respect of which there was a real prospect of altering or mitigating the harm suffered by the claimant. Indeed, when the defendant did consider these matters, the claimant was granted refugee status.

(d) Granting claimant exceptional leave to remain or refugee status

170. The claimant should have been given exceptional leave to remain for the reasons set out in the CIPU Bulletin and as explained by the decision in Hassan to which I referred in paragraph 117. According to a letter from Ms Angela Eagle MP who was then a Home Office Minister to the claimant's Member of Parliament dated 21 November 2001, the defendant refused to give the claimant exceptional leave to remain because he had not returned the SEF which he had not received and she explained that "a refusal on the grounds of non-compliance would not be affected by such an exceptional leave policy as it would be considered that the applicant had failed to make a prompt and full disclosure of facts relating to his asylum application".

171. This reasoning ignores the four vital facts to which I have already referred of which the first is that the SEF had been incorrectly addressed, the second is that it had been returned to the Home Office as incorrectly addressed, the third is that the Home Office were well aware of the full and complete address of the claimant but the fourth is that they had not thought fit to send another SEF to the claimant in the eight month period between the return of the SEF and the sending of the asylum refusal letter to the claimant. It should be noted that when the claimant's application was eventually and belatedly considered substantively and with the degree of care required, he was given, as should have been the case in 2000, leave to remain and granted refugee status. The reasoning of the Minister does not in those circumstances constitute a cogent reason to show why the claimant should not have been given exceptional leave to remain which would have had the effect that he would not have suffered the depression and the other matters of which complaint is now made. He would also have received financial benefits which would have avoided his financial problems. For all these reasons, the claimant should also have been granted asylum.

172. I conclude that the application of the test in E means that an obligation was imposed on the defendant to take steps reasonably to him to protect the claimant from infringement with his Article 8 rights. This obligation was not complied with, but if the defendants had taken steps reasonably open to him, there would have been a real prospect of avoiding the harm suffered by the claimant.

173. For the purpose of completeness and if I am incorrect and the test in E is not applicable, then applying the approach in Rees as explained in paragraph 132, I have no hesitation in concluding that the balance between the general interests of the community and the interests of the claimant necessitates a test similar to the E test so a similar conclusion would be reached. Thus I conclude that the defendant is liable for infringing the claimant's rights under Article 8 and so I turn to consider the remedies which should be granted.

(III) THE REMEDIES ISSUE

174. On this application, the claimant is seeking two forms of relief against the Secretary of State, namely first declarations and second an award of damages for psychiatric loss and for loss of furniture. The jurisdiction and conditions for granting such relief is set out in section 8 of the HRA to which it is now appropriate to turn.

Statutory Provisions

175. Section 8 of the HRA contains provisions relating to remedies that may be given by a Court which finds any act of a public authority, such as the Secretary of State, unlawful and insofar as is relevant to the present dispute it states that: -

> "(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including –
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining –

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

176. Section 8(4) of the HRA expressly requires the court to consider Article 41 of the Convention, which provides that: -

> "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

Declaratory relief

177. The power and jurisdiction of this court to grant declaratory relief on a HRA claim as set out in section 8(1) is very similar to that enjoyed by this court when dealing with conventional municipal claims. In the light of my findings that the defendant infringed the claimant's convention rights under Article 8, no cogent reason was put forward to show why the claimant is not entitled to declaratory relief to that effect, which I will grant.

Damages

178. The defendant contends that the claimant is not entitled to damages even if he can establish first that his convention rights have been breached and second that the defendant has failed to comply with an obligation imposed on him. It is common ground that the answer to this dispute is to be found in section 8 of the HRA, which I have already quoted and which now has to be analysed.

179. From those statutory provisions, it seems clear that damages are not to be awarded as a matter of right but that the process to be embarked upon by an English court before it can award damages to a successful claimant entails consideration of five issues which are: -

(i) whether the court has power itself to award damages as they can only be awarded by a court which has power and jurisdiction to award them or to order the payment of compensation in civil proceedings (stage 1);

(ii) whether damages should be awarded, bearing in mind that in determining whether to award damages and the amount of such award, this court must take account of the *principles* applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention (stage 2);

(iii) whether it is correct in a particular case to award damages, as it is not permissible to make an award of damages unless the English court is satisfied that the award is necessary to award just satisfaction to a claimant taking account of all the circumstances of the case, including (a) any other relief or remedy granted or order made in relation to the Act in question by the English court or by any other court (stage 3) and (b) the consequences of any decision in respect of that act (stage 4);

(iv) whether it is "just and appropriate" to award damages, even after taking all other factors into consideration (stage 5).

180. Before considering these stages, it is necessary to return, as I explained in paragraph 48 above, to determine if the defendant can rely on the principles enunciated by the Court of Appeal in Hatton v. Sutherland [2002] 2 All ER 1 [25] to resist the claim for damages for psychiatric loss. As I explained in paragraph 56 above, as a consequence of section 2(1) of the HRA an English courts is obliged in the absence of special circumstances to follow decisions of the Strasbourg court if, in Lord Slynn's words, those decisions constitute "clear and constant

jurisprudence". There is a significant difference from this position in the duties of an English court when it is considering Strasbourg case law at the stage when it is considering whether to award damages and the amount of them because in conducting that exercise, an English court is not bound as in section 2(1) to "take into account decisions" of the Strasbourg court, but merely as stated in section 8(4) to "take into account the principles" applied by the Strasbourg court. This indicates that in dealing with damages, the English court has to try to define principles of the Strasbourg court and then to apply Lord Slynn's approach to them so that in the absence of some special circumstance, an English court should follow "clear and consistent principles" applied by the Strasbourg court.

181. In fact, there are a number of decisions of the Strasbourg court which show that awards of damages can be made for psychiatric loss without the claimant having first to satisfy the requirements set out in Hatton's case to which I referred in paragraph 48 above. As I will explain later in this judgment, in TP and KM v. United Kingdom (2002) 34 EHRR 42, it was held that damages that should be awarded for distress, anxiety, feelings of injustice which would not be satisfied or compensated by findings of violation of the Convention. In addition, there are many cases in which the courts have made awards for this form of loss, merely because they consider it fair or equitable to do so (see for example Van der Leer v. Netherlands (1996) 12 EHRR 567 and Curley v. United Kingdom (2001) 31 EHRR 14). In none of these cases does the Strasbourg court adopt a test like that in Hatton, but it applies a general principle of fairness in considering whether damages should be ordered and their amount. Thus, I conclude that the Strasbourg jurisprudence establishes clearly that damages can be awarded for distress and psychiatric injury without regard to the principles in Hatton, which I therefore need not consider further or apply in this case.

(i) Stage 1 - Power of the Administrative Court to award damages

182. It is not disputed that sitting in the Administrative Court, I have power to award damages or to the payment of civil proceedings. Indeed, the CPR enables damages to be included in the claim for judicial review (CPR 54(3)(2)). In any event, counsel for the Secretary of State accepted correctly in my view that even if the Administrative Court did not have such power to award damages, this matter could in any event be transferred to the Queen's Bench Division, where I could then award damages if it was appropriate to do so.

(ii) Stage 2 – Article 41 principles on entitlement to damages and amount of them

183. Article 41 sets out three pre-conditions for recovery of an award of damages. The first is that the court has to find "a violation of convention rights" and I have already made such a finding in respect of Article 8 for the reasons that I have explained in paragraphs 108 to 125 above. Second, the domestic law of the Respondent State, namely in this case the United Kingdom, must allow only "partial reparation to be made". This condition is satisfied as the Strasbourg Court has reserved to itself jurisdiction to consider the question of just satisfaction in virtually all cases where violation is found and rightly it is not suggested that this case falls in to one of the exceptional categories. The third requirement in Article 41 is that the award of damages is "necessary" to "afford just satisfaction". This power gives the Strasbourg Court a wide discretion to determine when an award for damages should be made and this has enabled them to order compensation for psychological harm (Aydin v. Turkey (1997) 25 EHRR 251) as well as for anxiety for infringing Article 8 rights (Lopez Ostra v. Spain (1994) 20 EHRR 277).

184. The Strasbourg Court does not consider that a breach of the Convention automatically triggers an award of damages. Indeed the court has so regularly held that its own finding of violation of a convention right is sufficient just satisfaction of a claim before it so as not to award damages to a successful claimant that in the words of the Law Commission "these words have become an established formula" (Damages under the Human Rights Act 1998 (2000) Law Com. 266 paragraph 3.38). This remains the position, even though it has been recently strongly and cogently criticised by Judge Bonello in his dissenting judgment in TW v. Malta Acquiliva v. Malta (2000) 29 EHRR 185, where he said that "I consider it wholly inadequate and unacceptable that a Court of Justice should satisfy the victim of a breach of fundamental rights with a mere handout of legal idiom".

185. It is, however, important to stress that it is difficult to identify or discern any underlying principles applied and established in the decided cases on the interpretation of Article 41 and on the circumstances in which damages are or are not to be awarded. Indeed, Lord Lester QC and David Pannick QC state that the case law relating to Article 41 lacks coherence with the result that advocates and judges are in danger of spending time attempting to identify principles which do not exist (Human Rights: Law and Practice (2000) paragraph 2.8.4). Similarly Stephen Grosz, Professor Beatson QC and Peter Duffy QC conclude that courts and tribunals are likely to be frustrated in their search for the principles applied by the Strasbourg Court (The Human Rights Act: The 1998 Act and European Convention paragraph 6.20). Richard Clayton QC and Hugh Tomlinson QC state, in relation to Article 41 that "there are serious concerns about the lack of consistency in the case law, about the obscure

nature of the basis upon which the Court makes awards of specified amounts of compensation and about the moral judgment the Court makes when evaluating different types of applicants.. " (The Law of Human Rights (2000) paragraph 21.33). Dinah Shelton explains in a passage (Remedies in International Human Rights Law (OUP 1999 p.1), cited in the Law Commission Report Damages under the Human Rights Act 1998 (2000) Law Comm 266 para. 3.12)) that:-

> "It is rare to find a reasoned decision articulating principles on which a remedy is afforded. One former judge of the ECHR privately states: 'We have principles, we just do not apply them'".

186. Against that unpromising background and with great diffidence, I can now suggest that there are three relevant very general propositions that can be stated on the effect of Article 41. First, it is clear that the Strasbourg Court has held that just satisfaction *may* actually have been provided by measures taken by the Respondent State after the Convention rights of a particular claimant have been infringed. An example is where there has been a violation of a right to a fair trial under Article 6 in the original proceedings and the applicant is then given a retrial which, unlike the original trial, complies with the requirements of the Convention with the result that the order for the retrial constitutes sufficient just satisfaction for the applicant against whom the same verdict is reached on the retrial as was arrived at on the first and impugned trial (see Piersack v. Belgium (1984) 7 EHRR 251). More recently, Sullivan J has accepted correctly in my respectful view that section 8(3) means that in some cases, damages are unnecessary (Bernard v. London Borough of Enfield [2002] EWHC 2282 Admin [39]).

187. Second, before damages can be awarded to a claimant, there must be a clear causal link between the breach of the claimant's convention rights and the losses for which the claimant is seeking compensation. The third principle which partially flows from the first two is that if first a clear causal link is established between the breach of the claimant's convention rights and the loss claimed and second if just satisfaction is not in itself provided by the finding of a court that a breach has occurred, then in those circumstances, the court should seek to make reparations to the claimant by means of a damages award so as to compensate him for those losses especially where the claimant would not be fairly and adequately compensated by the finding of violation of the Convention.

188. Both the second and third proposition also seem consistent with common sense and also with the very recent decision of the Strasbourg Court in E and Others v. United Kingdom (26 November 2002) to which I have already referred in paragraphs 42 and 135 above in which the claimant succeeded in establishing a violation of Article 3 in respect of the failure of the United Kingdom Government to provide protection against child abuse. The court approached the matter on the basis that there should be complete reparation *(restitutio in integrum)* in respect of the pecuniary losses supplied by the applicants where there was "a clear causal connection between the damages claimed by the applicant and the violation of the Convention" [120] and [121]. The approach of the Strasbourg Court was to decide what was an equitable sum to award to a claimant when, as was in the position in that case, the necessary causal link was established. After I had reached that decision, I noted that in TP and KM v. United Kingdom (2002) 34 EHRR 42, the Strasbourg court found a breach of Article 8 where a child had been removed into care as a result of an error as to the identity of the abuser, but what is relevant for present purposes is that the court awarded damages for distress, anxiety, feelings of frustration and injustice caused by the wrongful acts and suffered in consequence by the claimants as their damage "is not sufficiently compensated by the findings of a violation of the Convention" [115]. I consider those decisions to be recent precedents expounding the "clear and consistent" principles applied by the Strasbourg court in its approach and that I should follow them not only because of their cogency but also because they are consistent with a just and fair approach.

189. In the present case, the evidence of the claimant and of Dr. Yasin, the consultant psychiatrist, both of which are not challenged, establish that there was a clear causal connection between the psychiatric injuries sustained by the claimant and the breaches of the Convention for the reasons to which I have already referred in paragraphs 85 to 94 above. This evidence indicated clearly that the claimant had not previously suffered any psychiatric illness.

190. I do not consider that the belated decision in May 2002 to give the claimant asylum can be regarded as just satisfaction for, for example, the acute anxiety and depression from which the claimant suffered after receiving the refusal letter in February 2001 according to his undisputed evidence and that of Dr. Yasin, the consultant psychiatrist, and to which I have referred in paragraphs 91 to 94 above. At most, the May 2002 decision of the Secretary of State to permit the claimant to remain in this country ends, or acts as a cut-off point for the period for which he can claim compensation. Indeed in the light of the combination of three factors to which I will refer in the next paragraph, it is not easy to envisage cases in which there would *not* be a finding of just satisfaction if the Secretary of State could successfully contend that a decision that he had acted in breach of the Convention in the present case was just satisfaction for this claimant.

191. First, as I have already explained in paragraphs 12 to 30 above, the way in which the claimant's asylum and support applications were dealt with by the Secretary of State especially after the claimant brought his appeal was harsh and this conduct constituted a serious breach of his convention rights. Second and very importantly the context of this treatment and the nationality of the claimant are very relevant because the Secretary of State accepted that failed asylum seekers would be treated harshly and oppressively on their return to Libya as is apparent from the Secretary of State's May 2001 statement. Finally, the consequences of these factors had a very adverse effect on the claimant as appears from the undisputed evidence from him and from Dr. Yasin concerning the psychiatric injury sustained by the claimant and which I have summarised in paragraphs 91 to 94 above.

192. Thus, the finding of violation is not just satisfaction and so the claimant is entitled to be compensated for the psychiatric loss suffered by him but as I have explained that will have to be determined at a further hearing. I am fortified in reaching that conclusion by the decision of Sullivan J in Bernard (supra) who decided that to refuse to award damages would not afford them just compensation for the ordeal, for which no proper explanation had been given. The claimant is also seeking to recover damages for special damages, but as I have explained time pressure meant that I did not hear full argument on whether he is entitled to all or any of the sums claimed, which I will consider at the next hearing, together with quantification of the claim for distress.

193. Thus, I do not consider that Article 41 precludes a claim for damages made against the Secretary of State by this claimant.

(iii) Stage 3 – Should damages be awarded in the light of another remedy granted to the claimant?

194. As I have explained, the claimant is entitled to declaratory relief against the Secretary of State for the breaches of the Convention to which I have already referred. Before making an award of damages to the claimant, section 8(3)(a) of the HRA requires the court to be satisfied that such an "award is necessary to afford just satisfaction to [the claimant]" after "taking account of all the circumstances of the case including [these declarations]". Two important points must be made about the approach to this provision.

195. First, it means that the primary remedy for a breach of convention rights should be a remedy other than damages and that damages should only be awarded if the claimant can establish that the other remedies that the court has power to grant will not provide just satisfaction. In other words, as Lord Woolf CJ has explained extra-judicially, any other remedy available should be granted by the courts initially and damages should only be granted in addition only if that was necessary to afford just satisfaction. (*The Human Rights Act 1998 and Remedies* in M. Adenas and D. Fairgrieve (eds) *Judicial Review in International Perspective* (2000), p. 433 cited in the Law Commission Report). Second, the negative structure of section 8(3) of the HRA suggest that the starting point for a court should be to regard an award of damages as the exception rather than the rule. I respectfully agree.

196. Applying those principles to the present claim, it is clear that the claimant has suffered serious psychiatric damage and that an award of declarative relief would not provide compensation or just satisfaction for this injury. Moreover this is not one of those cases where the declaration will in the future benefit the claimant because of a continuing relationship with the Secretary of State. Thus, I conclude that an award of damages to the claimant in this case is in the words of section 8(3) of the HRA "necessary to afford just satisfaction to [the claimant]" for his psychiatric loss after "taking account of all the circumstances of the case including [the award of these declarations]". When I assess those damages for the claimant's psychiatric loss, I will consider after hearing submissions whether to award damages for the furniture claim and for the other heads of special damage.

(iv) Stage 4 –is an award of damages necessary after taking into account the consequences of awarding damages?

197. At this stage, it is necessary as a result of section 8(3)(b) of the HRA to focus on the *consequences* of awarding damages when considering if an award of damage is necessary to afford just satisfaction to [the claimant]" for his psychiatric loss and loss of furniture. As I have just explained, the structure of this provision means that such an award of damages is to be regarded as exceptional.

198. Mr. Wilken for the Secretary of State contends that if damages were awarded in this case, this would in consequence lead to a vast number of claims. Put in another way, he is relying on the "floodgates" argument. Even if the floodgate argument had any application to the fact-sensitive decision whether or not to award damages in a particular case, I do not consider that it has any value or relevance to this case.

199. As I have already explained, the decision in this case is fact-sensitive to the extent that it is based on a unfortunate combination of very unusual factors present in this case relating to the treatment of the claimant in this country and the likely treatment of him on return to Libya. In my experience of examining asylum claims and of reading of them in law reports, there are many features of this case which fortunately make it almost unique. Hopefully they will not be repeated. Thus, I do not consider that awarding damages in this case would not lead to many other successful claims. In any event even if such an award would lead to further successful claims, I do not believe that this fact in itself or combined with any other relevant circumstances would mean that it would not be "necessary that the award of damage is necessary to afford just satisfaction to [the claimant]" for his psychiatric loss.

200. It therefore follows the claimant has shown that it is necessary to award damages for his psychiatric loss to the claimant to afford just satisfaction to the claimant. . When I assess those damages, I will consider after hearing submissions whether to award damages for the furniture and special damages claims.

(v) Stage 5-is it " just and appropriate" to award damages to the claimant?

201. The Secretary of State contends that it is not "just and appropriate" to award damages to the claimant and so this claim should be rejected pursuant to section 8(1) of the HRA as there was another and an obvious remedy open to the claimant, when he had the difficulties in establishing his right to remain in this country and to obtain financial support and that was to apply for what is described by Mr. Wilken as "a compelling order" against the Secretary of State. So he submits that the claimant could have mitigated his loss as at any time between the refusal of his asylum claim and the subsequent granting of it, he could and should have made an application to the High Court for an order requiring the Secretary of State to comply with his duties to the claimant with the result that he would have been permitted to remain in this country and to receive appropriate financial support.

202. No authority was cited in support of the proposition that under the Convention, damages are not awarded to a claimant who has failed to mitigate his loss. Lord Woolf LCJ has suggested extra-judicially that a failure by a claimant to take preventive or remedial action should reduce the amount of the damages payable to him or her (*The Human Rights Act 1998 and Remedies* in M. Adenas and D. Fairgrieve (eds) *Judicial Review in International Perspective* (2000), p. 433 (cited in the Law Commission report). I respectfully agree and consider that a concept similar to the doctrine of the need of claimant to mitigate in English municipal law should be applied by the English Courts to the statutory HRA claim for damages. That concept of common law has its origins in the need to achieve a just result. Indeed, it would be strange if a claimant could in an appropriate case receive damages without any discount for the fact that his condition could and should have been alleviated by medical treatment but which he refused to seek for no proper or acceptable reason.

203. Under English law the onus is on the wrongdoer, namely on this application on the Secretary of State, to show that the claimant has failed to mitigate all or some of his loss, which the claimant ought reasonably to have avoided. In this case, the Secretary of State makes the not instinctively attractive complaint that the claimant did not sue the Secretary of State to ensure that he complied with his duty. For three reasons, I do not consider that this claimant in the present case failed to mitigate his loss, even though as he had a number of possible remedies open to him when his asylum claim was turned down. First, if the claimant had sought to judicially review the decision of the Secretary of State to refuse the claimant's asylum application, this would be unlikely to have been successful because there was an alternative remedy in the form of an appeal to a Special Adjudicator open to the claimant. Thus it is likely that permission to proceed on such an application would have been refused.

204. His obvious remedy was to appeal against the refusal of asylum, which was the option that he selected and he duly instigated his appeal, but as I have explained, the Home Office failed to process it for about 11 months before the present claim was brought; I have given the only explanation for this regrettable failure in paragraph 2 above. Second, in any event, another remedy open to the claimant was to pursue his claim through correspondence in the hope that his solicitors would persuade those who had made the asylum decisions adverse to him to change their mind. It is clear that Tyndallwoods, the claimant's solicitors were continually and conscientiously trying from February 2001 onwards, to ensure that the claimant's financial and asylum problems were resolved without resorting to litigation. The claimant did not have any money even though he could have received public funding for a claim against the Secretary of State. In addition, his solicitors were writing to his Member of Parliament on 25 June 2001 and 13 September 2001 to ask him to put pressure on the Home Secretary. The first of those letters shows the attempts that were made by the solicitors to contact the Immigration Service. The claimant acted reasonably in relying on this option. Third, to decide otherwise would mean holding that any claimant for asylum dissatisfied with the way that the Secretary of State or any agency under his control had acted in handling his case or his appeal would be held to have acted unreasonably if he did

not issue court proceedings at an early opportunity to seek to remedy the actions of the Secretary of State and that is imposing far too high a duty to mitigate on the claimant.

Conclusion

205. The claimant is entitled to damages for breach of Article 8 of the Convention and such damages are to be assessed at a subsequent hearing. No breach of Article 3 of the Convention has been established. As I have explained, this is a highly unusual case in which prominent features were a series of deeply regrettable administrative errors, the effect of which was compounded by the consequences for the claimant because of the likely treatment that he would have received on return to Libya and this was known to the Home Office. The four errors that I mentioned in paragraph 5 hopefully will not be repeated.