Asylum and Immigration Tribunal
WK (Article 8 – expulsion cases - review of case-law) Palestinian Territories [2006] UKAIT 00070

THE IMMIGRATION ACTS

Heard at Field House	**Determination promulgated**
On 4 April 2006	**23 August 2006**

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Before

MR JUSTICE HODGE, PRESIDENT
SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE PERKINS

Between

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Mendoza, Counsel, instructed by Ben Hoare Bell Solicitors
For the Respondent: Mr J Gulvin, Home Office Presenting Officer

In view of the growing number of cases dealing with Article 8 post-Ullah [2004] UKHL 26 and post-Razgar [2004] UKHL 27, it is useful to summarise in the one place the main propositions which have now been established:

(a) Lord Bingham's approach in Razgar applies to all Article 8 expulsion cases. Subject to it being necessary first to establish that there is an existing private or family life (or both), his five questions should serve as a framework for deciding all Article 8 expulsion cases.
(b) If an appellant cannot show that interference with his right to respect for private and family life will have consequences of such gravity as to engage Article 8, his case must fail at this (question two) stage. Being able to demonstrate grave consequences is also a necessary but not a sufficient

condition for being able to show, in answer to Lord Bingham's fifth question concerning proportionality, that the circumstances are "truly exceptional" (Buxton LJ, ZT [31], SN [17], [19]).

(c) The threshold in Art 8 expulsion cases is high and is properly summarised as requiring circumstances which are "truly exceptional".

(d) The "small minority" of cases whose circumstances are truly exceptional are properly to be left for identification on a case by case basis, albeit such identification must always be informed by an awareness of the stringency of the "truly exceptional" test.

(e) All expulsion cases are primarily "foreign"' cases and the high threshold of "truly exceptional" applies even where such cases have significant "domestic" aspects or elements (Buxton LJ, SN [2005] EWCA Civ 1683).

(f) "Health cases" encompass both physical and mental health cases and both types of cases can sometimes require consideration under Article 8 as well as under Article 3 (and Article 2).

(g) Health cases under Article 8 normally require specific focus on the effect health problems have on the appellant's right to respect for private life and in particular on whether there would be a breach of his physical and moral integrity.

(h) In considering whether an appellant in a health case can show "truly exceptional" circumstances one particularly important consideration will be whether he was already suffering from physical and/or mental illness before coming to the UK or during a time, if any, when he was in the UK with valid leave.

(i) Suicide cases can engage an appellant's rights under Articles 2, 3 and 8 of the Convention), but they are not to be seen as a wholly separate category (Baroness Hale, Razgar [64]).

(j) *So far as suicide cases which seek to rely on Article 8 are concerned, the principles are still primarily those set out by the European Court of Human Rights in Bensaid v UK (2001) 33 EHRR 10 and the facts in Bensaid afford a particularly important yardstick in assessing whether the circumstances of a case are truly exceptional.*

DETERMINATION AND REASONS

1. The appellant claims to be a Palestinian. His mother is Lebanese. His father is Palestinian. He is thirty-two. He arrived in the UK on 28 August 1998 and applied for asylum. His application was refused on 12 May 2000. He appealed. His appeal against that refusal was dismissed by the Adjudicator, Mr D J B Trotter, on 23 September 2003. Because that appeal related to a decision made prior to 2 October 2000, Mr Trotter was not able to consider the appeal on human rights grounds. The appellant submitted a human rights application on 11 September 2003. On 8 November 2004 a decision was made to refuse his application for leave to enter on the grounds that removal would not place the United Kingdom in breach of its obligations under the Human Rights Act 1998. His subsequent appeal against this decision came before an Adjudicator, Mrs N.A. Baird, on 14 February 2005. She dismissed the appeal on Article 3 grounds but allowed it on Article 8 grounds. The respondent applied for permission to appeal. By virtue of transitional provisions made under the Asylum and Immigration (Treatment of Claimants,

etc.) Act 2004, this application took effect as one for an order for reconsideration. This was made.

2. The appellant's personal history is complicated. He was born in the Lebanon. He moved to the United Arab Emirates when he was aged six or seven. When he was aged seventeen he became mentally ill. At paragraphs 7 and 8 the Adjudicator, Mrs Baird, summarised the appellant's subsequent history, drawing on the account given in a medical report prepared on 1 October 2004 by Dr K G Shoilekova, a Consultant Psychiatrist with County Durham and Darlington NHS.

> "7.... He remembers not sleeping very well, being argumentative, shouting at his parents and reading a great deal about religion. He claimed that there were six to eight gods in England compared to twenty in Arabia. He then believed he had authority from God and was superior to other people. He was first admitted to a psychiatric hospital at the age of 17 and was diagnosed with paranoid schizophrenia. He was further admitted six or eight times. The information given by the appellant was not consistent. He was treated with typical anti-psychotic medication and mood stabilisers. Later the diagnosis varied from schizoaffective disorder to bipolar affective disorder.
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> 8. After his arrival in the UK, the appellant initially stayed with relatives in Glasgow, and some time at the beginning of 2000 his mental condition deteriorated and he was admitted to the Southern General Hospital in Glasgow at the end of February 2000 under the care of Dr Caplin, Consultant Psychiatrist. At one point he become "disinhibited" and was transferred to a psychiatric intensive care unit at Leverndale Hospital where he was aggressive towards a member of staff and apparently bit a staff member. He was detained under section 26 of the Scottish Mental Health Act and was treated with injections of anti-psychotic medication. He was discharged in July 2000 but re-admitted at the beginning of September that year because he had bitten the girlfriend of his flatmate. He was treated with various drugs and then discharged, but soon afterwards was re-admitted on a formal basis to Leverndale where he was diagnosed with schizoaffective disorder and mania with psychotic features. He was in intensive care. He was having grandiose illusions, claiming he had been chosen by God. He also felt he was Jesus and it is mentioned that he was responding to auditory hallucinations at that time. He was discharged and moved to Darlington, and has been in the care of County Durham and Darlington Priority Services NHS Trust since July 2001.
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> 9. When he first attended in Darlington, he was complaining of feeling low in mood, tiredness and of having thoughts of self-harm. He said he had stopped taking his mood stabiliser medication as he was worried about possible sexual dysfunction. He was found to be depressed and started on anti-depressant medication. Following on this he failed to keep his appointments with his doctor and almost fully disengaged from services.
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> 10. Sometime at the end of December 2001/beginning of January 2002 he was admitted to the Pierremont Unit as his behaviour had become increasingly inadequate and openly inappropriate. He was taken to the Accident and Emergency Department in a mute state following an attempt to cover the windows of his house and burn his property. He shared some ideas that he had risen from the dead and had a belief that people were watching him through the television. During his admission he continued to be quite agitated, inadequate in behaviour and at one point openly violent. He was making threatening gestures to the staff, taking off his clothing and crawling on the floor screaming. He was placed in intensive care on Section 3 of the Mental Health Act because of his behaviour, which included kissing a fellow male patient and engaging in inappropriate sexual talk. He was shouting at the top of his voice and claiming he was God. He was also thought to be responding to auditory hallucinations, believing that he

was influenced by telepathy and that patients and staff members were going to harm him. Sometime in April 2000 he appealed against his detention under section 3 of the Mental Health Act, but was not successful and was not discharged from this section.

11. His condition gradually started to improve and his medication was adjusted. He was discharged at the end of summer 2002, but again was not compliant with his medication and stopped attending for his depot injections. When Dr Shoilekova saw him for the first time, he described him as hypomanic, talkative, hyperactive, labile in mood and high in self esteem. The doctor said he was left with the impression, which proved to be correct, that he was not at all compliant with medication and was not keeping his outpatient appointments regularly. He was admitted at the beginning of March 2003 but discharged himself against medical advice three days later, and failed to attend out-patient appointments. This led to another new admission on 24 April 2003 under Section 3 of the Mental Health Act. He was found by the police shouting and was chanting in the middle of a very busy road. He was aggressive on admission, and was initially admitted to Carmel Ward, an intensive care psychiatric unit at the Pierremont. There is a description of his behaviour during this period which includes the appellant saying he had been receiving the word of prophets and was the only person in the whole universe to receive such prophecies. He was completely lacking in any insight into his mental condition.

12. His treatment is described. His condition gradually improved and at the beginning of August 2003 he was transferred to an open psychiatric ward at the Pierremont, during which time he admitted to smoking cannabis and drinking alcohol on the ward. His [sectioning] was rescinded on 23 September 2003 because his condition improved, but he remained on the ward as an informal patient, and was eventually discharged on 10 December 2003. His diagnosis on discharge was Bipolar Affective Disorder and Psychotic Mania.

13. After discharge he was reviewed on a monthly basis initially and kept most of his appointments but did not comply with his medication. He asked for his treatment to be changed to something he had been getting in Lebanon and the doctors complied with his request because they felt that was the lesser evil. He received one injection but never turned up when the next one was due. He said he would rather have oral medication. He was given a prescription of tablets, but again failed to take them. He was not taking his mood stabilisers. His non-compliance with medication raised the concerns of the team about the possibility of a relapse and this led to referral of his care to the Assertive Outreach Team. Unfortunately, at the time of the report, this service was on hold due to a shortage of staff. Notwithstanding this, the appellant's condition appeared to have improved. Dr Shoilekova said the appellant was planning to attend a computer course at MIND. He currently lives in supported accommodation. He said the prognosis, even in the best possible scenario, namely if he is consistently complying with medication, remains guarded given the duration of his mental illness and the frequency and severity of relapses."

3. The Adjudicator, Mrs Baird, noted that the directions accompanying the respondent's 8 November 2004 refusal letter were for removal to Palestine, not Lebanon or the UAE. She had before her a large number of documents, including the appellant's responses to the respondent's refusal letter and several psychiatric reports. There was a report dated 22 August 2000 from Dr Richard Caplin of the Department of Psychiatry at the Southern General Hospital in Glasgow. This was supplemented by a letter dated 12 September 2001. There was a report dated 5 June 2002 from a Dr M.P. Singh, a locum Consultant Psychiatrist in County Durham. There were two reports from the Consultant Psychiatrist with County Durham and Darlington NHS, Dr Leslie Burton. He appears to have taken over

from Dr Singh. Then there were two reports from Dr Shoilekova, one dated 29 July 2003, the other which we have already mentioned, dated 1 October 2004.

4. Mrs Baird also heard oral testimony from the appellant who, as before us, was represented by Ms Mendoza.

5. Having considered the evidence in the round she concluded that despite there having been an improvement in his condition over the past year, he was "still very ill indeed" and there was a "very high risk of a relapse". She contrasted the fact that in the UK he was "under constant care of a high standard" with the situation he would face if removed to the Occupied Territories:-

> "47. The removal directions are set to the Occupied Territories because the appellant claims to be a Palestinian. He has never lived there and has no one here. There is scant evidence on the availability of medical care but it seems that access to care is difficult and one report says that all the consultants work in Jerusalem and it is not easy to get papers to go there. Existing anti-discrimination laws do not prohibit discrimination based on disability and such people experience difficulties in the area of employment and housing.
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> 48. The security situation in the Occupied Territories is well documented. There are still serious problems. There are reports of curfews and closures. There are reports of killings by suicide bombers, the destruction of homes, human rights abuses and poverty. It does appear to present difficulties for people who are vulnerable."

6. Whilst she did not consider that the appellant's situation if removed to the Occupied Territories would meet the stringent requirements identified by the Court of Appeal in *N* as being necessary in order to satisfy Article 3 criteria, she did think it would make his removal a disproportionate interference with his private life and his right to physical and moral integrity.

7. For that reason she decided to allow the appeal on Article 8 grounds.

Grounds of appeal/reconsideration

8. The respondent's grounds of reconsideration, which solely concerned Article 8, were concise. First, it was submitted that the Adjudicator at paragraph 52 had relied on mere speculation about the lack of available healthcare in the Occupied Territories and had effectively treated the burden of proof as being on the Home Office rather than on the appellant to show that medical services were unavailable. Secondly, it was contended that the Adjudicator had misapplied the correct legal tests as set out in *Bensaid v UK* (2001) 33 EHRR 10 and *Razgar* [2004] UKHL 27 and that, if she had applied the correct legal tests, she would have reached a different conclusion.

9. We should note that further evidence submitted for the hearing before us made reference to the fact that two months after the Adjudicator promulgated her determination on 23 March 2005, the appellant was again detained under the Mental Health Act. On 27 May 2005 he was admitted to Cedar Wood and was not discharged until some time in January 2006. However, as Ms Mendoza acknowledged, this was not evidence we could consider when deciding whether her determination disclosed a material error of law: *R (Iran)* [2005] EWCA Civ 982, [2005] INLR 633, CA [90].

10. Turning to the respondent's first ground of reconsideration, we are not persuaded that the Adjudicator fell into error in her approach to the evidence concerning the lack of available medical treatment in the Occupied Territories. The respondent relied on what the Adjudicator said at paragraph 52 (we italicise the relevant sentences or parts thereof):

> "52. The appellant suffers from serious mental illness which has been kept under control in the UK by the treatment he has had here. *I have no evidence that such treatment would be available in the Occupied Territories. I doubt that any such treatment would be available, given the objective evidence. If there is treatment it is likely to be very much inferior to the treatment he is getting here*. I think there would be potentially serious damage to his mental health if he cannot access treatment. The problem is that this appellant does not suffer from a physical illness but from a mental one. As I have already said, one of his doctors said that he has no concept of his illness. His behaviour, when he is ill, is awful. He would be living in an Arab country with a tendency to think of himself as supreme God and to criticise Islam. I have some sympathy with the submissions of Ms Mendoza that he could get himself shot. It seems that he is fine then the symptoms appear and his behaviour is uncontrollable. He has a tendency not to take his medication. *I suspect the medication he takes may not be available to him*. No one has given opinion on how a change of lifestyle would affect him but this would not just be a change of lifestyle. He would be going to live in what is effectively a war zone where terrifying things happen every day. He would have no support, no job and no family. *He may have no access to medical care at all.* I felt that he would not be able to cope with all of this. *If he were to suffer a relapse like those described above and is unable to get appropriate treatment* I think he would be at risk of physical harm because of his behaviour and I think there would be a flagrant denial of his right to physical and moral integrity."

11. Some criticism can and should be made of the Adjudicator's uncertain phraseology here ("I doubt", "I suspect"), but reading the determination as a whole we think it is sufficiently clear she considered it unlikely the appellant would receive appropriate medical treatment for his condition in the Occupied Territories. She was not seeking to say that there were no medical facilities in the Occupied Territories, only that the type of treatment the appellant needed and was receiving in the UK would not be available. That she was not substituting speculation for evidence can be seen from her close reliance on the background evidence when making her assessment. Earlier in paragraph 47, with clear reference to a report in the bundle, she had noted that:

> 'There is scant evidence on the availability of medical care [in the Occupied Territories] but it seems to me that access to care is difficult and one report says that all the consultants work in Jerusalem and it is not easy to get papers there ...'

12. Nor do we think that the Adjudicator reversed the burden of proof as regards the availability of relevant medical treatment. At paragraph 40 she had reminded herself, correctly, that the burden was on the appellant to establish that returning him to the Occupied Territories would expose him to a real risk of a breach of his human rights. Nowhere did she say anything to suggest that she considered that it was for the respondent to prove that relevant medical treatment would be available.

13. We turn, therefore, to the second ground of reconsideration, which alleged that the Adjudicator had applied the wrong legal tests in deciding that there had been a breach of Article 8. In amplifying this ground Mr Gulvin highlighted two points in particular. The Adjudicator had failed to deal properly with the proportionality issue, he said, this being evident from her failure to conduct any kind of balancing exercise. She had also failed, he said, to show she had attached significant weight to the imperative interests of the state in the maintenance of effective immigration control.

14. In response to a request from us that the parties seek to comment on the current state of case law to be applied in Article 8 health cases, Mr Gulvin contended that we should approach matters on the basis that cases of physical illness fell to be considered under Article 3 whereas cases of mental illness, such as this one, fell to be considered under Article 8. However, that did not mean that it was any easier for an appellant with mental health problems to succeed under Article 8, since that required showing removal would cause a flagrant denial of his Article 8 right and a balancing exercise was required in which the interests of the state normally prevailed. Ms Mendoza did not seek to comment on the physical/mental health distinction, nor did she seek to disagree with the view that under Article 8 the threshold was a high one. However, considered cumulatively, she argued, the appellant's circumstances were reasonably regarded by the Adjudicator as truly exceptional and so her decision was not legally erroneous and the panel should not interfere with her decision.

15. We pause here to note that at the date of hearing before the Adjudicator (14 February 2005) the House of Lords had issued its judgment in the case of *Razgar* UKHL 27 (17 June 2004), but had yet to decide the case of *N* [2005] UKHL 31 [2005] INLR 388, (5 May 2005), and the Court of Appeal had yet to give further guidance on Article 8 criteria in the case of *Huang* [2005] EWCA Civ 105, [2005] INLR 247 (1 March 2005). Nevertheless, since these cases determine points of law, it is right that we ask ourselves whether the Adjudicator's approach to Article 8 adequately reflected the clarification they provide. For similar reasons we have to pay due regard to further decisions having a bearing on the Article 8 issues we have to examine.

The current state of case law on Article 8 in expulsion or removal cases

16. This case was listed before a panel chaired by the President with a view to clarifying the scope of Article 8 in health cases which have failed under Article 3, but this task requires that we draw carefully on the growing body of cases on Article 8.

17. Such a task confronts an immediate difficulty.

18. In broad terms the House of Lords in *Ullah* [2004] UKHL 26, [2004] INLR 381 and *Razgar* [2004] UKHL 27, [2004] INLR 349 endorsed the approach to Article 8 taken by the IAT immediately after commencement of the Human Rights Act 1998 in cases such as *Devaseelan* [2002] UKIAT 702 [2003] Imm AR 1 and *Nhundu and Chiwera* 01/TH/0613. However, we are now approaching the situation where the number of judgments post-*Ullah* and post-*Razgar* has become a cause of possible confusion, by virtue of the fact that not all expressly cross-refer

or seek to build on each other or provide an overview. The proper functioning of the AIT requires us to apply the law as clearly and simply as possible. Of necessity case law on Art 8 must remain open-ended, since the European Convention on Human Rights (ECHR) is a "living instrument". But just as the Court in Strasbourg in its jurisprudence on Art 8 expulsion cases constantly seeks to consolidate and build on its previous case law, so must national courts and tribunals. What follows, therefore, aims to set down in one place a summary of the main propositions that have been developed in *Ullah* and *Razgar* and subsequent cases, in particular *Huang* [2005] INLR 247, *Akaeke* [2005] EWCA Civ 947, [2005] INLR 575, *J* [2005] EWCA Civ 629, *Ernest Festus Betts* [2005] EWCA Civ 828, *KK* [2005] EWCA Civ 1082, *Sadri Alihajdaraj* [2005] EWCA Civ 1084, *R(Rodriguez-Torres)* [2005] EWCA Civ 1328, *Tural Boran* [2005] EWCA Civ 1141, *ZT* [2005] EWCA Civ 1421, *SN* [2005] EWCA Civ 1683, *Janosevic* [2005] EWCA Civ 1711, *Miao* [2006] EWCA Civ 75, *Krasniqi* [2006] EWCA Civ 391, *Tozlukaya* [2006] EWCA Civ 379 and *R(on the application of (1) Karas (2) Miladinovic and Secretary of State for the Home Department* [2006] EWHC 747 (Admin), *R (on the application of Jojo Mimi Katshunga) v Secretary of State for the Home Department* [2006] EWHC 1208 (Admin). At the tribunal level the most important cases since *Ullah* and *Razgar* have been *BK* [2005] UKIAT 00001, *MB (Huang-Proportionality-Bulletins)* Croatia [2005] UKIAT 00092, *CW (Deportation-Huang-Proportionality)* Jamaica [2005] UKIAT 00110 and *Sun Myung Moon* [2005] UKIAT 00112**,** although we have also had regard to *IK (Suicide/mental stability: legal requirements)* Turkey [2005] UKIAT 00049, *RG (Suicide-Risk-Razgar considered)* Sri Lanka [2005] UKIAT 00072, *MK (Mental Illness – Articles 3 and 8)* Pakistan [2005] UKIAT 00075, *JS (Suicide risks-Articles 3 and 8)* Sri Lanka [2005] UKIAT 00083, *AA (Algeria-Mental health)* Algeria [2005] UKIAT 000084, *MG (Assessing interference with private life)* Serbia and Montenegro [2005] UKAIT 00113, *GS (Article 8-public interest not a fixity)* Serbia and Montenegro [2005] UKAIT 00121, *MA(DP3/96, interpretation)* Algeria [2005] UKAIT 00127, *LH (Truly exceptional – Ekinci applied)* Jamaica [2006] UKAIT 00019 and *FN (Article 8-removal-viable options)* Eritrea [2006] UKAIT 00044.

(a) Lord Bingham's approach in Razgar applies to all Article 8 expulsion cases. Subject to it being necessary first to establish that there is an existing private or family life (or both), his five questions should serve as a framework for deciding all Article 8 expulsion cases.

19. Lord Bingham in *Razgar* [17] identified a number of questions adjudicators (now immigration judges) have to ask, step-by-step, in cases where removal is resisted in reliance on Article 8. His questions only arise, of course, if an appellant has first been able to establish that he has a protected right under Article 8, to private or family life (or both) as the case may be. His questions are:

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

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

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

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?

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

(b) If an appellant cannot show that interference with his right to respect for private and family life will have consequences of such gravity as to engage Article 8, his case must fail at this (question two) stage. Being able to demonstrate grave consequences is also a necessary but not a sufficient condition for being able to show, in answer to Lord Bingham's fifth question concerning proportionality, that the circumstances are "truly exceptional" (Buxton LJ, ZT [31], SN [17], [19]).

20. It should be noted that the above approach applies to all expulsion cases in which Article 8 is raised. For Article 8 even to be engaged in an expulsion case, it must be shown, in response to Lord Bingham's second question, that the interference will have grave consequences (*Razgar* [17]). It was pointed out by the Tribunal in *MG (Assessing interference with private life*) Serbia and Montenegro [2005] UKAIT 00113 that in many cases errors of law occur because judicial fact-finders miss out the second of Lord Bingham's five questions. Having found that a person enjoys a private or family life in the United Kingdom they move straight on to Lord Bingham's fifth question. Yet in many cases and particularly where private life alone is at issue, the second question, if properly addressed, will result in a negative answer. (We would not, however, affirm the suggestion in *MG* that if a case fails at the question 2 stage this obviates the need to address proportionality. That may be apt in certain cases, but generally speaking, it will be important to know, in case of further challenge, what answer the judicial fact-finder would have given to question 5, even if the answer to question 2 had been a negative one.)

21. It is suggested by Buxton LJ in *ZT* [31-32] and in *SN* ([15], [17]) that the requirement set out by Lord Bingham in his second question amounts to a "flagrancy" requirement, i.e. a requirement that a person be able to show that the interference would cause a "flagrant denial" of the right to respect for private and family life. However, this suggestion did not form part of the ratio of that judgment and it seems to us that it sets the bar too high. Lord Bingham's formulation in *Razgar* certainly makes clear that, for Article 8 to be engaged in an expulsion case of any kind, the interference must be shown to have grave consequences. However, it does not require that the consequences must be so grave as to nullify or totally negate or obliterate the right. As is made clear by their lordships in *Ullah* (reiterating the principles established in *Razgar* and approving the Tribunal's conclusion on this point in *Devaseelan*), a flagrancy requirement only arises in an expulsion case involving qualified rights such as Articles 8 (and 9), where the basis for claiming a breach of that qualified right concerns an extra-territorial threat to it, i.e. a threat caused to the enjoyment of the right in the territory of the receiving or destination state. It was held in *Ullah* that a flagrant violation requirement arises only "where the right will be completely denied or nullified *in the destination country*" (emphasis added) (Lord Bingham [24], [9], Lord Carswell [69]). In most (in-country) Article 8 cases, however, analysis of the severity of the

consequences resulting from the interference (Lord Bingham's question 2) involves examination of the alleged disruption of a person's private and family life relationships in the United Kingdom. Sometimes it may also involve examination of an alleged threat to that person's ability to enjoy private and family life in the receiving state. If both aspects are involved then the case is (in Lord Bingham's words in *Ullah* [18]) of "a hybrid nature". A case being of a hybrid nature does not mean that it is subject to two different legal tests: the legal test in every type of case is one of "grave consequences". But being able to show "grave consequences" will be harder where the claim turns on a threat to enjoyment of the right to respect for private or family life (or both) in the territory of the destination state. Conversely, it is a settled part of UK jurisprudence on Article 8 expulsion cases that the stronger a person's private and family life ties in the United Kingdom, the easier it will be for Lord Bingham's question 2 (concerning whether there is an interference having grave consequences) to be answered in the affirmative.

22. Yet to be fully explored is to what extent the nature of interference in a protected right under Article 8(1) depends on whether the subject matter is private life, family life or a mixture of the two. However, this much can be said: although Strasbourg jurisprudence on Article 8 accepts that both family life and private life relationships (or connections) formed in the sending state can create strong ties, it also considers it easier for a person to show that grave consequences would ensue from disruption of family life relationships than from disruption of private life relationships. It must also be borne in mind that the right guaranteed in Article 8(1) is a right to respect for "private and family life..." and that in many cases there will be an element of combination, so that account has to be taken of both "private life" and "family life" aspects of a person's situation (*Nhundu and Chiwera* 01/TH/0613, [26]).

23. Only in respect, therefore, of aspects of a claim based on the alleged interference with the right to respect for private and family life *in the territory of the destination country* will it be right to require that the claimant show that interference of that kind would have consequences so grave as to amount to a flagrant denial of that right.

24. Once Article 8 is found to be engaged (second question) and assuming questions 3 and 4 are also answered in the affirmative, an assessment must be made of proportionality.

(c) The threshold in Article 8 expulsion cases is high and is properly summarised as requiring circumstances which are "truly exceptional".

25. For a person to succeed in reliance on Article 8 the threshold is high (Lord Bingham, *Razgar* [9]). Although Article 8 can be engaged even when a case fails under Article 3, "decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of cases identifiable on a case by case basis" (*Razgar* [20]). The range of circumstances is "very narrow indeed" and it will not be enough that circumstances are compassionate (*CW*, [35], [42]). Cases which fall into this category must be ones where only "the most compelling humanitarian considerations" are to be found (Baroness Hale, *Razgar* [59]; Buxton LJ, *SN* [19]) or where the circumstances are "truly exceptional" (Laws LJ, *Huang*, [60]). Both of these formulations are practical applications of Lord

Bingham's generalisation about proportionality. That the "truly exceptional circumstances" test is a proper reflection of the approach taken in *Razgar* is also evident from the way matters were put by Lord Bingham at para [20] of *Razgar*: "Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of *exceptional cases*..." (emphasis added); see also Lord Carswell [72].

26. Whilst the grave consequences requirement most obviously arises in relation to Lord Bingham's second question in *Razgar* [17], it applies to all aspects of a case where there is to be expulsion to another country. Put another way, grave consequences is the only test under Lord Bingham's second question, whereas under Lord Bingham's fifth question it is a necessary but not a sufficient condition for establishing that an expulsion decision is disproportionate by virtue of being "truly exceptional". Lord Bingham's fifth question is thus one which cannot be answered in the appellant's favour unless the circumstances are established as "truly exceptional" (Buxton LJ, *ZT* [31], *SN* [17], [19]).

27. Although the speeches in *Razgar* do not employ the term "*truly* exceptional" (emphasis added) they make clear, by the stipulation that the number of cases in which it can be said that it is not proportionate for the state to remove a foreign national is "limited", that the circumstances in contemplation must be "truly exceptional".

28. The formulations to be found in *Razgar* and more recently in *Huang* represent a development from earlier case law, *Mahmood* [2001] INLR 1 in particular. That is not to say, however, that Lord Phillips MR's more particularised summary in *Mahmood* (later reconfirmed in *Ekinci* [2003] EWCA Civ 765) of factors to be taken into account in family life cases is no longer instructive. In *Mahmood* both Lord Phillips MR [61] and Laws LJ viewed the post-removal option of applying from abroad for entry clearance as normally making an expulsion decision proportionate unless exceptional circumstances can be shown. Simon Brown LJ in *Ekinci* likewise emphasised the need for there to be exceptional circumstances. Thus, so long as it is borne in mind that in deciding whether a decision is disproportionate the threshold is high and that circumstances must be truly exceptional, the guidance given in *Mahmood* and *Ekinci* remains relevant (for a recent application of this approach by the AIT, see *LH (Truly exceptional – Ekinci applied)* Jamaica [2006] UKAIT 00019).

29. The suggestion is sometimes made that the "truly exceptional circumstances" test is not one which is used by the Court in Strasbourg and as such does not reflect its jurisprudence on Article 8. However, even if the "truly exceptional circumstances" test were considered to be a purely UK test, that would not in itself show it was contrary to Strasbourg jurisprudence, since that jurisprudence has consistently emphasised that under Article 8 each state has a "margin of appreciation" as to how they apply Article 8. In any event we do not consider that this test is at odds with Strasbourg jurisprudence. On the contrary, Lord Bingham's above formulation (like Lord Phillips MR's formulation in *Mahmood*) was based squarely on Strasbourg jurisprudence. Close reliance on Strasbourg cases was integral to all the speeches in *Razgar*. Illustrative of this is the observation by Lord Walker at [30]: "It is unnecessary to repeat all the citations but it is relevant to note that the Strasbourg court's insistence on the need for 'very exceptional circumstances'

continues to be maintained in the most recent jurisprudence: see the admissibility decision in *Henao v The Netherlands* (unreported) 24 June 2003."

(d) The "small minority" of cases whose circumstances are truly exceptional are properly to be left for identification on a case by case basis, albeit such identification must always be informed by an awareness of the stringency of the "truly exceptional" test.

30. It would be short-sighted to attempt an enumerative definition of the "small minority of exceptional cases..." (*Razgar* [20]). The insistence by Lord Bingham on identification being only possible on a "case by case basis" is well-founded. There are very good reasons why identification should be left to a case-by-case basis. First and most obvious of all, the identification of cases that are "truly exceptional" is essentially one of fact. Decisions are and have to be fact-specific (Lord Phillips MR, *Mahmood* [55(6)]). Secondly, attempt at enumerative definition would be contrary to the Strasbourg Court's principle of dynamic interpretation: the ECHR is a "living instrument" (*Golder v UK* (1975) 1 EHRR 524). Hence decisions of the Strasbourg Court and those of the Tribunal and courts in the UK have constantly to adapt to developments in society. UK courts and tribunals also have an ongoing duty under s.2 of the Human Rights Act 1998 to take into account Strasbourg jurisprudence insofar as it is relevant to the proceedings in which a human rights question has arisen.

31. Thirdly, what is required when assessing proportionality under Article 8 is the striking of a fair balance which means a weighing up of all the circumstances of the case, both those appertaining to the applicant and those appertaining to the state's dealings with his case; it is not a mechanistic exercise in which fixed or predetermined weight is to be accorded to specific factors (Carnwath LJ, *Akaeke* [24], *GS (Article 8-public interest not a fixity)* Serbia and Montenegro [2005] UKAIT 00121). Conducting the balancing exercise will typically require having to consider circumstances *cumulatively* and to gauge factors which carry weight on both sides of the scale. One cannot simply designate certain factors as "truly exceptional" without considering them in their overall context.

32. But this is not to say that the identification of cases that are "truly exceptional" is wholly a matter of fact to be determined by the decision-maker and without being subject to scrutiny. As Sedley LJ noted in *Krasniqi* [2006] EWCA Civ 391, the question of whether a case is truly exceptional "is in principle one of fact. But it is a question of secondary fact dictated by law and, therefore, susceptible of closer scrutiny than findings of primary fact".

33. In this regard it will always be important to recognise that the "truly exceptional" test is a stringent one. Accordingly it will be an error of law to equate the "truly exceptional" criterion with circumstances which are merely compassionate or deserving of sympathy or admiration (*CW*, para [35]**,** *MG (Assessing interference with private life)* Serbia and Montenegro [2005] UKAIT 00113). The circumstances, to repeat Baroness Hale's words, must be ones where "the most compelling humanitarian considerations" obtain. Plainly, to show circumstances which are "truly exceptional", an appellant must be able to point to circumstances which are not covered by the immigration rules or extra-statutory policies and which differentiate his situation from that of unsuccessful claimants, many of

whom typically will have been in the UK for some length of time and developed strong private and/or family life ties (Munby J, *R (on the application of (1) Karas (2) Miladinovic) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin)).

34. It will always be important too to bear in mind the need for a proper approach to the question of proportionality. Although the decision-maker when conducting the proportionality exercise under Article 8(2) has to strike a fair balance between the individual's right to respect for private and family life on the one hand and the interests of the state and wider community on the other, that does not mean they are to be treated as being normally of equal weight. To the contrary, the *interests of the state* will normally be of an imperative character and are normally to be given very heavy weight (Lord Bingham, *Razgar* [19]; Laws LJ, *Huang*, [59]). In this regard the body of national immigration rules and extra-statutory policies sets limits: the balance struck by the rules [and policies] will generally dispose of proportionality issues arising under Article 8 (Lord Bingham, *Razgar* [19]; Laws LJ, *Huang*, [60]; Sedley LJ, *Miao* [24]). In the words of Ouseley J when sitting as President of the Immigration Appeal Tribunal in *CW*:

> "They are to be regarded as the proportionate response of the executive, approved by Parliament, to the many and varied circumstances which individual immigration cases present... When a rule or extra-statutory provision covers the sort of circumstances upon which an individual relies, e.g. entry for marriage, study, medical treatment or delayed decision-making, but the individual falls outside the specific requirements or limits of the otherwise applicable rules or policy, that is a very clear indication that removal is proportionate." (*CW*, [31], [32]).

35. For this reason, to be called "truly exceptional", a case must be one that has of necessity to be described as not being encompassed by the (generally Article 8-compliant) immigration rules or extra-statutory policies.

36. It is for this reason that Laws LJ in *Huang* describes the cases which can fall into the limited category of those which are truly exceptional as being residual (*Huang* [57], [60]).

37. However, the fact that a person cannot bring himself within the immigration rules or extra-statutory policies, whilst it sets limits to the balancing exercise which must be conducted, is only a start-point for deciding whether the circumstances are "truly exceptional" and so giving rise to disproportionality. The mere fact that a person cannot bring himself within the immigration rules or extra-statutory policies does not entitle him to say his case is "truly exceptional". On the contrary, every case under this head has this feature at least in common. The question is therefore not merely whether the case falls outside the rules or extra-statutory policies. It is whether the nature of the case is such that the rules can be shown to have failed as a code, to implement the state's Article 8 obligations.

38. Some further indication of the type of cases which fall or do not fall within the residue of cases not catered for by immigration rules or extra-statutory policies and which are also "truly exceptional" can be gleaned from guidance given in leading cases. We recall in this respect the summary of Strasbourg jurisprudence on Article 8 family life expulsion cases given by Lord Phillips MR in *Mahmood*:

> "55. From these decisions I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration controls:
>
> (1) A State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
> (2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.
> (3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.
> (4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.
> (5) Knowledge on the part of one spouse at the time of marriage hat rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.
> (6) Whether interference with family rights is justified in the interests of controlling immigration will depend on
>
> (i) the facts of the particular case and
>
> (ii) the circumstances prevailing in the State whose action is impugned."

39. From this summary it is clear, for example, that a person will not be able to establish "truly exceptional" circumstances simply on the basis that he has developed significant private life and/or family life ties and because there would be a degree of hardship involved in his family living together in the country of origin. Likewise, mere reliance on having enjoyed family life in the UK for a considerable period will not give rise to "truly exceptional circumstances" where the appellant knew that his immigration status was precarious when he entered into such a relationship. A similar difficulty would confront an appellant seeking to rely (under the "private life" rubric) on having done valuable work in the community or on having worked in an employment sector in which there is a skills shortage.

40. Leading cases not only contain guidance on what will not constitute "truly exceptional" circumstances, but also what may. Such circumstances can arise where there are unusually compelling reasons for attaching less weight than normal to *the interests of the state* due to special factors: e.g. bad faith, ulterior motive, deliberate abuse of power (Lord Bingham, *Razgar* [19]), failure of the state in the past to apply a policy which was in place and which would, if applied, have conferred a benefit on the applicant in terms of immigration status (Schiemann LJ, *Shala* [2003] EWCA Civ 233). What is significant about such factors is how special they have to be. Delay on its own, albeit always a relevant factor, is not a determinative factor (*Strabac* [2005] EWCA Civ 848; Carnwath LJ, *Akaeke* [2005] EWCA Civ 947; *Janosevic v Secretary of State for the Home Department* [2005] EWCA Civ 1711).

41. Conversely, factors which in a limited number of cases may justify attaching decisive weight to the *appellant's rights* under Article 8(1) so that they can override the normally imperative interests of the state include those where there are exceptional circumstances which (because there are insurmountable obstacles) prevent exercise of either of the normal options for the applicant of continuing family life aboard or of applying from abroad for entry clearance (*Mahmood; MB* [2005] UKIAT 00092, [29]*; EH* Iraq [2005] UKIAT 00062*; MS (inability to make entry clearance application)* Somalia [2005] UKIAT 00030*; KJ (Entry Clearance- Proportionality)* Iraq CG [2005] UKIAT 00066).

42. Limited help in identifying cases which are or are not "truly exceptional" can sometimes be gained from an analysis of leading decided cases insofar as they can be seen to delineate broadly similar facts or circumstances or persons who are similarly situated. These may be UK court or tribunal cases or Strasbourg cases. However, in relation to UK court decisions, it will be of little assistance in appeals which fall for decision on their merits, to cite cases where the decision concerns legality, not merits. Thus, for example, in the case of *Razgar* himself, the only basis on which he was entitled to succeed before the courts was in respect of whether it was *possible* that an Adjudicator might decide that his Article 8 rights would be violated by removal (majority decision of Lord Bingham [24], Lord Steyn [26] and Lord Carswell [78] upholding the certification of his claim). Similarly, as we shall see, our eventual decision on the facts of this case, being based not on whether the Adjudicator reached the correct decision, but only on whether her decision was one reasonably open to her, has similar limitations as a factual yardstick.

(e) All expulsion cases are primarily "foreign" cases and the high threshold of "truly exceptional" applies even where such cases have significant "domestic" aspects or elements or "stages".

43. A "foreign" case is one in which the conduct of the state in removing a person from its territory to another territory would lead to a violation of a person's Convention rights in that country (Lord Bingham, *Ullah* [7]). A "domestic case" is one "where a state is said to have acted within its own territory in a way which infringes the enjoyment of a Convention right by a person within that territory" (Lord Bingham, *Ullah* [7], Baroness Hale, *Razgar* [41]).

44. The distinction between "foreign" and "domestic" cases, albeit useful, is one which was recognised at the outset to be an "imperfect" one (Lord Bingham, *Ullah*, [9]). Ultimately it concerns a distinction between indirect and direct state responsibility (Baroness Hale, *Razgar* [41]). The "truly exceptional" test applies to both "foreign" and "domestic" cases concerning expulsion. Arguments to the contrary have now been tried twice and rejected twice by the Court of Appeal in *ZT* and *SN*. Such arguments sought to exploit an apparent difference of approach in *Razgar* between Lord Bingham and Baroness Hale over classification of cases into "foreign" and "domestic". It was asserted that Baroness Hale in *Razgar* was only prepared to accept that expulsion cases which were 'foreign' cases required a high threshold of true exceptionality. In *SN* Buxton LJ has rejected these arguments. His conclusion was that since all the speeches in *Razgar* accepted that a high

threshold was to be applied in all expulsion cases, the latter were properly to be treated always as "foreign" cases.

45. In our view, the opinion of Buxton LJ in *ZT* and *SN* that all Article 8 expulsion cases are "foreign" cases subject to a high threshold of true exceptionality should be regarded as definitive.

46. It should not be thought, however, that the "foreign"/"domestic" distinction no longer has utility. It does, but in terms of practical application it is best understood as referring to elements or aspects or "stages" of a case. As already noted, in expulsion cases there can sometimes be a degree of mixture of "foreign" and "domestic" elements (Lord Bingham, *Ullah* [9]; Baroness Hale, *Razgar* [41]; Buxton LJ, *SN* [13]). Cases can be of a hybrid nature (Lord Bingham, *Ullah* [18]). In *J* [17], Dyson LJ refers to "foreign and domestic" cases, but makes clear that one and the same appeal may need to be looked at in some respects as a "foreign" case, in other respects as a "domestic" case. "Foreign" elements relate to conditions in the receiving state, "domestic" elements relate to the situation of the individual in exercising his right to respect for private and family life in the UK. Because the "foreign"/"domestic" distinction requires the decision-maker to take account both of circumstances in the receiving state and circumstances in the UK, it is particularly useful in reminding him of the need to weigh relevant factors cumulatively. However, it should always be borne in mind that evaluating a person's situation in the territory of the destination state (examining "foreign" elements) is much less straightforward than evaluating his (or her) situation in the UK (examining "domestic" elements), where the existing and reasonably foreseeable facts are more readily ascertainable.

(f) "Health cases" encompass both physical and mental health cases and both types of cases can sometimes require consideration under both Article 3 (and Article 2) as well as under Article 8.

47. The definition given by Baroness Hale in *Razgar* of a "health case" is a broad one. By a 'health case' is meant, she stated, "one in which the applicant's health needs are being properly or at least adequately met in this country and the complaint is that they will not be adequately met in the country to which he is to be expelled" (*Razgar* [54]).

48. "Health cases" encompass both physical health cases (such as *N* [2005] UKHL 31 and *D v UK (*1997) 24 EHRR 423) and mental health cases (such as *J [2005] EWCA Civ 269* and *Bensaid v UK* (2001) 33 EHRR 10 and *SN* [2005] EWCA Civ 1683). The circumstances in mental as distinct from physical health cases are not precisely analogous. "One material difference is that the risk arises not just from the person's removal to a place where the condition is likely to worsen, but from the direct impact on that person's mental health of the decision to remove" (*J* [42]). However, such differences are less important than their underlying similarity as health cases subject to the same underlying Article 8 criteria *(MK (Mental illness-Articles 3 and 8)* Pakistan [2005] UKIAT 00075; *JS (Suicide risks-Articles 3 and 8)* Sri Lanka [2005] UKIAT 00083).

49. A "health case" may give rise to issues under either Article 3 or Article 8 or both (sometimes Article 2 is also in issue). Notwithstanding that the circumstances in

mental as distinct from physical cases are not precisely analogous, we see no jurisprudential basis for the suggestion (made by Mr Gulvin in his submissions to us in this case) that physical illness cases can only arise under Article 3 and mental illness cases can only arise under Article 8. The analysis in *N* embraced cases of physical as well as mental illness (*N* [44], [70]). The Court in *Bensaid* considered whether the applicant whose case was based on mental illness could succeed under Article 3 and Article 8 but found on the particular facts in his case he could not succeed under either article. We would observe that it would be highly artificial to attempt in the Article 8 context to treat physical and mental illness as totally separate categories, since both relate to a person's private life and in a significant number of cases a person's physical and mental conditions are interrelated.

(g) "Health cases" under Article 8 normally require specific focus on the effect health problems have on the appellant's right to respect for private life and in particular on whether there is a breach of his physical and moral integrity. It is clear, however, from Strasbourg jurisprudence that the European Court of Human Rights views its development of the concept of physical and moral integrity as a limited extension designed to assist in cases which only just fail under Article 3.

50. Reliance may, in principle, be placed on Article 8 to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties which a person has enjoyed in the expelling country but on the consequences for his mental health of removal in the receiving country (Lord Bingham, *Razgar* [9]).

51. "Health cases" arise under Article 8 as an aspect of the right to respect for private life, in particular the right to physical and moral integrity. In *Razgar* Lord Bingham emphasises that "private life" is a broad term and the court has wisely eschewed any attempt to define it comprehensively" ([9]). The Tribunal has considered that "private life" can indeed be understood in its broadest sense as embracing family as well as non-family aspects of the right to personal development and the right to establish and develop relationships with other human beings and the outside world (*Nhundu and Chiwera*). This fits well with the exposition given by Lord Bingham in paragraph [9] of *Razgar*. But in mental health cases the focus is on the physical and psychological integrity of a person or the "physical and moral integrity" of a person (*Razgar* [9]).

52. But, reflective of Lord Bingham's second question ("...will such interference have consequences of such gravity as potentially to engage the operation of Article 8"), for an interference with this aspect of private life to be shown, there must be "sufficiently adverse effects on physical and moral integrity" (*Razgar* [8], [17]). This formulation of Lord Bingham in turn reflects the jurisprudence of the European Court of Human Rights, which views its development of the concept of "physical and moral integrity" as a limited extension designed to assist in cases which only just fail under Article 3: *Raninen v Finland* (1998) 26 EHRR 563; *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112.

53. Although we have dealt earlier with the general status of all expulsion cases as "foreign" cases, it is appropriate to point out that in any event all the leading decisions have treated expulsion cases involving health as "foreign" cases,

notwithstanding that they are often cases which have significant domestic elements (see, for example, Baroness Hale, *Razgar* [54]; Dyson LJ, *J* [63]).

54. The way in which mental health cases concerning expulsion, always primarily "foreign cases", can contain domestic elements or aspects or "stages" is clarified by Dyson, LJ in *J*. Domestic elements can be particularly significant when it is asserted in a mental illness case that the conduct of the UK authorities will lead to a violation within its own territory either (i) when the applicant is informed that a decision has been made to remove him, or (ii) when he is physically removed by aeroplane to another country (*J* [17]). Domestic elements may also be significant in cases where the principal source of harm is said to be the severance of medical ties (as distinct from family or social ties) which a person has been enjoying in the UK and where these medical ties consist in a treatment regime for a mental health illness.

(h) In considering whether an appellant in a health case can show "truly exceptional" circumstances one particularly important consideration will be whether he was already suffering from physical and/or mental illness before coming to the UK or at a time, if any, when he had valid leave to remain in the UK.

55. When focussing on health cases under Article 8 it is especially important to bear in mind the analysis in *Huang* and *CW* of the significance of national immigration rules and extra-statutory policies. This analysis builds on Lord Bingham's reasoning in *Razgar* [20] (see also [19]) which emphasised that "decisions taken pursuant to the *lawful* operation of immigration control will be proportionate in all save a small minority of cases identifiable on a case to case basis" (emphasis added). This body of rules and policies caters for numerous categories of person, including those persons who have health needs, albeit requiring them to satisfy a number of financial and other requirements (paragraphs 51-56 of HC395 as amended set out the current rules for persons requiring leave to enter as a visitor for private medical treatment). It is entirely compatible with Convention rights that such rules (and related policies) should be made subject to requirements of this kind, since there is no human right to travel to another country to receive health care or welfare (Lord Bingham, *Razgar* [3]; Lord Nicholls, *N* [16]-[18], Lord Hope [48]-[50], Lord Brown [90]; Buxton LJ, *ZT* [19]-[20]). Thus if a person comes to the UK or is in the UK without complying with such rules or policies, then it will require truly exceptional circumstances to justify such lack of compliance (*CW* [32]).

56. Accordingly, a very important consideration in health cases is to examine to what extent a person's health problems existed prior to coming to the UK or *during* a time, if any, when he or she was in the UK with valid leave (Buxton LJ, *ZT* [19]-[20]). If such problems did pre-exist, yet someone is here without having been given permission to come or to stay under health-related immigration rules or policies, then that is a factor pointing heavily towards his or her expulsion being regarded as proportionate. The situation may be different for a person who whilst lawfully here (e.g. as a student or work permit holder) has contracted a serious illness requiring essential medical treatment and for whom there is no such treatment available in his receiving state - although here too it may be difficult, without more, to establish circumstances which are "truly exceptional".

(i) Suicide cases can engage an appellant's rights under Articles 2, 3 and 8 of the Convention (Baroness Hale, Razgar [64]), but they are not to be seen as a wholly separate category

57. In *J* it was pointed out that the Strasbourg Court in *Bensaid* was concerned with the general issue of suffering associated with deterioration in a person's mental illness. Self-harm and harm to others are thus to be seen as among the possible manifestations of suffering of this kind. Suicide cases can raise distinct issues, under Articles 3 and 8, but not so as to require the application of different legal tests (we leave aside here suicide cases reliant upon Article 2).

(j) So far as suicide cases which seek to rely on Article 8 are concerned, the principles are still primarily those set out by the European Court of Human Rights in Bensaid v UK (2001) 33 EHRR 10 and the facts in Bensaid afford a particularly important yardstick in assessing whether the circumstances of a case are truly exceptional.

58. Important guidance on the application of Article 3 to suicide cases has been set out by the Court of Appeal in *J*. However, so far as suicide cases which seek to rely on Article 8 are concerned, the principles are still primarily those set out by the European Court of Human Rights in *Bensaid* and the facts in *Bensaid* afford a particularly important yardstick in assessing whether the circumstances of a case are "truly exceptional".

59. *Bensaid* concerned someone who had been diagnosed as a schizophrenic suffering from psychotic illness of such severity that compulsory detention in a psychiatric hospital was considered, although eventually his condition was managed outside hospital except for one brief period. The reason why the Court did not consider that Article 3 requirements were met was that the applicant's medical condition had not reached such a critical stage that there were compelling humanitarian grounds for not removing him to a place which lacked medical and social services which he would need to prevent acute suffering. We draw here on the summary contained in paragraphs [5]-[8] of *Razgar*. In considering Mr Bensaid's position under Article 8 the Court noted that it had been submitted on his behalf that withdrawal of treatment and taking him away from the social support ties he had built up over 11 years in the UK would risk a deterioration in his serious mental illness and that there would be an immediate and real risk that he would act in obedience to hallucinations telling him to harm himself and others ([44]). The applicant contended that the nearest hospital at which his psychiatric illness could be treated in Algeria was some 75-80 kilometres from his home village, and adduced evidence that there was a high risk of his suffering a relapse of psychotic symptoms on returning. He had lost all insight into the fact that he was ill and believed the persecutory delusions and abuse which he experienced, including voices telling him to harm other people. He had previously felt so hopeless and depressed as to contemplate suicide. In the opinion of a psychiatrist, there was a substantial likelihood that forcible repatriation would result in significant and lasting adverse effects.

60. In deciding that there was no breach of Article 8, the Court stated at paragraph [48]:

> "Turning to the present case, the court recalls that it has found above that the risk of damage to the applicant's health from return to his country was based on largely hypothetical factors and that it was not substantiated that he would suffer inhuman and degrading treatment. Nor in the circumstances has it been established that his moral integrity would be substantially affected to a degree falling within the scope of Article 8 of the Convention. Even assuming that the dislocation caused to the applicant by removal from the United Kingdom where he has lived for the last eleven years was to be considered by itself as affecting his private life, in the context of the relationships and support framework which he enjoyed there, the Court considers that such interference may be regarded as complying with the requirements of the second paragraph of Article 8, namely as a measure "in accordance with the law", pursuing the aims of the protection of the economic well-being of the country and the prevention of disorder and crime, as well as being "necessary in a democratic society" for those aims."

61. It is noteworthy that in the above passage the Court found the applicant had not shown that his right to respect for his private life would be sufficiently affected to come within the scope of Article 8(1). The Court only went on to consider the proportionality issue under Article 8(2) in the alternative. Recasting the Court's analysis in terms of Lord Bingham's five questions in *Razgar*, the Court in *Bensaid* did not find that the applicant was able to show under question 2 that there was an interference having consequences of such gravity as potentially to engage the operation of Article 8. In the alternative the Court found that even if it considered that Article 8 was engaged under question 5, the expulsion measure was not disproportionate.

The appellant's case

62. We return now to consider the appellant's case in the light of the above summary of case law. So far as Mr Gulvin's point that the Adjudicator failed to deal properly with proportionality, we would agree that the Adjudicator did not conduct any detailed consideration of factors weighing for and against the appellant when analysing the Article 8 claim. The most she did was show that she undertook a balancing exercise. Thus at paragraph 56, when considering the appellant's position if returned to the Occupied Territories, the Lebanon or Dubai, she stated:

> 'To expect him to go to one of three countries, none of which is guaranteed to accept him without a good deal of administrative negotiation and preparation which the appellant is arguably not capable of, and given that in two of these countries he is extremely unlikely to be able to access even treatment at a moderate level for a very serious mental condition, is in my view *disproportionate to the need for effective immigration control in the UK*' (emphasis added).

63. Whilst this suffices to show that she weighed the competing interests at stake, it does not to show she understood that normally the interests of the state are imperative and it would only be in a small minority of exceptional cases that the claim of the individual would prevail. Accordingly her approach to the balancing exercise was legally flawed: she had failed to apply the correct legal criteria.

64. The second related point Mr Gulvin highlighted was that the Adjudicator nowhere stated that she had approached the appellant's circumstances under Article 8 by reference to the test that they had to be shown to be 'truly exceptional'.

65. Again we agree. The Adjudicator did not analyse Article 8 using the language of exceptionality, nor did her approach sufficiently accord with that enjoined in *Razgar*. It is true that the language she used at paragraph 52 suggests some awareness that she had to apply a stringent test as part of her analysis of the appellant's Article 8 claim: in that paragraph she stated her view that if the appellant were to suffer a relapse (as seemed likely at some stage) and was unable to get appropriate treatment, "I think he would be at risk of physical harm because of his behaviour and I think there would be a flagrant denial of his right to physical and moral integrity". If anything the language she used here appeared to apply an unduly stringent test of "flagrant denial", but, since she was focussing on the appellant's situation in the territory of the destination state, we think this was consistent with established principles and that overall she can be taken as having been concerned to establish that grave consequences would result from the interference with the appellant's right to respect for private life: see above paragraphs 21-26.

66. However, even accepting that the Adjudicator adequately addressed Lord Bingham's second question, it has still to be examined whether she adequately addressed Lord Bingham's fifth question concerning proportionality. For a finding of disproportionality more had to be considered than whether grave consequences would result from interference with the appellant's right to physical and moral integrity. It had also to be considered whether, after weighing up the relevant facts, the circumstances could be seen to be truly exceptional.

67. We particularly bear in mind here that the medical evidence had identified that there have been periods in the UK when the appellant has posed a threat to the human rights of others as well as to public order, e.g. through acts of arson and violence; hence there were weighty immigration control considerations. We do not think that the Adjudicator undertook this further consideration or took full account of all relevant considerations on both sides of the scales. Her failure to do so, in our view, constitutes a related error of law.

68. However, whilst the Adjudicator made two interrelated errors of law, we do not find that these amounted to material errors. Here we remind ourselves firstly of the limits of our error of law jurisdiction. We are not concerned with whether the Adjudicator reached the correct decision on the merits. We are only entitled to interfere with her decision if it was materially wrong in law: *Eman Abbas* [2005] EWCA Civ 992. Had we been adjudicating the appellant's Article 8 appeal at first instance, we very much doubt we would have allowed the appeal, but that is not our function in this type of case.

69. Secondly we remind ourselves that in considering materiality we have to look at the extent to which, even though applying the wrong legal tests, the Adjudicator's reasoning in fact identified a set of circumstances which, by reference to the correct legal tests, could reasonably be said to constitute "truly exceptional" circumstances.

70. We think her decision does identify circumstances capable of amounting when weighed in the balance (and even taking into account factors such as the

appellant's history of posing a threat to the human rights of others through acts of violence) to "truly exceptional" circumstances. What were these circumstances?

71. Before seeking to identify the circumstances relied upon by the Adjudicator, we would first of all observe that this is not a "pure" mental health case in which reliance is placed on a combination of foreign aspects relating to lack of adequate medical treatment abroad and domestic aspects of the appellant's case relating to him being at risk either by virtue of the withdrawal of the treatment in the UK and/or by virtue of the impact on him whilst here of any adverse decision (contrast *J* [17]). Nor is it a case in which it is said that there is any specific risk of suicide upon return, although there are serious (and important) concerns about a significant deterioration in the appellant's mental health in the Occupied Territories.

72. Had the appellant's case been a pure health case in the above sense, we very much doubt we would have concluded that the Adjudicator was entitled (notwithstanding legal errors) to allow the appeal on Article 8 grounds. For one thing the appellant was suffering from mental illness before he came to the UK and (although mitigated to some extent by his own lack of awareness of this) made no attempt to apply under the relevant immigration rules relating to private medical treatment (notwithstanding that in his statement he said he had come to the UK for "peace and quiet"). For another he has never had valid leave to remain in the UK. Further, at the date of hearing his medical condition was not at a critical stage. It was foreseeable that despite recent improvements he would suffer a relapse, yet it was not suggested that there were any intrinsic medical reasons for regarding his condition upon relapse as unmanageable. Nor were there any intrinsic medical reasons for thinking that, if able to access treatment, he would commit self-harm or pose a serious threat to others. His condition was not untreatable or acute. We remind ourselves here of the insistence by the European Court of Human Rights in *Bensaid* on an appellant being able to show "sufficiently adverse effects on physical and moral integrity" ([46]).

73. In our view the subsequent view of the House of Lords in *Razgar*, which considered that both under Article 3 and Article 8 there had to be a particularly high threshold, properly reflects this core finding in *Bensaid*.

74. However, we do not need to reach a definite conclusion on this matter because it is clear to us that the appellant's is not a pure health case in the sense outlined above. In particular, among the relevant factors which the Adjudicator looked at cumulatively, was one in particular which was not intrinsically health-related. That concerned the very unusual set of country conditions prevailing in the destination country, namely that the Occupied Territories is afflicted by significant levels of violence in the context of an ongoing armed struggle being conducted by various Palestinian organisations against the Israeli authorities and there is also a very significant presence of fundamentalist Muslim organisations. This factor took on enhanced importance in view of a further factor, which concerned the appellant's likely behaviour in such a country.

75. The significance which attaches or can attach to the first factor has been highlighted by the European Court of Human Rights in a case mentioned by Baroness Hale in *Razgar* [46]: the case of *Jakupovic v Austria* (2003) 38 EHRR

595, [2003] INLR 499. This concerned a sixteen year old boy facing return to Bosnia as a result of a residence prohibition imposed for criminal offences. The court observed that very weighty reasons would be needed to justify sending a 16 year old alone to a country which had recently experienced armed conflict and where he had no close relatives. The Court held that the decision to remove him was disproportionate.

76. The important implications of this first factor for the general issue of the significance of the appellant's likely behaviour on return is explained in more detail below.

77. Bearing in mind that this was not a pure health case, we find that whilst the Adjudicator erred in law in not properly approaching the balancing exercise she had to perform according to the correct legal criteria and not applying a test of "truly exceptional circumstances", the factors she identified as being decisive in this case, when considered cumulatively, were factors capable of giving rise to truly exceptional circumstances. What were these?

78. There was first of all the appellant's medical condition. His mental illness was long term. He has been variously diagnosed as a paranoid schizophrenic and as someone suffering from Bipolar Affective Disorder and Psychotic Mania. Since his arrival in the UK he had spent a significant amount of time in and out of psychiatric hospital care, having been compulsorily detained under the mental health legislation a number of times. There has been a pattern to his condition: being controlled and sometimes improved by medication, only for him to relapse following his failure to take medication or to turn up for injections. It was the real risk of further relapse which the Adjudicator saw as complicating the matter of what would happen to him if he were removed from the UK, where he had ready access to a high standard of medical treatment.

79. It was in the context of having found a very high risk of relapse that the Adjudicator approached the evidence relating to the availability of relevant medical treatment in the Occupied Territories. We have already explained why we see no error of law in the Adjudicator's approach to the issue of the availability of relevant medical treatment there, but it is important to reiterate it here because it formed an important premise in her reasoning as regards risk on return.

80. Moving beyond health-related factors, a further factor the Adjudicator saw as of particular importance related to the situation of generalised violence in the Occupied Territories: this is the *Jakupovic* point. This area of the world was not simply an Islamic country or area whose local populace could well be affronted by the appellant's expression of his religious views. It was also, in the Adjudicator's words "effectively a war zone". As she stated at paragraph 4:

> "The security situation in the Occupied Territories is well documented. There are still serious problems. There are reports of curfews and closures. There are reports of killings by suicide bombers, the destruction of homes, human rights abuses and poverty. It does appear to present difficulties for people who are vulnerable."

81. The Adjudicator also attached particular importance to the way in which the appellant's mental illness manifested itself. She noted that it caused him to behave

from time to time in an uncontrollably violent and dangerous fashion. At paragraph 52, she stated that if the appellant were to relapse and be unable to get appropriate treatment "he would be at risk of physical harm because of his behaviour ...". She attached signal weight to the fact that Dr Singh had expressed serious disquiet about the religious views expressed by the appellant when he was ill. These views included that he was God or had authority from God or had been chosen by God, that he was superior to other people, that he was Jesus, that he had risen from the dead, that he was the Devil, that he had been receiving the words of prophets and was the only person in the whole universe to receive such prophecies. He had also expressed very hostile views about Saudi Arabia. What concerned Dr Singh and the Adjudicator was that in this regard the appellant completely lacked insight into his own mental condition.

82. The Adjudicator clearly considered that on return to the Occupied Territories, an Islamic country or area, the appellant's bizarre religious views combined with his aggressive behaviour could attract hostility from the local populace. There was a combination, therefore, of behaviour which would be threatening or harmful to others and behaviour which would attract harm from others in the context of a country which was effectively a war zone.

83. The Adjudicator also identified as a relevant factor that the appellant would not have any family support on return to the Occupied Territories: "... no support no job and no family" was how she expressed this in paragraph 52. She had also accepted in this regard that persons of Palestinian origin faced discrimination in access to certain services such as housing and that this particular appellant had never been to the Occupied Territories.

84. Accordingly, despite the Adjudicator making certain errors of law in properly identifying and applying Article 8 legal criteria, we consider that the above factors as identified by her were just enough to form a sufficient basis for her conclusion that removal to the Occupied Territories would breach the appellant's Article 8 rights by disproportionately interfering with his right to respect for his private life. Although the appellant's case considered purely as a health (mental illness) case was not one which brought it within the "small minority of exceptional cases" category, it was open to her to find that it did fall within that category once proper account was taken of the likely consequences for the appellant and his behaviour of the general conditions in the Occupied Territories and the lack of relevant medical treatment.

85. For the above reasons we find that the Adjudicator did not materially err in law.

86. Accordingly, the decision of the Adjudicator to allow the appeal on Article 8 grounds must stand.

Signed Date

Dr H H Storey
Senior Immigration Judge