Case No: C1/2003/1032

Neutral Citation No: [2003] EWCA Civ 1371
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 16th October 2002

Before:

LORD JUSTICE SIMON BROWN
LORD JUSTICE LAWS
and
LADY JUSTICE ARDEN

- -

Between:

SEFER DJALI	Appellant
- and -	
THE IMMIGRATION APPEAL TRIBUNAL	Respondent

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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R de Mello Esq (instructed by The Immigration Advisory Service) for the Appellant
Ms L Giovannetti (instructed by The Treasury Solicitor) for the Respondent

- -

Judgment

Lord Justice Simon Brown:

1. The appellant is a 38 year old Kosovan citizen of Albanian origin who arrived in this country with his dependent wife and two children on 17 February 2000 and claimed asylum. Following interview on 3 January 2001 his claim was refused by letter dated 4 January 2001. On appeal to the Adjudicator the appellant abandoned his asylum claim but relied successfully upon Article 8 of ECHR. The appellant's wife suffers from severe Post-Traumatic Stress Disorder and the Adjudicator concluded that:

> "To require Mrs Djali to return to Kosovo at the present time would be inhumane and … her removal would be in breach of her right to respect for her physical and moral integrity under Article 8 … [and] it would be unreasonable and a further breach of Article 8 to allow the appellant's wife to stay but to require the appellant and their dependent children to be removed."

2. On 3 March 2003 the IAT allowed the Secretary of State's appeal against that decision, concluding that:

> "Whilst return would be an interference with the respondent's Article 8 rights, having regard to the legitimate aim of maintaining an effective immigration policy the return of the respondent and his wife to Kosovo would not be disproportionate."

3. The IAT had considered on the appeal a fresh psychiatric report from Dr Singh put in by Mr Djali.

4. The present further appeal comes before us by permission of Keene LJ who thought it "properly arguable that the IAT misinterpreted Dr Singh's report and that the Adjudicator was entitled to regard this case as comparable to that of *'M'*". (I shall return later to *M*, a decision of the IAT under reference 01/TH03623 dated 2 January 2002). That specific ground aside, Mr de Mello submits that the Adjudicator's determination and reasoning were unassailable; if anything, indeed, Mr de Mello submits that the Adjudicator applied too strict a test to the appellant's Article 8 claim.

5. With that brief introduction let me at once turn to the central facts of the case which were never in dispute and which were summarised by the Adjudicator as follows:

> "[I]n 1995 Serb soldiers entered [the appellant's] home. He and his wife were taken into separate rooms. He was beaten up and his wife was raped. In 1996 the appellant and his wife were again attacked by Serb soldiers. They were in the process of cutting up wood when they were attacked by the Serbs who used a chain-saw to cause injuries to them. The appellant was a member of the KLA but he deserted in March 1999 because of the way in which the KLA were behaving. Apart from killing Serbs they were also killing ethnic Albanians who did not support their cause. The appellant returned to his village and then together with his wife he went into the mountains to hide. The appellant was with many other

people from his village when they were attacked by Serb militia. Many people were killed including the appellant's brother. The appellant and his wife were extremely distressed and traumatised by their experiences."

6. The medical evidence before the Adjudicator consisted of a short letter dated 20 May 2002 from Dr Addo, describing himself as Clinical Attachment to Dr Singh, Consultant Psychiatrist. Dr Addo stated of the appellant's wife:

> "She is still suffering from severe symptoms of Post Traumatic Stress Disorder with insomnia, poor memory and concentration. She is unable to function at her optimum at home. … She also complains of severe recurrent headaches. Once she starts to show some improvement to her medication she will be referred for psychological therapy."

7. Dr Singh's subsequent report of 2 January 2003 stated:

> "Since her referral [in June 2001] … she has been treated with anti-depressant medication. [The counselling psychologist] reported on 30 May 2002 that 'Mrs Djali was unable to talk about the war which is the cause of her distressed state, she prefers to depend on medication to help her feel better. We agreed that psychotherapy was not useful at this time but it is an option to her when she feels she is able to talk'".

8. In his conclusions Dr Singh stated:

> "She has been treated with anti-depressant medication and since being on treatment there has been some improvement in her mental state but she continues to be handicapped by the residual symptoms of the illness. She was referred for psychological intervention with a view that she may be able to discuss about her feelings and her experiences in her native country. At that point she appeared to be too unwell to participate in such therapy. In my view she will most certainly benefit from such intervention. … I am in no doubt that if she is asked to go back to her native country it will have a detrimental effect on her mental and physical health. In terms of treatment, information that is available to me, it is very unlikely that Mrs Djali would have access to specialist treatment that is being made available to her in United Kingdom."

9. Largely on the basis of Dr Addo's report the Adjudicator concluded:

> "I find that Mrs Djali's psychiatric illness is directly related to the traumatising experiences which she suffered in Kosovo. I am satisfied from the objective evidence that there are no adequate facilities in Kosovo to provide her with the specialist care, counselling and rehabilitation which she requires. I find that to return her to Kosovo in the present circumstances would very likely result in an exacerbation of her present condition."

10. As to *M*, the Adjudicator said that that case:

> "involved features which are very similar to those in this present appeal. … there was clear medical evidence that her return at the present time would adversely affect the therapeutic treatment which she was currently receiving but was also likely to adversely affect the progress which had been achieved by returning her to the country where associations with her past suffering would be intensified. I find that exactly the same considerations apply in this appeal so far as Mrs Djali is concerned. Dealing with the question of proportionality, the Tribunal went on to state that whilst it will only be rarely that removals pursuant to maintenance of a consistent immigration policy would not be proportionate, this is one of those rare cases where it would not be so."

11. The critical passages in the IAT's determination are to be found in paragraphs 8, 9 and 11 as follows:

> "8. Mr Ekagha [the Home Office Presenting Officer] challenged the Adjudicator's assessment of the medical evidence relating to the respondent's wife. … [He] pointed out that the wife was only receiving treatment by way of anti-depressant medication in the UK, and there was no objective evidence that this would not be available in Kosovo, or that out-patient counselling would not be available if and when required. Mr Alin [Mr Djali's representative] was unable to dispute this. …
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> 9. Since the hearing before the Adjudicator there has been a report by Dr Singh, the consultant in charge of treating the wife. … He … opined that he was in no doubt that if [Mrs Djali] were asked to go back to her native country it would have a detrimental effect on her mental and physical health, but he did not indicate what that detriment might be or its severity. He also said that it is very unlikely that she would have access to specialist treatment being made available to her in the UK, but there was no indication what that consisted of besides the anti-depressant medication. Nor did he disclose any special knowledge about the medical facilities in Kosovo.
>
> 11. We … accept Mr Ekagha's submission that the medical and other evidence described above did not support the Adjudicator's view that this was a rare and exceptional case, comparable to the case of *M*. In so concluding we find he was in error. The Adjudicator was entitled to accept the evidence that the wife had been raped and traumatised by her experiences in Kosovo in the past at the hands of the Serbian forces, and that therefore special attention had to be paid to her claim. However, on the evidence of her actual condition and the availability of adequate medical treatment to treat her in Kosovo, the Adjudicator should have followed the

> starred Tribunal decision in *Kacaj* to the effect that it is difficult to envisage a case where Article 8 would be breached in the absence of persecution or Article 3 ill-treatment because the need to control immigration would make the removal proportionate. His failure to do so fatally undermines his determination, which cannot stand. We are able to make our own assessment of proportionality in its place. We conclude that, whilst return would be an interference with the respondent's Article 8 rights, having regard to the legitimate aim of maintaining an effective immigration policy the return of the respondent and his wife to Kosovo would not be disproportionate."

12. Since this appeal was brought, this court decided a group of three cases which I shall refer to simply as "*Razgar*" [2003] EWCA Civ 840, the judgment of the Court being given by Dyson LJ. *Razgar* casts considerable light on the approach to be taken in Article 8 cases of this sort and although Ms Giovannetti tells us that the Home Secretary is petitioning the House of Lords for permission to appeal against it, she naturally recognises that in the meantime we must apply it. It is her submission that, even on the *Razgar* approach, no case was made out here of an infringement of Article 8(1); alternatively she submits that, even if it was, any such infringement must in any event necessarily have been regarded as outweighed by the requirements of immigration control.

13. Much of *Razgar* was directed to a close examination of the so-called territoriality principle which had been the subject of this court's decision in *R (Ullah) -v- Special Adjudicator* [2003] 1 WLR 770 (itself now under appeal to the House of Lords). The critical paragraphs in *Razgar* are for present purposes these:

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

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

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

(b) Seriousness of harm

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

(c) Risk of harm

24. There must be substantial grounds for believing that the claimant would face a real risk of the adverse effect which he or she claims

> to fear: see, for example, *Kacaj v Secretary of state for the Home Department* [2001] INLR 354 at para 12. I would accept the submission of Mr Garnham (not disputed) that the degree of likelihood of the adverse effect occurring is no less than that required to establish a breach of article 3.
>
> Article 8(2)
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> 25. Even if a removal case engages article 8(1), there is article 8(2) to consider. As already noted, at para 48 of the judgment in *Bensaid*, the ECtHR said that even if the dislocation caused to the applicant by removal was to be considered by itself as affecting the claimant's private life, the interference was justified under article 8(2). In *Kacaj* (para 26), the IAT said that in deportation cases: 'it will be virtually impossible for an applicant to establish that control on immigration was disproportionate to any breach'. In *Ullah* (para 24), it was said that, where the ECtHR finds that removal engages the EHCR, the court 'will often treat the right to control immigration as one that outweighs, or trumps, the Convention right'.
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> 26. We are in no doubt that in *Kacaj*, the IAT overstated the position. Paragraph 24 of *Ullah* reflects the situation more accurately. That this is so has been shown by a number of recent decisions of the ECtHR."

14. It clearly follows from paragraphs 25 and 26 of *Razgar* that the IAT here misdirected itself in law in following the *Kacaj* approach and in holding that the adjudicator's failure "fatally undermines his determination". The approach should be that the needs of immigration control will "often" outweigh or trump an interference with the Article 8(1) right rather than that, as the IAT put it, "it is difficult to envisage a case where Article 8 would be breached in the absence of persecution or Article 3 ill-treatment because the need to control immigration would make the removal proportionate".

15. It does not, however, follow that this appeal must therefore be allowed: if Mr Djali's Article 8 claim is one which on any proper view of the facts and the law would be bound to fail, then we should in any event dismiss the appeal: there would be no point in remitting the matter to the Tribunal just for them to re-determine it in the Secretary of State's favour. Let me, therefore, now proceed to consider in turn each limb of Ms Giovannetti's argument.

Article 8(1)

16. Although, as will have been noted, not merely the Adjudicator but also the IAT accepted that returning Mr and Mrs Djali to Kosovo would involve an interference with their Article 8 rights, Ms Giovannetti submits that on the proper application of the principle subsequently laid down in *Razgar* that can be seen to have been a wrong conclusion. *Razgar* establishes that, in cases of this sort, an Article 8(1) claim is capable of being engaged only if there are "substantial grounds for

believing that the claimant [for present purposes Mrs Djali] would face a real risk" (*Razgar* paragraph 24) of "serious harm to [her] mental health . . . caused or materially contributed to by the difference between the treatment and support that [she] is enjoying in the deporting country and that which would be available to [her] in the receiving country" (*Razgar* paragraph 22), that harm constituting "a sufficiently adverse effect on physical and mental integrity, and not merely on health" as to engage Article 8 (*Razgar* paragraph 23).

17. The tribunal here found and were clearly entitled to find on the facts that the only treatment which Mrs Djali is receiving here is anti-depressant medication which is equally available in Kosovo, and that although there may and probably will come a time when out-patient counselling (psychotherapy) will be beneficial to her, that time has not yet arrived. They further found as a fact (and, indeed, recorded as undisputed) that there was no objective evidence in the case that out-patient counselling would not be available in Kosovo if and when required. Mr de Mello now seeks to challenge that further finding by reference to a number of other (mostly later) tribunal decisions and various UNHCR publications. Even, however, assuming that he is right in suggesting that psychotherapy would not be available to Mrs Djali in Kosovo if and when she is returned there and comes to need it, it seems to me quite impossible to characterise the effect of that upon her as constituting "serious harm to her mental health" such as to damage her "physical and mental integrity" so as to engage Article 8. At most it would amount to this: return to Kosovo would imperil her prospects of a better recovery. In short, for my part I accept Ms Giovannetti's argument that, even taking the medical evidence at its highest in the appellant's favour, on no view can Article 8(1) be regarded as engaged.

18. I should next say a word about the suggested comparison between this case and *M*. Before the IAT in *M* there was a report from a Chartered Clinical Psychologist stating:-

> "In my view, removing [M] from therapy would probably be detrimental to her mental state. Trust and a sense of security are a necessary condition for working with people who have experienced severe trauma. This has taken over half a year to develop with her and I think has created an important platform which has played a vital role in her improvement. I strongly believe that therapy with her is at a critical point and that it ending prematurely would compromise a process of working through her trauma that she is just beginning. In addition I think being forced out of therapy would 'hook' her into belief that investing or trusting in any relationship is not worthwhile, something which would clearly be counter therapeutic."

19. The IAT concluded:-

> "We are satisfied that on the basis of that evidence the appellant must be accepted to be deeply traumatised by her past experiences … The medical view is not only that she is in need of continued psychological and psychotropic treatment but that a severing of the bond of trust which has been forged with her clinical psychologist over a period of many months would be detrimental to her health at an important point in the present therapy."

20. *M* presented to my mind an altogether stronger case for saying that Article 8(1) was engaged than does the present case; I share the IAT's view that the Adjudicator here was wrong to decide otherwise. In particular M was already undergoing psychotherapy which, moreover, after six months was "at a critical point". Whether on the *Razgar* approach even *M* truly crossed the Article 8(1) threshold it is unnecessary for present purposes to decide. For my part I would not wish to be taken as accepting that it did.

Article 8(2)

21. Having regard to my conclusion with regard to Article 8(1) it is strictly unnecessary to address the further question arising as to whether, assuming Article 8(1) were engaged, the IAT would have been bound to regard the requirements of immigration control as outweighing Mrs Djali's right to respect for her "physical and mental integrity". The point having been argued, however, I will briefly state my conclusions upon it.

22. The first argument I must deal with under this head is Ms Giovannetti's contention that this case falls within the principle recently established by this court in *Edore -v- Secretary of State for the Home Department* [2003] 3 All ER 1265 so that strictly speaking the task of the Adjudicator and the IAT on the appeals before them was simply to decide whether the Secretary of State's decision on proportionality was properly one within his discretion, ie was "a decision which could reasonably be regarded as proportionate and as striking a fair balance between the competing interests in play" - see my judgment in *Edore* at p1274. This was, she submits, a case "where the essential facts are not in doubt or dispute", a pre-condition to adopting the *Edore* approach. On this approach, of course, the appellant's case becomes harder still: it would not be enough for Mr de Mello to establish that the IAT could properly decide the issue of proportionality under Article 8(2) in the appellant's favour; he would have to establish (as, in fact , the appellant established in *Edore*) that the Secretary of State's decision was outside the range of permissible responses open to him.

23. The difficulty with Ms Giovannetti's argument, however, is that on the facts of the present case the Secretary of State never did take a decision on the issue of proportionality. The claim to remain on human rights (as well as asylum) grounds was originally based only on Article 3 and in his decision letter of 4 January 2001 refusing leave the Secretary of State said this:

> "13. The Secretary of State has further considered whether your claim that your wife is ill would engage the United Kingdom's obligations under Article 3 of the Human Rights Act 1998.
>
> 14. You have claimed that your wife suffers from various medical problems and is currently receiving medical care in the United Kingdom, and that the withdrawal of that treatment will adversely affect her health. However, the Secretary of State is aware that a functioning hospital does exist in Gjakova, and that several health stations ('Ambulantas' exist in the surrounding villages. He also notes that a military hospital run by the Argentinian army is also supportive in terms of the provision of drugs and treatments.

> Taking all of these considerations into account, the Secretary of State is of the opinion that any suffering to which you may be exposed as a result of removal will not be sufficiently severe to engage Article 3."

24. It was not until the appeal to the Adjudicator that the appellant sought to rely on Article 8. Even, therefore, were I to accept Ms Giovannetti's submission that the essential facts here were not in dispute - and that submission too has its difficulties given the contrast between paragraph 14 of the Secretary of State's decision letter and what Mr de Mello suggests was the objective evidence before the IAT as to the availability of psychotherapy in Kosovo - I would not regard this case as falling within the *Edore* principle. Although no doubt the Secretary of State at some point in the course of the appeal proceedings must be taken to have decided the question of proportionality against the appellant, the appeal process itself is necessarily directed to his earlier decision.

25. I proceed, therefore, on the basis that the Adjudicator and the IAT were entitled to reach their own independent conclusions on the question of proportionality (assuming always that the Article 8(2) stage was reached). Could they, on this basis, reasonably conclude that the interests of immigration control did not require the appellant and family to be returned to Kosovo?

26. In my judgment they could not. Even assuming, as of course for this purpose I do, that Article 8 was engaged at all, this was plainly only a borderline case of interference. No doubt too it is, on its facts, a case widely replicated throughout the asylum system. One's own experience, indeed, suggests as much. In these circumstances, given the grave problems of asylum overload facing this country, it seems to me that the decision-maker must inevitably regard the interests of immigration control as the imperative and overriding factor in such a case.

27. In reaching this conclusion I have not overlooked paragraph 65 of *Razgar* which held that the Secretary of State had not been justified in certifying that particular case as manifestly unfounded:

> "… In our judgment, the present case is not one where it is so plain that Article 8(2) is bound to trump the Article 8(1) claim that it is possible to certify the claim as manifestly unfounded. We would add that we would be especially reluctant to allow this appeal on the basis of Article 8(2) when the point has, apparently, never even been considered by the Secretary of State."

28. It is not, I hope, inconsistent with that view to regard the return of this appellant and his family to Kosovo as any reasonable decision-maker's inevitable response to whatever question of proportionality and necessity arises here.

29. Before parting from this case I would say just a word about the inter-relationship between Articles 3 and 8 in cases of this kind, cases where it is said that the applicant's health will be put at risk if returned to his (or her) home country essentially as a result of the unavailability there of the forms of treatment and support available here. There appears to be one line of cases with regard to Article 3 claims and another with regard to Article 8. For my part I have some difficulty in understanding

why a different and less stringent approach should be taken to claims based on mental ill health than, say, claims by those suffering AIDS or other physical ailments. True it is that in *Bensaid -v- UK* (2001) 33 EHRR 205 the ECtHR in paragraph 46 of its judgment referred to the possibility of there being an Article 8 breach "where there are sufficiently adverse effects on physical and moral integrity". Paragraph 47, however, indicates what the court there had in mind:

> "47. Private life is a broad term not susceptible to exhaustive definition. The court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life."

Interference with sexual orientation or sexual life may adversely affect physical integrity; not, however, in this context physical health.

30. I have had the advantage of reading in draft the judgments to be handed down today in *"N"*, the case of an AIDS sufferer. That case and others like it fall for consideration only under Article 3 and will succeed (as *"N"* holds) only in the most extreme and exceptional circumstances. It would seem to me very odd if a markedly more generous approach were brought to bear in respect of those suffering mentally rather than physically. I would echo what Laws LJ says in paragraph 42 of his judgment in *"N"* as to the possible need for further scrutiny, beyond that in *Razgar*, of the true position regarding Article 8.

Lord Justice Laws:

31. I agree.

Lady Justice Arden:

32. I also agree.

Order: Appeal dismissed. The appellant to pay the respondent's costs of the appeal, but the liability for such costs be postponed and, under the Community Legal Service Funding Regulations 2000, there be a detailed assessment of the appellant's cost in accordance with the Community Legal Service Costs Regulations 2000. Permission to appeal to the House of Lords refused.

(Order does not form part of the approved judgment)