SB (cessation and exclusion) Haiti
[2005] UKIAT 00036

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 14 June 2004
Date Determination notified:

7 February 2005

Before:

The Honourable Mr Justice Ouseley (President)
Mr C M G Ockelton (Deputy President)
Miss B Mensah (Vice President)

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

For the Appellant: Mr N Blake QC and Ms S Naik, instructed by South West Law
For the Respondent: Mr J Gulvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This an appeal from the determination of an Adjudicator, Mr B Watkins CMG, dated 8 January 2003. The Appellant, a Haitian, had appealed against the refusal of the Secretary of State to revoke a deportation order and to grant asylum. The Adjudicator dismissed the appeals. The appeal gives rise to issues of some complexity.

Facts

2. The Appellant arrived in the United Kingdom, as a visitor, in 1989 aged twenty-three. His claim for asylum was refused in 1990. In 1992/3, the Secretary of State made a deportation order against the Appellant, and refused to revoke it in November 1993. This order was made following

the recommendation of the Crown Court which had convicted him of two offences of assault occasioning actual bodily harm, one of theft and one of burglary. He was sentenced to a total of two years and nine months imprisonment, the longest term of the four consecutive sentences being one year for the burglary. He obtained early release in August 1994. This was not his first experience of prison in this country. A year before, he had been convicted of three offences of burglary and one of attempted theft for which he had received sentences of imprisonment. These appear to have been concurrent, and the longest sentence was eighteen months.

3. On 6 February 1995, the Tribunal allowed an appeal from the decision of an Adjudicator against, it appears, both the refusal of leave to remain and the refusal to revoke the deportation order. It did so on asylum grounds. Mr Watkins summarised the basis of its decision as follows:

> "13. By a majority (the Chairman and Mrs Lloyd JP), the IAT was of the view that returning the appellant to Haiti would breach the UK's obligations under the 1951 Convention. They did so having received evidence from the Deputy UNHCR Representative in London. They did so also because they believed that the appellant would be seen as pro-President Aristide, in part because of the appellant's connections with the USA and in part because of his association with St Joseph's Boys' Home with which President Aristide was associated. They did not accept that his alleged fear as a former Ton Ton Macoute amounted to a well-founded fear for a 1951 Convention reason. That was considered in the context of the violent and corrupt state of Haiti."

4. The Tribunal accepted the evidence of the Appellant in its essentials. (It had decided to hear all the evidence afresh because of errors which it thought the Adjudicator had made). The Appellant had been orphaned aged eight and had lived on the streets for a year and a half before being taken into an orphanage from where an American, Mr Geilenfeld, had taken him to a boys' home where he was cared for until he was eighteen. Then he remained working at the home; he had come to regard Mr Geilenfeld as a stepfather. Threats by street boys had led Mr Geilenfeld to obtain from the police for the Appellant an ID card which showed that he was an attaché; he then bought and carried a gun. As an attaché he had the power to make arrests. The police attachés, unlike the army attachés, did not cause problems to civilians, though there was some extortion in which he did not participate. The Ton Ton Macoute had far greater power and used it to extort money on a wide scale reinforcing their threats with violence; they were a corrupt and violent political force working for the government.

5. In 1986, as a result of what he told journalists about the way in which the regime treated children, there was a plot to kill the Appellant which led to the removal of his attaché ID card as a safety measure. He was later asked by Mr Geilenfeld to help to deal with a breach of security at the US Embassy which involved Haitian security guards selling visa forms. He identified the three guards involved, who in order to obtain those jobs in the first place would have had to be attachés or Ton Ton

Macoute. In 1987 there were two attempted attacks on him at the boys' home by people who thought that he was a Ton Ton Macoute. Mr Geilenfeld helped him to leave temporarily for the USA but he returned because things were getting better, although he had to keep a low profile. He was arrested on two occasions by the police, beaten and ill-treated but eventually released without charge through the interventions of Mr Geilenfeld. After he had made another trip to the USA from which he returned to Haiti, he met a British woman doing charity work in Haiti, became engaged to her and at her suggestion came here and applied for asylum. There were supporting letters from Mr Geilenfeld explaining what the risk to the Appellant was: people were still looking to take revenge on him. His life and work in the orphanage, his visits to and association with the USA, his role in uncovering the visa scam would lead to people attributing to him pro-Aristide opinions because Aristide was associated with helping the poor, and drew support from poor areas. He was not in fact an Aristide activist and had no connections with Aristide.

6. It is worth pointing out that the Tribunal based its decision, as it then thought it was constrained to do, upon the situation as at November 1993. It ignored the implications, for someone who was seen as being at risk as a perceived Aristide supporter, of the return to power of Aristide in 1994. Aristide had been out of Haiti since 1991 when a coup had removed him from power; he had taken over from President Naumphy in 1989.

7. By a letter dated 25 September 1996, the Secretary of State granted refugee status and leave to remain from May 1990 to September 1997. In January 1999, the Appellant was granted Indefinite Leave to Remain. The deportation order was in effect revoked.

8. Meanwhile, and this is an aspect of timing upon which Mr Blake QC for the Appellant put some weight, the Appellant had been convicted of further offences. In February 1995, he was convicted of attempting to obtain money by deception, using a stolen cheque book, for which he was put on probation for 12 months. In November 1997, he was convicted of wounding; he said that it was in retaliation against two men who were attacking him. He was sent to prison for three years but was released in August 1998.

9. In July 1999, he was sentenced to fifteen months imprisonment for possession of an imitation firearm which he said he had when he was intending to visit the house of someone who was alleged to have raped his girlfriend. He intended to frighten him. This offence was committed while he was on licence. He was recommended for deportation. He was released in July 2000, but was immediately taken into immigration detention. The Secretary of State signed a deportation order against him in July 2000, and it was served on him with removal directions in August 2000. He was granted bail in December 2000, by which time he had appealed against the removal directions and the refusal to revoke the deportation order.

10. He moved to Cornwall and married very shortly after he was granted bail. In December 2001, as a result he said of constant racial harassment and abuse about which the police did nothing, he confronted one of the perpetrators with an air pistol, which led to charges of possessing a firearm while banned from doing so, possessing a firearm while committing an offence, assault occasioning actual bodily harm and possession of a class B drug. He was later detained; and it is said tried to commit suicide on a number of occasions.

11. He committed a hotel burglary in February 2002 for which he received three months in March 2002. He had by this time been taken back into immigration detention. The various December 2001 offences were dealt with in September 2002. Only the charge of possession of a firearm while banned was proceeded with and led to a conviction. The Appellant received a six month sentence suspended for twelve months. This sentence was imposed shortly before the hearing before Mr Watkins. The Appellant was released on bail in February 2004.

The appeals

12. Mr Watkins had before him three appeals, one in respect of removal directions under section 17 of the Immigration Act 1971, one in respect of the refusal to revoke the deportation order under section 69(4)(b) of the 1999 Act on asylum grounds and one under section 65 on human rights grounds. He said that the issues before him were (1) whether the Secretary of State's contention was correct that Article 1C(5) of the Refugee Convention, the cessation provision, now applied in the light of current circumstances in Haiti so that asylum need no longer be afforded to the Appellant; (2) if incorrect, whether he could nonetheless be returned to Haiti because the provisions of Article 33(2) of the Convention applied so as to exclude him from its protection because of his crimes; (3) whether returning him to Haiti would breach his human rights under Articles 2, 3, 5 or 8 of the ECHR.

13. Mr Watkins concluded that on the balance of probabilities the circumstances had changed in Haiti since the Appellant had been granted asylum such that he could no longer refuse to avail himself of its protection. He was an incorrigible criminal whose crimes overall, including those committed before 1997, were so serious that he was a danger to the community and fell outside the scope of Article 33(1) because he fell within Article 33(2). Article 3 ECHR would not be breached because the period of detention which the Appellant would face would be unlikely to exceed a month, appalling though prison conditions were. He had failed to establish that he could not receive the necessary treatment for his psychiatric condition, PTSD and depression. Having considered the balance to be struck for the purposes of the revocation of a deportation order, he concluded that the refusal to revoke it was proportionate. There was no appeal against the deportation order itself. The relationship which the Appellant had with his daughter was so limited that any interference with it which there

might be was not disproportionate. The appeal against removal directions as such was dismissed, insofar as it was before the Adjudicator, because there was no alternative destination proposed.

14. This appeal to the Tribunal is on fact and law, and in accordance with the Tribunal's understanding of that jurisdiction, it has accepted evidence which was not before the Adjudicator and which related to changes of circumstances in Haiti, and in particular the departure of President Aristide whose return to power in 1994 had been seen by the Adjudicator as very significant for his conclusions about the change in circumstances since the previous Tribunal decision in 1995. It was also common ground that the appeal provisions of the 1999 Act continued to apply notwithstanding their repeal and replacement by the 2002 Act, by virtue of paragraph 6(4) of Schedule 2 to the Nationality, Immigration and Asylum Act 2002 (Commencement No 4) Order 2003 SI 754.

15. Mr Gulvin reluctantly asked for an adjournment at the outset of the appeal, because although he had worked through the weekend on voluminous background material, he was not fully prepared so as to provide the level of assistance which he would have wished. He said that the relevant dates and directions had not been picked up as they should have been.

16. We rejected that application. Although Mr Gulvin had not seen a small quantity of new material, it did not alter the picture significantly. He was given the opportunity to provide written submissions in fourteen days after the close of the hearing.

17. Nothing during the hearing of the appeal, and the absence of written submissions from him, whilst the Appellant submitted his on 28th June 2004, has caused us to conclude that greater time for him to prepare would have added significantly to his comments on the material. This appeal had already been overlong in the appeal system. We regret the delay in the production of this determination, which is the consequence of workload and availability.

Cessation

18. We turn to the first issue which is whether the Adjudicator erred in concluding that there had been such a change in circumstances, particularly in the light of the present situation in Haiti, as to enable the Secretary of State to discharge the burden which he conceded he bore to show that Article 1C(5) applied. This provides:

> "He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality."

19. The Adjudicator referred to the background material, pointing out that the UNHCR Representative's letter of October 2000 had said that the general situation in Haiti was not so fundamentally and permanently

changed that the cessation clause could be generally applied. The UNHCR letter of March 2000 said that the changes were not durable or deep although the election of Preval as successor to Aristide had suggested a fundamental change. There had been a serious, continuing constitutional crisis since 1997 and despite the UN Mission the police and justice systems were fragile or functioned badly; prison conditions and detention practices were unacceptable, political violence and human rights abuses had grown. It was insufficient, as the Adjudicator noted and did not disagree with, for general return of refugees.

20. The position of the Appellant, however, individually had changed according to the UNHCR. His past association with the US and street children no longer carried the risks which they had done in 1993; the supporters of Aristide did not face in general a risk of persecution because of their actual or imputed views. It was the Appellant's past association with the US rather than any overt activity which led to the imputation to him of pro-Aristide views. The Adjudicator commented that there was now even less reason to suppose that there was a real risk of persecution now that Aristide had been elected President.

21. The Adjudicator also referred to what the UNHCR said about the other fear which the Appellant had expressed, which was that he would be at risk as a result of his association with the attachés or Ton Ton Macoute. Although the risk might have diminished, the UNHCR said that it could not exclude the possibility that the Appellant might become the target of mob violence. The Appellant had not had a prominent role; only a small circle might recall his role as an attaché. The Appellant had relied upon a Report of Dr Marshrons of September 2002 which led her to suggest that the Appellant would be at risk of persecution because of his actual or perceived past links with the attaches or Ton Ton Macoute. This would in turn lead him to be seen as hostile to Aristide.

22. The Adjudicator commented that the Appellant had not been granted asylum on that basis, saying that the claim to fear persecution as an alleged attaché or Ton Ton Macoute had been rejected by the Tribunal. He continued:

> "16. With the elapse of seven years, it is even less likely that the appellant would face any risk of persecution for a Convention reason on account of that alleged past association than he did in January 1995 when the Tribunal heard his case. As a supporter of President Aristide, real or perceived, there is no reason for him to fear persecution by the authorities in Haiti. Were opponents of the President to attempt to persecute him, I am satisfied that, despite the state of Haitian society and made plain in the objective reports, he could look to the authorities for protection. Nothing in the evidence satisfies me that the government would be unable or unwilling to afford it to him. Indeed, the objective reports including that of Dr Marshrons refer to the policy of 'zero tolerance' of crime by the Aristide regime. I am, therefore, satisfied on a balance of probabilities that the circumstances now prevailing in Haiti are such that the grounds on which asylum was granted have ceased to exist and that the appellant can no longer refuse to avail himself of the protection of his own country."

23. Mr Blake submitted that the effect of Article 1C (5) was to require the Secretary of State to show that there had been a change of circumstances which was fundamental, durable and stable. It was not enough to show that if the asylum claim were now being considered for the first time it would fail, even though he did not accept that that was the position here. The clause could not be invoked simply because the basis for the grant of asylum had disappeared, if it had been replaced by another basis for the grant of asylum. The cessation clause was usually applied where the change was by its nature one which affected general groups of refugees, though it could be invoked where particular personal circumstances satisfied the test. This approach is reflected in paragraph 135 of the UNHCR Handbook and in other UNHCR material, in particular the 2003 UNHCR Guidelines on the application of the cessation clauses.

24. Mr Gulvin submitted that this was a case about the circumstances of an individual and, contrary to the way Mr Blake understood his submissions, we did not understand him to be taking significant issue with the need for a durable change which removed the basis for the persecution. His argument was that he could demonstrate just such a change for this individual and there had been no significant change since the Adjudicator's determination, a determination which was to be supported.

25. We do not see it as therefore necessary to rehearse all the material on the general issues about Article 1C(5) which we were offered. We simply make the following comments, which indicate sufficiently our real reservations about the UNHCR guidelines, which appear to go considerably beyond the Convention along the lines of the wider humanitarian concerns which it pursues.

26. Paragraph 10 of the guidelines deals with the fundamental nature of the change, but, to us, that adjective is really no more than an encapsulation of the wording of the clause itself because it is treated as requiring the changes to have addressed the causes of the displacement which led to the grant of refugee status in the first place.

27. This requirement is emphasised by the need for the change to be such that the refugee can no longer refuse to avail himself of the protection of his country of nationality. The guidelines in paragraph 15 say that this means that protection must therefore be effective and available. We are not sure that that must be so in every case. There may be no or rather less need to focus on protection where there is no longer any persecutory treatment to which the refugee would be subject. The extensive scope of protection which is to be found in paragraph 15 and which includes a functioning government, administrative and legal system as well as adequate infrastructure to enable the residents to exercise their rights including the right to a basic livelihood, considerably overstates the Convention requirement.

28. We add that the guidelines, paragraph 16, should not be read as requiring that the indicators of change to which it refers all have to be in place before the cessation clause can be invoked. They are indicators of both change and of the factors which show that the previously persecutory conditions will not foreseeably return to displace the refugee again. They do not require a particular level of good and democratic governance to be achieved. It is the avoidance of a predictable return to the conditions of persecution which must be shown as a result of the changes relied on. It is for that reason that the UNHCR does not see the clause being used in respect of individuals usually, because it is changes which affect groups of refugees which will be the more enduring and fundamental.

29. Paragraph 13 deals with the enduring and stable nature of that fundamental change. We agree that temporary changes in a situation of volatility do not suffice. Time should be allowed for the changes to consolidate, so as to show their durability.

30. Mr Blake made two submission about the Adjudicator's conclusions: first, he had not taken adequate account of background material before him including a letter from Mr Geilenfeld; second, there had been a significant change in circumstances in February 2004 with the departure of Aristide, a change which also served to emphasise the volatility and the lack of functioning state even at the time when the Adjudicator was dealing with matters. It was suggested, but not really pursued and we do not accept, that the Adjudicator really treated the appeal as a re-investigation of the original claim.

31. Mr Blake submitted that the material showed that although Aristide had returned after the Tribunal's 1993 date of assessment for its determination, there had been a steady decline in the functioning of the Haitian state and in its legal and law enforcement organs markedly accelerating after 1997. Thereafter human rights abuses become increasingly widespread; the zero tolerance police policy was a licence or code for extra-judicial killings and punishments, police corruption and politicisation in the interests of Aristide. By 2003, the state had ceased effectively to exist. If the Appellant had been pursued as a former attaché or a perceived Ton Ton Macoute, he could have received no protection at all but would rather have been the target of Aristide thugs.

32. Mr Blake drew our attention to a report of 2000 by Merrill Smith, a US Attorney with a particular interest in Haiti. But we did not find the list of incidents particularly illuminating though illustrative of law and order problems of some gravity. It showed political instability, corruption, violence and electoral fraud. Dr Marshrons' reports of 2000 and 2002 show the violent consequences of the "*popular justice*" or "*zero tolerance*" policy of Aristide and that it was used against political opponents, journalists and ordinary citizens in a way which encouraged violence and the breakdown of law and order, and of any

semblance of a non-political police. It encouraged gangs of politically allied thugs. The judiciary became politicised.

33. Mr Gulvin submitted that it was necessary to focus on the reason why asylum had been granted and that the background material supported the carefully considered views of the Adjudicator. As the Adjudicator pointed out, Dr Marshrons' concern was not for the Appellant perceived as an Aristide supporter but for the Appellant who, seen as a former attaché or Ton Ton Macoute, would be at the risk of mob violence or revenge attacks against which there would be no protection provided by the state apparatus, such as it was, because it was under the sway of Aristide.

34. We now deal with the Adjudicator's determination. The Adjudicator sets out correctly the gist of what the UNHCR said, which included the comment that the Appellant was not believed to face any serious risk of harm related to imputed pro-Aristide views dating back to 1989. There was a risk in relation to those few who might recall him as an attaché; former Macoutistes allegedly still operated as assassins. Old antagonists might still bear a grudge since they could still remember him in 1994 according to Mr Geilenfeld. But as the Adjudicator pointed out that had not been the basis for the grant of asylum.

35. He approached the cessation provision on the basis that it was the way in which the Appellant, through his association with the USA and the orphanage, would be perceived as an Aristide supporter which had been the basis of the grant of asylum. To him the question was whether there had been such a change in those circumstances that the Appellant could no longer refuse the protection of Haiti. There had been and was no actual involvement with Aristide by way of political activity. There was no grant of asylum because of the risk that the Appellant would be seen as a former attaché, or misperceived as a Ton Ton Macoute. It appears to us that while the Tribunal in 1995 thought that the Appellant might be at some risk from the guards whose scam he had exposed, that risk of a revenge attack did not furnish a Convention reason.

36. It is right that the Adjudicator does not refer to the emailed statement from Mr Geilenfeld dated 1st October 2002. This says that the Appellant would return to a place without family or job, and where his life would be in danger from "*mob types*" who had a very long memory. Other former attachés were still being murdered and most of those with whom the Appellant used to associate had been murdered or had fled the country. This too does not relate to the basis upon which asylum had been granted.

37. If there had been no changes to the situation as at the time when the Adjudicator was considering matters, we would not have interfered with his assessment of fact and degree. We would not have felt impelled to disagree. Putting the matter very simply, the basis for the grant of asylum was that the Appellant would be at risk as a result of being perceived as pro-Aristide. Once Aristide was in power, or his

supporters were, there was no real risk to the Appellant for that reason. Even though the state was functioning badly, he would not have been at a real risk of persecution because of those imputed views and would have been supported by the supporters of Aristide, however unpleasant they might be. That was the UNHCR position as well. Aristide's return to power had been a fundamental change; it removed the basis of the persecution risk to this individual underlying the grant of asylum. There was no real evidence at that stage to show that the rule of Aristide supporters was to end shortly. It would have been possible to take the view that the instability and volatility of Haiti had already been demonstrated so that no political future could be predicted with the necessary degree of certainty, but that is not a view to which the Tribunal feels impelled to come in the absence of hindsight. We do not accept that it is a legal requirement for the operation of the cessation clause that there be functioning institutions and rights provisions, as the indicators in the guidelines appeared to require. We agree, however, that the absence of such institutions makes the prediction of stable and enduring change a more fragile exercise of judgement.

38. We should refer at this stage to the arguments about the risk arising out of the perception of the Appellant as a former attaché or Macoutiste. They were not quite formulated in this way because they were lumped in indiscriminately with the risk as a perceived Aristide supporter. But in 1995 the Tribunal concluded, not that there was no risk, but that the risk was of revenge attacks which did not give rise to a Convention reason for protection. It did not consider that this risk might be occasioned by any imputed political opinion. The Adjudicator did not reject the risks as claimed by the Appellant before him, rather he treated them as irrelevant because they did not form the basis of the grant of asylum. On the evidence which we have set out, the Appellant, as at the date of the Adjudicator's determination, may have been facing a real risk in that respect. Although the evidence about such attachés is sparse, the Geilenfeld e-mail is relevant as is the fact that such individuals might be seen as hostile to the Aristide cause. Where the original risk or cause of persecution ceases but is replaced by another Convention risk, there may have been a cessation and in effect a fresh claim for adjudication, but removal would continue to breach the Convention, which is the way United Kingdom law normally engages with the Convention. However, in view of other conclusions which we have reached it is not necessary to analyse the degree of risk and whether it arises for a Convention reason.

39. We now turn to the evidence of the changes to the position after the Adjudicator's determination. The September 2003 report from Dr Marshrons describes a further deterioration in press freedom, an increase in zero tolerance killings and police brutality. There was an atmosphere of widespread insecurity and violence; the institutions of government were crumbling. The rule of law was brazenly disregarded; the police and populist organisations were linked to many human rights violations. Special Brigades appeared which had many resemblances to the attachés system and were responsible for violence, thefts, arrests

and disappearances. There is no mention that former attachés were at any particular risk although Dr Marshrons says that the risk to the Appellant in that respect had diminished but had not been eliminated.

40. The US State Department Report for 2003, which Mr Gulvin produced, highlighted the continuing increase in extra-judicial killings and assaults under the guise of the zero tolerance policy. The use of attachés arising out of that policy was reported though these are not, or not necessarily, the same individuals who were the attachés during the Naumphy regime. Pro-Aristide thugs were left unchecked to attack his opponents in demonstrations. Human rights abuses were rife.

41. Dr Marshrons' report of May 2004 described the armed insurrection which had developed in late 2003 and early 2004 led by former soldiers now hostile to Aristide. He had been forced to leave in February 2004; his supporters saw the intervention of the USA in his departure as a hostile act. Although there had been a Political Transition Pact in April and a multinational interim force, there were large numbers of active armed groups including some loyal to Aristide. The police were ineffective against even the ordinary criminal gangs which had increased in number; there was no effective judicial system. The new leaders had bad human rights records and were keen to prosecute those abuses of Aristide while ignoring those of 1991-4 when he was not in power. Violence, random and targeted, was widespread. There were attacks on opposition supporters and those who supported Aristide, including those who had been officials or employees. There was a higher degree of instability than before. Anti-Aristide forces operated with impunity. His supporters had refused to participate in the government positions offered to them because of the continuing attacks.

42. This general picture was repeated in the reports of Amnesty International and Human Rights Watch.

43. The UNHCR Washington Office said in a letter of October 2003 that whilst the Appellant's imputed pro-Aristide views were unlikely to cause him serious risks, he could be at risk because of his role as an attaché. The general condition of Haiti was marked by a sense of hopelessness, increasing violence, a climate of impunity for those acting in the interests of Aristide, and increasing and unjust detention and inhumane treatment in gaol for those returned after having committed crimes abroad. In a letter from the UNHCR UK Representative of May 2004, it said that the atmosphere of impunity in Haiti continued, but that now it was favourable to those who attacked Aristide supporters. A myriad of armed groups held sway in various parts of the country, there was no effective police force to counter them and the other institutions of the state were inactive. There was no prospect of this climate of uncertainty ending immediately. The Appellant would be particularly vulnerable in view of his history, and having no family or other support to help him integrate into the unstable society of Haiti.

44. We take the view that, judged as of now, the Secretary of State has failed to show that the requirements of Article 1C(5) have been satisfied. When exercising the error of fact and law jurisdiction in an asylum case, we are obliged in line with Ravichandran to look at the situation as at the date of our determination. The very cause of the grant of asylum was the imputation of pro-Aristide views and an association with the USA. Whilst there was a period when Aristide was in power and that risk had been eliminated, that is not now the position. Even taking a narrower view of the Article than we have done, it is clear that the circumstances which underlay the grant of asylum have not ceased to exist; and those circumstances mean that he cannot avail himself of the protection of the state in Haiti such as it may be. Aristide supporters are under routine and random attack and are not protected save to the extent that his armed gangs can assist. He risked being perceived as an Aristide supporter. The passage of time and changes in regime have resurrected that risk. Indeed, if he was perceived by Aristide supporters as having associations with the USA, that is unlikely to be helpful to him in seeking their help, because they see it as having betrayed Aristide. It is difficult to ignore the risk that he would also be seen as a former attaché who would thus at the very least not be certain of the protection even of Aristide gangs. In any event such sources of protection are not what the Convention has in mind in the cessation provisions. The situation is so unstable, the breaches of human rights on all sides so common that the conditions for cessation of refugee status do not exist. We reject the suggestion that there has not been a real change since the departure of Aristide so far as it affects this Appellant.

45. We have not considered for these purposes the question of any period of detention and the conditions of detention which may face the Appellant were he to be returned. We have considered the position solely on the basis of what he would face were he to be at large. However, once it is accepted that there is a real risk that he would be seen as an Aristide supporter, the question of whether the Appellant would face detention on return and, if so, in what circumstances, becomes a live one for the cessation clause. It cannot be considered on the basis upon which the Adjudicator dealt with it, which was that he would only be detained for a month or so, as an ordinary deportee.

46. The position as noted by the Adjudicator was that those deported to Haiti, including those who had lost their refugee status because of criminal convictions, were kept in prison for indefinite periods. But the average period of detention for deportees had decreased by 2001 to about a month. Conditions were very poor, overcrowded, filthy, with inadequate hygiene, healthcare, food and water or exercise. Detention appeared to be routine for deportees though.

47. Subsequent material from Dr Marshrons in September 2003, but drawing on information from 2002 from Human Rights Watch, National Coalition for Haitian Rights and a UN Expert's visit, referred to the very overcrowded state of the prisons, the lack of food leading to malnutrition, poor sanitation, diseases, dilapidated buildings, the

absence of sufficient beds or exercise, and the abuse of prisoners which included the withholding of medical treatment. There were long delays pending trial and sentences were absurdly severe. The US Immigration and Naturalization Service reporting in 2002 said that criminal deportees were routinely imprisoned on return. Detention for three months was common if there was then a close family member who could take responsibility for the deportee, in effect standing surety with his own liberty for his good behaviour. A family was also useful for bribing guards to release someone and for providing food and so on. In the absence of a family member willing to take responsibility, it could be many months before a criminal deportee was released; the USINS said ten months, UNCHR spoke of years. Its report for 2003 also spoke of improvements in certain respects.

48. However, by her May 2004 Report, Dr Marshrons was referring to complete disarray in the prison system with many escapes, releases, and the UN said that many facilities were not usable because of the risk to prisoners and staff. Overcrowded police cells were being used. An important part of the reconstruction and stabilisation programmes was to improve the prison facilities, as part of the restoration of law and order.

49. There was no evidence as to how deportees were now treated, perhaps because there was very little experience post February 2004.

50. If we make the assumption, which we have to do for these purposes, that the Appellant would be returned to the chaotic conditions in Haiti, it seems to us that some sort of functioning state apparatus for his reception at the port or airport must be assumed. He would be returned, absent any contrary material as someone who was a criminal deportee, even if there were no mention of his refugee status. It would be wrong on the material to conclude that the state was so broken down that it would be unable to detain him, but rather that it would be able to carry on as before in 2003. He would be detained even as an ordinary criminal deportee without family for many months in very poor conditions. We cannot assume or conclude that Mr Geilenfeld would be in a position to risk offering assistance at all. The Appellant would be asked questions, with no sense of restraint on his interrogator's part, about his origins in Haiti, and his reasons for going to the United Kingdom. There is at least a real risk that his association with the orphanage would come out, and that he would be considered as a possible Aristide supporter by those in charge of the state's security and enforcement apparatus. Were that to happen, there is a real risk that he would be killed or very seriously ill-treated, regardless of the general conditions in prison. But he would at best receive the worst of the general conditions; and whatever may be the true position in relation to prison conditions and Article 3 generally, and whether or not they would by themselves breach his Article 3 rights, they add powerfully to the conclusion that the cessation clause cannot now apply to him.

51. This position is reinforced by his medical condition. Briefly, it appears to have been accepted by the Adjudicator that he is suffering from chronic PTSD and depression. Psychiatric reports prepared in part in connection with his court appearances refer to suicide attempts in and out of prison. Anti-depressants have been prescribed with some success. Part of his depression relates to a fear of return to Haiti. However, the conclusions of the Adjudicator as to the availability of medical treatment in Haiti for depression and PTSD do not hold good for someone in detention. The evidence shows that there is no real prospect of him receiving any such medication in present circumstances in prison.

Refoulement

52. Accordingly, we approach the second issue, refoulement under the Convention on the basis that we accept that the Appellant is still a refugee. Article 33(1) prevents the return of a refugee to territories where he would be at a risk of persecution. Article 33(2) provides:

> "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

This removes the protection against non-refoulement from refugees.

53. The Adjudicator concluded in paragraph 18:

> "The appellant committed not one but several serious crimes. They ranged from attempted deception through burglary to crimes of violence including actual bodily harm and wounding. He has been in prison a number of times. Two of the offences were committed after the 1997 trial judge's recommendation for deportation. The latest pre-sentence report of March 2002 assessed the risk of re-0ffending at a moderate level and said that the appellant wished to settle down. Despite that, his whole history is one of repeated re-offending. Moreover, he appears to have been less than truthful with the Probation Officer, suggesting that he lived in a stable relationship with his wife. Mrs Belvue told the Trainee Probation Officer that she considered the relationship at an end and that she wanted nothing more to do with him. He also appears to have given the Probation Officer the impression that his 'immigration status was stable' and that one attempt to deport him had been unsuccessful. That was despite the order signed on 31 July 2000 and the removal directions of 21 August 2000 of both of which he must have been aware. The appellant, in my judgment and in the words of the UNHCR Deputy Representative in his letter relied upon by Miss Naik is covered by the words,
>
> > '*one or several convictions are symptomatic of the criminal, incorrigible nature of the person against which Article 33(2) action is contemplated*.'
>
> I am satisfied that the offences for which the appellant was convicted and in particular that of wounding which led to the recommendation for deportation are of a serious nature. I do not accept that those before 1997 should be excluded from consideration. There is no doctrine of estoppel in immigration

> law and, in my judgment, the respondent is entitled to regard them as pointing to a pattern of incorrigible criminality which taken with the serious wounding offence placed the appellant, even if he is still at risk of persecution in Haiti for a 1951 Convention reason, outwith the protection of that Convention as an exception under Article 33(2).
>
> ...
>
> As the UNHCR says, what is required in applying Article 33(2) is a balancing exercise. I am satisfied from the evidence before me that the appellant is a danger to the community of the United Kingdom by virtue of his incorrigible criminality. I am also satisfied that the situation he as an individual would face if returned to Haiti is such that he would not face persecution on account of a 1951 convention reason and in particular not for the reason for which refugee status was originally granted following the determination of his appeal in 1995 by the Immigration Appeal Tribunal. The appeal on the grounds that the appellant is not outwith Article 33 of the 1951 Convention is dismissed."

54. Although the Adjudicator considered this provision on the basis that the cessation provision did not apply and carried out a balancing exercise between the risk to the community and the risk to the individual, it is not clear what assumptions he made about the risk to the individual. He treated the Appellant as still being entitled to refugee status, seemingly (paragraph 17) on the basis that he still had a well-founded fear of persecution as a perceived Aristide supporter. Yet he also said in paragraph 18 in the very context of the balance that the Appellant would not face persecution on return. This appears to be illogical.

55. Mr Blake submitted that the crimes did not show the requisite degree of severity to come within the scope of "*a particularly serious crime*" which showed that he constituted a "*danger to the community*". This had to be seen as a requirement akin in gravity to a threat to national security. The offences, when analysed, did not reach that threshold although in principle some such offences might. They were different from homicides, dealing in hard drugs, gang violence and robbery. The Secretary of State had moreover granted Leave to Remain to the Appellant as a refugee in September 1996 and January 1999, revoking a previous deportation order and those earlier offences should not now found this exclusion and the refusal to revoke this deportation order. Indefinite Leave to Remain was granted after the most serious of his offences for which he received his longest sentence of three years, for wounding. In reality, there was no increasing gravity of offending over time. There had been no further convictions. His longest sentence had been three years. He had had seven sentences in fourteen and a half years. The UNHCR letter of 15th November 1999, which from the information available, concurred that the totality of the convictions reached the threshold for "*particularly serious crimes*" might have been based on no more than the mere name of the offence rather than on the substance of the criminal behaviour. In any event, the UNHCR emphasised the narrowness the exclusion clause, the need for great caution about its application and the balance which had to be struck between the danger to the host community of his remaining and the risk to the Appellant upon his return.

56. Mr Blake also dealt with the provisions of section 72 of the 2002 Act, which he said could not apply to this appeal. Section 72 applies to the construction and application of Article 33(2). Subsection (1) provides:

> "This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).

57. Subsection (2) says:

> "A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is-
> (a) convicted in the United Kingdom, and
> (b) sentenced to a period of imprisonment of at least two years."

58. Subsection (6) says that the presumption as to danger is rebuttable.

59. Subsection (8) is also material and provides:

> "Section 34(1) of the Anti-terrorism, Crime and Security Act 2001 (c. 24) (no need to consider gravity of fear or threat of persecution) applies for the purpose of considering whether a presumption mentioned in subsection (6) has been rebutted as it applies for the purpose of considering whether Article 33(2) of the Refugee Convention applies."

60. Section 34(1) of the Anti-Terrorism, Crime and Security Act 2001 reads:

> "Articles 1(F) and 33(2) of the Refugee Convention (exclusions: war criminals, national security, &c.) shall not be taken to require consideration of the gravity of-
> (a) events or fear by virtue of which Article 1(A) would or might apply to a person if Article 1(F) did not apply, or
> (b) a threat by reason of which Article 33(1) would or might apply to a person if Article 33(2) did not apply."

62. Section 72 of the 2002 Act was brought into force on 10 February 2003, after the Adjudicator's determination in this case. The Commencement Order SI 2003 No 1 contains no transitional provisions. Section 34 of the 2001 Act came into force on 14 December 2001 by section 127, after the appeal against the Secretary of State decision had been lodged but before the Adjudicator's hearing.

63. If section 72(2) were consistent with international obligations, submitted Mr Blake, it showed for the purposes of an appeal to which it did not directly apply what Parliament considered to be particularly serious. There was only one offence which fulfilled that criterion, after which Indefinite Leave to Remain had been granted.

64. Mr Blake submitted that this section could not apply to a pending appeal if it cut back on the case available to the Appellant, in the absence of clear language. He drew support from R (Khadir) v SSHD [2003] EWCA Civ 475, [2003] INLR 426. Between the hearing of an application for Judicial Review and the Secretary of State's appeal to the

Court of Appeal, Parliament had enacted section 67 of the 2002 Act which provided that section 67 was to be treated "*as always having had effect*". It gave an extended definition to those who were liable to immigration detention, and hence broadened those who were eligible for temporary admission. That new provision was clearly intended to have substantive retrospective effect. Mance LJ at paragraphs 82 and 83 dealt with the general position in relation to Acts said to have retrospective effect:

> "82. But the general principle is that if a new Act affects substantive rights, as distinct from procedure, it will not apply to proceedings which have already commenced unless a clear intention is manifested: see *Colonial Sugar Refining Company Ltd v Irving* [1905] AC 369 and *Attorney-General v Vernazza* [1960] AC 965.
>
> 83. In the former case, an Act removing the right of appeal to the Privy Council did not affect an appeal in litigation pending when the Act was passed and decided after its passing, on the ground that '[t]o deprive a suitor in pending litigation of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure'. In the latter case, during the pendency of an appeal against an order restraining a vexatious litigant from commencing proceedings, an Act was passed adding to the court's power to restrain vexatious litigants from commencing proceedings a power to restrain them from pursuing existing proceedings. The Act was held to be procedural on the basis that it did not deprive the litigant of a right to bring proper proceedings and even if it had been regarded as substantive, Lord Denning said that it was retrospective (at 977). The effect of a contrary decision would simply have been to require the Attorney-General to bring fresh proceedings."

65. Mr Blake also relied on R v SSHD ex parte Chahal [1995] 1 WLR 526 in which the Court of Appeal considered whether a balance had to be struck in an exclusion case. It took the view that it did; pp533 and 544 per Staughton and Neill LJJ. This showed that section 72(8) and section 34 were consciously altering the substantive law and not clarifying an area of dubiety.

66. If decisions were to be made on a legal basis with provision for appeal and further appeal, it would undermine the rule of law were these provisions to be brought in so as to affect this appeal, in the absence of specific wording. There was nothing here akin to the language of section 67. The issues were locked into the 1999 Act under which the appeal was still proceeding. The Appellant would be adversely affected by the strung out nature or happenstance of judicial proceedings.

67. Mr Gulvin argued that the sequence and totality of the offending met the requirements of Article 33 (2). They could properly be said to be "*particularly serious*" and to show that the Appellant was a danger to the community. All the offences should be taken into account. He agreed that the section 72 arguments were "*difficult*" for the Secretary of State.

68. We shall consider this matter, leaving on one side for the moment the effect of section 72. First, we reject the argument that it is only the post-Indefinite Leave to Remain offences which should be taken into account. Such a restriction would be wholly artificial; it is necessary to form a view about the current danger to the community and it would be impossible to do that properly with an eye closed to offences in the past or to do so on a different basis from that upon which the existence of particularly serious crimes was assessed. Besides, past offences may help in understanding the significance of the later offences for better or worse for either party. It is the history and pattern of offending as a whole which must be examined when considering danger to the community. We do accept that the grant of Indefinite Leave to Remain is however an important factor in judging how "*particularly serious*" an offence was and how dangerous the Appellant is.

69. Second, the fact that none of the offences in substance are of the gravity which often underlies a deportation order, is relevant but there is nothing in the Convention which requires only those offences to found exclusion. The power is to be used sparingly but that is inherent in the wording of the clause.

70. Third, we reject the assumption behind the submissions of Mr Blake and Mr Gulvin, misled by the UNHCR's misinterpretation of the Convention, that a series of offences can suffice to show that a refugee has been convicted of "*a particularly serious crime*". The Convention, and section 72, refer to "*a*" particularly serious crime. Of course, convictions for several "*particularly serious crimes*" also suffices, but convictions for several "*not particularly serious crimes*" do not cause the protection against non-refoulement to be removed. There must be at least one conviction for "*a particularly serious crime*". This is not a piece of pedantic focus on an indefinite article. The removal of protection is serious; the disqualifying offence has to attain a particular level not met by persistent low level offending. Incorrigible criminality and danger to the community do not suffice of themselves. The Adjudicator approached this as if they did.

71. As we have said, a sequence of previous offences may show a more recent one to have been "*particularly serious*", even though as a first offence it might have not reached that threshold. It is theoretically possible for a subsequent offence to cause an earlier offence to be seen, with hindsight as rather more serious than appeared at the time, but that is likely to be because of a subsequent more serious offence. All offences, whether individually "*particularly serious*" or not, will be relevant, however, to the assessment of the danger posed to the community. This is an assessment as of now of future risk. Conviction of "*a particularly serious crime*" is essentially historic.

72. There is only one offence which is a candidate for "*a particularly serious crime*". That is the wounding offence of which the Appellant was convicted in 1997 and after which he received Indefinite Leave to Remain.

73. There is not much information about this and the older offences other than what the Appellant said in his statement for his appeal. He was the driver on domestic burglaries for others who entered the flats. He found a wallet and when its owner returned to reclaim it, the Appellant refused to give it back and hit the owner as he tried to get it back. That was one ABH. Another occurred when he thought he saw someone wearing an item of clothing which had been stolen from him and went round to his house where he knew the sister and in the course of an argument hit her. He said that the cheque fraud was an attempt to get back at someone who had defrauded him. The wounding arose when he went again to someone's house to sort out what he thought was a false accusation of theft where two men armed with a sword and bars chased him, leading to a fight in which the Appellant fighting back gashed one of their legs. That is an account which is hard to reconcile with a conviction for wounding as opposed to an acquittal on the grounds of self defence.

74. This offence, by itself or as a single offence, does not quite reach the threshold, even though it was a nasty attack, on people in their homes, and undertaken because the Appellant thought that he was entitled to take the law into his own hands. However, in the context of the Appellant's previous offending, which involved dishonesty and violence, and an earlier occasion on which he had gone to someone's house to deal with a perceived wrong, outside the law, it does reach that threshold.

75. The subsequent grant of Indefinite Leave to Remain does not warrant us taking a different view here. The grant of Indefinite Leave to Remain, following on the earlier grant of Exceptional Leave to Remain, was to be expected so as to give effect to the Tribunal's 1995 decision. Besides, the grant of Indefinite Leave to Remain in 1999 would also have reflected a view on dangerousness as well (if all the past facts had been known to the decision-maker, itself somewhat speculative) which could not have allowed for the unknown contemporaneous or subsequent offences.

76. We turn to those other offences for the purposes of considering danger to the community. The possession of the imitation firearm again involved an intended visit to someone's house with a view at least to frightening them. His girlfriend reported him to the police because she feared that he was going to attack the men. He explained all these by reference to the way Haitians respond in Haiti to such incidents and to a shortage of money. The next firearms offence involved an air pistol purchasable over the counter and firing small ball bearings. Again he took it to the house of someone who he thought, perhaps correctly, was racially abusing him and about which the police had done nothing, and shot the occupant's dog, apparently without immediate effect, as the dog was being set on him. Then, with his wife a drug addict, he went at the suggestion of a friend to a hotel to steal money and ended up stealing bottles of wine instead. Some damage was done. The drugs

offence was not proceeded with, although he admitted in the Pre-Sentence Report that he had seeds to grow cannabis but only so as to save on the cost of purchases.

77. The second firearms offence had been committed while he was on licence. The Pre-Sentence Report in 1999 said that based upon his history there was a significant risk of a similar offence in the future; it appears that that referred to the firearms and not the wounding offence. (The Secretary of State's letter of 13 October 2000 accompanying the refusal to revoke the deportation order misleadingly puts his understanding of which offence was being spoken of into his quote from the report.) This problem was more likely to arise among the people he knew than with a stranger.

78. A Pre-Sentence Report of 2002 in connection with the burglary conviction assessed the risk of future offending as moderate and said that the Appellant was seeking to address his behaviour, changing his lifestyle and settling down, which the Probation officer was minded to believe. The risk to the public could be dealt with under supervision.

79. The psychiatric reports, starting in 2002, do not suggest that he is a particular threat to the community although describing him, accurately, as an habitual thief with convictions for assaults. This behaviour was seen as related to his PTSD which had not been treated for many years. Treatment and help could reduce the risk of his re-offending.

80. We do not consider that the Adjudicator erred in his assessment that the Appellant constituted a danger to the community. He has committed offences of violence and dishonesty, sometimes in combination, over a number of years, regardless of his prison sentences and experiences. Some of his burglaries were domestic. He has used a firearm, and intended to frighten with another. He has gone to other people's houses on a number of occasions in order to deal with what he says were wrongs done to him by frightening them, or in circumstances in which violence by him was likely and in fact occurred. We do not accept that his statement tells the complete truth about these offences because there is a clear attempt to minimise the wounding offence. The fact that Indefinite Leave to Remain was granted in 1999 is not persuasive. The offences would not have warranted exclusion under Article 1F; it would have been odd not to have granted Indefinite Leave to Remain eventually in view of the Tribunal decision and odder still to have immediately revoked it. It was the further recommendation for deportation which triggered the present position. The imitation firearms offence was committed the day before the letter from the Secretary of State was written granting him Indefinite Leave to Remain. The Probation Officers in their Pre-Sentence Reports recognise that there is a risk of re-offending. Although this may be reduced by treatment and the Appellant's efforts, the history gives no cause for optimism. Rather it demonstrates that violence and dishonesty are routine constituents of his life and create continuing danger for those who come into contact with him or whose property he wants.

81. We do not accept Mr Blake's contention or the Adjudicator's view that a balance must be struck under Article 33(2) between the risk to the refugee upon refoulement and the danger which his continued presence poses to the community. First, Article 33(2) is on its face absolute. Chahal considered both its wording and international materials on its meaning as well as deportation provisions of the Immigration Rules in coming to its conclusions. The Immigration Rules supported the view to which Staughton LJ came at p533D; they were even more influential in Neill LJ's conclusions at p544F. With the exception of part of Staughton LJ's reasoning, the two were intertwined. Yet it is not necessary to intertwine them; the Rules are quite clear as is the appeal provision, section 69(4). A deportation order will not be made and removal cannot be carried out where that would breach the Convention. This use of the Immigration Rules might have been relevant to the overall decision in Chahal, but it was not relevant to the interpretation of Article 33(2). The Rules do not assist here anyway; there is no in-country right of appeal against the refusal to revoke a deportation order on its merits. Section 69(4) permits an appeal on the grounds that removal would breach the Refugee Convention, not the Rules.

82. A closely related issue of balance was considered by the House of Lords in T v SSHD [1996] AC 742 in relation to the exclusion of a terrorist under Article 1F, cast in similarly absolute terms. The House held that there was no balance to be struck between the risk to the returning excluded individual who would otherwise have been a refugee, and the gravity of his exclusionary acts. The argument as to balance, which Mr Blake suggested to their Lordships was even stronger than in Chahal and Article 33(2), was given short shrift, but is clear enough. Its conclusion is more implicit than explicit, but it clearly accepted that T should return to Algeria, notwithstanding the contested arguments as to the existence of a balance.

83. T did not expressly overrule Chahal in the Court of Appeal and it did relate to Article 1F and not Article 33(2). But we regard its conclusion as necessarily leaving little scope for the Article 33(2) balance argument.

84. The effect of there being no balance in Article 33(2), as we conclude, is to emphasise that the tests for "*a particularly serious crime*" and "*danger*" must be higher than they would be if there were a balance to be undertaken. We have allowed for this in our conclusions on those issues. It is in particular the "*danger*" threshold which would be affected by the risk on return to the refugee, if a balance were to exist and which we see as quite a high threshold in its absence.

85. Accordingly, on the view of the law which we take, the changes in the 2001 and 2002 Acts are not material, but we refer to them briefly.

86. Plainly the effect of section 72(2), if applicable, is to put beyond argument the existence of a particularly serious crime, and the fact that

the crime for which a sentence of three years was passed preceded the Act does not affect the application of the Act to it. This would otherwise introduce a wide and arbitrary degree of variability into the application of the provision. No language in the Act supports such an outcome. On the views which we have expressed the presumption as to the danger to the community has not been rebutted. It follows that the debate about the coming into force of section 72(2) of the 2002 Act has no bearing on the decision as to the existence of a particularly serious crime or danger to the community.

87. Were we to have reached a different view of the law and facts, so that section 72 if applicable, made a difference to the outcome, its possible retrospective application here would have to be considered. Section 72(1) must be read as saying that section 72 applies, from the coming into force of the section on 10 February 2003, to the construction and application of the Convention. It does not purport to have retrospective effect in the way illustrated by section 67 in Khadir. So the question is whether that can apply to an appeal to the Tribunal from an Adjudicator's determination to which it did not apply. As we have said, the appeal continues under the 1999 Act by virtue of the transitional provisions of Commencement Order No 4.

88. If the specific definition of "*a particularly serious offence*" in section 72(2) includes offences which would not otherwise have been within the scope of Article 33(2), section 72(2) alters the law to that extent but in its effect is qualified by the rebuttable presumption as to dangerousness in subsection (6). Except to the extent that that alters the burden of proof, the dangerousness requirement would have to be satisfied conformably with the Convention thresholds. This ought to lead to the same result as before, except where the change in the burden of proof, if it is a change, would affect the outcome.

89. This provision does not have many of the objectionable features of retrospective changes to the law. It does not change the character of past transactions or arrangements; nor does it criminalise past conduct or increase the criminal penalties. But it changes the potential asylum consequences of a past criminal act and its sentence; it may affect a decision as to whether an appeal against sentence should be launched. Whether this is characterised as a retrospective change to the law or not (because it affects the prospects of removal), we would not regard it as right to apply it so as to enable an Adjudicator's decision to be appealed to the Tribunal on the grounds that the effect of the intervening statutory provision was to give one side an argument, potentially a winning argument, which previously he had lacked, after what could have been a final judicial determination. We would have expected clear words to show that that effect was intended. We do not consider that the new definition of "*a particularly serious crime*" can be regarded as a mere clarification. Its scope is capable of including some crimes which would not have previously been covered.

90. This is reinforced by the language of the Tribunal's powers on appeal in paragraph 22(2) of Schedule 4 to the 1999 Act which, if not affirming the Adjudicator's determination, enables it only "*to make any other determination which the Adjudicator could have made*".

91. Accordingly, we would not have applied those provisions if we had reached a different view about the seriousness of the Appellant's crimes or his continuing danger. The provision applies to appeals brought under the 2002 Act, whether to the Adjudicator or to the Tribunal.

92. We turn to those statutory provisions which deal with the question of balance. It follows from what we have said that we do not regard section 72(8) or section 34 as changing the substantive law or the way in which the United Kingdom applies the Refugee Convention. Section 34 is the key provision on the absence of a balancing exercise.

93. Although section 34 falls within Part 4 of the 2001 Act headed "*Immigration and Asylum*", it is not in the group of sections sub-headed "*Suspected International Terrorists*" but in the group sub-headed "*Refugee Convention*". There is little value in the sub-headings as an interpretative aid and the section is not limited to certification of suspected international terrorists or SIAC cases. We can see no justification for limiting the scope of that provision to terrorist crimes, which are usually ordinary crimes committed for political motives, and excluding from it ordinary crimes. If various distinctions of that sort had been intended, the drafting would have had to have been rather more specific. Section 72 does not simply apply section 34 to a wider group of asylum cases. Neither the wording of section 72 nor of section 34 is apt for that. The latter is formulated generally so as to deal with balance.

94. Section 72(8) is less directly important here. It removes the issue of risk on return from consideration of whether someone is a danger to the community under subsection (6). It may be difficult to see how the consideration of the risk to the individual on return would be relevant to the degree of risk which he posed to the community if he stayed, and therefore difficult to see what more it is that this provision achieves which was not already covered by section 34. The later part of section 72(8) starting "*as it applies ...*" suggests that it is introducing the removal of a possible obligation in relation to subsection (6), which has already been removed in relation to the Refugee Convention by section 34. It seems that the provision is simply designed to make matters clear in relation to the new statutory presumption in section 72(6) and to avoid argument that this had negated the effect of section 34 when the new statutory provision in section 72(6) was being applied. It thus aimed for consistency.

95. Even if we had accepted Mr Blake's submissions as to the relevance of balance within Article 33(2), in the absence of other legislative provision, we would have applied section 34 to this case. First, the position is far from clear at its most favourable to Mr Blake and section

34 can legitimately be seen as clarifying the law along the lines in part unsuccessfully contended for by the Secretary of State in Chahal and successfully argued in T. It is not necessary to reach a view that Mr Blake was right and then to treat section 34 as an alteration. Second, this legislation deals with how, prospectively for removal, danger is to be compared with risk or rather not to be compared. It does not involve changing any characterisation or effect of a past completed act, or giving a new effect to it. Third, the change came into effect here before any judicial determination of the appeal and does not involve the removal of what might have successfully been achieved before the Adjudicator.

96. However, for the reasons which we have given, the Appellant does not have the protection of Article 33(2) anyway.

97. Accordingly, we consider that the Appellant is excluded from the operation of Article 33(1). His return to Haiti would not involve a breach of the Refugee Convention.

98. We turn finally to the ECHR. We regard the views of the Adjudicator in relation to the availability of medical treatment in Haiti even in the circumstances which he was considering as markedly optimistic, but we do not need to consider whether or not we are impelled to disagree with them on the basis upon which he reached his conclusions, because we approach the application of Article 3 on a rather different factual basis. Having concluded that there is a real risk that the Appellant would be persecuted were he to be returned, there is no need for any further separate consideration of Article 3. The return of the Appellant would breach this provision for the reasons which we have set out, including detention in the prison conditions we should assume to prevail and the effect which that would have upon his mental health. On that basis, he will not be removed. It is not necessary for us to consider Article 8 and mental health separately from Article 3. The issues as to proportionality do not arise. We do not disagree with the Adjudicator's conclusions in relation to the Appellant's family life.

99. Therefore, we allow the appeal in part in relation to the Refugee Convention but on different grounds from those which persuaded the Adjudicator. We allow the appeal on human rights grounds. The effect, however, is that the Appellant remains a refugee, who cannot be returned, even though to do so would not breach Article 33(2). Article 33(2) is not by itself a cessation or exclusion provision; it only deals with removal.

100. This decision is reported for what we say about cessation and refoulement, and about Haiti.

MR JUSTICE OUSELEY
PRESIDENT