IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 10/04/2001 & 21/05/2001
Date Determination notified: 19/7/2001

Before

The President, The H$^{on.}$ Mr Justice Collins
The Deputy President, Mr CMG Ockelton
Mr J. Freeman

Secretary of State for the Home Department	APPELLANT
and	
Klodiana KACAJ	RESPONDENT
Klodiana KACAJ	APPELLANT
And	
Secretary of State for the Home Department	RESPONDENT

Mr Robin TAM, Counsel	For the Secretary of State
Mr Mungo BOVEY Q.C.(Scotland)	For Ms. Kacaj
Mr David JONES, Counsel	

DETERMINATION AND REASONS

1. Ms. Kacaj is a 21 year old citizen of Albania. She arrived in this country concealed in a lorry on 12 November 2000 and claimed asylum the following day. She was detained at Oakington and her claim was considered and refused on 20 November 2000. In his refusal letter, the Secretary of State also refused to allow Ms. Kacaj to remain in the United Kingdom despite her claim that to remove her would constitute a breach of her human rights under the European Convention on Human Rights.

2. Ms. Kacaj appealed to an adjudicator relying on both the Refugee and the Human Rights Conventions. On 5 January 2001 the adjudicator (C.C. Wright Esq.) dismissed her asylum appeal but allowed her appeal under s.65 of the Immigration and Asylum Act 1999 on the ground that removal would constitute a breach of Article 3 of the Human Rights Convention. The Secretary of State sought and was granted leave to appeal against the allowing of the human rights appeal. Ms. Kacaj sought leave to appeal against the dismissal not only of her asylum appeal but also of her assertions that there had been a breach of Articles 4 and 8 of the Human Rights Convention in addition to Article 3. Leave was granted in relation to the alleged human rights breaches but not in relation to the asylum claim. At the hearing, we indicated, following an application by Ms. Kacaj, that we would permit the asylum appeal to be pursued.

3. Since the appeal raised three issues of considerable importance in dealing with claims under the Human Rights Convention, it was decided that it would be starred. It was originally anticipated that the argument would be concluded within one day. Unfortunately,

that proved impossible and it was necessary to find a second day. While we were anxious to conclude the argument as soon as possible since the issues were of great importance to other appeals, we were naturally concerned that the same counsel, from whom we obtained the greatest assistance, should attend and should not, if possible be required to break other commitments. In addition, the tribunal as constituted was constrained by holidays and the forthcoming Easter vacation. In the result, it was not possible to arrange the second day until 21 May 2001. Any delay since that is regretted but results from the need for careful consideration of the issues. In addition to the submissions of counsel appearing before us, we have received and taken into account written submissions prepared by Mr. Nicholas Blake, Q.C. on behalf of Liberty.

4. The issues are as follows:-

> (1) What is the correct standard of proof to be applied in deciding whether to return an applicant to a country where it is alleged that his human rights, particularly under Article 3, would be breached?

The Secretary of State contended that the facts upon which the risk of treatment contrary to Article 3 had to be assessed must be established beyond reasonable doubt. This, of course, contrasts with the test under the Refugee Convention established by the Court of Appeal in *Karanakaran* [2000] Imm A.R. 271.

> (2) Can there be a breach of the Human Rights Convention and in particular of Article 3 where the treatment which may result if the removal takes place is by non-state actors? Does the approach adopted by the House of Lords in *Horvath*[2000] 3 WLR 379 to the Refugee Convention apply equally to the Human Rights Convention or are there differences?

The Secretary of State submits that the existence of a system which is designed to provide the necessary protection is enough even if that system may in individual cases operate imperfectly. Ms. Kacaj submits that, however *Horvath* is to be interpreted in relation to the Refugee Convention, in human rights terms what is needed is that there should in fact be no risk that the individual who is to be returned is treated in such a way as to violate his or her human rights. Thus if it can be shown that there is a real risk that he or she will, whatever the general system in being, be treated in a way contrary to Article 3, return should not be permitted. It is no good saying, if there is a real risk of torture, that the police will investigate and seek to prosecute the torturers.

> (3) Does any Article of the Human Rights Convention other than Article 3 have what has been called ‘extra-territorial’ effect?

In this case, the Secretary of State submits that neither Article 4 nor Article 8 can be relied on where the breach complained of will or may occur outside the jurisdiction of the United Kingdom. The same submission applies to all Articles except Article 3. Article 3 is singled out because of the decision of the European Court of Human Rights in a number of cases, particularly *Chahal v United Kingdom* (1996) 23 E.H.R.R. 413.

Issue (1): Standard of Proof

5. Mr. Tam's starting point is *Ireland v United Kingdom* (1978) 2 E.H.R.R. 29. That case concerned an allegation by the Republic of Ireland that the United Kingdom had been guilty of breaches of Article 3 in the investigation of suspected terrorists in Northern Ireland. In determining whether any practices which contravened Article 3 had been adopted, the Court approved the standard set by the Commission, saying this (at paragraph 161 on Page 79):-

> "The Court agrees with the Commission's approach regarding the evidence on which to base the decision whether there has been violation of Article 3. To assess this evidence, the Court adopts the standard of proof 'beyond reasonable doubt' but adds that such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account".

In *HLR v France* (1997) 26 E.H.R.R. 29 (an important case to which we shall have to return), the opinion of the majority of the Commission includes in Paragraph 35 on Page 37 the following observations:-

> "The Government adds that, according to the Commission's case law, an individual's allegations of treatment contrary to Article 3 …, if he is deported to a specific country, must be supported by persuasive prima facie evidence. In this case, however, the evidence supplied by the applicant is not such as to support his allegations. The Convention institutions require allegations of treatment prohibited by Article 3 to be proved 'beyond reasonable doubt'".

The Commission is there setting out the Government's argument. It does not itself approve it and, as we shall see when we consider the judgment of the Court, there is no reflection let alone approval of the argument. Indeed, in Paragraph 39 on Page 38 the Commission sets out the test which has been said to be applicable in deportation cases since at least *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 thus:-

> "However, according to the case law of the Convention institutions, the decision to deport an individual to a particular country may, in certain circumstances, be contrary to the Convention, in particular Article 3, where there are serious reasons to believe that the individual will be subjected, in the receiving state, to treatment proscribed by that Article."

6. It is not in the least surprising that where an allegation is made that a State itself has been guilty of acts of torture or inhuman or degrading treatment or punishment the allegation must be strictly proved. The allegation is of intentional conduct which violates one of the most fundamental of human rights. But the Court has, in addition, recognised that a failure to prevent such violations may itself constitute a breach of Article 3. Thus in *A v United Kingdom* (1998) 27 E.H.R.R. 611, the United Kingdom Government conceded that the applicant, a 9 year old boy, had been beaten by his stepfather so severely as to amount to a breach of Article 3, but did not accept that it was responsible. The Court decided that it was because under English Law there was a defence of reasonable chastisement which had in the case of A persuaded the jury to acquit his stepfather. The existence of that defence meant

that the law for which the State was of course responsible did not provide adequate protection to A against breaches of Article 3. Thus children were exposed to the risk that they would be treated in such a way as breached Article 3 because no proper sanctions existed. It was not necessary to prove more than that the lack of proper sanctions would expose a child to a real risk that treatment contrary to Article 3 would be meted out.

7. In deportation cases (a term which we do not use in its technical sense but to cover all cases where removal from the United Kingdom is required) the decision maker and, on appeal, the adjudicator and tribunal must be concerned to decide whether there is a real risk that Article 3 (or indeed any other Article, assuming the Secretary of State's extra-territorial submission to be incorrect) will be violated. This approach was first spelt out in detail by the Court in *Soering v United Kingdom* (1989) 11 E.H.R.R. 439. The applicant in that case was to be extradited to the United States where he would face trial for murder and, if convicted, might be sentenced to death. He could not allege a breach of Article 2 (right to life) because it expressly recognised a right to impose capital punishment nor was the imposition of the death penalty prohibited by Article 3. He alleged that the American system whereby a convicted prisoner endured years on death row constituted a violation of Article 3 and the Court agreed. The case is relevant and helpful in relation to extra-territoriality because it explains the scope of Article 1, which requires that all States shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, and we shall return to it in that context. But it was primarily concerned with Article 3 and, as we have said, Mr. Tam accepts (as he must unless he seeks to persuade us not to follow well established jurisprudence of the Convention institutions) that a State can breach Article 3 by deporting to a country where relevant ill-treatment occurs. In *Soering*, the Court records the submissions of the United Kingdom Government on standard of proof thus (Paragraph 83 on Page 465):-

> "… [T]he United Kingdom Government submitted that the application of Article 3 in extradition cases should be limited to those occasions in which the treatment or punishment abroad is certain, imminent and serious. In its view, the fact that by definition the matters complained of are only anticipated, together with the common and legitimate interest of all States in bringing fugitive criminals to justice, requires a very high degree of risk, proved beyond reasonable doubt, that ill-treatment will actually occur."

The Court then proceeded to explain what in its view was the correct approach and in so doing rejected the United Kingdom Government's arguments. The passages cover extra-territoriality as well as standard of proof but we should cite them in full. Paragraphs 86 to 91 on Pages 466 – 469 read as follows:-

> "86… Article 1 of the Convention, which provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1' sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of States not Parties to it, nor

does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 in particular.

In the instant case it is common ground that the United Kingdom has no power over the practices and arrangements of the Virginia authorities, which are the subject of the applicant's complaints. It is also true that in other international instruments cited by the United Kingdom Government – for example the 1951 United Nations Convention relating to the Status of Refugees, the 1957 European Convention on Extradition and the 1984 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment – the problems of removing a person to another jurisdiction where unwanted consequences may follow are addressed expressly and specifically.

These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction.

87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.

88. Article 3 makes no provision for exceptions and no derogations from it are permissible under Article 15 in time of war or other national emergency. This absolute prohibition under the terms of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights

and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.

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

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

90. It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its

> foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article.
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> 91. In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which as a direct consequence the exposure of an individual to proscribed treatment."

8. The test is that set out in Paragraph 91, namely have substantial grounds been shown for believing that the person concerned, if extradited (or deported) faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting (or receiving) country? The application of this principle to deportation cases was confirmed in *Varas v Sweden* (1991) 14 E.H.R.R. 1. That case concerned a number of Chileans who had sought asylum. Cruz Varas had, he said, been tortured in the past by the police and feared that the same would happen if he were returned. Normally, the Commission will determine the facts and in the Cruz Varas case, the Commission undertook that exercise: E Commission H. R. 7/6/1990. In Paragraph 80 of its opinion, the Commission sets out the Court's test in Paragraph 91 of *Soering*, and continues:-

> "81. In the Commission's view, this test also applies to cases of expulsion. Consequently, it must be examined whether, at the time of the expulsion, there were substantial grounds for believing that Mr. Cruz Varas faced a real risk of being subjected to treatment contrary to Article 3 ... if deported to Chile.
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> 82. This examination involves, on the one hand, an establishment of the facts as regards Mr. Cruz Varas' personal background and, on the other hand, an assessment of the general situation in Chile. The Commission considers that the general situation in Chile at the relevant time was not such that an expulsion to Chile would generally be a violation of Article 3 ...In order to raise an issue under Article 3 ... there must be some substantiation that there existed a specific risk of treatment contrary to Article 3 for the first applicant in the particular circumstances of this case.
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> 83. The Commission considers that the evidence submitted by the applicants suggest that Mr. Cruz Varas has in the past been subjected in Chile to treatment contrary to Article 3 ... The medical certificate ...

> and the evidence that Mr. Cruz Varas has been so treated. Although there are, as the Government suggests, certain elements which reduce the credibility of Mr. Cruz Varas' story, the Commission accepts, on the basis of the material before it, that Mr. Cruz Varas has been subjected in the past in Chile to treatment contrary to Article 3 ..."

9. This is not language which supports the need for proof of past facts beyond reasonable doubt, although it is interesting to note that those representing Mr. Cruz Varas had submitted that past breaches of Article 3 had been proved beyond reasonable doubt (see Paragraph 78). The Court says nothing to support the approach espoused by Mr. Tam. At Paragraphs 75 and 76 of its judgment it states:-

> "75. In determining whether substantial grounds have been shown for believing in the existence of a real risk of treatment contrary to Article 3 the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained proprio motu (see the *Ireland v United Kingdom* judgment of 18 January 1978 (supra)).
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> 76. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation or the well-foundedness or otherwise of an applicant's fears."

All that the Court says is consistent with the conclusion that what is required is an overall assessment whether substantial grounds have been established to believe that there is a real risk of treatment contrary to Article 3.

10. The link with the Refugee Convention is obvious. Persecution will normally involve the violation of a person's human rights and a finding that there is real risk of persecution would be likely to involve a finding that there is a real risk of a breach of the European Convention on Human Rights. It would therefore be strange if different standards of proof applied. There is nothing in the Strasbourg jurisprudence which requires us to adopt the approach which Mr. Tam submits is appropriate. As we have sought to demonstrate, it supports the submissions made by Mr. Bovey and Mr. Blake. Since the concern under each Convention is whether the risk of future ill-treatment will amount to a breach of an individual's human rights, a difference of approach would be surprising. If an adjudicator were persuaded that there was a well-founded fear of persecution but not for a reason which engaged the protection of the Refugee Convention, he would, if Mr. Tam is right, be required to reject a human rights claim if he was not satisfied that the underlying facts had been proved beyond reasonable doubt. Apart from the undesirable result of such a difference of approach when the effect on the individual who resists return is the same and may involve inhuman treatment or torture or even death, an adjudicator and the tribunal would need to indulge in mental gymnastics. Their task is difficult enough without such refinements.

11. In our view, the decision of the European Court of Human Rights in *Vilvarajah v United Kingdom* (1992) 12 E.H.R.R. 2118 provides added support for our conclusion. At Paragraph

69 of its judgment, the Court referred to the decision of the House of Lords in *Sivakumaran v Secretary of State for the Home Department* [1988] 1 All E.R. 193. The Court continued:-

> "The House of Lords found that the test [for establishing whether a person was a refugee] was an objective one and that there has to be demonstrated a reasonable degree of likelihood, or a real or substantial risk, that the person will be persecuted if returned to his own country."

The Court then proceeded to cite substantial extracts from the speeches of Lord Keith, Lord Templeman and Lord Goff. When formulating the test that there must be 'substantial grounds for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was [to be] returned', (Paragraph 103) the Court is clearly intending to follow the same approach as was considered correct for the Refugee Convention. It is true that in *Sivakumaran* their Lordships did not answer the issue of how past facts should be established, but what they said was consistent with the global approach and the Court of Appeal has now confirmed that in *Karanakaran* [2000] Imm A.R. 271.

12. Various expressions have been used to identify the correct standard of proof required for asylum claims. These stem from language used by Lord Diplock in *R v Governor of Pentonville Prison ex p. Fernandez* [1971] 2 All E.R. 691 at p.697, cited by Lord Keith in *Sivakumaran* at [1988] 1 All E.R. 198. Lord Diplock said that the expressions 'a reasonable chance', 'substantial grounds for thinking' and 'a serious possibility' all conveyed the same meaning. There must be a real or substantial risk of persecution. The test formulated by the European Court requires the decision maker and appellate body to ask themselves whether there are substantial grounds for believing that the applicant faces a real risk of relevant ill-treatment. That is no different from the test applicable to asylum claims. The decision maker and appellate body will consider the material before them and will decide whether the existence of a real risk is made out. The words 'substantial grounds for believing' do not and are not intended to qualify the ultimate question which is whether a real risk of relevant ill-treatment has been established. They merely indicate the standard which must be applied to answer that question and demonstrate that it is not that of proof beyond reasonable doubt.The adjudicator in the instant case used the expressions "'a reasonable chance' or 'a serious possibility'" when considering the asylum claim, both of which are used by Lord Diplock. In our view, now that the European Court has fixed on a particular expression and it is one which is entirely appropriate for both asylum and human rights claims, it should be adopted in preference to any other, albeit others may be intended to convey the same meaning. This will lead to complete consistency of approach and avoid arguments such as were raised by Mr. Tam that the adjudicator in using the expression 'reasonable likelihood' in relation to Article 3 was applying too low a test. The use of the words 'real risk' also has the advantage of making clear that there must be more than a mere possibility. The adjective 'real' must be given its proper weight. Anxious though the scrutiny must be and serious though the effect of a wrongful return may be, the applicant must establish that the risk of persecution or other violation of his human rights is real. The standard may be a relatively low one, but it is for the applicant to establish his claim to that standard.

13. It is unnecessary to consider whether the adjudicator applied the correct test. As will be apparent when we consider his determination against the proper criteria and the material before him, it is so unsatisfactory that we have had to reconsider the whole claim.

14. Before leaving this first issue, we should refer to *Osman v United Kingdom* (1998) 29 E.H.R.R. 245. The applicant alleged a breach of inter alia Article 2 in the alleged failure by the State to protect him from an attempted murder and his father from being murdered. The Court underlined an important aspect of the Convention rights, namely that a State might have a positive obligation to take preventive measures to protect an individual whose life was at risk from criminal acts of others. The same approach is to be seen in *A v United Kingdom* to which we have already referred. At Page 306 in Paragraph 116 the Court said this:-

> "For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge."

The same approach is appropriate for Article 3 which is also, as the Court has frequently said, a fundamental right in the Convention. That language is far from requiring proof beyond reasonable doubt. The duty to protect against a real risk can readily be equated to a duty not to expose to a real risk.

15. There is nothing in the jurisprudence of the human rights' Court or Commission which requires us to adopt a different approach to the standard applicable to the Refugee Convention; indeed, in our view, there is every reason why the same approach should be applied. Different standards would produce confusion and be likely to result in inconsistent decisions We therefore reject the argument of the Secretary of State on this issue.

Issue (2): Violation by non-state actors

16. There is no doubt that the obligations of a state which is intending to deport an individual can extend to the need to protect him against relevant ill-treatment by non-state actors. This is consistent with duties to provide protection initially expounded in cases such as *Osman v United Kingdom* and *A v United Kingdom.* Thus in *HLR v France* (supra) the Court was concerned with a Colombian drug trafficker who had given information against dealers in Colombia and claimed that there was a real risk that, if returned to Colombia, he would be subjected to treatment contrary to Article 3 at their hands. He claimed that the authorities would not be able to provide him with adequate protection. At Paragraph 40 on Page 50 we find the majority (the decision was by 15 votes to 6) saying:-

> "Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 ... may also apply where the danger emanated from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection."

The Court concluded that, despite the general violence and tense situation in Colombia, the applicant had not made out his claim. At Paragraph 43 it said:-

> "The Court is aware, too, of the difficulties the Colombian authorities face in containing the violence. The applicant has not shown that they are incapable of affording him appropriate protection."

The language is cautious and understandably so. No guarantees of safety could conceivably be required and the prospect of the Convention providing a haven for criminals who have fallen out with their erstwhile colleagues is an unattractive one.

17. Thus the threshold is a high one, as the Court has recently confirmed in *Bensaid v United Kingdom (*E. Ct. H.R. 6 February 2001). That case concerned an Algerian suffering from schizophrenia who claimed that the unavailability of proper medication and treatment coupled with the dangers of travel due to the activities of the GIA terrorists would result in a violation of Article 3. At Paragraph 34 of the unanimous decision of the Court we find this:-

> "While it is true that Article 3 has been more commonly applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities or non-State bodies in the receiving country, the Court has, in the light of the fundamental importance of Article 3, reserved to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or, which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to rigorous scrutiny, especially the applicant's perceived situation in the expelling State."

This goes beyond deliberate acts by non-State actors against which the State ought to provide protection. But the observations in Paragraph 40 are material. It is there said:-

> "... Having regard ... to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicants' removal in those circumstances would be contrary to the standards of Article 3. It does not disclose the exceptional circumstances of [*D v United Kingdom* (1997) 24 E.H.R.R. 423] where the applicant was in the final stages of terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St Kitts."

In deportation cases, there will rarely be a direct responsibility of the expelling State for the infliction of harm (we do not rule out the possibility that the mere act of removal may contravene Article 3 having regard to the physical or mental condition of the individual being expelled).

18. Mr. Tam has submitted that it cannot be right that an individual cannot complain against his own State because the alleged violation was not caused by a public body but he can when the violation occurs in another State. That submission ignores the State's responsibility to provide the necessary protection. In any event, as we shall see when we consider issue (3), the so-called extra-territoriality of the Convention, the complaint is that it is the United Kingdom which is violating the Convention by expelling him to face a real risk that he will suffer a violation of his human rights.

19. We have already identified the desirability of a similar approach under each Convention to the standard of proof. In our view, the same ought to apply to the question whether a real risk of harm has been established. The nature of the harm and the circumstances in which it will arise may produce different results depending on the Convention in issue. Thus it must amount to persecution and be for a Convention reason if an asylum claim is to succeed. Persecution and breaches of Article 3 are not necessarily the same, although we doubt whether treatment which did not amount to persecution could nonetheless cross the Article 3 threshold. We recognise the possibility that Article 3 could be violated by actions which did not have a sufficiently systemic character to amount to persecution, although we doubt that this refinement would be likely to be determinative in any but a very small minority of cases. But apart from this and a case where conduct amounting to persecution but not for a Convention reason was established, we find it difficult to envisage a sensible possibility that a breach of Article 3 could be established where an asylum claim failed.

20. In *Horvath v Secretary of State for the Home Department* [2000] 3 W.L.R. 370, the House of Lords considered the issue of sufficiency of protection in the context of the Refugee Convention. Lord Hope of Craighead effectively approved the test, which he formulated thus (p.382G), that there should exist in the receiving State:-

> "... a system of criminal law which makes violent attacks by the persecutors punishable and a reasonable willingness to enforce that law on the part of the law enforcement agencies."

There was no dissent in any other speech. Lord Clyde at p. 398 cited *Osman v United Kingdom*, referring in particular to the European Court of Human Rights' recognition that account must be taken of the operational responsibilities and the constraints on the provision of police protection so that the obligation to protect must not be so interpreted as to impose an impossible or disproportionate burden upon the authorities. The observations in *Soering* at Paragraph 86 which we have already cited are also material. Regard must be had to the general situation in the country in question and the degree of protection to be expected by the population as a whole.

21.It may be said that it is no consolation to an applicant to know that if he is killed or tortured, the police will take steps to try to bring his murderers or assailants to justice. He is concerned with the risk that he may be killed or tortured and, if the authorities cannot provide effective protection to avoid that risk, there will be a breach of the Convention if he is returned. Practical rather than theoretical protection is needed. We see the force of that contention, but in our view it fails to recognise that the existence of a system should carry

with it a willingness to do as much as can reasonably be expected to provide that protection. In this way, the reality of the risk is removed. Since the result will be similar, namely persecution or a violation of a human right, it would be wrong to apply a different approach. We do not read *Horvath* as deciding that there will be a sufficiency of protection whenever the authorities in the receiving State are doing their best. If this best can be shown to be ineffective, it may be that the applicant will have established that there is an inability to provide the necessary protection. But it is clear that, as Lord Hope said (p.388F):-

> "... [I]t is a practical standard, which takes proper account of the duty which the State owes to all its own nationals."

The fact that the system may break down because of incompetence or venality of individual officers is generally not to be regarded as establishing unwillingness or inability to provide protection. In many cases, perhaps most, the existence of the system will be sufficient to remove the reality of risk.

Issue (3): Extra-territoriality

22. The submission of the Secretary of State, which was accepted by the adjudicator and which is repeated before us by Mr. Tam, is that only Article 3 has extra-territorial effect. The argument relies on Article 1 which provides that

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1."

This it is said imposes a territorial limit on the reach of the Convention. That argument was rejected by the Court in *Soering* (supra) at paragraphs 86 et seq. That rejection was not limited to Article 3; indeed, in *Soering* itself reliance was also placed on an alleged breach of Article 6 about which the Court said this (at Paragraph 113 on Page 479):-

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

We see no reason to limit this to extradition. Furthermore, there are Articles other than Article 3 from which there can be no derogation and which can properly be regarded as fundamental and breach of which would result in suffering of a serious and irreparable nature. An obvious example is Article 4. To an extent it is qualified but, where any such qualification does not apply, the right is fundamental and there can be no derogation. Thus it can be equated to Article 3.

23. Mr. Tam has sought to rely on a decision of the Commission in *Dehwari v Netherlands* (E.Comm.HR 29.10.8). That case involved an application by an Iranian who alleged his return would place him at risk of death and of torture so that Articles 2 and 3 were relied on. The Commission adopted a narrow construction of Article 2, pointing out that there was a general requirement in the first sentence that the right to life should be protected by law, and a prohibition in the second sentence against the intentional deprivation of life. This led the Commission to reason thus (Paragraph 61):-

> "As to the prohibition of intentional deprivation of life, including the execution of a death penalty, the Commission does not exclude that an issue might arise under Article 2 of the Convention or Article 1 of Protocol No. 6 [abolition of death penalty] in circumstances in which the expelling State knowingly puts the person concerned at such high risk of losing his life as for the outcome to be a near certainty. The Commission considers, however, that a 'real risk' - within the meaning of the case-law concerning Article 3 - of loss of life would not as such necessarily render an expulsion contrary to Article 2 of the Convention or Article 1 of Protocol No.6 although it would amount to inhuman treatment within the meaning of Article 3."

We confess we do not find the reasoning persuasive. It places far too great an emphasis on the word 'intentionally'. The duty to provide protection against breaches of the Convention should extend to the duty not intentionally to deprive of life. This is consistent with *Osman*, albeit the focus was there on the first sentence. To expel someone to a country where there is known to be a real risk of death seems to us to be an intentional exposure to that risk and just as such exposure can engage Article 3 so it ought to engage Article 2. However, the argument is academic since, as the Commission found in *Dehwari,* there was a breach of Article 3 involved in the imposition of a death penalty for the applicant's activities. *Dehwari* does not help Mr. Tam since, even if its reasoning should be followed, it depends upon the precise words used in Article 2 and particularly the adverb 'intentionally'.

24. Mr. Tam also prays in aid the decision of the Court of Appeal in *Holub v Secretary of State for the Home Department* [2001] l WLR 1359. *Holub* involved a claim that the right to education contained in Article 2 of Protocol No.1 was breached where the applicant and his family were to be returned to Poland. Mr. Tam relies particularly on Paragraph 21 where Schiemann LJ, giving the judgment of the Court, said:-

> "We are not bound to follow the decisions of the European Court of Human Rights but simply to take them into account. Nevertheless, the jurisprudence of the Court does point clearly to the fact that rights which are not absolute, such as the right to education, are not engaged where a State is exercising legitimate immigration control."

He went on to say that the Secretary of State was not therefore required to "take a view as to whether the child's Article 2 right will be infringed in Poland". But he concluded the paragraph thus:-

> "However, in the spirit of restraint to which we have referred, we do not think it is necessary to decide this point authoritatively in this case, in view of our decision on the other issues to which we now turn."

25. With great respect to the Court of Appeal, we are not persuaded that the rights are not engaged in immigration cases. That in our view is contrary to *Soering.* The true analysis is that, although the rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate. There may be exceptions, as the reference in *Soering* to flagrant breaches of Article 6 indicate. This is because the court has recognised that a country is entitled, "as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens". (See *Hilal v United*

Kingdom E.Ct.HR 6 March 2001 at Paragraph 59). In *Salazar v Sweden* (E.Comm HR 7 March 1996) the Commission observed:-

> "In the field of immigration Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention, with due regard to the needs and resources of the community and of individuals."

Among other cases, it cites *Abdulaziz v United Kingdom* (1985) 7 E.H.R.R. 471, which concerned an alleged breach of Article 8 in the refusal to permit the applicant to join his family in the United Kingdom. The Court decided that Article 8 could apply where immigration control was being enforced but that in the circumstances of that case there was no breach.

26. We therefore see no reason to exclude the possible application of any relevant Article (save, perhaps Article 2 if the reasoning in *Dehwari* is to be followed) in deportation cases, but it will be virtually impossible for an applicant to establish that control on immigration was disproportionate to any breach. In particular, if Article 3 is not established, it is difficult to see how Article 8 could be if, as in this instant case, the alleged breach will occur in the receiving State when the applicant is removed. In the context of this case, the adjudicator was in error in concluding that Article 4 could not be relied on because it did not, as he put it, have extra-territorial effect. That definition is misleading since there is no question of extra-territorial effect in the true sense of that word since the breach, if any, will have occurred within the jurisdiction by the decision to remove which will have the effect of exposing the individual to whatever violation of his human rights is in issue. We have used the word as a convenient label for the argument, but, for the reasons given, we reject the argument.

The adjudicator's determination

27. We now turn to consider the adjudicator's determination and his findings of fact. Mr. Bovey and Mr. Tam understandably sought to uphold the adjudicator's favourable findings and to demolish his unfavourable. In our view, the demolition on each side was successful. The determination is regrettably unsatisfactory. In Paragraph 4 the adjudicator sets out the evidence of Ms. Kacaj which came from her statement and interview. She did not give evidence before him and so her account was not tested by cross-examination. In summary, she said that her father, who owned a bakery in a town called Kucove, was an active member of the Democratic Party (DP). In 1997 a demand was made from him for $10,000. He and Ms. Kacaj were threatened and assaulted by armed men when he refused to pay. He believed the Socialist Party (SP) was behind this. Anonymous threats followed and in June 1997 a cousin was shot and killed. This led her father to pay up and to close the bakery. Shortly after, the premises were destroyed in a robbery. In September 1997 her father assisted the DP in the elections.

28. There then followed the Kosovan civil war and the need to assist their fellow Albanians. This meant that they were able to live in peace until September 2000 when again elections were to take place. This time her father, who again was assisting the DP, was faced with a demand for $20,000 coupled with threats that if he did not pay Ms. Kacaj would be taken to Italy and make the money for them. These threats were contained in anonymous letters, but they were not taken to the police because her father believed they would not help because they were corrupt. On 24 September 2000 Ms. Kacaj was abducted by three masked men who raped her in turn. They said that all democrats would suffer in the same way. She went to the police, but they asked only a few questions and said they would not help. Further demands for money and threats followed although her father had ceased his activities on

behalf of the DP. Fearing that she would be taken to Italy and forced into prostitution, Ms. Kacaj decided to leave Albania and her father arranged with an agent for her to be brought to England.

29 In giving reasons for refusing her claim on 20 November 2000, only 7 days after she had claimed asylum, the Secretary of State did not in terms reject any part of her account (which at that stage consisted of what she had said in interview) or impugn her credibility, but pointed out that there was no evidence of recent persecution on political grounds. The abduction and rape was regarded as criminal conduct against which the Albanian authorities were able and willing to provide effective protection. The adjudicator under the heading 'Credibility' refers to the refusal letter and comments that it did not "in general terms" dispute the credibility of Ms. Kacaj's account. He then in Paragraph 11 under the heading 'Conclusion on the 1951 Convention' refers to the lack of corroboration of her medical condition and the absence of any medical report and the lack of evidence corroborating her father's membership of the DP. He continues:-

> "For reasons which [her representative] did not, and did not need to, explain, [Ms Kacaj] has not given evidence. The result of this decision is that [Ms Kacaj] has not discharged the burden of proof on her, required under the 1951 Convention, that she has the subjective element of fear as she asserts. As the burden of proof is on [Ms Kacaj] to satisfy me that at the date of her application, and at the date of the hearing of her appeal, she had such a fear, the totality of the evidence does not satisfy me either that [Ms Kacaj's] experience amounts to torture or that she has a Convention reason, namely imputed political option, on account of her father's support for and membership of DP, as she asserts."

30. The reasoning is muddled and defective. It is far from clear whether the adjudicator is accepting her account of what happened to her since he appears not to have believed that she had any fear of persecution. The reason for finding that she had not discharged the burden of proof, namely her failure to give evidence, is self-evidently erroneous. Failure to give evidence establishes nothing: it may in appropriate cases enable adverse findings to be made where no explanation is given of matters which point in a particular direction. Whether or not what Ms. Kacaj suffered amounted to torture is not material. The question was whether there was a real risk that she would be abducted as she said she feared and sent to prostitution in order to extort money from or punish her father for his political activities. Her political opinions, imputed or otherwise, were irrelevant; her case was that she was being persecuted because she was the daughter of her father and the persecution was because of his political views. Thus the adjudicator's dismissal of the asylum appeal cannot stand and we have to consider it for ourselves since we are in just as good a position as was the adjudicator as no live evidence was called before him or has been called before us.

31. The Article 3 claim was upheld because the adjudicator believed from what he describes as the summary provided by the Refugee Legal Centre of the documentary evidence concerning the position of women and women's rights in Albania that there was a reasonable degree of likelihood that she would be at risk of kidnap. He seems, judging by what he said on the asylum claim, to have reached this conclusion because Ms. Kacaj was a woman. In any event, it is far from clear how much of the account given by her he accepts and why he is satisfied that she faced a real risk of kidnap. The so-called summary is in fact a distillation of all the observations favourable to Ms. Kacaj's claim rather than an objective summary. We deprecate the submission of a document in such a form since it is misleading and the

adjudicator seems to have been persuaded by it to find it unnecessary to look at the source documents to which it refers. Naturally, representatives are entitled to identify and draw attention to passages in reports which assist their case, but they must make it clear that this is what they are doing. However, we accept that there is much material to show that women in Albania are treated with considerable cruelty and have little redress against male violence, both sexual and other, particularly within family relationships. But there is very little, if any, material which supports a case that such conduct has been for political ends. We shall return to consider the objective material in due course when deciding whether Ms. Kacaj has made out her claim under either Convention.

32. The reasoning is sparse and we are bound to say defective. The adjudicator makes no explicit findings of fact when considering Article 4, but he does say in Paragraph 14:-

> "The evidence satisfies me that [Ms Kacaj] was never forced to perform compulsory labour in Albania and that her fear arose from threats uttered to her father that if he did not meet demands for payment [Ms Kacaj] would be abducted and sent to Italy where she would be forced into prostitution."

Is that meant to imply an acceptance of her account of her fear? If so, it does not sit well with his conclusion that she had no subjective fear in relation to the asylum claim. Furthermore, Ms. Kacaj had never alleged she had been forced to perform compulsory labour in Albania and so the adjudicator's statement that 'the evidence satisfied him' that she had not reads somewhat curiously.

33. Here too the adjudicator's conclusions cannot stand. Although we are bound to record that we have a degree of scepticism about some of the account given by Ms. Kacaj, we have decided that it would be fair to assume that her account is generally true and to decide the appeal on the basis that she is to be believed.

Conclusions

34. There can be no doubt that Albania still faces serious problems of lawlessness and corruption. In 1997, when many criminals were released from prison, violent crime was rampant and it is by no means surprising that anyone who was perceived to have money should have been targeted by criminals. There was political violence and upheaval following the collapse of the pyramid schemes in early 1997. Those schemes had been, it was believed, promoted by the government, then run by the DP, and had led to a disastrous loss of money which impoverished many. The DP was ousted in 1997 and in November 1998 a new constitution was established. In 2000 the restructuring of the police began and there was a relatively successful crackdown on armed gangs. In October 2000 there were municipal elections (no doubt those referred to by Ms. Kacaj). Only a few violent incidents were reported, leading the Human Rights Watch Report of December 10 2000 to say that this was:-

> "a tribute to the governments' efforts, as well as to the restraint of the political parties themselves."

Nonetheless, criminal groups still exist and Albania is a major route for drug and people smuggling. Organised crime is a powerful force, assisted by corrupt police and weak and corrupt judiciary. Nonetheless it is clear that real efforts are being made by the authorities to try to improve things and some success is being achieved.

35. Women are still regarded in some parts of Albania as no more than chattels. Domestic violence is widespread and violations of women's human rights is a serious problem. Trafficking in women for prostitution continues, as the Human Rights Watch Report confirms. But a fair reading shows that the major problems arise from women being lured with deceptive offers of lucrative work abroad. Other reports show that families sell daughters to those traffickers and that abduction and kidnapping of children occurs. In addition, there is widespread trafficking in women from the various countries which made up the old Soviet Union. We do not overlook the reports of abduction and kidnapping of women, but these do not suggest that such occurrences are as frequent as the other means by which women may find themselves forced into prostitution. Furthermore, as we have said, there are no reports that suggest that such abductions are or have been used for political purposes. They are the actions of criminals out for gain. In addition, the abuse of women and the low regard in which they are held mean that rape is not treated as seriously as it should be.

36. We have, of course, read the material which has been put before us. We note that Ms. Kacaj's family, including her sister and brother, remain in Albania, albeit her sister is married and no longer lives in Kucove. No evidence has been produced to suggest that any of them have recently been threatened or troubled, and we gather that her father has given up his political activities. The rapists told Ms. Kacaj, according to her interview, that they were dealing with her because:-

> "Your father didn't want to please us so you are paying the bill for him. We will use you to hurt him."

That is consistent with their failure to extort money and does not necessarily show any political motivation. The only evidence which could suggest a political motive is the observation on releasing Ms. Kacaj that all democrats would suffer in the same manner. Even if that remark was made, in our view it was intended to make Ms. Kacaj's father believe that he was being targeted for political reasons, perhaps because then he might be more reluctant to involve the police. The objective evidence persuades us that Ms. Kacaj has suffered at the hands of criminals motivated by a desire to extort money and not because of a desire to dissuade Ms. Kacaj's father from continuing his political activities on behalf of the DP.

37. The general lawlessness and position of women in Albania does not in our view mean that every Albanian woman can have a claim to remain under either Convention. Actions are being taken to stem such lawlessness and the police are undoubtedly willing to provide protection. It is said that such protection is not effective and that there is therefore a real risk that the feared abduction will take place. It is important to remember that the fear relied on is that of abduction and forced prostitution in Italy. As we have said, the threats were made by criminals to extort money. There is no reason to believe that they intended to put them into effect; indeed, it is in our view probable that they did not. The rape underlined their ruthlessness; the threats were to reinforce the blackmail.

38. There is in our view no real risk that what Ms. Kacaj fears will occur. That finding, which we regard as inevitable upon the material before us, means that no claim can succeed under either Convention, since, in the absence of such a risk, there will be no persecution, no violation of Article 3 and no violation of Article 4. So far as Article 8 is concerned, any breach of that (which of course falls well below Article 3 in terms of seriousness) will be acceptable because of Article 8.2 and the need to maintain proper immigration control. We should say that we are far from saying that there is a real risk of a breach of Article 8, but we

do not need to reach a firm conclusion about it. Any such breach will be common to all women in Albania.

39. It may be helpful if we summarise here our conclusions on the general issues raised by this appeal.

(i) Where a prospective breach of Article 3 of the Human Rights Convention is alleged under section 65 of the 1999 Act, the standard of proof is the same as in an asylum appeal. The question is, has the claimant established that there is a real risk that his rights under Article 3 will be breached?

(ii) The approach adopted by the House of Lords in Horvath to persecution applies equally to prospective breaches of Article 3. A claimant whose claim is that his Article 3 rights will be breached by non-state agents must also show that the state is unwilling or unable to offer him such protection as is necessary.

(iii) Within the context of immigration law, all the Articles of the Human Rights Convention (save perhaps Article 2) have what has been called extra-territorial effect, because what is being alleged is that by removing the applicant the United Kingdom Government is breaching his or her human rights.

40. For the reasons we have given in paragraph 38, we allow the appeal by the Secretary of State and dismiss that by Ms. Kacaj. Her removal will not contravene either Convention.

MR JUSTICE COLLINS
PRESIDENT