Neutral Citation Number: [2009] EWCA Civ 362
Case No: 1. C5/2008/2262 & 2. C5/2008/2261

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
AS/56874/2003 & AS/57476/2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2009

Before :

LORD JUSTICE SEDLEY
LADY JUSTICE ARDEN
and
LORD JUSTICE MOSES

- -

Between :

1. Y (SRI LANKA)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
- and –	
2. Z (SRI LANKA)	**Appellant**
- and –	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Mr Alasdair Mackenzie (instructed by Messrs Fisher Meredith) for the A**ppellants**
Miss Susan Chan (instructed by Treasury Solicitors) for the **Respondents**

Hearing date: Thursday 12 March 2009

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Judgment

Lord Justice Sedley :

1. The appellants, who are brother and sister, are Sri Lankan Tamils. Because their fate is still uncertain, with the agreement of both parties the court has directed that they be referred to as Y (the brother) and Z (the sister). They arrived here in October 2003 and sought asylum. It is now accepted that they had been tortured by the Sri Lankan security forces as suspected LTTE members or sympathisers, that both had been raped in captivity, and that both suffer from consequent post-traumatic stress disorder and depression.

2. The outcome of a succession of appeals has been, however, that they have been found ineligible for asylum or for humanitarian protection. It has further been decided that returning them to Sri Lanka will not violate their Convention rights, in particular by causing them to take their own lives.

3. The detailed procedural history is not material, but the salient points for present purposes are these. Following a partial decision in Z's favour by an adjudicator, Mr Elvidge, in January 2004, remitted cross-appeals resulted in a full reconsideration of both cases, first by IJ Craig in April-May 2005 and then by DIJ Manuell in February 2007. DIJ Manuell dismissed both appeals, finding in relation to art. 3 that there was no real risk that return would provoke suicide. An application to this court for permission to appeal was granted, but the appeal was compromised by an agreed order remitting the cases for a fresh reconsideration hearing on the risk of suicide or self-harm.

4. It was agreed in the statement of reasons that DIJ Manuell had erred in his application of the tests set out by this court in *J v Home Secretary* [2005] EWCA Civ 629. It is also material to the present appeal that, in granting permission, Hallett LJ (with the agreement of Toulson LJ) had accepted that DIJ Manuell had arguably failed to deal adequately either with the expert evidence about the appellants' current mental state or with the state of psychiatric provision in Sri Lanka.

5. It is against the consequent decision of DIJ Woodcraft, again dismissing both appeals, that the present appeals are brought. Giving permission to appeal on sight of the papers, I wrote:

> 1. I do not hold out great hope for these appellants, but there seems to me to be a real – and difficult – issue: where, as here, an accepted history of shocking state violence and abuse has been held not to create an entitlement to humanitarian protection because the fear of repetition is not well-founded, does that finding necessarily carry over into the assessment of the risk of suicide? The fifth proposition in *Re J* suggests that it does; but it must be arguable that, in relation to suicide, what frequently matters is whether there is a real and overwhelming fear, not whether it is well-founded.
>
> 2. Beyond this, but associated with it, are tenable concerns about the DIJ's appraisal of the psychiatric evidence and

> the availability of treatment and of extended family support in Sri Lanka. The two groups of issues need to be looked at together.

6. It may be helpful to set out at the start what *J* laid down. Dyson LJ, giving the judgment of the court, said in relation to the possibility that enforced return might bring about the appellant's suicide:

> 25. …… It should be stated at the outset that the phrase "real risk" imposes a more stringent test than merely that the risk must be more than "not fanciful". The cases show that it is possible to amplify the test at least to the following extent.
>
> 26. First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity. The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case. But the ill-treatment must "necessarily be serious" such that it is "an affront to fundamental humanitarian principles to remove an individual to a country where he is at risk of serious ill-treatment": see *Ullah* paras [38-39].
>
> 27. Secondly, a causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's article 3 rights. Thus in *Soering* at para [91], the court said:
>
> > "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 *has as a direct consequence the exposure of an individual to proscribed ill-treatment."*(emphasis added).
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> See also para [108] of *Vilvarajah* where the court said that the examination of the article 3 issue "must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka…"
>
> 28. Thirdly, in the context of a foreign case, the article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental. This is made clear in para [49] of *D* and para [40] of *Bensaid.*
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> 29. Fourthly, an article 3 claim can in principle succeed in a suicide case (para [37] of *Bensaid*).
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> 30. Fifthly, in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3.
>
> 31. Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her article 3 rights.

7. I have reproduced this passage in full in order to set the context, but the present case hinges upon the last two propositions. It also touches on the third. The broad contention is that, notwithstanding the emphasis in the fifth proposition in *J* on the fear being well-founded, a fear of renewed torture and sexual abuse may sometimes be just as real, and its potential consequences just as grave, when there is no longer a foundation for it. The narrow contention is that in relation to both appellants DIJ Woodcraft has misread the uncontested expert evidence, in every instance to the appellants' detriment and to a point at which his conclusion cannot stand. In particular, it is submitted that he has damagingly conflated two things which the experts were at pains to distinguish: the current state of mind of the appellants and the prognosis if they were to be returned.

8. In addition to the torture and sexual violation of both appellants in government custody, the second appellant's husband and daughter were killed by the security forces in 2001 while she was working in Malaysia as a housemaid to support her family. Two male cousins were executed by the security forces, and their mother (the appellants' aunt) starved herself to death in a public protest. None of this was found to create a well-founded fear of persecution or ill-treatment on return, but in the light of the AIT's reappraisal in *LP* [2007] UKAIT 00076 of the situation of returnees in Sri Lanka a further application has been made, and is still pending, by way of a fresh claim. Meanwhile, however, the severity of the appellants' experiences is capable of having a bearing on the issues before this court, as is the further tragedy of the loss of some 50 family members in the tsunami which occurred at the end of 2004.

9. The Home Office has at no point of this protracted and complex case sought to have either appellant examined by a psychiatrist nominated by itself or to secure agreement to a joint psychiatric examination. All the expert evidence has been submitted on the appellants' behalf, and all has come from reputable specialists whose qualifications and experience have not been in question. The Home Office's case has depended entirely on finding fault with it.

10. One fault that they have found, and which was accepted by DIJ Woodcraft, is in the over-explicit letter of instruction to Dr Anne Patterson, the consultant psychiatrist who has examined and reported on both appellants. Ms Chan, for the Home Secretary, justifiably calls the questions slanted, and the immigration judge expressed his concern about them. But there is no finding that any part of Dr Patterson's evidence has been influenced by the form of the questions put to her, and there the matter rests. It is to be hoped, nevertheless, that notice will be taken by the solicitors acting in this and other cases of the impropriety (and incidentally the damage that can be done to their clients' cases) of putting leading questions to experts who are required to advise impartially.

11. While no tribunal is bound simply to accept everything that such experts say because they have gone uncontradicted, it is well established that the tribunal must have, and must give, acceptable reasons for rejecting such evidence. Where the reason is that the evidence of one expert witness is so internally contradictory as to be unreliable, the obligation remains to make an objective decision on the rest of the evidence. Where the reason is that one expert has contradicted another, the judge may need to choose between them, but may not for that reason alone reject both.

12. Similarly, where the factual basis of the psychiatric findings is sought to be undermined by suggesting that the appellants have been exaggerating their symptoms, care is required. The factuality of an appellant's account of his or her history may be so controverted by the tribunal's own findings as to undermine the psychiatric evidence. This happens from time to time, but it did not happen here. What happened here was that the designated immigration judge himself formed the view that the appellants (who had not given oral evidence before him) had been calculatedly exaggerating the symptoms they recounted to the expert witnesses. That is in the first instance a matter for the experts themselves, a fundamental aspect of whose expertise is the evaluation of patients' accounts of their symptoms: see *R(M) v IAT* [2004] EWHC (Admin) 582 per Moses J. It is only if the tribunal has good and objective reason for discounting that evaluation that it can be modified or – even more radically - disregarded.

13. The principal premise on which DIJ Woodcraft was required to proceed was that, as found by DIJ Manuell, neither appellant had a well-founded fear of persecution or ill-treatment by either the state or the LTTE if returned to Sri Lanka. But the terms on which the case had been remitted to the AIT by this court meant that, while it remained a fixed finding that any such fear was not objectively well-founded, what had to be freshly decided was the reality and consequences of such subjective fear as each appellant might nevertheless have.

14. It is necessary, before considering how DIJ Woodcraft dealt with this issue, to situate it in the context set by this court in *J*. The fifth principle, it will be recalled, is that:

> …in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3.

If a fear of ill-treatment on return *is* well-founded, this will ordinarily mean that refoulement (if it is a refugee convention case) or return (if it is a human rights case) cannot take place in any event. In such cases the question whether return will precipitate suicide is academic. But the principle leaves an unfilled space for cases like the present one where fear of ill-treatment on return, albeit held to be objectively without foundation, is subjectively not only real but overwhelming.

15. There is no necessary tension between the two things. The corollary of the final sentence of §30 of *J* is that in the absence of an objective foundation for the fear some independent basis for it must be established if weight is to be given to it. Such an independent basis may lie in trauma inflicted in the past on the appellant in (or, as here, by) the receiving state: someone who has been tortured and raped by his or her captors may be terrified of returning to the place where it happened, especially if the same authorities are in charge, notwithstanding that the objective risk of recurrence has gone.

16. One can accordingly add to the fifth principle in *J* that what may nevertheless be of equal importance is whether any genuine fear which the appellant may

establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return.

17. DIJ Woodcraft's scepticism about the existence of such a fear in either of the two appellants begins with his noting that, at the time of the initial appeal decision, that of Mr Elvidge, in January 2004, there was no suggestion in the evidence that Y, despite serious physical scarring, had been emotionally traumatised by his ill-treatment. It was in the report of Dr Patterson, prepared shortly after that hearing, that this first emerged: as the DIJ records it (§82), "Dr Patterson noted that [Y] was now becoming increasingly preoccupied with suicidal thoughts 'since he received the adjudicator's determination several weeks ago'." This, taken by itself, is perfectly intelligible: a victim of torture and abuse who believes he has found safety here and expects or hopes to be given asylum may be trying to put his experiences behind him; but if told that, in spite of what he has undergone, it is now considered that he can safely be returned, his fears, whether or not still well-founded, may well resurface and possibly become overwhelming.

18. Dr Patterson was an independent consultant psychiatrist; Y's and Z's treating psychiatrist was Dr Eberstein. About their respective reports and letters DIJ Woodcraft reached this conclusion:

> Although Dr Eberstein stated in her letter to the GP of 1st March 2006 that her impression and recommendations were entirely consistent with those of Dr Patterson, she by contrast to Dr Patterson did not find any evidence of suicidal or homicidal ideation. This is a glaring contradiction between the Psychiatrists and I find it difficult to see how Dr Eberstein can come to the view that her impressions as at March 2006 which were that 'Y' did not have suicidal ideation were "entirely consistent" with Dr Patterson's report that he did.

19. Such a contradiction, if it is real, cannot properly be overlooked by a fact-finder. DIJ Woodcraft went on to find that, contrary to Dr Eberstein's assertion that her opinion had not changed and that her earlier letter had been misconstrued by DIJ Manuell, the only possible conclusion was that Dr Eberstein in March and July 2006 had reported that Y had no suicidal ideation, whereas Dr Patterson had in 2004 reported that he did have. He therefore rejected Dr Eberstein's assertion that her opinion had not changed: it was on the basis of alleged earlier expressions of suicidal ideas that she was now prognosing a risk of suicide if Y were removed to Sri Lanka.

20. This fact-finding gives very short shrift to Dr Eberstein's explanation that her reports to the GP had been concerned with the current state of Y's mind, which was not suicidal, whereas her subsequent reports considered the potential impact of return. The doctors were agreed that both appellants were suffering from PTSD and depression, conditions which can of course precipitate suicide. To describe the difference between the two psychiatrists' reports in this situation as a glaring contradiction was a strong thing.

21. The DIJ went on to explain (§108) why he had so found. Dr Eberstein's letter of 25 August 2006 to the GP saying that Y had "no continuing suicidal ideation", betokened, in his view, a continuing process, not a one-day description, and suggested that Z, like Y, was not contemplating suicide. When one looks at the letter, however, this is what it says about Z:

> "Last week, she did not eat and felt like she did not want to live. She has now been eating again. She remains tearful but has no continuing suicidal ideation, no plan or intent."

22. It is plain, in my respectful view, that Dr Eberstein was not saying that Z had not contemplated suicide. She was saying, on the contrary, that she had done so or come close to doing so ("felt like she did not want to live") but that by the time of her examination the feeling had passed.

23. This is only one of a series of findings which appear to be striving not to evaluate but to reject the evidence of suicidal ideation in both appellants. That evidence, taking the two psychiatrists' reports at face value, was unequivocal. But DIJ Woodcraft found reason to doubt it, first, in the want of sufficient explanation of why, having given evidence at two earlier appeal hearings, neither appellant had given evidence to him. He considered, in short, that while "it might be oppressive for them to relate their accounts of ill-treatment", both had been able to amplify their witness statements substantially. This he found "curious" in itself and a source of criticism of Dr Patterson for not going more thoroughly into how the appellants had managed to give evidence twice before.

24. In relation to Y, what Dr Patterson had written was this:

> "With regard to whether [Y] is fit to give evidence, he told me he has found the experience acutely distressing in the past. He described the way in which his mind becomes numb and he is unable to concentrate.
>
> I have observed the same mechanism at every interview with him , including the most recent.
>
> …… being interviewed by me provoked symptoms of PTSD that is 'flashbacks' and dissociation on every occasion …
>
> The more formal, interrogatory manner of a hearing would be likely to be experienced as even more traumatising, especially if he were asked about the details of his ordeal because this would be an extremely powerful trigger to 'flashbacks'.
>
> I recommend, therefore, that [Y] is not required to give further evidence as he would be retraumatised and would be unlikely, in that dissociated state of mind, to be able to give any more information than before. I think it would be particularly undermining of his mental state and current treatment if he were required to answer questions about his torture and sexual abuse."

25. With all possible respect, I do not understand how an advocate with such a report in his or her hands could responsibly tender an appellant for examination and cross-examination in proceedings in which the genuineness and intensity of their fear was an issue. Nor do I see what else Dr Patterson could reasonably have been expected to investigate. She knew perfectly well that Y had given evidence twice before, and she noted his account of how it had affected him. DIJ Woodcraft noted that Immigration Judge Craig had "not recorded … that [Y] had any apparent difficulty in giving evidence" on an earlier occasion; but there is no necessary inconsistency between the two things.

26. Secondly, DIJ Woodcraft noted Dr Patterson's evidence that the tsunami ("in which [Y] claims that a number of his relatives were killed") had "precipitated a significant deterioration in [Y's] mental state and … significantly increased the existing high risk of suicide". The judge commented:

> "Dr Patterson did not explain how one could significantly increase an already high risk."

In relation to Z, whose depression Dr Patterson considered had been exacerbated by the effects of the tsunami on the family, the judge wrote:

> "She did not clarify how someone already suffering from extreme depression could have their depression made significantly worse by a completely independent event."

I limit myself to saying, with respect, that both comments are unworthy.

27. Having thus attenuated the evidence which he had to evaluate, DIJ Woodcraft went on to say (§112):

> I note here that allowing either Appellants appeal would not of course deal with the alleged depression they are said to suffer from as a result of the tsunami and the hopelessness which both Dr Patterson and Dr Eberstein describe that came over the appellants after the tsunami. However these would seem to be no longer of importance if the Appellants were to win their appeal. It is hard to resist the conclusion that having served their purpose to exaggerate symptoms the alleged depression and hopelessness caused by the tsunami could then be dispensed with.

28. This finding picks up what the judge had said at §99:

> The Appellants had been under a degree of stress with the uncertainty of the proceedings hanging over them for several years and yet at least [Y] had not attempted suicide (I deal below with the alleged attempt by [Z]). I asked Dr Eberstein how the Appellants would be able to tolerate such a degree of stress. The doctor replied that there was still the possibility that the Appellants might be able to stay in the United Kingdom which distinguished the case from if they knew they were to be removed on the next day. In my view

> this appeared to demonstrate an element of calculation in their alleged suicidal ideation.

29. With great respect, such a conclusion does not begin to follow. Hope, however slender, can well alleviate what would otherwise be intolerable stress. Take away the hope and the stress may become unbearable. If there was reason to find that the appellants were fabricating their suicidal ideation, this could not rationally contribute to it. If the diagnoses and prognoses were right, lifting the threat of removal would remove one of the principal sources of depression. It would not remove the effect of the tsunami.

30. I am also troubled by the recurrence, in § 113, of a critique of the expert evidence for not exploring more fully a factor that the immigration judge believes to be possibly significant – here Z's unsatisfactory living conditions. It is one thing to note that the psychologist deals with this but that the psychiatrists do not. It is another to call the latter fact "significant" without explaining what that word is intended to signify. If it was a significant lacuna, the right place to explore it was with Dr. Eberstein when she gave evidence, not by hinting in the determination at some oblique motive.

31. This is not all, but it is enough to demonstrate why the adverse findings on the psychiatric evidence cannot stand. What then follows?

32. The immigration judge's summary of his findings at §145 begins:

> "The evidence is ambiguous as to whether either or both of the appellants have or have not expressed suicidal ideation in the past. While Dr Patterson says they have, Dr Eberstein has said they have not but has then sought to retract that evidence in a way which I find unimpressive."

33. No finding follows, however, as to which doctor is to be preferred. By describing the evidence in total as ambiguous the judge has treated the two psychiatrists as cancelling each other out. But this by no means follows. If, as seems logical, he was going to stand by his earlier finding that her attempts to close the gap made Dr Eberstein an unreliable witness, what was left was the unambiguous testimony of Dr Patterson that both appellants had suicidal ideation. Instead, and illogically, the immigration judge goes on apparently to rely on Dr Eberstein in this single regard:

> "Whilst I understand the wish of a treating doctor to do her best for her patient and while I have no reason to doubt Dr Eberstein's experience and expertise the contents of her earlier reports to the GP are plain that there was no suicidal ideation expressed."

34. With all possible respect, it is not acceptable to cherry-pick evidence like this. Given that the finding is clearly intended to be that Dr Eberstein was fixed with her initial report that neither appellant had expressed suicidal thoughts to her, Dr Patterson's evidence that they had expressed such ideas to her was distinct, was intact and had to be evaluated.

35. There is no such evaluation, however. At the end of §83 the immigration judge, having indicated a clear preference for the opposite view of the original adjudicator, Mr Elvidge, said:

> "Dr Patterson was firmly of the view that [Y] had suicidal ideation and was considering suicide if he had to go back to Sri Lanka."

If this was so, it formed an important part of the picture which the designated immigration judge had to appraise. Instead it is supplanted by the credence given, for no articulated reason, to what the judge has erroneously taken to be the evidence of Dr Eberstein on this one issue.

36. Although a series of cases, of which *J* is the best known, have acknowledged that returning someone to a situation which is likely to drive them to suicide is a breach of art. 3, the mode of reasoning in the present case (which is far from unique) is such that no art. 3 "foreign" claim based on a risk of suicide is likely ever to succeed. Indeed Hughes LJ in *AJ (Liberia) v Home Secretary* [2006] EWCA Civ 1736 remarked on the fact that, so far as the reported cases went, none ever had. The reasoning is that, since Y had made no attempt at suicide despite more than one refusal of his asylum claim, and since Z's attempt at suicide had not been seriously life-threatening, and since both would ex hypothesi find on return that their fears, even if genuine, are now groundless, there is no real risk that return will impel either appellant to commit suicide. The effect is that, apart from an asylum-seeker who actually commits suicide, only one who comes close enough to succeeding to manifest a serious intent is going to be regarded as presenting a serious risk of suicide on return. Yet the medical logic is exactly the reverse: it is that individuals who are at serious risk of suicide if returned can be stabilised, using therapy and medication, and kept from self-harm so long as they feel safe here. For such individuals the recent past may be no guide at all to the immediate future.

37. In my judgment DIJ Woodcraft was not justified in interpreting Dr Eberstein's evidence as he did; nor in then selecting and relying on a single element of it; nor in any event in marginalising Dr Patterson's consistent evidence. There was no contrary evidence from the Home Office. In the result, whatever scepticism the judge had arrived at for himself or acquired from previous decision-makers (to whose findings he makes repeated reference), and however discontented he was (for he makes no bones about it) with the handling of the case when it reached this court and was remitted by consent, the expert evidence before him was all one way and was materially shaken neither in terms of its authorship nor in terms of its content. The only available conclusion was that, notwithstanding the earlier finding that neither in fact faced any appreciable risk of future persecution or ill-treatment, both appellants were severely traumatised by what had happened to them as prisoners of the security forces, were frightened and seriously depressed at the prospect of return to Sri Lanka, and were likely to commit suicide if returned.

38. Both cases therefore come, in my judgment, within the ancillary principle set out in §16 above.

39. What remains is the question whether, if returned, the appellants will have access to care and treatment which will keep the risk of self-harm under control. The DIJ's findings about this, drawn principally from the Sri Lankan Ministry of Health website, satisfied him that the appellants would have access to adequate healthcare if returned. He also relied on the concession made to this effect in *J*.

40. Counsel for the appellants points to three facts in the determination itself which he submits undermine the Home Secretary's case. In a population of about 20 million, some 376,000 Sri Lankans suffer from serious and debilitating mental illness. The country has one of the highest suicide rates in the world. Yet it has only 41 qualified psychiatrists and is significantly short of skilled mental health staff. With a psychiatrist: patient ratio of about 1:9000, and with no known prospect of familial shelter or support, it is submitted that the appellants' chances of access to treatment are remote. It is also submitted that the immigration judge has sought to give his conclusion improper weight by treating the concession made in *J* as having the court's imprimatur ("there is an adequacy of treatment as the Court of Appeal recognised in *Re J*").

41. The judge's consideration of this aspect of the case was predicated, as it had to be, on an assumption that he was mistaken in dismissing the risk of suicide – as he put it in his concluding summary – as low, or – as his earlier findings suggest – as fabricated. He wrote this:

> Upon arrival in Sri Lanka adequate reception facilities would be available. Again the Appellant's aunt could assist in this connection. Even if I accept the Appellant's evidence that other family members were killed in the tsunami (although some relatives seem to be still there according to the aunt's evidence), adequate medical facilities exist in Sri Lanka and I have set them out at some length above. The evidence on whether the family were indeed killed in the tsunami is ambiguous given the way that the focus of the Appellant's concerns in this case have shifted from their treatment in Sri Lanka through to the tsunami through to domestic circumstances in the United Kingdom. Concern about the tsunami does not appear to be so important that it would stop a full recovery if their cases were allowed. The number of relatives said to be affected by the tsunami is as Judge Manuel pointed out evidence of a large extended family and would ease the Appellants reintroduction into Sri Lankan society. There are adequate medical facilities to continue the treatment they have received.

42. The finding of DIJ Manuell to which this paragraph refers reads as follows:

> "Sad though it is, the fact that the appellants lost some 50 relatives in the December 2004 tsunami shows that they have numerous relatives living locally, just as would be expected in a society following a traditional way of life in a fertile and pleasant land, marred only by sectarian conflict."

43. The evidence of the aunt who has taken care of them in this country (omitting names) was this:

> "About 50 of our relatives were killed by the tsunami … Those known to be dead include my first cousin…. and my elder brother's son… My niece told me over the phone … that their bodies had been found. [She] also told me that my sister, [Y's and Z's] mother, and two of their brothers (her sons) and [one son's] wife and child were all missing. The house where they were all living had caught the full brunt of the tsunami and had been destroyed. This was the house … built after the LTTE burned down my sister's house ([Y's and Z's] family home) in May 2003. They are all still missing. It is almost certain that they are all dead. This is so in the case of their other brother … as well…. There is no word of him either….
>
> The effect of all this on my nephew and niece has been disastrous."

44. As for the surviving niece in Sri Lanka who had given her the information, the aunt in her subsequent witness statement said this:

> "[Y] and [Z] do not have anyone to support them in Sri Lanka. I used to have a niece there …who would update me about our family, but I have not heard anything from her in some time and I no longer know how to contact her. Last time I spoke to her she had cholera, and I suspect she may have died. Although we may still have some distant relatives in Sri Lanka, we do not have contact with them. [Y] and [Z] require extensive support and I am the only family member who can help them."

45. There is a limit to how much Panglossian optimism can decently be extracted from such a history of physical and familial devastation. I am entirely unable to accept that this limb of the case has been approached with the necessary realism and attention to fact.

46. Given the psychiatric evidence which I have considered above, unless there is good reason to find that both appellants will have sufficient help and support to enable them to access the exiguous and overstretched local psychiatric services, their removal will entail a breach of art. 3.

47. The inquiry into this critical question must, it seems to me, involve among many other things consideration of where in Sri Lanka they would be likely to find themselves on return. If it is their now devastated home area, what medical help would be available there, and to whom, if anyone, could they look for help and support? If it is Colombo, where they were held and tortured in the CID headquarters (and the horrific character of their treatment is relevant to this), what is the realistic possibility of their venturing into any proximity with officialdom? It is not and cannot be an answer that, because it has been decided that there is objectively no real risk of repetition, all such fears will evaporate in the light of day. The subjective reality of fear has to be given its full – and sometimes overwhelming – weight.

48. If it were necessary to do so, these two appeals would have to be remitted once more to the AIT for yet another determination, in the light of this court's

judgment, as to whether enforced return would carry a risk of suicide sufficiently serious to breach art. 3. But, for reasons to which I now turn, I consider that it is not necessary to do so.

49. It is clear from the jurisprudence of the Strasbourg court that, save in exceptionally compelling cases, the humanitarian consequences of returning a person to a country where his or her health is likely to deteriorate terminally do not place the returning state in breach of art. 3. This understanding has most recently been restated by the Grand Chamber in *N v United Kingdom* (26565/05, 27 May 2008), a case concerning the repatriation of a Ugandan national suffering from HIV/AIDS:

> 42. ……Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D.* case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.
>
> 43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D. v. the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.

50. The first distinction which it is appropriate to draw in relation to the present case is that, in contrast with what is envisaged at the end of §43 of *N*, the anticipated self-harm would be the consequence of the acts of the Sri Lankan security forces, not of a naturally occurring illness. It would be, if it were to occur, the product of fear and humiliation brought about by the brutality to which both appellants were subjected before they fled.

51. A second distinction arises out of the decision of this court, following the promulgation of *N v United Kingdom*, in *RA (Sri Lanka) v Home Secretary* [2008] EWCA Civ 1210. This was a case close in many respects to the present one, concerning as it did a Sri Lankan Tamil whose intended return was said to carry a serious risk of suicide. This court rejected the submission that different principles applied to HIV/AIDS cases and suicide cases, or more generally to cases of physical and mental illness. Richards LJ at §50 held:

> "Whilst there may be factual differences between the two types of case…. *N v United Kingdom* makes clear, as it seems to me, that the same principles are to be applied to them both."

52. Taking that approach, the court dismissed the appeal for two main reasons. First, the appellant's account of torture, which was the foundation of the psychiatric prognosis, had been rejected by the AIT. Secondly, to the extent that there was nevertheless a suicide risk on return, the appellant would have sufficient cash resources from the business he had built up here to access private healthcare in Sri Lanka. That neither of these factors applies in the present case does not of course mean that the appeals have to succeed; but it does mean that they are not foreclosed by parity of fact or reasoning with *RA*.

53. We are concerned here with two appellants whose experience of torture and rape is accepted fact, and whose consequent depression and fear are testified to in psychiatric evidence which, for reasons I have explained above, cannot be marginalised or dismissed. It is the absence of a continuing objective foundation for their fear which permits their enforced return to Sri Lanka, but only if the consequences of return are not themselves such as to violate their Convention rights.

54. As noted earlier in this judgment, the Home Office has not had either appellant examined or sought a joint examination. The medical evidence that there is comes from two well-qualified psychiatrists, one of them (Dr Eberstein) the treating practitioner, the other (Dr Patterson) an independent consultant. The evidence of the aunt who is settled here and has taken care of them was that she would not return with them if they were removed to Sri Lanka.

55. In relation to Y, Dr Patterson in February 2004 gave evidence, supported by her clinical findings, that there was a high risk that Y would kill himself here rather than be returned to Sri Lanka, and that "his mental state would be adversely affected by being returned to Sri Lanka where he would be extremely unlikely to seek the psychiatric treatment that he urgently needs." In January 2005 she reported that "the recent multiple bereavements that he has suffered have precipitated a significant deterioration in his depression … and markedly increased the risk of suicide." She restated her opinion that if returned to Colombo he would not seek out the help he needed, and that none would be on hand.

56. Dr Eberstein in May 2008 wrote:

> "I believe [Y's] long-term prognosis would be very poor if he were forced to return to Sri Lanka. I believe there would be a real risk of suicide.

> ….
>
> I do not believe that [Y] would be able to seek or access treatment in Sri Lanka due to his overwhelming despondency and hopelessness about life in Sri Lanka. I do not believe that he would easily overcome his conviction that suicide is his only option."

57. In relation to Z, Dr Eberstein in August 2006 reported:

> "[If removed to Sri Lanka] I believe the only mechanism that would minimize the risk of suicide for the short term would be hospitalisation on an acute psychiatric ward where she would be closely monitored to prevent her from self-harming. This intervention would decrease her suicide risk only as long as she remained in the hospital.
> ….
> I believe there would be a real risk of suicide if [Z] were forced to return to Sri Lanka. I therefore believe her long-term prognosis if she were made to return is extremely poor.
>
> She has said she would not be able to seek treatment in Sri Lanka and I do not believe she would do so. She has described being very fearful of the authorities in Sri Lanka and does not want to draw attention to her past. She has also described a great mistrust in the authorities, and she says this includes doctors, to whom she would not feel able to reveal details of her past."

58. In a report of January 2004 which her subsequent reports confirmed, Dr Patterson wrote:

> "The risk of aggravation of suicidal ideation is greatly increased because she is likely to have lost all hope. Hopelessness has a serious significant association with completed suicide.
>
> In my opinion if she does not manage to kill herself in the UK [viz if told she is to be returned] there is a high risk that she would commit suicide immediately upon her arrival in Sri Lanka to avoid falling into the hands of the authorities or the LTTE and to escape the extensive cultural condemnation that she is convinced awaits her.
> …..
> In my opinion her fragile psychological functioning would be seriously undermined if she were returned to Sri Lanka where I think she would be unlikely to access the treatment she needs and would be in danger of further psychiatric breakdown and suicide."

59. These are brief extracts from a series of full and uncontroverted reports, made between early 2004 and mid-2008, following psychiatric examination and re-examination of each appellant.

60. I have set out above what DIJ Woodcraft wrote in §145(iv) of his determination, and have commented on it. He had earlier found, on the basis of the Ministry of Health website:

> 134. Sri Lanka has three major mental hospitals in the western province with beds for 3000 patients. There are several important non-governmental organisations providing psychiatric assessment and treatment. All patients receiving mental health services from the government sector receive the services and drugs free of charge. Paragraph 26.17 of the COIR lists the therapeutic drugs generally available at the primary healthcare level. This too is significant. Dr Eberstein listed the drugs prescribed to the Appellants. The objective evidence is that chemical therapy could be continued in Sri Lanka.
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> 135. Paragraph 26.19 states that information provided by the source country information system of Sri Lanka in December 2004 noted that treatment for Post Traumatic Stress Disorder was available in all private hospitals and clinics in Colombo.

61. The upshot of the material findings and of the expert evidence which (for reasons I have given) stood unshaken, is that, although some psychiatric care is available in Sri Lanka, these two appellants are so traumatised by their experiences, and so subjectively terrified at the prospect of return to the scene of their torment, that they will not be capable of seeking the treatment they need. Assuming (what cannot be certain) that they come unscathed through interrogation at the airport, with no known family left in Sri Lanka and no home to travel to, the chances of their finding a secure base from which to seek the palliative and therapeutic care that will keep them from taking their own lives are on any admissible view of the evidence remote.

62. None of this reasoning represents a licence for emotional blackmail by asylum-seekers. Officials and immigration judges will be right to continue to scrutinise the authenticity of such claims as these with care. In some cases the Home Office may want to seek its own or a joint report. But there comes a point at which an undisturbed finding that an appellant has been tortured and raped in captivity has to be conscientiously related to credible and uncontradicted expert evidence that the likely effect of the psychological trauma (aggravated in the present cases by the devastation of home and family by the tsunami), if return is enforced, will be suicide.

63. On the present evidence, including where material the AIT's evaluation of it, the clear likelihood is that the appellants' only perceived means of escape from the isolation and fear in which return would place them would be to take their own lives. For reasons I have given, the concomitant findings that their fear is no longer objectively well-founded and that there exists a local health service capable of affording treatment do not materially attenuate this risk, which is subjective, immediate and acute.

64. In this situation, return would in my judgment reach the high threshold of inhuman treatment unconditionally prohibited by art. 3 of the ECHR.

65. I would accordingly allow both appeals.

Lady Justice Arden:

66. I agree.

Lord Justice Moses:

67. I also agree.