Case No: C4/2005/2338

Neutral Citation Number: [2006] EWCA Civ 379
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
Mr Andrew Nicol QC (sitting as a Deputy High Court Judge)
Case No: CO/3085/2004

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 11th April 2006

Before :

LORD JUSTICE BUXTON
LORD JUSTICE LLOYD
and
LORD JUSTICE RICHARDS

- -

Between :

The Queen (on the application of Mehmet Tozlukaya)	**Respondent**
- and -	
Secretary of State for the Home Department	**Appellant**

- -

(Transcript of the Handed Down Judgment of
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- -

Monica Carss-Frisk QC and Tim Eicke (instructed by **The Treasury Solicitor**) for the **Appellant**
Hugh Southey (instructed by **Trott & Gentry**) for the **Respondent**

- -

Judgment

Lord Justice Richards :

1. This case raises once more an issue recently considered in *J v Secretary of State for the Home Department* [2005] EWCA Civ 629, namely the circumstances in which the removal of an asylum-seeker from the United Kingdom can be resisted under articles 3 and 8 of the European Convention on Human Rights on the ground that it will create or exacerbate a risk of suicide by the asylum-seeker himself or a member of his family who will be removed with him.

2. It also raises questions concerning the Secretary of State's policy relating to removal of families with children who have seven years or more continuous residence in the United Kingdom: what the policy actually is and what implications it has for the application of article 8 in the particular circumstances of this case.

3. The case comes before us as an appeal from a decision of Andrew Nicol QC, sitting as a Deputy Judge of the High Court, in which he quashed a certificate by the Secretary of State under section 93(2)(b) of the Nationality, Immigration and Asylum Act 2002 that the respondent's claim under articles 3 and 8 was "clearly unfounded".

The facts

4. I take the factual background from the judgment of the deputy judge, with various points of amplification or qualification that have emerged from the submissions to this court.

5. The respondent and his wife (Maryem Tozlukaya) are Turkish nationals who entered Germany in 1996 and claimed asylum there. On 8 June 1998, following the rejection of their claim by the German authorities, they and their daughter (Kader, born on 2 February 1997) travelled to the United Kingdom, where they again claimed asylum.

6. In October 1998 the Secretary of State asked Germany to accept responsibility under the Dublin Convention (as it then was) for examining the asylum claim. The German authorities accepted such responsibility in January 1999, and the Secretary of State then certified the claim on "third country" grounds and set removal directions. The respondent's representatives made representations that his removal to Germany would be in breach of article 3, on the basis that if removed to Germany as an undocumented asylum seeker he would be at risk of indirect *refoulement* to Turkey. No mental health grounds were advanced. The representations were rejected by the Secretary of State.

7. The respondent failed to report in accordance with the removal directions. Then, in February 1999, he lodged an application for permission to apply for judicial review of the Secretary of State's certificate on the basis of his article 3 claim. That application was withdrawn in October 2001 when decisions of the appellate courts made it clear that the objection to the certificate was unsustainable. In the meantime, in June 2001, the respondent's second daughter (Rojda) was born.

8. In November 2001 further representations were made, under article 3 and article 8, on the basis that, since the respondent had already been refused asylum in Germany, his case would not be given proper consideration on his return there and that he had close family ties in the United Kingdom. Again no mental health grounds were advanced.

The representations were rejected by the Secretary of State, who certified the claim as manifestly unfounded. By mistake, however, the refusal letter included an appeal form which appeared to grant a right of appeal. In consequence of that administrative error, the Secretary of State withdrew his certificate.

9. The respondent then appealed the Secretary of State's decision, first to an adjudicator and then to the Immigration Appeal Tribunal, in each case without success. In the course of those appeals he relied on a psychiatric report in support of his contention that his return to Germany with his family would be in breach of his human rights, but no mention was made of any mental health problems suffered by Mrs Tozlukaya.

10. Following the dismissal of the appeal to the Immigration Appeal Tribunal the Secretary of State set further removal directions, for 14 June 2004. The respondent and his family were detained shortly before the removal was due to take place. At the airport on 14 June, Mrs Tozlukaya complained of abdominal pains and informed the authorities that she was four months pregnant. The removal was not proceeded with on that day, but the family remained in detention. Mrs Tozlukaya was examined by the duty doctor and was declared fit to travel, and the removal was re-arranged for 17 June. But an attempt at removal on 17 June also failed, when the captain of the aircraft refused to carry Mrs Tozlukaya because she again complained of abdominal pains and was distressed. (One set of medical notes refers to an attempt by Mrs Tozlukaya to hang herself in the toilet of the aircraft during this second attempt at removal, but the Secretary of State has no record of any such suicide attempt and it is not referred to in any of the other medical reports on her.)

11. At about the time of the first of those attempted removals, further representations were made to the Secretary of State, claiming that the respondent was entitled to remain on the basis of the backlog clearance exercise announced by the Secretary of State in October 2003 or by virtue of his rights under the EC/Turkey Association Agreement. Those representations again made no mention of any mental health problems suffered by Mrs Tozlukaya. The representations were rejected by the Secretary of State on 16 June.

12. By letter of 22 June 2004 the respondent's representatives made further representations as to why his removal to Germany would be in breach of article 8. The letter also raised for the first time the issue of Mrs Tozlukaya's "mental health problems", but making no reference to a risk of suicide.

13. On the same day, 22 June, there occurred the only officially recorded attempt at self-harm by Mrs Tozlukaya. The family had remained in detention, at Oakington Immigration Reception Centre. Mrs Tozlukaya was found in her room with one end of a bed sheet around her neck and the other end over the door. There were no marks around her neck, and the detention custody officer who attended the scene wrote that "it wasn't tight enough to do any harm but was obviously a cry for help". On the other hand, there is other material to support the view that this was a serious suicide attempt. Some of the expert reports regard it as such, and it must be treated as such for present purposes.

14. Some time after this incident the respondent and his family were moved from Oakington to Dungavel Immigration Reception Centre.

15. On 13 July 2004 Mrs Tozlukaya was seen by a psychiatrist, Dr Aryiku. She said that she wanted to be with her (dead) father who was calling on her and that she intended to end her own life. Dr Aryiku said that he would section her under the Mental Health Act and recommended constant observations within the health centre until a hospital bed was available.

16. On 14 July it was reported that the midwives could detect no foetal heart beat. It was determined that the baby had died *in utero*. Mrs Tozlukaya was admitted to the maternity ward of Wishaw General Hospital where, on 18 or 23 July (the records differ), the dead foetus was delivered.

17. While in the maternity ward Mrs Tozlukaya was seen by Dr Keith, a consultant psychiatrist. In his report dated 27 July 2004 he noted that the duty psychiatrist had seen her on 21 July and had thought she was threatening suicide and was refusing essential medical treatment. She had therefore been detained under the Mental Health Act (Scotland). From his own observations of her, however, Dr Keith concluded that, whilst she had suffered from a quite normal and understandable distress at having a stillborn baby, she had recovered physically and mentally and "could be considered mentally well"; she was "both mentally and physically fit to cooperate with whatever further disposal should be arranged for her"; and he did not think there was any significant illness such as would prevent her removal.

18. As a result, on 28 July Mrs Tozlukaya was discharged from hospital and returned to Dungavel. The deputy judge notes (though it does not fit easily with the assessment by Dr Keith that led to her discharge) that on admission there she was believed to be at high risk of suicide and was placed on constant observation and was to have an officer with her at all times.

19. The family was then moved from Dungavel to Yarlswood Immigration Reception Centre. On 4 August Mrs Tozlukaya was diagnosed by Dr Pinto, a consultant psychiatrist, as suffering from a mild dissociative reaction in the context of a post-natal depression: she was not overtly distressed but appeared to deny the death of her child and to be convinced that she was holding and nursing the child in the form of a rolled-up blanket which she constantly carried with her. She was therefore admitted on 6 August under the Mental Health Act to the secure unit at Luton Hospital.

20. On 7 August Mrs Tozlukaya was seen by Dr Hajioff, a consultant psychiatrist instructed by the respondent's representatives. In his report dated 12 August 2004, Dr Hajioff concluded that she was suffering from depression and post-traumatic stress disorder and referred to a risk of suicide. He said that her depressed state and the risk of suicide were the result of her experiences in Turkey and also subsequent events, including the refusal of her asylum application in Germany, being in an uncertain situation in England, the unsuccessful appeal hearing and her miscarriages. He thought that the risk would be greatest when she felt that she had no hope of avoiding return to Turkey, even while she was still in this country. If she went to Germany the risk would remain because she believed that she would not be allowed to stay there. In addition, the uncertainty of her position would be prolonged, which would constitute a further stress. He therefore believed that "there is a marked risk of suicide while she is England and that will continue if she is removed to Germany".

21. On 25 August, Dr Hajioff's report was sent to the Secretary of State, together with further representations. By letter dated 2 September 2004 the Secretary of State rejected the appellant's claims under articles 3 and 8 based on Dr Hajioff's report and certified the claim as clearly unfounded pursuant to section 93(2)(b) of the 2002 Act. It appears that the present proceedings for judicial review were commenced before the date of that letter, but they became in substance a challenge to the certification contained in it.

22. On 3 September Mrs Tozlukaya was discharged from hospital and returned to Yarslwood. On the same day Dr Pinto, the consultant psychiatrist under whose care she had been in hospital, wrote to the Home Office to give his opinion on her. In preparing his report Dr Pinto had had sight of Dr Hajioff's report of 7 August. Dr Pinto confirmed his opinion that Mrs Tozlukaya had suffered from a post natal depression that manifested itself in a dissociative reaction. He said that this view "does not greatly differ from Dr Hajioff's in our assessment of her mental state during the first week of August", but that since that time she had clearly improved and did not have significant signs of post natal depression at present, nor any psychotic symptoms. He did not feel it inappropriate for her to be transferred back to Yarlswood or for the legal process relating to her detention to proceed.

23. In a letter dated 14 September 2005, Dr Hajioff elaborated his opinion of Mrs Tozlukaya's suicide risk, stating his belief that "there is a serious risk of suicide, which will be greatest when she sees no hope of remaining in England and the risk will continue throughout the process of removal". The risk might be controlled by appropriate treatment and close supervision, but "[t]he act of removal will disrupt such support and treatment and will increase her feeling of hopelessness and desperation so that she will then be more likely to act in a suicidal manner". From what she told him, "she believes that she will not receive what she feels is appropriate consideration in Germany and that prospect will increase the risk further".

24. On 18 October Mrs Tozlukaya was examined by Ms Emma Citron, a chartered consultant psychologist. In her report of the same date Ms Citron concluded that Mrs Tozlukaya had had mental health issues which could be traced back to her very early childhood following her father's sudden and tragic death in her presence. This propensity to mental health difficulties was made considerably worse and psychiatrically diagnosable following the detentions and torture of her husband in 1996. Mrs Tozlukaya suffered from post-traumatic stress disorder and depression following those incidents and continued to suffer from florid symptoms of these into the present. Asked to comment on the likely effect of removal to Germany, Ms Citron said that she was "of the firm opinion that Mrs Tozlukaya's mental health would deteriorate even further were this to be the case and indeed she would present as a severe and serious suicide risk" and "would be at marked increase risk of suicide were she to be returned to Germany".

25. By letter dated 23 October 2004 the Secretary of State rejected further representations based on Ms Citron's report and maintained his certification of the claim as clearly unfounded. He questioned Ms Citron's ability to express a view on Mrs Tozlukaya's mental health since her father's death (when she had been four years old) or her husband's detentions (some eight years before Ms Citron saw her), referred to the absence of reference to her mental health problems in representations or evidence before June 2004, and pointed to the fact that neither Dr Keith nor Dr Pinto

considered that she suffered from post-traumatic stress disorder or a major depressive episode.

26. Following the grant of permission to apply for judicial review the respondent filed a number of further expert reports.

27. The first was a report dated 15 March 2005 by Dr Turner, a consultant psychiatrist. It was prepared primarily for a potential separate civil claim for damages for unlawful detention, but also considered the issue of suicide risk in relation to removal to Germany. Dr Turner's view was that Mrs Tozlukaya had a current major depressive order of moderate intensity and that she suffered from post-traumatic stress disorder. On the issue of suicide risk he stated:

> "My opinion is that an attempt to remove Ms Tozlukaya from this country could indeed trigger a suicide attempt. There are a number of reasons for this, but probably three stand out.
>
> The first reason is that she has a Depressive Disorder. This increases the risk of self-harm and suicide.
>
> She appears to believe that deportation to Germany would simply trigger a return to Turkey. Similarly, she seems to believe that return to Turkey would place her and her family at risk. If this is what she believes (and here the objective facts about Germany and Turkey matter less than what she actually believes) then she will inevitably see removal as an act associated with substantial threats both to herself and to her family. In my view, the perception of threat of this type is likely to be associated with an increase in her suicide risk.
>
> The final mechanism to consider relates to the fact that she has been detained and that during detention, she was able to avoid removal. Now as I have already indicated, my opinion is that she was suffering from Major Depressive Disorder. However, she also had the experience of learning that her behaviours can affect the decisions made by the authorities concerning removal. My opinion is that this process of learning will make it more likely that she will act in a disturbed way if she were to face detention and removal again ….
>
> To that degree, therefore, my opinion is that the experience of detention probably has heightened her risk of completed suicide. I would say that if she faced a future attempt to remove her from this country then the risk of deliberate self-harm of some sort would be very high. With regard to the risk of completed suicide, I would describe this as being at least a moderate risk. By this I mean that it would be substantially elevated over the general population …."

28. In relation to the process of removal, he also expressed the opinion that "being strapped into an aeroplane in a setting probably perceived as humiliating and in the

presence of her young children is likely to lead to a deterioration in her mental health". He said he had not seen any plans for continuity of medical care following return to Germany; but, as set out below, there was subsequent evidence on that issue.

29. In a letter dated 6 April 2005 Ms Citron considered Dr Turner's report and, based on her assessments in October 2004, stood by her diagnosis of post-traumatic stress disorder.

30. Dr Hajioff had seen Mrs Tozlukaya for a second time in February 2005. In a report dated 11 April 2005, in which he was asked to comment *inter alia* on the assessments by Dr Turner and Ms Citron, he concluded that Mrs Tozlukaya was suffering from a major depressive illness and chronic post-traumatic stress disorder and that "[t]he three of us also agree that she is depressed and that there is a serious risk of suicide if her present feeling of being in a secure place is interfered with".

31. There was also a further report from Ms Citron, dated 18 May 2005, following an assessment of Mrs Tozlukaya and her two children on 9 May. Although prepared primarily for the civil claim for damages for unlawful detention, the report did also comment on "Mrs Tozlukaya's suicide risk were she to be deported to Germany and/or Turkey". It remained Ms Citron's opinion that "Mrs Tozlukaya would present as a serious suicide risk were she to be threatened with deportation", and Ms Citron "would expect to see a significant decline in her mental health were she to be threatened with deportation to Germany". The deputy judge noted in addition Ms Citron's comments on the two girls. She found that the eldest, Kader, was significantly depressed at the time of examination. The younger child, Rojda, was psychologically affected by the detentions and separation but was not currently presenting as significantly psychologically impaired. Both children were fearful of the threat of deportation.

32. On 10 May 2005 Dr Turner provided a supplementary report addressing some additional medical records with which he had been provided. It did not add materially to the views he had expressed in his report of 15 March 2005.

33. The Secretary of State served his evidence later in May. It consisted of a witness statement of Mr Ian Taylor, a Senior Executive Officer in the Immigration Service, Enforcement and Removals Directorate. The statement dealt with Mrs Tozlukaya's situation in the United Kingdom, during her return to Germany and following her return to Germany.

34. As to the situation in the United Kingdom, Mr Taylor simply stated that she was subject to the normal NHS mental health provisions and that there had been no complaint from the appellant or his wife about that.

35. As to the situation during return, Mr Taylor stated that it was the Secretary of State's intention to return her to Germany accompanied by escorts, who would include suitably medically qualified detainee custody officers. He annexed witness statements made by officials for the purposes of another case, which described in detail the policy and procedure for removal of individuals considered to be at risk of suicide or self-harm. In summary, the contractor responsible for carrying out the removal is required to conduct a full risk and needs assessment and to provide appropriate escorts to meet the detainee's needs. The contract states that the safety

and security of the detainees in their care is of absolute importance and must not be jeopardised, and escorting personnel are certified detainee custody officers with a duty to attend to the wellbeing of the detainees in their custody. They must all receive suicide and self-harm awareness and prevention training. Medical support is provided where necessary.

36. As to the situation following return to Germany, Mr Taylor's statement describes as follows the way in which the appellant and his wife will be dealt with:

> "On their arrival [at Frankfurt airport] they will be initially received into the care of the Bundesgrenzschutz [the German Border Control Police]. The Bundesgrenzschutz at Frankfurt confirmed that, if and when the United Kingdom notifies them … of the date of the family's return they would ensure that a suitably qualified doctor is at the airport to meet the family upon their arrival there. From my own knowledge of German procedures I am aware that, as a routine, all asylum seekers … are medically examined upon arrival in Germany. The Bundesgrenzschutz confirmed that, in the light of the situation for this family, in particular the Claimant's wife's psychiatric condition, and the fact that they will be informed well in advance of the family's arrival, they will arrange for a specialist in mental health to be in attendance. They also stated that they would provide the specialist with any medical information from doctors in the United Kingdom, provided the Claimant's wife, Mrs Tozlukaya, gives her consent to this.
>
> The Ausländerbehörde [the administrative office in the federal State (Land) which deals with accommodation and support of asylum seekers] will be responsible for the family once they have left the airport. The Ausländerbehörde have confirmed that, in their experience, the family would have no difficulty in accessing appropriate medical/psychiatric treatment, if necessary, on their return to Frankfurt. The degree and level of treatment required will, of course, depend upon the results of the assessment to be carried out by the mental health specialist who will examine the Claimant's wife upon her return to Frankfurt. Germany has a highly developed system of health care. It has not been suggested that the treatment the Claimant's wife would receive in Germany would be inferior in any way to that which she has received in this country.
>
> The Ausländerbehörde have also confirmed that they foresee no problems in providing the family with suitable accommodation if, as will be the case, they are given sufficient advance notice of the date of their return to Frankfurt. Rather than accommodate the family in an Accommodation Centre, the family will be provided with a flat or small house, depending on what is available at the time …."

37. The Secretary of State's evidence was considered by each of the respondent's three experts.

38. In a report dated 10 June 2005, Dr Turner acknowledged that there was "evidence of a serious approach to consider Ms Tozlukaya's need in the circumstances of her removal, mainly through liaison with the German authorities". He thought that the precise training and supervision arrangements for escort officials remained unclear. It was his opinion that the mere fact of being told that she faced removal could trigger a further episode of self-harm with a risk of completed suicide. He gave a very cautious answer to the question of how long it was likely to take for the proper and adequate treatment of Mrs Tozlukaya to reduce her increased suicide risk should she be removed. He said that in general terms, where there were no adverse ongoing factors, it would be reasonable to expect recovery from depression in most people in two to three months from the inception of treatment. In Ms Tozlukaya's case, however, it was unlikely that she would achieve a complete recovery while she faced the risk of deportation; and, given her history, it was unlikely that even substantial recovery would take place as quickly.

39. Dr Turner was subsequently asked to say whether the risk of suicide following removal to Germany would be higher and, if so, how long it would remain higher. In a further report, dated 24 June 2005, he stated:

> "In my opinion, the risk of suicide following removal to Germany will be higher than it presently is.
>
> My opinion [on how long it will remain higher] is that the answer to this question depends upon what happens to Ms Tozlukaya – and what she perceives is likely to happen. There will be a transient effect simply to do with relocation ….
>
> However, in addition, she seems to perceive removal to Germany as the first step in her return to Turkey. My opinion is that the risk of deliberate self-harm and the risk of suicide derives from a number of elements. One of these is the presence of a depressive illness. Another is what appears to be her perception of risk if returned to Turkey. Here, from a psychiatric perspective, what matters is not the objective likelihood of return, or even the objective likelihood that return would be associated with harm. What is important is her subjective perceptions regarding these matters since it is her subjective sense which will affect her emotional state. In other words, it is her own appraisal which will affect her mood."

40. Dr Hajioff, in a report dated 23 June 2005, made the following comments in the light of the Secretary of State's evidence:

> "(a) … From the documents I have seen I presume that there will be a female escort who will be in continuous attendance if Mrs Tozlukaya's suicide risk remains high. With such close care I believe that the risk of her actually harming herself will be low. …

(c) Mrs Tozlukaya has been in the UK for seven years and has established a network of support. Being forcibly removed from that network will increase her sense of helplessness and lack of control of her life.

(d) Mrs Tozlukaya's depression is responsive to her situation. I noted previously that, during her time in the UK there had been some improvement in her mood. With stability and security she becomes less depressed. Moving her to a place where she believes she was badly treated will have the opposite effect. It is likely that, whatever reassurances she is given, she will fear that she will not be allowed to remain in Germany and live a normal life there and that she may even be returned to Turkey. Because of that she will be more anxious and depressed and in consequence there will be an increase in the risk of suicide.

(e) If she is given appropriate treatment in Germany, and also as she begins to feel safe and secure there, the risk will gradually diminish, but I believe that that will take many months."

41. In a report dated 23 June 2005, Ms Citron stated:

> "It is my opinion that Ms Tozlukaya will remain a severe suicide risk so long as she is threatened with removal to Turkey. It is unclear to me what mental health provision would be available to Ms Tozlukaya in Germany. If she were to remain in Germany with her family and be monitored by a full mental health team without the threat of removal to Turkey, this would be adequate. It is the threat of removal to Turkey which Ms Tozlukaya perceives as inevitable that re-evokes all her fears. It is this fear that she is unable to cope with and which destabilises her, prompting suicidal behaviour. It is therefore my opinion that removing Ms Tozlukaya to Germany will increase her risk of suicide and may well prompt suicidal behaviour which will continue after any mental health provision provided in Germany has ceased.
>
> It is likely that any treatment provided in Germany is unlikely to be sufficient to ensure that Ms Tozlukaya does not pose a severe risk of suicide in future given the threat of removal to Turkey."

42. The Secretary of State considered those further comments by the respondent's experts but maintained his certification of the claim as clearly unfounded.

The correct approach to certification of a claim as clearly unfounded

43. There is no dispute about the test to be applied by the Secretary of State in determining whether the respondent's claim was "clearly unfounded" within section

93(2)(b) of the 2002 Act. In relation to the same statutory language in section 115 of the 2002 Act, it was held in *R (L) v Secretary of State for the Home Department* [2003] EWCA Civ 25, [2003] 1 WLR 1230 at paras 49 and 56-58 that a claim is clearly unfounded if it cannot on any legitimate view succeed; but if there is an "arguable case" or on at least one legitimate view of the facts the claim might succeed, it does not qualify for certification. This is essentially the same as the test adopted in *R (Yogathas) v Secretary of State for the Home Deparment* [2002] UKHL 36, [2003] 1 AC 920 in relation to the materially identical expression, "manifestly unfounded", in section 72(2)(a) of the Immigration and Asylum Act 1999. In *Yogathas* it was stated by Lord Bingham of Cornhill at para 14 that the Home Secretary is entitled to certify if, after reviewing the relevant material, "he is reasonably and conscientiously satisfied that the allegation must clearly fail"; and by Lord Hope at para 34 that the question is "whether the allegation is so clearly without substance that the appeal would be bound to fail". See, further, the decision of the Court of Appeal in *R (Bagdanavicius) v Secretary of State for the Home Department* [2003] EWCA Civ 1605, [2004] 1 WLR 1207, per Auld LJ at para 58.

44. The same passages make clear that, although the court is exercising a supervisory jurisdiction over the Secretary of State's decision, it is in as good a position as he to determine whether the test is met, since the test is an objective one and the court has the same materials before it.

45. It is also common ground that no artificial constraint is imposed by the date of the decision letter in this case. The Secretary of State has maintained his certification in the face of all the evidence filed in the judicial review proceedings. The court can therefore take all that material into account in deciding whether the appellant has an arguable case under articles 3 and 8 or whether his claim is bound to fail.

The decision at first instance

46. The deputy judge held first that, whatever difficulties it might face before the Asylum and Immigration Tribunal on an appeal, the claim under article 3 was not bound to fail. It seems to me that the core of his reasoning is to be found in para 68 of his judgment. In the previous paragraph he had referred to the evidence of Mr Taylor concerning the steps that would be taken to safeguard Mrs Tozlukaya during the process of removal and on arrival, and had referred to the subsequent reports of Dr Hajioff, Dr Turner and Ms Citron. He continued:

> "In view of those reports, I cannot conclude that the Claimant and his wife would be bound to fail in showing that removal to Germany, notwithstanding the measures proposed by the Home Office in carrying out the removal or the treatment available to Mrs Tozlukaya in Germany, would lead to a real risk of her attempting and successfully attempting to commit suicide and that that risk would be significantly greater than if there was no attempt to remove her. There is an arguable case that there is a real risk of this happening either in the UK when further measures are taken to remove her, in transit or after her arrival in Germany."

47. The deputy judge's conclusion in relation to article 3 meant that it was not strictly necessary for him to consider the arguability of the claim under article 8, but he did make some observations on it. There were two strands in the respondent's arguments: one was the impact of removal on the mental health of Mrs Tozlukaya and her daughters; the other was the family's long residence in the United Kingdom. In relation to the first strand, the deputy judge observed only that if the Tribunal were to find that the predicament of Mrs Tozlukaya would not cross the article 3 threshold, it was still possible that removal would so impinge on her mental integrity that article 8 was engaged. In relation to long residence, he referred to the Secretary of State's "7 year policy", the details of which are considered later in this judgment. For reasons given in para 83 of his judgment, his view was that "it is at least arguable that the 7 year policy puts the Claimant's case in a different category such that an adjudicator might decide that removal is now disproportionate".

The issues

48. The Secretary of State challenges the deputy judge's conclusions on article 3 and his observations on article 8, and contends that the deputy judge was wrong to quash the Secretary of State's certificate.

49. In relation to article 3 it is submitted that the deputy judge concentrated unduly on the existence of a risk or increased risk of suicide and gave insufficient attention to other relevant factors which ought to have led him to conclude that the claim under article 3 was bound to fail.

50. In relation to article 8 it is submitted that the deputy judge lost sight of the very high threshold before article 8 is engaged in a case of this kind, and of the fact that it is only in exceptional circumstances that an interference with article 8(1) rights will not be justified by the need to maintain firm and effective immigration controls.

51. Whilst attention was understandably focused in argument on the deputy judge's reasoning, the ultimate question for this court is the same as that addressed by the Secretary of State and then the deputy judge, namely whether the respondent's claim under articles 3 and 8 would be bound to fail on an appeal to the Asylum and Immigration Tribunal.

Article 3

52. I take as my starting point the decision of the Court of Appeal in *J v Secretary of State for the Home Department* [2005] EWCA Civ 629, since the court in that case considered at some length the test for the application of article 3 in relation to suicide risk, albeit the case itself did not concern a "clearly unfounded" certification.

53. The court in *J v Secretary of State* drew a clear distinction between "domestic cases" (where it is said that the conduct of the state within its own territory will infringe a person's rights in that territory) and "foreign cases" (where it is said that the conduct of the state in removing a person from its territory to another territory will lead to a violation of the person's rights in that other territory). That classification was applied to three stages of a person's removal, namely (i) when the person is informed that a decision has been made to remove him, (ii) when he is physically removed by aeroplane to another territory, and (iii) after he has arrived in that other territory. In

relation to stage (i), the case was said to be plainly a domestic case. In relation to stage (iii), it was equally clearly a foreign case. In relation to stage (ii) the classification was less easy, but since in practice arrangements are made in suicide cases for an escort, it was safer to treat it as a domestic case.

54. The court considered foreign cases first. Having examined the Strasbourg and national case-law, it held there to be no doubt that the relevant test is "whether there are strong grounds for believing that the person, if returned, faces a real risk of … inhuman or degrading treatment …" (para 25). It rejected a contention that a different test applies in cases where the article 3 breach relied on relates to suicide or other self-harm. It then put forward six points by way of amplification of the test (paras 26-31):

> "First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant will 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' ….
>
> 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 ….
>
> 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 ….
>
> Fourthly, an article 3 claim can in principle succeed in a suicide case ….
>
> 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.
>
> 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."

55. In relation to domestic cases, the court said that the third of those factors is absent but that the remaining factors are equally applicable and the sixth is of particular significance: the signatories to the European Convention on Human Rights have sophisticated mechanisms in place to protect vulnerable persons from self-harm within their jurisdictions, and although someone who is sufficiently determined to do so can usually commit suicide, "the fact that such mechanisms exist is an important, and often decisive, factor taken into account when assessing whether there is a real risk that a decision to remove an immigrant is in breach of article 3" (para 33). The court also made a number of observations about dicta in other cases, to which I will return.

56. Miss Carss-Frisk QC submitted that the sixth factor referred to in *J v Secretary of State* must now be read in the light of the decision of the House of Lords in *R (Bagdanavicius) v Secretary of State for the Home Department* [2005] UKHL 38, [2005] 2 WLR 1359. In that case the claimant resisted removal on the basis of a claim under article 3 that he was at risk of harm at the hands of non-state agents in the receiving state. It was held that any harm inflicted by non-state agents would not constitute article 3 ill-treatment unless in addition the receiving state had failed to provide a reasonable level of protection against such harm, on the basis that a state is not in breach of article 3 unless it has failed in its positive duty to provide such protection. Miss Carss-Frisk submitted that the same approach must apply to the risk of *self-harm*, including suicide, in the receiving state: it is necessary to consider whether there would be any notional breach by the receiving state of its positive obligation to protect the individual against such harm. As regards the content of the positive obligation, she also relied on *Keenan v United Kingdom* (2003) 33 EHRR 38, in which the court, when considering whether a suicide in prison had given rise to a breach of article 2, asked whether the authorities knew or ought to have known of the suicide risk and "did all that could reasonably have been expected of them to prevent that risk" (para 92). On this basis Miss Carss-Frisk argued that it could not be a breach of article 3 to remove the respondent and his family to Germany, since Germany could be expected to comply with its positive obligation under the Convention to provide reasonable protection against the risk of suicide.

57. In my view *Bagdanavicius* has no direct bearing on the present case. We are concerned here not just with the risk of harm in the receiving state, but also with the risk of harm in the removing state; and in each case the risk arises not from the action of third parties but from the direct impact of the decision to remove on the person's mental health. Moreover, and more fundamentally, the line of authority that establishes that article 3 can in principle apply in a case of suicide risk also shows that the application of article 3 does not depend on an actual or notional breach of any Convention obligation by the receiving state.

58. Thus in *Bensaid v United Kingdom* (2001) EHRR 10, where the Strasbourg court first accepted that suffering associated with a deterioration in a person's mental illness, including the risk of self-harm and harm to others, could in principle fall within article 3, it did so on the basis that article 3 can apply even in circumstances which do not themselves engage either directly or indirectly the responsibility of the receiving state (see para 34). In that connection it referred to its judgment in *D v United Kingdom* (1997) 24 EHRR 423, which concerned the removal of a person in the final stages of a terminal illness, AIDS, and it used the same language as it had done in *D v United*

Kingdom. That line of reasoning is distinct from the reasoning deployed in *Bagdanavicius* with regard to harm by non-state agents. The distinction was acknowledged in *Bagdanavicius* by Lord Brown of Eaton-under-Heywood at para 28, where he said that no reliance was placed on *D v United Kingdom*, which "was a case where article 3 was found to be engaged notwithstanding that the risk of harm … involved no actual or notional breach of article 3 on the part of the receiving state".

59. Whilst I reject the Secretary of State's reliance on *Bagdanavicius*, that does not diminish the importance of the sixth factor in *J v Secretary of State*, that the relevance of effective mechanisms in the receiving state to reduce the risk of suicide is a factor of considerable importance. That proposition is supported by *Bensaid* and by the later Strasbourg cases that follow the same approach as *Bensaid*.

60. On the facts of *Bensaid*, the court accepted that removal of the applicant from the United Kingdom to Algeria would arguably increase the risk of relapse, but noted that medical treatment was available to the applicant in Algeria and stated that the fact that his circumstances in Algeria would be less favourable than those enjoyed in the United Kingdom was not a decisive factor from the point of view of article 3. It found that the risk that he would suffer a deterioration in his condition if he were returned to Algeria and that, if he did, he would not receive adequate support or care was to a large extent speculative. It concluded (at para 40):

> "The Court accepts the seriousness of the applicant's medical condition. Having regard however 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 that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. It does not disclose the exceptional circumstances of the *D* case … where the applicant was in the final stage of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St Kitts."

61. The court has maintained that line of reasoning in recent mental health cases. *Ovdienko v Finland* (Application no. 1383/04, decision of 31 May 2005) concerned a decision to remove the applicants from Finland to the Ukraine in circumstances where the second applicant had severe depression associated with a risk of suicide. The court accepted the seriousness of his medical condition but observed that his mental health problems had not been relied upon until a late stage and that it had not been shown that he would not receive adequate care in Ukraine. In rejecting the application as manifestly ill-founded, it used language (at page 10) virtually identical to that in *Bensaid*. The same approach was adopted in *Paramsothy v The Netherlands* (Application no. 14492/03, decision of 10 November 2005), where again the court noted (at page 10) that mental health care would be available in the receiving state, though possibly not of the same standard as in the removing state.

62. Although the court's approach in these mental health cases derives from *D v United Kingdom*, it was stated in *J v Secretary of State* (at para 42) that the circumstances are not precisely analogous. One material difference is that the risk in the present context arises not just from the person's removal to a place where the condition is likely to

worsen, but from the direct impact on that person's mental health of the decision to remove. Nonetheless the similarities are in my view more important than the differences.

63. In *N v Secretary of State for the Home Department* [2005] 2 WLR 1124, where *D v United Kingdom* was the subject of detailed consideration by the House of Lords, the analysis embraced cases of mental as well as physical illness (see, in particular, paras 44 and 70); and although that case was concerned with the specific problems arising out of the disparity of medical facilities for the treatment of HIV/AIDS in different countries of the world, it does serve to illustrate the relevance of the availability of treatment in the receiving state and to underline the high threshold for the application of article 3. Thus it was held that only in very exceptional circumstances would an applicant's medical condition make removal contrary to article 3. The test of exceptional circumstances would not be satisfied if medical treatment was available in the receiving country:

> "it would need to be shown that the applicant's medical condition had reached such a critical stage that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services which he would need to prevent acute suffering while he is dying" (per Lord Hope of Craighead at para 50; see, to the same effect, Baroness Hale of Richmond at para 69).

64. The reference to "compelling humanitarian grounds" brings one back to the first of the six factors in *J v Secretary of State*. One way of determining whether the case reaches the article 3 threshold is to ask whether removal would be an "affront to fundamental humanitarian principles".

65. Mr Southey contended that the evidence of an increased risk of suicide in this case rendered the claim arguable despite the high article 3 threshold. He sought to derive assistance from the judgment of the Court of Appeal in the case of *Soumahoro*, one of three cases reported together under the title *R (Razgar) v. Secretary of State for the Home Department* [2003] Imm AR 529: *Soumahoro's* case, unlike that of *Razgar*, was not the subject of further appeal to the House of Lords (whose decision is reported at [2004] 2 AC 368).

66. The passage particularly relied on by Mr Southey is this (para 85):

> "This appellant is a person who is suffering from depression and has on two occasions taken overdoses of medication which required her to be admitted to hospital. There is uncontroverted evidence that, if she is removed to France, there is a real risk that she may commit suicide …. We agree with the judge that the issue was the degree of risk that there would be an increased likelihood of suicide. *If it was arguable on the evidence that there was a real risk of a significantly increased risk that, if she were removed to France, the appellant would commit suicide, then in our view her claim based on article 3 could not be certified as manifestly unfounded*" (emphasis added).

67. In *J v Secretary of State*, however, at paras 34-40, the court was at pains to stress that that passage did not represent a modification of the core test for the application of article 3 and was to be read in the light of the particular facts of that case. The court agreed with the Immigration Appeal Tribunal in *AA v Secretary of State for the Home Department* [2005] UKIAT 00084 that an increased risk of suicide was not itself a breach of article 3, though in certain circumstances it was capable of being a breach. In the light of those observations I think it unhelpful to look at the language used in *Soumahoro*. The application of article 3 should be considered by reference to the test and its amplification as set out in *J v Secretary of State*.

68. I turn to consider the application of the test to the facts of the present case. It is common ground that the respondent is entitled for these purposes to rely on the effect of removal on his wife's mental health. As to that, the court must proceed in this context on a view of the evidence that is most favourable to the respondent, even though the bleakest assessment of Mrs Tozlukaya's condition comes from Ms Citron who, on the face of it, is the least well qualified of the defence experts to express an opinion on the subject. Dr Turner (paras 38-39 above) states that Mrs Tozlukaya's risk of suicide following removal to Germany will be higher than it presently is; and, whilst he appears to accept that the risk will reduce over time with appropriate treatment in Germany, he also indicates that, because of her subjective fear of return to Turkey, it will not reduce as quickly as would otherwise be the case and she is unlikely to achieve a complete recovery. Dr Hajioff (para 40 above) states that there will be an increase in the risk of suicide; and that, whilst the risk will gradually diminish if she is given appropriate treatment in Germany, it will take many months. Ms Citron (para 41 above; see also para 31) considers that the risk of suicide will not only be increased but will be "severe"; and that any treatment provided in Germany will be unlikely to be sufficient to ensure that Mrs Tozlukaya does not continue to pose a severe risk of suicide.

69. As regards the three stages of removal identified in *J v Secretary of State* (para 53 above), I need say very little about the first. I do not consider there to be any question of a breach of article 3 while Mrs Tozlukaya remains in this country following the communication to her of the removal decision, even if communication of that decision gives rise in itself to an increased risk of suicide. The authorities will remain under a positive obligation to take reasonable measures to protect her against the risk of suicide (cf. *Keenan v United Kingdom*, at para 56 above). There is no reason to believe that they will be in breach of that obligation.

70. Similar considerations apply to the second stage, i.e. physical removal by aeroplane to Germany. Mrs Tozlukaya will have suitably qualified escorts (para 35 above) which, as Dr Hajioff accepts, will mean that the risk of her harming herself during this period is low. In any event, what is proposed amounts in principle to the taking of reasonable measures to protect against that risk and there is again no reason to believe that there will be any breach of the positive obligation to take such measures under article 3.

71. As to the third stage, it is clear from the Secretary of State's evidence (para 36 above) that appropriate measures will be taken by the German authorities, both at the airport and subsequently, to protect against the risk of suicide. In addition to the general point that Germany is a signatory to the European Convention on Human Rights, there is specific evidence that relevant medical facilities will be available in Germany

for the respondent and his family and that the treatment that Mrs Tozlukaya will receive can be expected to be at least as good as the treatment she has received in this country. In addition, suitable accommodation will be provided.

72. In my judgment it is plain in these circumstances that an increase in the risk of suicide as a result of the removal is not sufficient to bring the case near the high article 3 threshold, even if the risk is regarded as severe and likely to continue. I do not see how it could be said to be an affront to fundamental humanitarian principles to return this respondent and his family to Germany.

73. I should mention, for completeness, that in my view the position is not materially affected by the potential impact on the children of a possible deterioration in their mother's mental health, or even her possible suicide. Even if it is permissible to have regard to such an impact in the context of article 3, as opposed to article 8, it does not seem to me that it could affect the outcome in this case.

74. Accordingly, I take the view, in respectful disagreement with the conclusion reached by the deputy judge, that the respondent's claim under article 3 is bound to fail and that in this respect the Secretary of State was entitled to certify the claim as clearly unfounded.

Article 8

75. Mr Southey conceded that it was highly unlikely that the claim under article 8 could succeed on mental health grounds if the mental health claim had failed under article 3. However, in reliance on *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, he sought to argue that the claim in this case ought to succeed under article 8 as well as under article 3. I do not think it necessary to deal with *Razgar*, save to note, first, that *Razgar* shows that the threshold for successful reliance on article 8 in a mental health case is very high (see e.g. per Lord Bingham at para 9); and, secondly, that the present case is factually very different from *Razgar* because of the detailed evidence filed by the Secretary of State concerning the facilities and treatment that would be available in Germany if the respondent and his family were removed there. It is sufficient to state my conclusion that, in the light of the considerations to which I have referred in the context of article 3, the respondent's claim under article 8 would in my view be bound to fail in so far as it relates to the effect of removal on the mental health of Mrs Tozlukaya.

76. There is, however, an altogether separate strand to the article 8 claim, in relation to which the respondent's case has more substance to it. It concerns the position of the two children of the family, now aged 9 and 4 respectively, and in particular that of the elder child.

77. The deputy judge held that, in view of the length of time they have been in the United Kingdom and the ties they will have established during that period, removal of the children would arguably constitute an interference with their right to private life under article 8(1). I agree.

78. The Secretary of State contends that any such interference is justified under article 8(2) by the need to maintain firm and effective immigration controls. This engages the issue of proportionality. As Lord Bingham expressed it in *Razgar*, "decisions

taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis" (para 20). The approach to be adopted by the Tribunal (or adjudicator, as was then the case) in these circumstances was laid down in *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105, [2006] QB 1, at para 59:

> "The true position in our judgment is that the Human Rights Act 1998 and section 65(1) [of the Immigration and Asylum Act 1999] require the adjudicator to allow an appeal against removal or deportation brought on article 8 grounds if, but only if, he concludes that the case is so exceptional on its particular facts that the imperative of proportionality demands an outcome in the appellant's favour notwithstanding that he cannot succeed under the Rules."

79. In deciding whether the case is truly exceptional an immigration judge is entitled to have regard to statements of policy by the Secretary of State as to the exercise of his discretion to grant leave to remain outside the Immigration Rules. If a policy tells in favour of the person concerned being allowed to stay in this country, it may affect the balance under article 8(2) and provide a proper basis for a finding that the case is an exceptional one. In *Shkembi v Secretary of State for the Home Department* [2005] EWCA Civ 1592 the court allowed an appeal on a procedural ground but considered the relevance of a policy when rejecting an argument by the Secretary of State that it should decline to remit the case because the claim was doomed to fail. The policy in question was the Secretary of State's concession, announced in October 2003, in respect of families who came to this country prior to October 2000. Having pointed out that the Tribunal has an independent assessment to make, Latham LJ stated (paras 14-15):

> "… The consequence is that the Tribunal in the present case would have been entitled to consider, and if the matter is returned to the Tribunal will have to consider, what the true policy is and decide whether it does or does not apply to the appellant [on] the facts as we understand them ….
>
> The policy does not strictly apply to the appellant but, nonetheless, [counsel for the appellant] is entitled, it seems to me, to argue that if and insofar as a rationale can be discerned for the policy the Tribunal can consider whether or not as a consequence the Adjudicator was wrong to conclude that this was merely a concession which the Secretary of State is entitled either to depart from or require strict adherence to, but goes further than that and justifies the conclusion that his is an exceptional case."

80. In the present case the respondent relies on the Secretary of State's policy on removal where there are children with long residence in this country. That such a policy exists is not in doubt, but the case has thrown up a troubling degree of confusion about its actual terms.

81. A document headed "DP 5/96 and instruction to IES" states in its present form:

> "DEPORTATION IN CASES WHERE THERE ARE CHILDREN WITH LONG RESIDENCE
>
> Introduction
>
> The purpose of this instruction is to define more clearly the criteria to be applied when considering whether enforcement action should proceed or be initiated against parents who have children who were either born here and are aged 7 or over or where, having come to the United Kingdom at an early age, they have accumulated 7 years or more continuous residence.
>
> Policy
>
> Whilst it is important that each individual case must be considered on its merits, the following are factors which may be of particular relevance:
>
> (a) the length of the parents' residence without leave;
>
> (b) whether removal has been delayed through protracted (and often repetitive) representations or by the parents going to ground;
>
> (c) the age of the children;
>
> (d) whether the children were conceived at a time when either of the parents had leave to remain;
>
> (e) whether return to the parents' country of origin would cause extreme hardship for the children or put their health seriously at risk;
>
> (f) whether either of the parents has a history of criminal behaviour or deception.
>
> 3. When notifying a decision to either concede or proceed with enforcement action it is important that full reasons be given making clear that each case is considered on its individual merits."

82. The document was originally published in March 1996 and referred in the Introduction to children "aged 10 or over" or who had accumulated "10 years or more" continuous residence. The document in its present form reflects a manuscript amendment whereby "7" was substituted for "10" following a policy modification announced by the Under-Secretary of State for the Home Department, Mr O'Brien, in a written answer to a Parliamentary question on 24 February 1999.

83. In his Parliamentary statement, as it effectively was, Mr O'Brien said this:

> "For a number of years, it has been the practice of the Immigration and Nationality Directorate not to pursue

> enforcement action against people who have children under the age of 18 living with them who have spent 10 years or more in this country, save in very exceptional circumstances.
>
> We have concluded that 10 years is too long a period. Children who have been in this country for several years will be reasonably settled here and may, therefore, find it difficult to adjust to life abroad. In future, the enforced removal or deportation will not normally be appropriate where there are minor dependent children in the family who have been living in the United Kingdom continuously for 7 or more years. In most cases, the ties established by children over this period will outweigh other considerations and it is right and fair that the family should be allowed to stay here. However, each case will continue to be considered on its individual merits."

84. In *Baig v Secretary of State for the Home Department* [2005] EWCA Civ 1246 there was an issue as to the effect of that statement. Counsel for the applicant contended that it introduced a significant shift in the policy, in that it made clear, which the original document did not, that the assumption was that children falling within the stated period of years should not be removed from this country, and that an exceptional case would need to be demonstrated before they were removed. After some discussion counsel for the Secretary of State accepted, albeit for the purpose of the particular case, that a fair reading of the original document and the Parliamentary answer was to be found in a passage in Butterworths' *Immigration Law Service*, at para 1121, which reads:

> "Whilst it is important that each individual case must be considered on its merits, there are specific factors which are likely to be of particular relevance when considering whether enforcement action should proceed or be initiated against parents who have children who have lengthy residence in the United Kingdom. For the purpose of proceeding with enforcement action in a case involving a child, the general presumption is that we would not usually proceed with enforcement action in cases where a child was born here and has lived here continuously to the age of seven or over, *or* where, having come to the United Kingdom at an early age, they have accumulated seven years or more continuous residence. However, there *may* be circumstances in which it is considered that enforcement action is still appropriate despite the lengthy residence of the child, for example in cases where the parents have a particularly poor immigration history and have deliberately seriously delayed consideration of their case. In all cases the following factors are relevant in reaching a judgment on whether enforcement action should proceed:
>
> - the length of the parents' residence without leave; whether removal has been delayed through protracted (and often repetitive) representations or by the parents going to ground;

- the age of the children;

- whether the children were conceived at a time when either of the parents had leave to remain;

- whether return to the parents' country of origin would cause extreme hardship for the children or put their health seriously at risk;

- whether either of the parents has a history of criminal behaviour or deception.

It is important that full reasons are given making clear that each case is considered on its individual merits."

85. In the present case, the argument at first instance proceeded on the same basis. That the deputy judge so understood the position is clear from para 83 of his judgment. In the course of the hearing before us, however, it became apparent that the Secretary of State took a more limited view of the policy. At the court's request, the Secretary of State's stance was confirmed in a letter from counsel following the hearing. Counsel stated on instructions that the Secretary of State's policy is as set out in the original document DP 5/96 as amended by the substitution of "7" for "10", and that the ministerial statement by Mr O'Brien is not part of the policy. The Secretary of State does not accept that the summary in Butterworths' *Immigration Law Service* is an accurate reflection of the policy.

86. In the present case a decision was purportedly taken under the policy. It was contained in a letter dated 20 June 2005 sent in the context of the judicial review proceedings. The decision was in these terms:

> "The announcement of the concession made it clear that each case would be considered on its individual merits. The Secretary of State has again considered your client's case but is not prepared to grant the family the benefit of the concession given the particular circumstances of their case. They used the services of a people smuggler to gain entry to the United Kingdom in June 1998, travelling from Germany, where they had previously sought asylum. Their application for asylum in this country was certified on safe third country grounds in January 1999 after the authorities in Germany had accepted responsibility for the further consideration of their claim under the terms of the Dublin Convention. They have been aware since that time that they have no claim to remain in the United Kingdom and that they are properly returnable to Germany, and have only been able to remain until now by pursuing protracted legal challenges against their removal. In all the circumstances, the Secretary of State is not prepared to exercise discretion in their favour."

87. The court also sought confirmation of the terms of the policy actually applied by the decision-maker. In a further letter sent after the hearing, counsel for the Secretary of

State stated on instructions that the policy considered and applied by the official who took that decision on behalf of the Secretary of State was the policy set out in the original document DP 5/96 as amended by the substitution of "7" for "10", and that caseworkers do not have access to Mr O'Brien's statement or to the summary set out in Butterworths' *Immigration Law Service*.

88. All this places the Secretary of State in a most uncomfortable position. In 1999 the Under-Secretary of State made in Parliament what was clearly intended to be a statement of policy. The way in which the statement described the existing practice and the change to 7 years instead of 10 years strongly suggested a presumption against enforcement action in such cases ("save in very exceptional circumstances", "will not normally be appropriate"). Yet it is now said that none of this forms any part of the policy and that the actual policy is limited to one under which each case is considered on its merits but a number of factors may be of particular relevance (something which is barely more than a statement of considerations relevant in *any* discretionary decision of this kind). Moreover this position is now adopted despite the absence of any action over the intervening years to correct the false impression created by the text of Butterworths *Immigration Law Service* on which practitioners will have relied, and despite the concession made by counsel for the Secretary of State in *Baig*.

89. All this is contrary to basic principles of good administration. It also has potentially important legal consequences. From the information we have been given it is apparent that decisions concerning children with long residence are taken without any regard to the Parliamentary statement on the subject by the Under-Secretary of State. There is a strong argument not only that the Parliamentary statement is a relevant consideration, but that there is a legitimate expectation that it will be applied. If, therefore, the issue before us were a direct challenge to the decision of 20 June 2005 purporting to deny the family "the benefit of the concession", I have little doubt that the challenge would succeed.

90. The actual issue before us is of course different. It is whether there is an arguable case that, in the light of the policy and Parliamentary statement to which we have referred and their application in the circumstances of the case, the Tribunal might find that this was an exceptional case in which removal would be disproportionate under article 8. On that question the decision of 20 June 2005 would carry no weight since it was taken without regard to the Parliamentary statement. The Tribunal would be entirely free to form its own judgment on the matter.

91. I think that there is force in the views expressed by the deputy judge on this question. He proceeded on the basis that the policy expressed in, or as amended by, the Parliamentary statement "tilts in favour of the grant of leave" (para 83(4)). He assumed, understandably, that the Secretary of State's actual decision had been taken by reference to the Parliamentary statement. But even on that basis he considered there to be an arguable case:

> "(5) In this case, the Secretary of State was entitled to refer to the fact that he had taken an early decision to remove the Claimant and his wife under the Dublin Convention and that there have been proceedings to challenge this decision which in total have occupied a lengthy period of time. However, of that

time some 22 months passed waiting for the resolution of an important general point in other lead cases, about 2 years were spent on appeals which the Claimant was entitled to pursue and the present application for judicial review was launched over a year ago. Although the Tribunal might need to investigate why Mrs Tozlukaya's mental health difficulties were not raised earlier than June 2004, this is not a procedural history of such manifest abuse that the family was bound to be excluded from the benefit of the policy.

(6) … when it comes to deciding whether removal would be disproportionate under Article 8, the Tribunal will be entitled to take account of the Secretary of State's policy and that it calls for an individualised decision with something of a bias in favour of the claimant …."

92. In the circumstances I do not think that the respondent's case under article 8 concerning the position of the children is bound to fail.

Conclusion

93. For the reasons I have given I consider that the Secretary of State was entitled to certify the respondent's claim as clearly unfounded in so far as it related to article 3 and the mental health aspect of article 8. But I do not consider that he was entitled so to certify in so far as the claim related to the position of the respondent's children under article 8. On that limited basis I would uphold the quashing of the Secretary of State's certificate and would dismiss this appeal.

Lord Justice Lloyd :

94. I agree.

Lord Justice Buxton :

95. I also agree.