C1/2002/1914

Neutral Citation Number: [2003] EWCA Civ 1187
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London, WC2

Thursday, 24th July 2003

B E F O R E:

LORD JUSTICE ALDOUS
LORD JUSTICE BUXTON
LORD JUSTICE MAY

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GZIM JANUZI

Applicant/Appellant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent/Respondent

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(Computer-Aided Transcript of the Palantype Notes of
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MISS S HARRISON (instructed by Messrs Tyndallwoods, Birmingham B2 5TS) appeared on behalf of the Appellant
MISS L GIOVANNETTI (instructed by Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondent

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J U D G M E N T

1. LORD JUSTICE ALDOUS: I invite Lord Justice Buxton to give the first judgment.

2. LORD JUSTICE BUXTON: This is an appeal from a determination of the Immigration Appeal Tribunal, notified to the parties as long ago as 12th July 2002, in which the Immigration Appeal Tribunal allowed an appeal by the Secretary of State from a determination of an adjudicator. The appellant concerned, Mr Januzi, is a citizen of the Federal Republic of Yugoslavia. However he is Albanian by race and he comes from Mitrovica, an area in which persons of Albanian extraction are in a minority. He came to this country as long ago as 17th May 1998 and claimed asylum on the basis of persecution by Muslim elements in his home area of Mitrovica. It is not necessary to go into the details of that, which are not in issue for the purposes of this appeal, save to say that Mr Januzi gave evidence that his father had been a member of the political party the LDK, which had been identified by hostile elements amongst the Serb majority. He himself was a supporter, though not a member, of that party and for that reason and because of his family connections he had been arrested by the majority elements in that area and had been ill-treated and assaulted in a way that would attract the protection of the Refugee Convention.

3. The Secretary of State's position with regard to the claim is set out in paragraph 4 of the Immigration Appeal Tribunal's determination:

> "The Secretary of State accepted that the appellant came from a majority Serb area and that, as an ethnic Albanian he might face protection concerns. However, as 95% of the population was ethnic Albanian, he could safely live in many other parts of the province. Some 800,000 ethnic Albanians (90% of those who had fled Kosovo in 1998 and 1999) had already voluntarily returned."

4. Putting it therefore in what I think now have to be called colloquial terms, the case on its face raised questions of internal flight; that is to say, it was the Secretary of State's contention that Mr Januzi would be safe if he went, for instance, to Pristina, an area of Kosovo in which Albanians were in the majority, and located, as I understand it, only some 35 kilometres from his home town of Mitrovica.

5. The internal flight issue and the question of the circumstances in which Mr Januzi might be returned to Kosovo are strongly affected by the evidence that was before both the adjudicator and the Immigration Appeal Tribunal as to his mental health. That evidence took the form of a report and a subsequent follow-up report from a Dr Barrett, who is a consultant psychiatrist and a lecturer at the Imperial College of Science and a member of the Royal College of Psychiatrists. He had examined Mr Januzi, albeit that examination only took place some three years after Mr Januzi arrived in this country. He reported as follows:

> "I think that Mr Januzi is currently suffering from a moderate depressive episode with somatic symptoms. Moderate depressive episode with somatic symptoms is classified as code F32.11 in the International Classification of Diseases version 10 as used by the World Health Authority."

6. Dr Barrett then went on to describe the treatment that he thought that Mr Januzi ought to receive for the depressive disorder. Dr Barrett was not wholly certain whether the disorder was of toxic origin -- that is to say, caused by toxic substances that he had encountered in the course of warfare or disturbance in Kosovo -- or had its origin in a psychological basis. He felt that it did not matter what was in fact the origin. Dr Barrett pointed out that Mr Januzi was currently receiving antidepressant medication of a nature that Dr Barrett thought was not the most suited for his condition. He took the view that the medicine should be changed and

that Mr Januzi would also be helped by counselling or psychotherapy, neither of which he is, I think, receiving in this country.

7. Dr Barrett in his first report then went on as follows:

> "... returning to Kosovo would also be viewed as a negative step. People with such symptoms can be returned to the environment which precipitated them but only if this is done rapidly and in association with complex pharmacological management."

I omit a sentence, and Dr Barrett then concluded:

> "... because he has had symptoms for in excess of a year they are liable to have become chronic and to be worsened by a return to the precipitating environment."

8. Dr Barrett was asked to supplement his report with specific reference in more detail to the effect on Mr Januzi's mental health of a return to Kosovo. He said that if the symptoms had been caused by physical or toxic effects, such a return might be disastrous because the environmental precipitating factors would return. Dr Barrett then went on, in an important paragraph:

> "If, on the other hand one adheres to the psychological school of thought (as I do) then a return to Kosovo would be equally disastrous. After this length of time Mr Januzi's symptoms have become chronic, and a return to the environment would be likely to worsen them. I would have thought that he would be at strong risk of developing more symptoms of depression, and in due course to qualify for a diagnosis of severe depression. Such a diagnosis carries with it a strong risk of death by suicide or self-neglect. This risk should not be underestimated."

9. In case the point had not been fully made, Dr Barrett wrote to Mr Januzi's solicitors after the conclusion of the proceedings before the Immigration Appeal Tribunal, emphasising that his concern as to Mr Januzi's return to Kosovo related to the effect upon him of return to any part of Kosovo. It was not limited to return to Mitrovica. As I have said, that letter really only underlined what was already inherent in his report.

10. In that context the Tribunal and ourselves are taken to such information as is available about the arrangements for treatment of mental health disorders, including disorders of the serious sort that Dr Barrett foresaw in his report in Kosovo. The United Nations High Commissioner for Refugees has issued a series of papers about Kosovo, and has identified groups of persons whom he thinks should not be returned to Kosovo on what are described as humanitarian grounds. It is perhaps important in the context of an issue that I shall have to deal with later to emphasise that latter point. In these papers the High Commissioner is not, as I would understand it, saying that such a return would be a breach of the Convention, but saying that it is desirable, because of conditions at present in Kosovo, that certain persons should not be returned. Amongst those groups are what are described as:

> "Chronically ill persons whose conditions require specialised medical intervention of the type not yet available in Kosovo."

11. The UNHCR in a document shown to us, took the view that "severe and chronic mental illness and psychosocial disorders" cannot at the moment be satisfactorily treated in Kosovo. He pointed out that there was one psychiatrist for every 100,000 inhabitants and the facilities

were not suitable for treatment of what were likely to be a large number of persons seeking those facilities.

12. The only evidence to put in the balance against that gloomy, and indeed alarming, picture of mental health provision in Kosovo is a report, also before the Tribunal and before us, of the Organisation for Security and Cooperation in Europe's Mission to Kosovo. That sets out a good deal of helpful factual information about a whole range of services, including education, the economy, social services and the infrastructure. It deals also with health, and records that there is in fact what is described as a psychiatric institution in Pristina, part of the clinical centre of the university, which is stated to employ some 144 people. There is no indication of how many of them are clinically qualified, though we are told the name of the doctor who is in charge of that group.

13. The principal argument before the Immigration Appeal Tribunal was therefore the view that had commended itself to the adjudicator that it would be, in terms of the language then used in cases of this sort, "unduly harsh" to return Mr Januzi to that part of Kosovo where he would not suffer persecution for a Convention reason.

14. Paragraph 16 of the Immigration Appeal Tribunal's view on that is of importance and I need to set it out in full:

> "Of course it will be difficult for the appellant to readjust to life in Kosovo. However, we are not satisfied that despite the medical report and the various factors relied on by Counsel, it would be unduly harsh for the appellant to be returned to Pristina. We found that there are facilities available for treatment in Pristina which are adequate for the appellant and we are not satisfied on the evidence that the appellant's return to Kosovo would precipitate a deterioration in his condition. We take into account that many thousands of Kosovans have returned to Kosovo. GPs in the area will be all too familiar with dealing with problems of returnees who would have faced ill treatment at the hands of the Serbs. We are not satisfied that the appellant could not receive some appropriate counselling nor that adequate medication would not be available for him. Although the appellant may be isolated, there would be many individuals in circumstances like his in Pristina. He would have the support of his compatriots in coming to terms with the difficulties he would undoubtedly face on return. We do not underestimate these difficulties and we give weight to all the factors properly relied upon by Counsel. However we do not find that it would be unduly harsh for the appellant to return to Pristina nor do we find that his Article 3 or Article 8 rights would be infringed by his return. It is right to record that counsel placed her arguments principally on the question of undue harshness."

15. The centre point of that decision was therefore the issue of undue harshness in a safe haven case, such as this was. For reasons that will become apparent later in this judgment, the centrality of that argument became less significant before us; and before us issues arising not under the Refugee Convention, but under the Human Rights Convention, Article 3 and Article 8 became of considerable more importance. I will say now that one of the difficulties in dealing with this appeal has been the fact that, because of the way in which it was argued below, the Immigration Appeal Tribunal did not give to the Article 8 question attention of the detail required both by authority decided since the Immigration Appeal Tribunal made its determination and by the detailed arguments that we have heard in this court. All that, however, is for the future.

16. I turn first to the question of undue harshness and the circumstances in which a person can claim that it would not be right under the Refugee Convention to return him to a part of his home country where he would not be at risk of suffering persecution for a Convention reason. It was for some time in doubt whether those considerations arose under the Refugee Convention at all. Those doubts at least were laid to rest by the well-known decision of this court in R v Secretary of State for the Home Department *ex parte* Robinson [1998] QB 929, a judgment delivered by Lord Woolf, then Master of the Rolls. It is not necessary to go into the facts of that case, save to say that it raised the issue with which we are now concerned because it was contended that the applicant, who was a Tamil and therefore potentially suffering persecution in part of Sri Lanka, would be able to relocate within Sri Lanka to Colombo without thereby suffering that persecution. Lord Woolf said this at page 939F:

> "It follows that if the home state can afford what has variously been described as 'a safe haven', 'relocation', 'internal protection', or 'an internal flight alternative' where the claimant would not have a well-founded fear of persecution for a Convention reason, then international protection is not necessary. But it must be reasonable for him to go to and stay in that safe haven."

Lord Woolf then cited a case in the Federal Court of Australia from which he drew that conclusion. He continued at page 939H:

> "In determining whether it would not be reasonable to expect the claimant to relocate internally, a decision-maker will have to consider all the circumstances of the case, against the backcloth that the issue is whether the claimant is entitled to the status of refugee. Various tests have been suggested. For example, (a) if as a practical matter (whether for financial, logistical or other good reason) the 'safe' part of the country is not reasonably accessible; (b) if the claimant is required to encounter great physical danger in travelling there or staying there; (c) if he or she is required to undergo undue hardship in travelling there or staying there; (d) if the quality of the internal protection fails to meet basic norms of civil, political and socio-economic human rights."

17. So far as the last of these considerations is concerned, the preamble to the Convention shows that the contracting parties were concerned to uphold the principle that human being should enjoy fundamental rights and freedoms without discrimination. In Thirunavukkarasu, 109 DLR (4th) 682, at page 687, Linden JA, giving the judgment of the Federal Court of Canada, said:

> "Stated another way for clarity ... would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?"

18. Two comments should be made, with respect. First, the court in these questions is still concerned with an issue of refugee status; that is to say, that the applicant must establish that he has a well-founded fear of persecution for a Convention reason. He is not entitled to international protection unless that is so. Secondly, the judgment in Robinson was delivered before this country had the benefit of the Human Rights Act and the direct applicability of the European Convention on Human Rights. True it is, as Miss Harrison reminded us, that even then we were obliged to interpret international instruments in the light of human rights considerations. But, in my respectful judgement, it is undoubtedly the case that the introduction of human rights considerations by that method was not as apparent to the courts as a necessary step as it might now be.

19. Based upon the observations of Lord Woolf, Miss Harrison argued, as has been frequently argued in cases since, that in considering an "internal flight relocation" the court must indeed take a wide range of circumstances into account, including the state in the area of relocation of human rights considerations, not being considerations that would lead to a finding of persecution in terms of the Refugee Convention.

20. The law on these matters, and the case of Robinson and other cases, have recently been exhaustively reconsidered by this court, in a constitution presided over by the Master of the Rolls and containing Simon Brown LJ, the Vice-president of the court, and Lord Justice Ward, in the case of AE and FE, determined as recently as 16th July 2003 and therefore, necessarily, a case that not only was not available to the Immigration Appeal Tribunal, but also was not available to the advocates at the time of preparation of this case.

21. The court in AE and FE necessarily started from the jurisprudence of Robinson and cases that have followed it, which I have already endeavoured to set out. It commented at paragraph 58 in these terms, referring to the passage of Lord Woolf that I have cited:

> "Lord Woolf referred to the principle that [civil, political and socio-economic human rights] should be enjoyed *without discrimination*. While discriminatory denial of human rights in the place of relocation can plainly be relevant to the question of whether an asylum-seeker can reasonably be expected to move there, we do not consider that *Robinson* establishes that it will not be reasonable to require relocation unless, in the place of relocation, these human rights are protected."

22. The court also went on, in paragraph 66, to refer to developments since Robinson. In particular, it drew attention to the passing of the Human Rights Act and, with it, the positive obligation to have regard to Convention rights when considering whether to remove asylum seekers. In that context, therefore, and for that reason this court emphasised that in a case under the Refugee Convention, such as an internal flight case necessarily will be, it is necessary to concentrate on issues that refer to refugee questions and the protection afforded by that Convention. At paragraph 24, in that context, it said:

> "... the nature of the test of whether an asylum seeker could reasonably have been expected to have moved to a safe haven is clear. It involves a comparison between the conditions prevailing in the place of habitual residence and those which prevail in the safe haven, having regard to the impact that they will have on a person with the characteristics of the asylum seeker. What the test will not involve is a comparison between the conditions prevailing in the safe haven and those prevailing in the country in which asylum is sought."

23. At paragraph 38 it said this, having quoted passages from the works of both Prof Hathaway and Prof Goodwin-Gill, passages which had been quoted to the court in Robinson:

> "An asylum seeker who has no well-founded fear of persecution but has left his home country because he does not there enjoy those rights, will not be entitled to refugee status. When considering whether it is reasonable for an asylum seeker to relocate in a safe haven, in the sole context of considering whether he enjoys refugee status, we cannot see how the fact that he will not there enjoy the basic norms of civil, political and socio-economic human rights will normally be relevant. If that is the position in the safe haven, it is likely to be the position throughout the country. In such circumstances it will be a neutral factor when considering whether it is reasonable for him to move from the place where

> persecution is feared to the safe haven. States may choose to permit to remain, rather than to send home, those whose countries do not afford these rights. If they do so, it seems to us that the reason should be recognised as humanity or, if it be the case, the obligations of the Human Rights Convention and not the obligations of the Refugee Convention."

24. I venture respectfully to comment that that passage relates back to the passage in paragraph 24 that I have already quoted, requiring a comparison between conditions in the safe haven and conditions in the place of habitual residence: because the court points out that in the normal circumstance the availability of what it described as "the basic norms of civil, political and socio-economic human rights" will not differ between those two places. Therefore, they will not enter into the comparison that the court has indicated.

25. This court considered that on some occasions sight had been lost of the centrality of refugee considerations when considering issues under the Refugee Convention; and that human rights considerations -- important though they are, but not engaged by the Refugee Convention -- had been allowed to play a part. It said this at paragraph 28:

> "When considering whether it would be unreasonable, or unduly harsh, to send an asylum seeker back to a safe haven within his home country, courts and jurists have tended to apply a test which involves not merely the considerations which bear on whether he enjoys the status of a refugee but also the wider considerations described above. The UNHCR has commended such an approach. The result has been that it is difficult to identify the extent to which decisions constitute rulings on the refugee status of asylum seekers as opposed to applications of wider humanitarian considerations."

At paragraph 64 it said this:

> "So far as refugee status is concerned, a comparison must be made between the asylum seeker's conditions and circumstances in the place where he has reason to fear persecution and those that he would be faced with in the suggested place of internal location. If that comparison suggests that it would be unreasonable, or unduly harsh, to expect him to relocate in order to escape the risk of persecution, his refugee status is established. The 'unduly harsh' test has, however, been extended in practice to have regard to factors which are not relevant to refugee status, but which are very relevant to whether exceptional leave to remain should be granted having regard to human rights or other humanitarian considerations."

26. The court therefore held, in paragraph 67, that the approach was as follows:

> "It seems to us important that the consideration of immigration applications and appeals should distinguish clearly between (1) the right to refugee status under the Refugee Convention, (2) the right to remain by reason of rights under the Human Rights Convention and (3) considerations which may be relevant to the grant of leave to remain for humanitarian reasons. So far as the first is concerned, we consider that consideration of the reasonableness of internal relocation should focus on the consequences to the asylum seeker of settling in the place of relocation instead of his previous home. The comparison between the asylum seeker's situation in this country and what it will be in the place of relocation is not relevant for this purpose, though it may be very relevant when considering the impact of the Human Rights Convention, or the requirements of

humanity."

27. That guidance, and the clear indication of the comparison to be made, renders straightforward the determination of the Refugee Convention issue in this case.

28. By far the strongest point urged upon the courts below was the medical considerations; that is to say, the difficulty of securing proper medical treatment for the condition in respect of which Dr Barrett thought Mr Januzi to be at risk. But it was entirely clear from Dr Barrett's evidence -- indeed he went, as we have seen, to some trouble to emphasise it -- that those difficulties, both in terms of the likely effect on Mr Januzi and also of the availability of treatment, extended throughout Kosovo. They were as much and as little apparent in Pristina as they were in Mitrovica and vice versa. That being so, the application of the guidance given by this court in AE and FE demonstrates that those considerations must be left on one side. They are irrelevant because they apply to both places, and cannot be taken into account in the balance.

29. Miss Harrison in effect recognised that in her submissions, but she said that there were further considerations, even within the test in AE and FE, that the Tribunal below ought to have borne in mind, had it appreciated that this was indeed the nature of the test and to which this court ought to give weight even under the AE test. She pointed to the fact that Mr Januzi had, or at least had had, family ties in Mitrovica which would not be available to him in Pristina, and that the situation as to accommodation and living conditions in Pristina, indeed in Kosovo generally, was very unsatisfactory, as the Refugee Commissioner had said. Therefore, firstly, he would suffer by being moved from Mitrovica in the loss of his family connections; and secondly, that that would aggravate the mental condition to which the doctor had testified.

30. I am not able to give weight to those arguments. So far as accommodation is concerned, there is nothing in the evidence shown to us that suggests that this also is not a pan-Kosovo problem. So far as the social factors are concerned, we are concerned with the position now. We know little or nothing about Mr Januzi's family connections in Mitrovica. But even if that were not so, first of all, as Miss Giovannetti pointed out, these matters were raised before the Tribunal and the Tribunal refers to them, albeit understandably in somewhat allusive terms, granted that these matters were not in any way stressed before them; and secondly, in applying this comparison we still have to have in mind the guidance that was given by this court in the case of Karanakaran v Secretary of State for the Home Department [2000] 3 All ER 449, where, admittedly addressing himself to the language of undue harshness, Brooke LJ said at page 456 that although the language was not the language of inability, or impossibility, it still imposed a very rigorous test to be pursued it could be said that relocation was unreasonable. Applying any sort of rigorous test to this case, it becomes clear, in my judgement, that relocation is an option available to Mr Januzi in order to avoid persecution in his home area of Mitrovica. Granted that what was the principal case before the court below fails, there are no grounds for relief with regard to the Refugee Convention.

31. I do, however, then have to come to considerations arising under the Human Rights Convention, emphasised by this court in AE as being something that the court will normally go on to consider in a case such as this, where complaint is made as to breach of the party's rights in being relocated to another part of his home country.

32. Although Article 3 was referred to in the court below, and in passing before us, no serious case was made by Miss Harrison that the facts in this case reach the requirements of Article 3. She no doubt had well in mind the decision of the European Court of Human Rights in the case of D v United Kingdom 24 EHRR 423, where a very extreme case of danger to health -- indeed, danger not only to life but also to the dignified acceptance of death -- was found to

ground an Article 3 complaint. But even a case as extreme as that was described by the Strasbourg court as being one of quite exceptional circumstances, not normally to be relied on. That, however, takes us to the principal complaint which was raised under Article 8 of the Convention, albeit, as I say, having been a subsidiary matter in the court below.

33. It was for some considerable time in doubt as to whether the use of the powers of a country to expel persons who are not its nationals fell under Article 8 at all; that being a question of whether the territoriality principle in the application of the Convention extended to such an act of expulsion. It is, however, now clearly determined that in principle Article 8 questions can be engaged by a decision to remove a person from one country to another. That was made clear in the decision of the European Court of Human Rights in Bensaid v United Kingdom [2001] INLR 325, where the court said, at paragraph 46 of its judgment:

> "Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Art 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of Art 3 treatment may none the less breach Art 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity ..."

34. That emphasises the wide reach of Article 8, which is concerned not merely with family life (a point which is not in issue in our case) but also with the individual physical and moral integrity of the applicant. That is something that is potentially engaged by the danger to his health of return to Kosovo. In the Bensaid case, at paragraph 48, the court emphasised the significant degree of danger that must be established, and also the significant degree of harm involved; and held that an Article 8 case was not made out. It said this:

> "... the Court recalls that it has found ... that the risk of damage to the applicant's health from return to his country of origin was based on largely hypothetical factors and that it was not substantiated that he would suffer inhuman and degrading treatment. Nor in the circumstances has it been established that his moral integrity would be substantially affected to a degree falling within the scope of Art 8 of the Convention."

It then described how additionally it is necessary in an Article 8 case to bear in mind the powers and rights of the member state under Article 8(2), which have to be balanced out against the individual's interests under Article 8(1).

35. Further guidance as to the application of Article 8 in such cases is to be found in another recent decision of this court, Razgar v Secretary of State for the Home Department [2003] EWCA Civ 840, a decision handed down on 19th June 2003. The court engaged itself at some length with the territoriality principle, in the light of the warnings given in that regard by this court in the previous decision of R (Ullah) v Special Adjudicator [2003] 1 WLR 770, but concluded that it was in principle possible for Article 8 to be engaged in an expulsion case. The guidance that it gave needs to be set out in detail. At paragraph 22 the court said:

> "First, the claimant's case in relation to his private life in the deporting state should be examined. In a case where the essence of the claim is that expulsion will interfere with his private life by harming his mental health, this will include a consideration of what he says about his mental health in the deporting country, the treatment he receives and any relevant support that he says that he enjoys there. Secondly, it will be necessary to look at what he says is likely to happen to his mental health in the receiving country, what treatment he can expect to

> receive there, and what support he can expect to enjoy. The third step is to determine whether, on the claimant's case, serious harm to his mental health will be caused or materially contributed to by the difference between the treatment and support that he is enjoying in the deporting country and that which will be available to him in the receiving country. If so, then the territoriality principle is not infringed, and the claim is capable of being engaged. It seems to us that this approach is consistent with the fact that the ECtHR considered the merits of the article 8 claim in *Bensaid*. ...
>
> 23. The degree of harm must be sufficiently serious to engage article 8. There must be a sufficiently adverse effect on *physical and mental integrity*, and not merely on health ...
>
> 24. There must be substantial grounds for believing that the claimant would face a real risk of the adverse effect which he or she claims to fear: see, for example, *Kacaj v Secretary of State for the Home Department* [2001] INLR 354 at para 12. I would accept the submission of [counsel] that the degree of likelihood of the adverse effect occurring is no less than that required to establish a breach of article 3."

36. Therefore it is emphasised that in the context of an Article 8 claim it is necessary to make a comparison between the conditions enjoyed by the applicant in this country and the conditions that will affect him when he is transferred to another country: the very comparison that in a refugee case was emphasised by this court in AE not to be available.

37. The Tribunal in our case did not have the benefit of Razgar, nor did it have the benefit of any sustained argument, as far as we can see, on Article 8. We have, however, to approach its decision on the basis of Razgar and see whether it can nonetheless be upheld.

38. There are two different reasons why I am not persuaded that this decision can, in the light particularly of Razgar, be upheld in its reference to Article 8. The first is that I am not satisfied that the Tribunal sufficiently addressed or sufficiently explained its conclusions as to the medical implications of returning Mr Januzi to Kosovo. I quote just one sentence from paragraph 16 that I have already set out:

> "We found that there are facilities available for treatment in Pristina which are adequate for the appellant and we are not satisfied on the evidence that the appellant's return to Kosovo would precipitate a deterioration in his condition."

39. It is certainly not sufficiently explained how, and on the evidence that was before the Tribunal I am very doubtful whether it was open to the Tribunal to say that, they could conclude with confidence that there would be facilities in Pristina adequate for the treatment of the appellant; or, if that is reading the sentence too harshly, adequate for the treatment of persons in the general condition that the appellant was likely to find himself in. Secondly, the Tribunal said that it was not satisfied on the evidence that Mr Januzi's return to Kosovo would precipitate a deterioration in his condition. That it seems to me is contrary to the only evidence of a medical nature that they in fact had. That was the report of Dr Barrett. He said that if Mr Januzi was to return there would be strong risk of his incurring severe depression, and that in its turn carried a strong risk of death by suicide or self-neglect. If that was indeed the case, that was, at least potentially, a threat to his moral and physical integrity of a sort that potentially engages Article 8.

40. Miss Giovannetti argued that the Tribunal had been justified in taking that view of the evidence because the doctor did not say in terms that severe depression, and therefore suicide or self-neglect would occur, and it was that test that the Immigration Appeal Tribunal had rightly set out as the criterion that it had to adopt.

41. I find that a difficult submission in the light of what this court said in paragraph 24 of its judgment in Razgar, when it said that there must be substantial grounds for believing that the claimant would face a real risk of whatever adverse effect it was that he complained of. Both for that reason, and in terms of the general approach to human rights considerations, it seems to me that it is strongly arguable that the test is one of real risk of the adverse considerations, not of absolute certainty. I am therefore in any event concerned by the Tribunal's approach to the evidence.

42. Secondly -- and this is a matter in respect of which the Tribunal cannot be, in my judgement, in any way criticised -- they do not either go through the considerations set out in Razgar; or explain how they view the implications for their findings of the considerations that arise under Article 8(2); or say in what respects the requirements of immigration control are such as to offset whatever findings they eventually make in respect of the threats to Mr Januzi's condition.

43. I would therefore allow this appeal, but only on the limited basis that the matter should be referred back to the Immigration Appeal Tribunal for them to consider solely the issue arising under Article 8 in the light of the guidance in particular given by this court in Razgar. In so doing, it will, in my judgement, be necessary for the Tribunal again to review the evidence. I would consider it appropriate in this case, granted that the jurisprudence has significantly changed since the matter was before the Immigration Appeal Tribunal, for there to be a limited liberty to adduce either further evidence or to seek the adduction of Dr Barrett for cross-examination if, as was the case before us, the Secretary of State expresses concern about his evidence.

44. If my Lords agree, I would suggest that the matter be remitted in the first instance to the President of the Immigration Appeal Tribunal, for him to give directions for the further hearing of the human rights appeal in the light of the judgment of this court. In that limited way, and in that limited way only, I would allow this appeal.

45. LORD JUSTICE MAY: I agree that this appeal should be allowed to the extent only indicated by my Lord, Lord Justice Buxton, and that the matter should be remitted to the Immigration Appeal Tribunal for reconsideration of the human rights part of the matter. I agree with his reasoning and gratefully adopt his account of the facts and circumstances.

46. I agree, by reference to the very recent decision of this court in AE and FE v Secretary of State, that a Refugee Convention claim alone should fail. In the context of the reasonable possibility of relocation, a comparison has to be made between conditions prevailing in the place of habitual residence and those which prevail in the safe haven, having regard to the impact that they will have on a person with characteristics of the asylum seeker: see paragraph 24. The fact that he would not there enjoy the basic norms of civil, political and socio-economic human rights will not be relevant if the position is the same throughout the country: see paragraph 38. There is no basis in this case for saying that there is any relevant difference in the availability of psychiatric treatment and care between Mitrovica and, for instance, Pristina. A superficial variance between these passages in AE and FE and the judgment of the Master of the Rolls, Lord Woolf, in Robinson at page 948B is, in my view, explained by the facts that: (a) Robinson was decided before the inception of the Human Rights Act; (b) the passage in Robinson was concerned with refugee status and internal protection from

persecution; and (c) AE and FE was concerned only with claims under the Refugee Convention and the claimant there was not invoking the Human Rights Act: see paragraph 68. Lord Phillips MR said more than once (see for example paragraph 70) that there might in that case have been good grounds under the Human Rights Act or, as a matter of common humanity, for not sending the family back to Colombo. So in the present case failure of the Refugee Convention claim does not preclude a successful claim under the Human Rights Act.

47. As to that claim, I agree with Lord Justice Buxton's criticisms of the Immigration Appeal Tribunal's factual conclusions in paragraph 16 of its determination. In particular, their rejection of Dr Barrett's opinion as to the likely deterioration in the appellant's psychiatric condition if he returned to Kosovo, as to which there was no opposing evidence, was inadequately reasoned. There was no reasoned basis for rejecting the finding of the adjudicator, who had the advantage of hearing the appellant give oral evidence, that whereas his depression currently is described as moderate, a return to Kosovo would precipitate a strong risk of it becoming serious. Dr Barrett had described the end of a process of deterioration as severe depression, carrying with it a strong risk of death by suicide or self-neglect. That seems to me to raise for consideration a human rights claim under Article 8 and, conceivably, Article 3. Neither the Immigration Appeal Tribunal nor the adjudicator gave more than cursory attention to this possibility, understandably in the case of the adjudicator since he had upheld the appellant's refugee claim.

48. Miss Giovannetti made a strong submission that the facts of this case taken at their highest did not begin to raise a viable human rights claim. She referred us to D v United Kingdom [1997] EHRR 423, and Bensaid v United Kingdom [2001] INLR 325, emphasising the apparent difference in seriousness between the conditions in those cases and this, and relying on the fact that in Bensaid Articles 3 and 8 were not violated. Without in any way detracting from the personal seriousness of the appellant's condition, she emphasised that this was no more than a case of moderate depression controllable by ordinary drugs which should be available in Pristina from a general practitioner or the general hospital with its sizeable neuropsychiatry department.

49. I have not found this an easy matter and I see the force of Miss Giovannetti's submission in this respect. However, with some hesitation, I have concluded, in agreement with Lord Justice Buxton, that this court should not itself decide this matter but should remit it to the Immigration Appeal Tribunal. The Immigration Appeal Tribunal in the present decision proceeded on findings of fact which were inadequately reasoned and, at a time before AE and FE was decided, gave no more than cursory attention to a separate human rights claim. I do not consider that this court should proceed to decide this matter summarily.

50. LORD JUSTICE ALDOUS: I agree with both judgments. There is nothing I would wish to add.

ORDER: Appeal allowed in part; order of the Immigration Appeal Tribunal of 2nd September 2002 set aside; case remitted back to the IAT to determine afresh whether return to appellant to Kosovo/Pristina would place the United Kingdom in breach of its obligations under the Human Rights Act; the case initially to be remitted to the President of the IAT for directions; the appellant's costs to be paid by the Secretary of State to be the subject of detailed assessment; permission to appeal to the House of Lords refused.

(Order not part of approved judgment)