

## IMMIGRATION LAW PRACTITIONERS ASSOCIATION

"Immigration, Extra territoriality and Human Rights: where and how rights are breached in removal cases"

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1. **Article 3 ECHR**

**A. Strasbourg authorities**

Basis of liability of Contracting State in removal cases: implied prohibition on doing indirectly what the Convention expressly prohibits a Contracting State doing directly

Whether removal would constitute a violation of Article 3 requires examination of the conditions in the receiving country, but the liability of the removing state is *not* because the receiving country would be in breach of its obligations under the Convention or public international law.

The test is whether there are substantial grounds for believing that the person removed would face a real risk of treatment within the scope of Article 3.

If the test is satisfied, the act of removal amounts to 'treatment' for the purposes of Article 3.

The scope of Article 3 is wider than Refugee Convention. In particular there is no need to show that ill-treatment would be because of one of the grounds referred to in Article 1A of the RC. There are no equivalents to the exclusion clauses in Article 1F of the RC or Article

33(2) of RC which does permit *refoulement*. There is no equivalent either of the need to show a subjective fear of ill-treatment, although that will generally be implicit in the application for protection.

The treatment must reach a level of sufficient severity to come within Article 3.

- Whether it does is fact sensitive. The age, circumstances and physical and mental condition of the person concerned are relevant.
- Physical ill-treatment in detention is likely to come within Article 3.
- Article 3 includes a hierarchy of prohibited conduct with 'torture' at the apex. Torture is the deliberate inhuman treatment causing very serious and cruel suffering
- Because the Convention is a living instrument, treatment might be included in the concept of torture now which might not have been in the past.

In principle ill-treatment from non-state agents may come within the scope of Article 3 (Contrast the position under the UN Convention Against Torture).

In exceptional cases removal may infringe Article 3 even if there is no positive ill-treatment in the receiving country but simply a lack of facilities or care and where removal would lead to a serious deterioration in physical or mental health.

The fact that removal is to another Contracting Party of the ECHR does not necessarily relieve the removing state of responsibility.

*Soering v UK* (1989) 11 EHRR 439

*Chahal v UK* (1996) 23 EHRR 413

*HLR v France* (1997) 3 EHRR 333  
*D v UK* (1997) 24 EHRR 423  
*Selmouni v France* (1999) 29 EHRR 403  
*TI v UK* [2000] INLR 1  
*Bensaid v UK* (2001) 33 EHRR 10  
*Pretty v UK* (2002) 35 EHRR 1

## **B. Domestic authorities**

The degree of risk - the real risk test equates with the test under the Refugee Convention – substantial grounds for believing

*Kacaj v SSHD* [2001] INLR 354

Where risk depends on membership of a class or group, it is not improper to consider whether the background evidence shows that members of that class suffer gross and systematic violations of human rights

*Hariri v SSHD* CA 25<sup>th</sup> May 2003

Non-state agents – the relevance of ‘sufficiency of protection’. Is it material only to the extent that protection is effective to reduce risk below the ‘real risk’ threshold?

*McPherson v SSHD* [2002] INLR 139 CA

*R (Dhima) v SSHD* [2002] INLR 243 Admin Court

*Krepel v SSHD* [2002] EWCA Civ 1265 CA permission application

*Bagdanavicius v SSHD* CA (judgment pending)

Third country removals where the ill-treatment would only arise if there was onward removal to the country of origin

*Yogathas and Thangarasa v SSHD* [2002] 3 WLR 1276

Third country removals where there is a real risk of suicide

*Soumahoro v SSHD* [2003] EWCA Civ 840 (part of the *Razgar* group of cases)

The assessment of whether there is a real risk of ill-treatment will be reviewed by adjudicators if there is a right of appeal. If there is no right of appeal, the Administrative Court will have a special responsibility to examine the facts with particular scrutiny.

*Turgut v SSHD* [2001] 1 ALL ER 716 CA

2. **Do the Soering principles apply to any article other than Art 3?**

“*within the jurisdiction*” Art 1

*Bankovic* review of the principles : essentially territorial but de facto territorial control sufficient to engage non art 3 issues

*Cyprus v Turkey* 10 05 2001 violations of Art 8

*Ocalan v Turkey*: (unreported 12.03.2003  
Turkish agents in Kenya governed by art 5

*WM v Denmark*: 14.10.1992 (unreported) App 17392/90  
refugee in Danish Embassy

*Xhavara v Italy* 11/01/01 (interdiction;

*European Roma Rights Centre* [2003] EWCA Civ 666

3. **The Ullah decision**

The exceptional nature of extra territoriality.

The problem of justification of Art 9 rights: whose assessment of the proportionality of restrictions on the manifestation of freedom of religion

*Razaghi v Sweden* 11<sup>th</sup> March 2003

No inherent restriction to Art 3:

See death penalty cases:

Art 2 Protocol 6: see *Jin v Hungary* 6<sup>th</sup> November 2000;

The Bosnian Human Rights Chamber decision in *Boudella v Bosnia* [2002] 13 BHRC

Flagrant violations of non absolute rights: flagrantly unfair detention, flagrantly unfair trial

*MAR v UK*

See Lord Scott in *Fawwaz*

Lord Justice Sedley in *Ramda* [2002] EWHC Admin 1278 paras 6-11; 22, 28

Unfair punishment and conditions of detention: *Kalashnikov v Russia*

#### **4. Ullah and Article 8**

*Abdulaziz and Cabales*: control of frontiers subject to respect for private and family life

*Boultif* (not *Mahmood*) the classic exposition of expulsion principles

*Jakupovic v Austria* (unreported) 13.10.2002 private life as well (*Nazri v France*;  
*B v Sec State*)

*Amrollahi v Denmark* (2002)

*Yildiz v Austria* (divorce and visits back to Turkey) but still an expulsion  
Conceptual difficulties in locating whether interference is the removal or the  
treatment suffered abroad

*Bensaid v UK* (above)

The gay cases *ZAM v Sec State*; *Mundowa*

The limits of *Ullah* in *Razgar* split foci = proportionate justification

Proportionality of immigration laws, but not where the suffering will be serious  
irreversible

Positive and negative obligations.

*Sen v Netherlands* (2003) EHRR,

*Goodwin v UK* (2002) 35 EHRR 18