ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
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A0164

ILPA Training

ADVANCED EUROPEAN CONVENTION ON HUMAN RIGHTS

London, 28 February 2002

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Course Code: DT 579
Continuing Professional Development – 5 hours

TRAINING COURSE
Advanced European Convention on Human Rights

Course Notes

Materials

Article 3 ECHR

No one shall be subjected to torture or inhuman or degrading treatment or punishment

A. The prohibited treatment

1. Must attain minimum level of severity - relative dependent on circumstances of case (duration treatment, physical or mental effects and in some cases sex, age, state of health of victim) (*Ireland v UK* [1978] 2 EHRR 25).

Torture

2. Not defined in ECHR, but see Article 1 UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment: intentional act by which severe pain or suffering (whether mental or physical) is inflicted for purpose (such as obtaining information or confession, for intimidation or coercion or for any discriminatory reason) by public authority.

Ireland v UK (wall standing, hooding, subjection to noise, sleep deprivation and food & drink deprivation *not* torture because intensity insufficient).

Greek case [1969] 12 Yearbook 1 (falaka and severe beating torture).

Aydin v Turkey [1997] 25 EHRR 251 (woman stripped, beaten, sprayed cold water and raped by Turkish security forces tortured: rape by state official is a specially grave and abhorrent form of ill-treatment because of vulnerability and weakened resistance of the victim. Contrast in refugee law *R v Special Adjudicator, ex p Okonkwo* [1998] Imm AR 502, rape by Nigerian military not torture).

Selmouni v France [1999] 29 EHRR 403

> 82. The applicant complained that he had been subjected to various forms of ill-treatment. These had included being repeatedly punched, kicked, and hit with objects; being forced to kneel down in front of a young woman to whom an officer had said "Look, you're going to hear somebody sing"; having a police officer show him his penis, saying "Here, suck this", before urinating over him; being threatened with a blowlamp and then with a syringe; etc. The applicant also complained that he had been raped with a small black truncheon after being told "You Arabs enjoy being screwed". He stressed that his allegations had neither varied nor been

inconsistent during the entire proceedings and submitted that the expert medical reports and the evidence heard from the doctors who had examined him established a causal link with the events which had occurred while he had been in police custody and gave credibility to his allegations.

87. The Court considers that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention (see the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, §§ 108-11, and the Ribitsch v. Austria judgment of 4 December 1995, Series A no. 336, pp. 25-26, § 34). It also points out that in his criminal complaint and application to join the proceedings as a civil party, Mr Selmouni directed his allegations against the police officers in question (see paragraph 28 above) and that the issue of their guilt is a matter for the jurisdiction of the French courts, in particular the criminal courts, alone. Whatever the outcome of the domestic proceedings, the police officers' conviction or acquittal does not absolve the respondent State from its responsibility under the Convention (see the Ribitsch judgment cited above). It is accordingly under an obligation to provide a plausible explanation of how Mr Selmouni's injuries were caused.

95. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see the following judgments: Ireland v. the United Kingdom cited above, p. 65, § 163; Soering cited above, pp. 34-35, § 88; and Chahal v. the United Kingdom, 15 November 1996, *Reports* 1996-V, p. 1855, § 79).

96. In order to determine whether a particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As the European Court has previously found, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see the Ireland v. the United Kingdom judgment cited above, pp. 66-67, § 167).

97. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, also makes such a distinction, as can be seen from Articles 1 and 16:

Article 1

"1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. ..."

Article 16, paragraph 1

"1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."

98. The Court finds that all the injuries recorded in the various medical certificates (see paragraphs 11-15 and 17-20 above) and the applicant's statements regarding the ill-treatment to which he had been subjected while in police custody (see paragraphs 18 and 24 above) establish the existence of physical and – undoubtedly (notwithstanding the regrettable failure to order a psychological report on Mr Selmouni after the events complained of) – mental pain or suffering. The course of the events also shows that the pain or suffering was inflicted on the applicant intentionally for the purpose of, *inter alia*, making him confess to the offence which he was suspected of having committed. Lastly, the medical certificates annexed to the case file show clearly that the numerous acts of violence were directly inflicted by police officers in the performance of their duties.

99. The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading (see the Ireland v. the United Kingdom judgment cited above, pp. 66-67, § 167, and the Tomasi judgment cited above, p. 42, § 115). In any event, the Court reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see the Ribitsch judgment cited above, p. 26, § 38, and the Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1517-18, § 53).

100. In other words, it remains to be established in the instant case whether the "pain or suffering" inflicted on Mr Selmouni can be defined as "severe" within the meaning of Article 1 of the United Nations Convention. The Court considers that this "severity" is, like the "minimum severity" required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.

101. The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture (see the Aksoy judgment cited above, p. 2279, § 64, and the Aydın judgment cited above, pp. 1891-92, §§ 83-84 and 86). However, having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions" (see, among other authorities, the following judgments: Tyrer v. the United Kingdom, 25 April 1978, Series A no. 26, pp. 15-16, § 31; Soering cited above, p. 40, § 102; and Loizidou v. Turkey, 23 March 1995, Series A no. 310, pp. 26-27, § 71), the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

102. The Court is satisfied that a large number of blows were inflicted on Mr Selmouni. Whatever a person's state of health, it can be presumed that such intensity of blows will cause substantial pain. Moreover, a blow does not automatically leave a visible mark on the body. However, it can be seen from Dr Garnier's medical report of 7 December 1991 (see paragraphs 18-20 above) that the marks of the violence Mr Selmouni had endured covered almost all of his body.

103. The Court also notes that the applicant was dragged along by his hair; that he was made to run along a corridor with police officers positioned on either side to trip him up; that he was made to kneel down in front of a young woman to whom someone said "Look, you're going to hear somebody sing"; that one police officer then showed him his penis, saying "Here, suck this", before urinating over him; and that he was threatened with a blowlamp and then a syringe (see paragraph 24 above). Besides the violent nature of the above acts, the Court is bound to observe that they would be heinous and humiliating for anyone, irrespective of their condition.

104. The Court notes, lastly, that the above events were not confined to any one period of police custody during which – without this in any way justifying them – heightened tension and emotions might have led to such excesses. It has been clearly established that Mr

Selmouni endured repeated and sustained assaults over a number of days of questioning (see paragraphs 11-14 above).

105. Under these circumstances, the Court is satisfied that the physical and mental violence, considered as a whole, committed against the applicant's person caused "severe" pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention.

Inhuman treatment

3. Less intense suffering than torture and need not be deliberate. Threat of torture may be inhuman treatment (*Campbell and Cousins v UK* [1982] 4 EHRR 293.

4. 'Five techniques' in *Ireland v UK* inhuman treatment (methods applied in combination with premeditation and hours at stretch causing acute psychological disturbance).

5. Physical assaults in *Greek case* (electric shocks, squeezing head in vice, pulling out hair from head or pubic region, kicks in groin, use of dripping water on head, sleep prevention) and *Ireland v UK* (severe beating causing contusions and bruising) inhuman treatment.

Soerring v UK [1989] 11 EHRR 439 (death row phenomenon).

Kurt v Turkey [1998] 27 EHRR (waiting for news of 'disappeared').

6. Conditions of detention inhuman treatment in *Greek case* (over-crowding, inadequate heating, toilets, sleeping arrangements, food, recreation and provisions of contact with outside world) and *Cyprus v Turkey* [1984] 4 EHRR 482 (withholding food, water and medical treatment). See also *Dougoz v Greece* [2001] 6th March (Application no. 40907/98) where a breach was found for the following reasons in respect of the applicant's detention awaiting expulsion in both Drapetsona and Alexandras detention centres.

1. In the present case the Court notes that the applicant was first held for several months at the Drapetsona Police Station, which is a detention centre for persons held under Aliens legislation. He alleges, *inter alia*, that he was confined in an overcrowded and dirty cell with insufficient sanitary and sleeping facilities, scarce hot water, no fresh air or natural daylight and no yard in which to exercise. It was even impossible for him to read a book because his

cell was so overcrowded. In April 1998 he was transferred to the Police Headquarters in Alexandras Avenue, where conditions were similar to those in Drapetsona and where he was detained until 3 December 1998, the date of his expulsion to Syria.
The Court observes that the Government did not deny the applicant's allegations concerning overcrowding and a lack of beds or bedding.

2. The Court considers that conditions of detention may sometimes amount to inhuman or degrading treatment. In the *Greek case* (Yearbook of the European Convention on Human Rights no. 12, 1969), the Commission reached this conclusion regarding overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contacts with the outside world. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant. In the present case, although the Court has not conducted an on-site visit, it notes that the applicant's allegations are corroborated by the conclusions of the CPT report of 29 November 1994 regarding the Police Headquarters in Alexandras Avenue. In its report the CPT stressed that the cellular accommodation and detention regime in that place were quite unsuitable for a period in excess of a few days, the occupancy levels being grossly excessive and the sanitary facilities appalling. Although the CPT had not visited the Drapetsona detention centre at that time, the Court notes that the Government had described the conditions in Alexandras as being the same as in Drapetsona, and the applicant himself conceded that the former were slightly better with natural light, air in the cells and adequate hot water.

3. Furthermore, the Court does not lose sight of the fact that in 1997 the CPT visited both the Alexandras Police Headquarters and the Drapetsona detention centre and felt it necessary to renew its visit to both places in 1999. The applicant was detained in the interim from July 1997 to December 1998.

4. In the light of the above, the Court considers that the conditions of detention of the applicant in the Alexandras Police Headquarters and the Drapetsona detention centre, in particular the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions, amounted to degrading treatment contrary to Article 3.

Solitary confinement not in itself inhuman treatment, but may be where combination of complete sensory and social isolation destroys personality (*Ensslin, Baader and Raspe v Germany* [1978] 14 DE 64).

Inhuman punishment

7. Must reach minimum level of severity (in terms of age, sex, health etc.). Birching not inhuman punishment in *Tyrer v UK* [1978] 2 EHRR 1.

Degrading treatment

8. Conduct which 'grossly humiliates' although causes less suffering than torture. Although in *Abdulaziz, Cabales and Balkandali v United Kingdom* [1985] 7 EHRR 471 Court appeared to require *intention* to humiliate (immigration rules distinguishing between spouses of husbands and wives not degrading treatment because "it was not designed to, and did not, humiliate or debase but was intended

solely to achieve specified non discriminatory aims") this is not necessary since, torture apart, proper focus is on suffering caused rather than intention.

9. Race discrimination can be degrading treatment (*East African Asians v UK* [1973] 3 EHRR 76) (Commission state that treatment which lowers a person in "rank, position, reputation or character, whether in his own eyes or in the eyes of other people" and reaches a certain minimum level of severity capable of being degrading treatment; applicants deprived of their livelihood and being left destitute in Africa by UK denying them admission to country of their nationality suffered degrading treatment).

10. Detention conditions can be degrading: *Hurtado v Switzerland* [1994] A-280-A (unreported) (Commission found 'degrading' refusal to let applicant who had defecated in trousers change until following day). 'Dirty protests' conditions of IRA prisoners also degrading – but no liability because self-imposed. Not a detention case, but in *Gurdogan, Mustak, Mustak and Mustak v Turkey* [1989] 76A DR 9 lips of applicant Kurdish villagers smeared with excrement by Turkish security forces: claims admitted for consideration on merits.

Degrading punishment

11. More than usual element of humiliation following fact of conviction. See

Tyrer v UK (sentence of three strokes of birch by Isle of Man juvenile court on 15 year old boy carried out by police constable at police station degrading punishment; would have been more so if in public, but this was institutionalised violence with applicant an object in the power of the authorities; irrelevant that form of punishment widely supported by Manx public). But cf *Costello-Roberts v UK* [1993] 19 EHRR 112 (smacking bottom of 7 year old boy in private school did not reach minimum level of severity). Although in *A v UK* [1998] 27 EHRR 611 parent's beating of 9 year old step-son, leaving bruising, was sufficiently serious.

B. Scope of article 3

Extra-territoriality

12. Although not (now) disputed in relation to article 3, first applied to 'extradition' case in *Soerring v UK*. Whilst Court noted existence of other instruments (Refugee Convention and UNCAT specifically addressing return to risk of prohibited treatment) treaties these did not absolve Contracting States from responsibility under Article 3 for foreseeable consequences of extradition suffered outside their jurisdiction. See in particular following paragraphs:

> 87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 90, § 239). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, inter alia, the Artico judgment of 13 May 1980, Series A no. 37, p. 16, § 33). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society" (see the Kjeldsen, Busk Madsen and Pedersen judgment of 7 December 1976, Series A no. 23, p. 27, § 53).
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> 88. Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 (art. 3) enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard. The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3 (art. 3). That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 (art. 3) of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3).
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> 89. What amounts to "inhuman or degrading treatment or punishment" depends on all the circumstances of the case (see paragraph 100 below). Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international

dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

90. It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 (art. 3) by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article (art. 3) (see paragraph 87 above).

91. In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 (art. 3) of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.

13. First example of case involving refused asylum seeker was *Cruz Varas v Sweden* [1991] 14 EHRR 1. Court applied *Soering*:

69. In its Soering judgment of 7 July 1989 the Court held that the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country (Series A no. 161, p. 35, § 91). Although the establishment of such responsibility involves an assessment of conditions in the requesting country against the standards of Article 3 (art. 3), there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment (ibid., p. 36, § 91).

70. Although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above principle also applies to expulsion decisions and a fortiori to cases of actual expulsion.

(Although applicant did not succeed on facts.)

14. Thereafter see principle applied in

Vilvarajah v United Kingdom [1991] 14 EHRR 248

103. In its Cruz Varas judgment of 20 March 1991 the Court held that expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned (Series A no. 201, p. 28, paras. 69 and 70).

15. In 1995 UK had sought to resurrect contrary argument in *Chahal v United Kingdom* [1996] 23 EHRR 413 before the Commission, although not the Court:

74. However, it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country. In these circumstances, Article 3 (art. 3) implies the obligation not to expel the person in question to that country (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 35, paras. 90-91, the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69-70, and the above-mentioned Vilvarajah and Others judgment, p. 34, para. 103).

Limitations on scope?

16. The Government did however argue for a different approach to national security cases:

76. Although the Government's primary contention was that no real risk of ill-treatment had been established (see paragraphs 88 and 92 below), they also emphasised that the reason for the intended deportation was national security. In this connection they submitted, first, that the guarantees afforded by Article 3 (art. 3) were not absolute in cases where a Contracting State proposed to remove an individual from its territory. Instead, in such cases, which required an uncertain prediction of future events in the receiving State, various factors should be taken into account, including the danger posed by the person in question to the security of the host nation. Thus, there was an implied limitation to Article 3 (art. 3) entitling a Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds. The Government based this submission in the first place on the possibility of implied limitations as recognised in the Court's case-law, particularly paragraphs 88 and 89 of its above-mentioned Soering judgment. In support, they furthermore referred to the principle under international law that the right of an alien to asylum is subject to qualifications, as is provided for, inter alia, by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees (see paragraph 61 above).

In the alternative, the threat posed by an individual to the national security of the Contracting State was a factor to be weighed in the balance when considering the issues under Article 3 (art. 3). This approach took into account that in these cases there are varying degrees of risk of ill-treatment. The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security. But where there existed a substantial doubt with regard to the risk of ill-treatment, the threat to national security could weigh heavily in the balance to be struck between protecting the rights of the individual and the general interests of the community. This was the case here: it was at least open to substantial doubt whether the alleged risk of ill-treatment would materialise; consequently, the fact that Mr Chahal constituted a serious threat to the security of the United Kingdom justified his deportation.

17. This was rejected by Court: Article 3 protection irrespective as to whether applicant terrorist who posed national security risk:

> 79. Article 3 (art. 3) enshrines one of the most fundamental values of democratic society (see the above-mentioned Soering judgment, p. 34, para. 88). The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 163, and also the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, p. 42, para. 115).
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> 80. The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion (see the above-mentioned Vilvarajah and Others judgment, p. 34, para. 103). In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees (see paragraph 61 above).
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> 81. Paragraph 88 of the Court's above-mentioned Soering judgment, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 (art. 3) is engaged.
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> 82. It follows from the above that it is not necessary for the Court to enter into a consideration of the Government's untested, but no doubt bona fide, allegations about the first applicant's terrorist activities and the threat posed by him to national security.

18. So scope of article 3 applies to alleged terrorist who are threat to national security.

19. In terms of going beyond scope of Refugee Convention, see also: *Ahmed v Austria* [1996] 24 EHRR (Somali recognised refugee could not be removed under article 3 ECHR despite criminal convictions which Austrian government had relied on to permit removal under article 33.2 Refugee Convention).

MAR v United Kingdom [1998] No. 28038/95 (Commission apply *Chahal* to convicted Iran drug dealer whose presence in UK found to be danger to the community).

Paez v Sweden [1997] 30th October Applicant refused asylum under article 1F; when brother succeeded before UNCAT (28th April 1997) Swedish government felt constrained to grant protection from expulsion.

20. In respect of non state agents see:

HLR v France [1997] 26 EHHR 29 Applicant in fear of being killed by Colombian drug barons: lost on facts but risk from non-state agents *could* found case under article 3.

21. And for a different approach to 'internal flight' (looking "a reliable guarantee against the risk of ill-treatment") see *Hilal v United Kingdom* [2001] No. 45276/99 6th March Breach to return to Tanaznia applicant with well founded fear of persecution in Zanzibar owing to commonality across police and security services.

B. The Court's assessment

59. The Court recalls at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies. The expulsion of an alien may give rise to an issue under this provision where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (e.g. the Ahmed v. Austria judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, §§ 38-39, and the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports* 1996-V, §§ 73-74).

60. In determining whether it has been shown that the applicant runs a real risk, if deported to Tanzania, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu* (see the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 36, § 107, and the HLR v. France judgment of 29 April 1997, *Reports* 1997-III, p. 758, § 37). Ill-treatment must also attain a minimum level of severity if it is to fall within the scope of Article 3, which assessment is relative, depending on all the circumstances of the case.

61. The Court recalls that the applicant arrived in the United Kingdom from Tanzania on 9 February 1995, where he claimed asylum. In the domestic procedures concerning his asylum application, his claim was based on his membership of the CUF, an opposition party in Tanzania and the fact that he had been detained and tortured in Zanzibar prior to his departure. He also claimed that his brother had been detained and had died due to ill-treatment and that the authorities were accusing him of tarnishing Tanzania's good name, increasing the risk that he would be detained and ill-treated on his return.

62. The Government have urged the Court to be cautious in taking a different view of the applicant's claims than the Special Adjudicator who heard him give evidence and found him lacking in credibility. The Court notes however that the Special Adjudicator's decision relied, *inter alia*, on a lack of substantiating evidence. Since

that decision, the applicant has produced further documentation. Furthermore, while this material was looked at by the Secretary of State and by the courts in the judicial review proceedings, they did not reach any findings of fact in that regard but arrived at their decisions on a different basis – namely, that even if the allegations were true, the applicant could live safely in mainland Tanzania, the "internal flight" solution.

63. The Court has examined the materials provided by the applicant and the assessment of them by the various domestic authorities. It finds no basis to reject them as forged or fabricated. The applicant has provided an opinion from the Professor of Social Anthropology at All Souls College, Oxford, that they are genuine. Though the Government have expressed doubts on the authenticity of the medical report, they have not provided any evidence to substantiate these doubts or to contradict the opinion provided by the applicant. Nor did they provide an opportunity for the report and the way in which the applicant obtained it to be tested in a procedure before the Special Adjudicator.

64. The Court accepts that the applicant was arrested and detained because he was a member of the CUF opposition party and had provided them with financial support. It also finds that he was ill-treated during that detention by, *inter alia*, being suspended upside down, which caused him severe haemorrhaging through the nose. In the light of the medical record of the hospital which treated him, the apparent failure of the applicant to mention torture at his first immigration interview becomes less significant and his explanation to the Special Adjudicator – that he did not think he had to give all the details until the full interview a month later – becomes far less incredible. While it is correct that the medical notes and death certificate of his brother do not indicate that torture or ill-treatment was a contributory factor in his death, they did give further corroboration to the applicant's account which the Special Adjudicator had found so lacking in substantiation. They showed that his brother, who was also a CUF supporter, had been detained in prison and that he had been taken to hospital from the prison where he died. This is not inconsistent with the applicant's allegation that his brother had been ill-treated in prison.

65. The question remains whether, having sought asylum abroad, the applicant is at risk of ill-treatment if he returns home. The Government have queried the authenticity of the police summons, pointing out that it was dated 25 November 1995, while the package to his parents intercepted by the authorities was sent on 27 November 1995. It may be observed however that the Special Adjudicator's summary of the applicant's evidence referred to his claim that his parents had not been receiving any of his letters. Nevertheless, his only proof of postage related to a registered package with money concerning which he had entered into correspondence with the Royal Mail. He provided this correspondence to prove that his mail had been interfered with; it does not appear from the documents that he claimed that it was from interception of this particular item that the police first knew that he was in the United Kingdom. His account is therefore not inconsistent on this point.

66. The Court recalls that the applicant's wife, who has now also claimed asylum in the United Kingdom, informed the immigration officer in her interview that the police came to her house on a number of occasions looking for her husband and making threats. This is consistent with the information provided about the situation in Pemba and Zanzibar, where CUF members have in the past suffered serious harassment, arbitrary detention, torture and ill-treatment by the authorities (paragraphs 38-46 above). This involves ordinary members of the CUF and not only its leaders or high profile activists. The situation has improved to some extent, but the latest reports throw doubt on the seriousness of reform efforts and refer to continued problems faced by CUF members (paragraph 46). The Court concludes that the applicant would be at risk on return to Zanzibar of being arrested, detained and suffering a recurrence of ill-treatment.

67. The Government rely on the "internal flight" option, arguing that even assuming that the applicant was at risk in Zanzibar, the situation in mainland Tanzania was more secure. The documents provided by the parties indicate that human rights infringements were more prevalent in Zanzibar and that CUF members there suffered more serious persecution (paragraphs 47-49 above). It nonetheless appears that the situation in mainland Tanzania is far from satisfactory and discloses a long-term, endemic situation of human rights problems. Reports refer in general terms to police

in Tanzania ill-treating and beating detainees (paragraph 46) and to members of the Zanzibari CCM visiting the mainland to harass CUF supporters sheltering there (paragraph 49). Conditions in the prisons on the mainland are described as inhuman and degrading, with inadequate food and medical treatment leading to life-threatening conditions (paragraphs 44 and 46). The police in mainland Tanzania may be regarded as linked institutionally to the police in Zanzibar as part of the Union and cannot be relied on as a safeguard against arbitrary action (cf. the Chahal case, cited above, p. 1861, § 104, where the applicant Sikh was at particular risk of ill-treatment within the Punjab but could not be considered as safe elsewhere in India as the police in other areas were also reported to be involved in serious human rights violations). There is also the possibility of extradition between Tanzania and Zanzibar (see the Special Adjudicator's decision cited at paragraph 33 above and the report cited at paragraph 48).

68. The Court is not persuaded therefore that the internal flight option offers a reliable guarantee against the risk of ill-treatment. It concludes that the applicant's deportation to Tanzania would breach Article 3 as he would face a serious risk of being subjected there to torture or inhuman and degrading treatment.

22. For approach in 'safe third country cases' see:

TI v United Kingdom [2000] INLR 211 Allegation that return to Germany of failed Sri Lankan asylum seeker would breach article 3 inadmissible. But see rejection of United Kingdom government's that it ought not 'police' other Contracting States such as Germany.

> They [the UK Government] further argue that this Court should be slow to find that the removal of a person from one Contracting State to another would infringe Article 3 of the Convention, as in this case, the applicant would be protected by the rule of law in Germany and would have recourse, if any problems arose, to this Court, including the possibility of applying for a Rule 39 indication to suspend his deportation. It would be wrong in principle for the United Kingdom to have to take on a policing function of assessing whether another Contracting State such as Germany was complying with the Convention. It would also undermine the effective working of the Dublin Convention, which was brought into operation to allocate in a fair and efficient manner State responsibility within Europe for considering asylum claims.

The Court rejected the argument in these terms:

> The Court's assessment
>
> *The responsibility of the United Kingdom*
>
> The Court reiterates in the first place that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. It also notes that the right to political asylum is not contained in either the Convention or its protocols (see the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, § 102). It is however well-established in its case-law that the fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3, read in conjunction with Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3

(see, amongst other authorities, the Ahmed v. Austria judgment of 17 December 1996, *Reports* 1996-VI, p. 2206, §§ 39-40).

The Court's case-law further indicates that the existence of this obligation is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country. Having regard to the absolute character of the right guaranteed, Article 3 may extend to situations where the danger emanates from persons or groups of persons who are not public officials, or from the consequences to health from the effects of serious illness (see H.L.R. v. France judgment of 29 April 1997, *Reports* 1997-III, § 40, D. v. the United Kingdom judgment of 2 May 1997, *Reports* 1997-III, § 49). In any such contexts, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny.

In the present case, the applicant is threatened with removal to Germany, where a deportation order was previously issued to remove him to Sri Lanka. It is accepted by all parties that the applicant is not, as such, threatened with any treatment contrary to Article 3 in Germany. His removal to Germany is however one link in a possible chain of events which might result in his return to Sri Lanka where it is alleged that he would face the real risk of such treatment.

The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (see e.g. Waite and Kennedy v. Germany judgment of 18 February 1999, *Reports* 1999, § 67). The Court notes the comments of the UNHCR that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered. The English courts themselves have shown a similar concern in reviewing the decisions of the Secretary of State concerning the removal of asylum-seekers to allegedly safe third countries (see Relevant Domestic Law and Practice above, United Kingdom case-law).

The Court has therefore examined below whether the United Kingdom have complied with their obligations to protect the applicant from the risk of torture and ill-treatment contrary to Article 3 of the Convention.

23. And where there is *no* 'responsibility' (state or non state) for circumstances in receiving state see:

D v United Kingdom [1997] 24 EHRR 278 Expulsion AIDS sufferer to St Kitts where he had no family or material resources or treatment available inhuman treatment.

47. However, in exercising their right to expel such aliens Contracting States must have regard to Article 3 of the Convention (art. 3), which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 (art. 3) prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question (see, most recently, the Ahmed v. Austria judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, p. 2206, para. 38; and the Chahal v. the United Kingdom judgment of 15 November 1996, Reports 1996-V, p. 1853, paras. 73-74).

48. The Court observes that the above principle is applicable to the applicant's removal under the Immigration Act 1971. Regardless of whether or not he ever entered the United Kingdom in the technical sense (see paragraph 25 above) it is to be noted that he has been physically present there and thus within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention (art. 1) since 21 January 1993. It is for the respondent State therefore to secure to the applicant the rights guaranteed under Article 3 (art. 3) irrespective of the gravity of the offence which he committed.

49. It is true that this principle has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection (see, for example, the Ahmed judgment, loc. cit., p. 2207, para. 44).

Aside from these situations and given the fundamental importance of Article 3 (art. 3) in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article (art. 3) in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 (art. 3) where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article (art. 3). To limit the application of Article 3 (art. 3) in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State.

50. Against this background the Court will determine whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3 (art. 3) in view of his present medical condition. In so doing the Court will assess the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on his state of health (see the Ahmed judgment, loc. cit., p. 2207, para. 43).

51. The Court notes that the applicant is in the advanced stages of a terminal and incurable illness. At the date of the hearing, it was observed that there had been a marked decline in his condition and he had to be transferred to a hospital. His condition was giving rise to concern (see paragraph 21 above). The limited quality of life he now enjoys results from the availability of sophisticated treatment and medication in the United Kingdom and the care and kindness administered by a charitable organisation. He has been counselled on how to approach death and has formed bonds with his carers (see paragraph 19 above).

52. The abrupt withdrawal of these facilities will entail the most dramatic consequences for him. It is not disputed that his removal will hasten his death. There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering. Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts (see paragraph 32 above). While he may have a cousin in St Kitts (see paragraph 18 above), no evidence has

been adduced to show whether this person would be willing or in a position to attend to the needs of a terminally ill man. There is no evidence of any other form of moral or social support. Nor has it been shown whether the applicant would be guaranteed a bed in either of the hospitals on the island which, according to the Government, care for AIDS patients (see paragraph 17 above).

53. In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3 (art. 3).

The Court also notes in this respect that the respondent State has assumed responsibility for treating the applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3 (art. 3), his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.

Without calling into question the good faith of the undertaking given to the Court by the Government (see paragraph 44 above), it is to be noted that the above considerations must be seen as wider in scope than the question whether or not the applicant is fit to travel back to St Kitts.

54. Against this background the Court emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison.

However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3 (art. 3).

24. See also *BB v France* [1998] 7th September Proposed expulsion to Zaire of AIDS sufferer whose four brothers all granted asylum in France and Belgium. Applicant made subject compulsory residence order, but not granted residence permit, after Commission's decision that expulsion would violate Article 3.

25. But are these cases a 'high water mark'?

26. Certainly the Secretary of State attempts to marginalise impact of *D* by reference to decision Court of Appeal in *R v Secretary of State for the Home Department, ex p K* [2000] 16th February (FC3/7739/C) where challenge was by way of *judicial review* and at issue was whether the Secretary of State's refusal of exceptional leave to an AIDS sufferer was rationally open to him. But see paragraph 11 (from the judgment of Sir Christopher Staughton):

11. What it comes to is this. Would it be inhuman or degrading treatment to send Mr. K back to Uganda on the grounds that he may or may not be able to afford all the

treatment that he requires? It does seem to me that, if we were to accede to that argument, we would be in effect adopting a rule that any country which did not have a health service which *was available free to all people within its bounds, would be a place to which it would be inhuman and degrading to send someone. I do not consider that the European Court of Human Rights would reach that conclusion. It seems to me that one has to weigh up all the circumstances of the case, as was done in the case of D, and decide whether that test is fulfilled. In those circumstances, I am unable to say that the Secretary of State's decision was illegal or irrational or procedurally improper or ought to be revisited by the courts. I would dismiss this application.

27. See also before Court of Appeal:

X v Secretary of State for the Home Department [2001] INLR 205 (no breach article 3 to remove paranoid schizophrenic whose removal would give rise to risk of self harm, cause distress and who would be less receptive to treatment in Malta).

R (on the application of Pyotr Lamanovs and others) v Secretary of State for the Home Department [2001] EWCA Civ 1239 (epileptic facing removal to France as a 'safe third country'). No breach article 3 ECHR in spite of previous cancellation of removal because of epileptic attack on the day of proposed removal and medical evidence showing six recent attacks; suicidal feelings and symptoms characteristic of severe depressive episode causally related to 'recent stresses with the Home Office'). Concerns met by Secretary of State's undertaking that the claimant would be medically examined before removal; that he would be accompanied by a medical escort; and third that the French immigration authorities would be informed of his medical condition.

Certification of human rights claim as 'manifestly unfounded' upheld by CA. the words of Schiemann LJ, the Court was "concerned essentially with ... whether or not ... what is threatened to be done by the Home Secretary to this applicant can be regarded as a breach of his rights under Article 3". The answer to the question posed was described by Schiemann LJ as "a matter of impression". In view in particular of the undertakings he did not consider what was proposed, even on the claimant's own evidence, to be of "sufficient severity to amount to an infringement of his rights in relation to Article 3". Epilepsy was not a new condition to the claimant and what was threatened was "a journey to France which will take less than an hour in the aeroplane, following a medical examination and in the presence of a medical escort. A

journey moreover to French authorities who will have been warned of this man's condition".

28. And before E.Ct.HR see *Bensaid v UK* [2001] INLR 205 (removal of schizophrenic to Algeria no breach article 3).

> 32. The Court recalls at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. However in exercising their right to expel such aliens Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question (e.g. the Ahmed v. Austria judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, § 38; and the Chahal v. the United Kingdom judgment of 15 November 1996, Reports 1996-V, §§ 73-74).
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> 33. The Court observes that the above principle is applicable to the applicant's removal under the Immigration Act 1971. It is to be noted that he has been physically present in the United Kingdom since 1989, with only short absences, and that he has been receiving medical care and support in the United Kingdom in relation to his mental illness since 1994-1995.
>
> 34. While it is true that Article 3 has been more commonly applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities or non-State bodies in the receiving country (e.g. the Ahmed v. Austria judgment, loc. cit., § 44), the Court has, in light of the fundamental importance of Article 3, reserved to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to rigorous scrutiny, especially the applicant's personal situation in the expelling State (see the D. v. the United Kingdom judgment of 2 May 1997, Reports 1997-III, § 49).
>
> 35. The Court has therefore examined whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3 in view of his present medical condition. In so doing the Court has assessed the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on his state of health (see the Ahmed v. Austria judgment, loc. cit., § 43, and the D. v. the United Kingdom judgment, cited above, § 50).
>
> 36. In the present case, the applicant is suffering from a long-term mental illness, schizophrenia. He is currently receiving medication, olanzapine, which assists him in managing his symptoms. If he returns to Algeria, this drug will no longer be available to him free as an outpatient. He is not enrolled in any social insurance fund and cannot claim any reimbursement. It is however the case that the drug would be available to him if he was admitted as an inpatient and that it would be potentially available on payment as an outpatient. It is also the case that other medication, used in the management of mental illness, is likely to be available. The nearest hospital for providing treatment is at Blida, some 75-80 km from the village where his family live.

37. The difficulties in obtaining medication and the stresses inherent in returning to this part of Algeria, where there is violence and active terrorism, are alleged to endanger seriously his health. Deterioration in the applicant's already existing mental illness could involve relapse into hallucinations and psychotic delusions involving self-harm and harm to others, as well as restrictions in social functioning (e.g. withdrawal and lack of motivation). The Court considers that the suffering associated with such a relapse could, in principle, fall within the scope of Article 3.

38. The Court observes, however, that the applicant faces the risk of relapse even if he stays in the United Kingdom as his illness is long term and requires constant management. Removal will arguably increase the risk, as will the differences in available personal support and accessibility of treatment. The applicant has argued, in particular, that other drugs are less likely to be of benefit to his condition, and also that the option of becoming an inpatient should be a last resort. Nonetheless medical treatment is available to the applicant in Algeria. The fact that the applicant's circumstances in Algeria would be less favourable than those enjoyed by him in the United Kingdom is not decisive from the point of view of Article 3 of the Convention.

39. The Court finds that the risk that the applicant will suffer a deterioration in his condition if he is returned to Algeria and that, if he did, he would not receive adequate support or care is to a large extent speculative. The arguments concerning the attitude of his family as devout Muslims, the difficulties of travel to Blida and the effects on his health of these factors are also speculative. The information provided by the parties does not indicate that travel to the hospital is effectively prevented by the situation in the region. The applicant is not himself a likely target of terrorist activity. Even if his family does not have a car, this does not exclude the possibility of other arrangements being made.

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 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 (cited above) where the applicant was in the final stages of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St. Kitts.

41. The Court finds, therefore, that the implementation of the decision to remove the applicant to Algeria would not violate Article 3 of the Convention.

29. In sum if the threshold of Article 3 is met removal will breach the UK's obligations irrespective as to the source of the harm and irrespective as to the personal circumstances of the individual concerned and the 'desirability' of his or her removal.

30. *Cf.* Provisions of Anti Terrorism, Crime and Security Act 2001, and the UK's derogation from Article 5 (below).

C. Meeting the threshold of 'real risk'

31. See *Cruz Varas v Sweden*:

75. In determining whether substantial grounds have been shown for believing in the existence of a real risk of treatment contrary to Article 3 the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained proprio motu (see the *Ireland v United Kingdom* judgment of 18 January 1978 (supra)).

76. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation or the well-foundedness or otherwise of an applicant's fears.".

32. The Commission and Court has tended to be cautious. In *Vilvarajah v UK* the Court emphasised that "a mere possibility of ill-treatment" was not sufficient to give rise to a breach of Article 3 in the cases of the removed Sri Lankan Tamils. No breach of Article 3 was found despite the fact that on return the applicants had in fact been subjected to treatment contrary to article 3.

33. An approach which exculpated the Secretary of State because of the absence special distinguishing features which he ought to have foreseen is inconsistent with the absolute nature of Article 3 which does not require an individual to show that he or she is more relatively at risk than others in similar vulnerable conditions.

35. But in *Chahal* the Commission rejected the UK government's assessment of the risk of return to India.

36. And in *Hatami v Sweden* [1998] No. 32448/96 the Commission also substituted its evaluation of the evidence for that of the Swedish authorities. The Commission in *Hatami* also echoed the case law of the UN Torture Committee in stating that "complete accuracy is seldom to be expected from victims of torture" (see for example paragraph 11.4 of decision of UN Torture Committee in *Ismail Alan v Switzerland* [1995] 31 January, No. 21/1995).

37. See also *TI v UK* where the Court – despite the rejection by the German authorities of the credibility of the applicant's claim – stated that the materials presented gave rise to "concerns as to the risks faced by the applicant should

he be returned to Sri Lanka". And see above approach to evidence and adjudicator's findings in *Hilal*.

D. The impact of *Horvath* on the UK's approach to Article 3

38. In *Horvath* [2000] INLR 239 the House of Lords considered the meaning of 'persecution' in the definition of refugee in article 1A(2) of the Refugee Convention in a case concerning risk from 'non state' agents.

39. Recent decision in the UK courts have examined whether the *Horvath* principles - founded squarely in the *refugee* convention – apply to Article 3 ECHR. The matter arose squarely in the starred decision of the IAT in *Kacaj v Secretary of State for the Home Department* [2001] 19th July (01/TH/0634) which posed the following question:

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

40. The respective parties' submissions were summarised thus:

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

41. In answering the question the IAT stated as follows:

> Issue (2): Violation by non-state actors
>
> 16. There is no doubt that the obligations of a state which is intending to deport an individual can extend to the need to protect him against relevant ill-treatment by non-state actors. This is consistent with duties to provide protection initially expounded in cases such as *Osman v United Kingdom* and *A v United Kingdom*. Thus in *HLR v France* (supra) the Court was concerned with a Colombian drug trafficker who had given information against dealers in Colombia and claimed that there was a real risk that, if returned to Colombia, he would be subjected to treatment contrary to Article 3 at their hands. He claimed that the authorities would not be able to provide him with adequate protection. At Paragraph 40 on Page 50 we find the majority (the decision was by 15 votes to 6) saying:-
>
> > "Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 ... may also apply where the danger emanated from persons or groups of persons who are not public officials. However, it must be shown that the risk is

> real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection."

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

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

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

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

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

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

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

In deportation cases, there will rarely be a direct responsibility of the expelling State for the infliction of harm (we do not rule out the possibility that the mere act of removal may

contravene Article 3 having regard to the physical or mental condition of the individual being expelled).

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

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

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

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

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

21.It may be said that it is no consolation to an applicant to know that if he is killed or tortured, the police will take steps to try to bring his murderers or assailants to justice. He is concerned with the risk that he may be killed or tortured and, if the authorities cannot provide effective protection to avoid that risk, there will be a breach of the Convention if he is returned. Practical rather than theoretical protection is needed. We see the force of that contention, but in our view it fails to recognise that the existence of a system should carry with it a willingness to do as much as can reasonably be expected to provide that protection. In this way, the reality of the risk is removed. Since the result will be similar, namely persecution or a violation of a human right, it would be wrong to apply a different approach. We do not read *Horvath* as deciding that there will be a sufficiency of protection whenever the authorities in the receiving State are doing their best. If this best can be shown to be ineffective, it may be that the applicant will have established that there is an inability to provide the necessary protection. But it is clear that, as Lord Hope said (p.388F):-

> "... [I]t is a practical standard, which takes proper account of the duty which the State owes to all its own nationals."
>
> The fact that the system may break down because of incompetence or venality of individual officers is generally not to be regarded as establishing unwillingness or inability to provide protection. In many cases, perhaps most, the existence of the system will be sufficient to remove the reality of risk.

The Court of Appeal is to consider the appeal in *Kacaj* this week.

42. In *Dhima v IAT* [2002] EWHC 80, 6th February a two judge Administrative Court (Auld LJ and Ouseley J) considered the correctness of an adjudicator's determination applying *Horvath* approach to an article 3 claim involving risk from non state agents in Albania. The relevant extracts of Auld LJ's judgment are as follows:

> **The applicability of the *Horvath* test to human rights claims**
>
> 16. *Horvath* was an asylum case in which the House of Lords concluded that the applicant's well-founded fear of violence by non-state agents did not amount to persecution within the Geneva Convention because he had not shown that the state was unwilling or unable to protect him from persecution by those non-state agents. The ratio of their Lordships' decision, which was unanimous, is not entirely clear, but, in my view, the differences are more a matter of semantics than substance. Lords Hope, Clyde and Lloyd gave the major speeches in favour of dismissing the asylum seeker's appeal; Lord Browne-Wilkinson agreed with the reasoning of Lords Hope and Clyde, and Lord Hobhouse agreed with that of Lord Hope. The reasoning of Lords Hope, Clyde, Browne-Wilkinson and Hobhouse, put at its broadest, was that when the conduct claimed to give rise to a well-founded fear of persecution emanates from non-state agents, the question whether it amounts to "persecution" for asylum purposes, depends, not only the risk and nature of the conduct, but also on the sufficiency of state protection against it. Lord Lloyd considered that the question whether there is a well-founded fear of persecution is separate from the question of insufficiency of state protection from it. However, he agreed that, though the asylum seeker had satisfied the "fear" test, he had not satisfied the "protection" test. Whatever the correct analysis, all their Lordships were of the view that sufficiency of protection meant a system of criminal law rendering violence punishable and a reasonable willingness and ability on the part of the authorities to enforce it.
>
> 17. Sufficiency of protection, so defined, means something less than a guarantee of safety against the risk of violence, since the protection provided by a receiving state under the Geneva Convention is that of a surrogate or substitute for the claimant's home state, applying the same standards of protection that it provides for its own nationals. Lord Hope, in articulating this principle of surrogacy, observed, at 500f-h, that the primary duty to provide protection rests with the home state, which has a "duty to establish and to operate a system of protection against the persecution of its own nationals". However, he noted, at 500g-h, that, just as the state in which refuge is sought cannot achieve complete protection against isolated and random attacks, so also complete protection cannot be expected of the home state:
>
> > "The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard,

> which takes proper account of the duty which the state owes to all its nationals. "

18. As I have noted, Lord Browne-Wilkinson agreed with the reasoning of Lords Hope and Clyde, whereas Lord Hobhouse agreed only with that of Lord Hope. If and to the extent that Lords Hope and Clyde differ, it seems to me to be largely a matter of emphasis. For both of them, in non-state agents cases the surrogacy principle underlying state protection inextricably linked the two issues of conduct feared and sufficiency of state protection against it in determining whether there is persecution; see per Lord Hope at 497E-498A and 499G-H; and per Lord Clyde at 513G-514B, 514F-H and 516E. And for both, the practical standard indicated in the above passage of Lord Hope is part of the exercise of evaluating the risk of persecution.

19. Mr. Andrew Nicol, QC, on behalf of Mr. Dhima, challenged the propriety of the adjudicator's application of the *Horvath* test to human rights cases. He raised the issue for the first time on this appeal; it was not put to the adjudicator or to the Immigration Appeal Tribunal. In summary, he said that, whilst it may be appropriate under the asylum test to take into account sufficiency of state protection in non-state agent cases when evaluating the risk of persecution, sufficiency of state protection formed no part of the test of evaluating the risk of torture under Article 3. Before going any further with his argument, I should set out the respective criteria for asylum claims and those based on Article 3.

20. The asylum test, derived from the definition of a refugee in Article 1(A) of the 1951 Geneva Convention as amended by the 1967 Protocol Relating to the Status of Refugees, is whether a claimant has:

> "... a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion ... and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; ..."

The meaning of "a well-founded fear" of such persecution is partly subjective and partly objective, and, in its objective sense means "a real and substantial risk"; see *R v. SSHD, ex p. Sivakumaran* [1988] AC 958, per Lords Templeman and Lord Goff of Chieveley, at 996 and 1000 respectively.

21. The human rights test, as consistently stated by the European Court since *Soering v. UK* (1989) 11 EHRR 439, is:

> "Are there substantial grounds for believing that the person's expulsion will expose him to a real risk of suffering torture and/or inhuman or degrading treatment?"

The words "real risk" in that formulation mean much the same as the term "real and substantial risk" in the asylum test, but here the test is not expressly qualified, as in the latter, by any consideration of state protection.

22. Mr Nicol acknowledged the relevance in non-state agency cases of state protection to Article 3 claims, but maintained that sufficiency of protection in the *Horvath* sense is not enough. He said that, because of the fundamental and absolute nature of the right under the European Convention, the only protection capable of meeting it is one that removes a real risk of its breach. He did not go so far as to argue that the protection must be such as to guarantee the safety of a claimant, conceding that the protection required to defeat a claim is against the reality of risk not against all possibility of it. Here, it seems to me, his description of the Article 3 test comes very close to the *Horvath* test.

23. However, Mr. Nicol maintained, on his interpretation of the ratio in *Horvath,* that there are essential differences between the two tests. First, he said that, given the terminology and structure of the asylum test, the central issue for the House in *Horvath* was a choice between two separate matters - real risk and sufficiency of protection. He said that the House, in its reliance on the latter, drew heavily on the surrogacy principle which does not apply to the international protection of human rights, and went beyond the evaluation of risk. Second, he said that the protection given by Article 3 is absolute and that the only matter for determination is the reality of the risk. State protection only comes into play if and to the extent that it removes that reality.

24. Mr Nicol sought support for his analysis from the European Court's reasoning in *Ahmed v. Austria* 24 EHRR 278, at paragraphs 39-41 of its judgment, on the issue of the effect and application of Article 3 in an expulsion case:

> "39. ... the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 ... in the receiving country ...
>
> 40. The Court further reiterates that Article 3, which enshrines one of the fundamental values of democratic societies ... prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 ..., Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 ... even in the event of a public emergency threatening the life of the nation ....
>
> 41. The above principle is equally valid when issues under Article 3 arise in expulsion cases. Accordingly, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Article 33 of the 1951 Convention relating to the Status of Refugees ..."

25. In my view, those observations do not assist Mr. Nicol's argument, which is essentially about the degree of risk, with or without state protection, to which a claimant is exposed. The *Ahmed* judgment does not suggest that Article 3 imports a near guarantee of safety in non-state agency cases. It is about something else; it is about the protection, whatever its level, given by Article 3 to persons who, by reason of their own conduct, might be excluded from protection under the Geneva Convention.

26. Similarly, Mr. Nicol's reliance on the following passage from Lord Hope's speech in *Horvath*, at 499h, identifying the limited nature of the asylum test is misplaced in this context:

> " ...the risk, however severe, and the fear, however well founded, do not entitle him to the status of a refugee. The Convention has a

more limited objective, the limits of which are identified in the list of Convention reasons and by the principle of surrogacy."

That passage was not concerned with the evaluation of risk, with or without state protection, but about the limited categories of motivation for persecution in respect of which the Refugee Convention provides protection.

27. Miss Julie Anderson, on behalf of the Secretary of State, submitted that the adjudicator was correct, when assessing the reality of the risk of violence to Mr. Dhima if he returned to Albania, to take into account the *Horvath* sufficiency of protection test. She argued that there is no good reason for a different test in the context of human rights applications and that the Strasbourg jurisprudence, in particular, *HLR v. France* (1977) 26 EHRR 29, does not suggest so. On the contrary, she urged that now that adjudicators often have to deal with both asylum and human rights claims in the same proceedings and arising out of the same or similar facts, it would be confusing, as well as absurd, if they were to attempt to apply marginally different tests on the issue of real risk when, whatever the different semantic analyses, the common question is whether there is, as a matter of practicality, a real risk of harm to the claimant if he is returned to his home country.

28. Miss Anderson submitted, in the alternative, that the *Horvath* test is sufficiently similar to the Strasbourg test as to come within the margin of appreciation afforded to member states, a margin that the European Court has held, in *Banomova v. Secretary of State for the Home Department* (Case No. C/2000/3674, 25th May 2001, at para. 35), is afforded to member states in the discharge of their obligations under the European Convention of Human Rights.

Conclusions on the applicability of the *Horvath* test to human rights claims

29. I make two preliminary observations. They are important given the fine analysis that this topic has received in *Horvath* and other authorities and in the submissions in this appeal. First, as Lord Clyde cautioned in *Horvath*, at 508B-509E, tribunals concerned with the enforcement of obligations derived from international conventions should keep their eyes on the purpose of the Convention they are there to apply. Whilst they must respect the language of the individual provisions they are considering, often such provisions, by reason of their derivation, are not susceptible to fine analysis or over-sophisticated construction. Second, such provisions, particularly in the fraught field of asylum and associated human rights applications, should not be needlessly complicated for applicants, the Secretary of State, and those advising him, or adjudicators. Where it is consistent with the overall purpose of convention obligations and the substance of the provision under consideration, simplicity should be the keyword in the interests of both justice and the efficiency of the process. In my view, it would be an absurdity and an artificial burden for all concerned for the Secretary of State and adjudicators to have to apply, often in consecutive applications in the same proceedings and arising out of the same or similar facts, two barely distinct tests as to what constitutes a real risk of harm. For the reasons I now give, I cannot see that either Convention requires it.

30. In my view, there is a fallacy in Mr. Nicol's argument in separating, to the extent he does, the concept of a real risk of harm from Article 3 conduct from the consideration of the availability and sufficiency of state protection to remove it. Although Article 3 has a wider application than Article 1(A) of the Geneva Convention, and is absolute in its terms and effect, it clearly allows for the home state, by providing suitable protection, to remove the real risk at which it is directed. As Mr. Nicol acknowledged, availability of protection is, therefore, relevant to an Article 3 enquiry.

31. Mr. Nicol's premise that, in non-state agent asylum cases, the factor of state protection goes beyond the assessment of a real risk of harm, flows, I believe, from a misreading of the ratio in *Horvath*. As I have said, it is that the level of risk posed by non-state agents depends, not only on their motivation and conduct, but also on the level of

protection against it that the state provides. One cannot be considered without the other. It seems to me that that would have been the interpretation of the courts even if Article 1(A) of the Geneva Convention had not expressly referred to state protection. And that this must also be so in human rights claims, where there is no such express reference, was recognised by the European Court of Human Rights in *HLR v. France.* One of the issues in that case was whether state authorities in a deportation case were capable of affording protection to the applicant. The Court observed, at paragraphs 40 and 43 of its judgment:

> "40. Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving states are not able to obviate the risk by providing appropriate protection."
>
> "43. The Court is aware, too, of the difficulties the Colombian authorities face in containing the violence [referring to the general situation of violence in Colombia]. The applicant has not shown that they are incapable of affording him appropriate protection."

I can see no inconsistency between that reasoning and the approach of the House of Lords in *Horvath.*

32. In this context I have also found helpful the reasoning of the Immigration Appeal Tribunal in its starred determination in *Secretary of State for the Home Department v, Kacaj* (Appeal No. CC/23044/2000, 19th July 2001). The Tribunal, referring to the assessment of risk under Article 3, said at para. 10:

> "The link with the Refugee Convention is obvious. Persecution will normally involve the violation of a person's human rights and a finding that there is a real risk of persecution would be likely to involve a finding that there is a real risk of a breach of the European Convention on Human Rights. ... Since the approach under each Convention is whether the risk of future ill-treatment will amount to a breach of an individual's human rights, a difference of approach would be surprising."

33. The broad symmetry of the two tests is also to be found in the extent of state protection that may serve to remove the real risk of harm. The sufficiency test in *Horvath* falls short of a guarantee of safety from harm, as does the factor of protection in removal of a real risk of harm, as distinct from the possibility of harm, in Article 3 cases. This is illustrated in the reasoning of Lords Hope and Lord Clyde in *Horvath*, at 500F-H and 510F respectively, that no guarantee of safety can be expected, and in the comment of the Tribunal in *Kacaj*, at para. 16 (on the European Court's approach in *Osman v. UK* [1999] 1 FLR 193, at para. 31) that in an Article 3 case "[no] guarantees of safety could conceivably be required". Moreover, as the Tribunal in *Kacaj* noted at paras. 20 and 21 of its determination, the House of Lords in *Horvath*, at 510F-G, drew for its statement of the "sufficiency of protection" test on the reasoning of the Strasbourg Court's approach to the evaluation of domestic protection in *Osman,* at para. 116, in relation to an alleged infringement of Article 2.

34. The symmetry between the two tests may not always be exact, but this should not cause problems in practice. I can do no better than adopt and approve the following discussion of the Tribunal on this aspect in Kacaj, at paras 19 and 21:

> "19. We have already identified the desirability of a similar approach under each Convention to the standard of proof. In our view, the same ought to apply to the question whether a real risk of harm has been established. The nature of the harm and the

circumstances in which it will arise may produce different results depending on the Convention in issue. Thus, it must amount to persecution and be for a Convention reason if an asylum claim is to succeed. Persecution and breaches of Art. 3 are not necessarily the same, although we doubt whether treatment which did not amount to persecution could none the less cross the Art. 3 threshold. We recognise the possibility that Art. 3 could be violated by actions which did not have a sufficiently systemic character to amount to persecution, although we doubt that this refinement would be likely to be determinative in any but a very small minority of cases. But apart from this and a case where conduct amounting to persecution but not for a Convention reason was established, we find it difficult to envisage a sensible possibility that a breach of art. 3 could be established where an asylum claim failed."

"21. It may be said that it is no consolation to an applicant to know that if he is killed or tortured, the police will take steps to try to bring his murders or assailants to justice. He is concerned with the risk that he may be killed or tortured and, if the authorities cannot provide effective protection to avoid that risk, there will be a breach of the Convention if he is returned. Practical rather than theoretical protection is needed. We see the force of that contention, but in our view it fails to recognise that the existence of a system should carry with it a willingness to do as much as can reasonably be expected to provide that protection. In this way, the reality of the risk is removed. Since the result will be similar, namely persecution or a violation of a human right, it would be wrong to apply a different approach. We do not read *Horvath* ... as deciding that there will be a sufficiency of protection whenever the authorities in the receiving State are doing their best. If this best can be shown to be ineffective, it may be that the applicant will have established that there is an inability to provide the necessary protection. ..."

34. As those observations make clear, what is critical is a combination of a willingness and ability to provide protection to the level that can reasonably be expected to meet and overcome the real risk of harm from non-state agents. What is reasonable protection in any case depends, therefore, on the level of the risk, without that protection, for which it has to provide. Such reasoning, in my view, reflects the ratio in *Horvath* and not the representation of it in the last, conditional sentence in the following passage from a decision of the New Zealand Refugee Status Appeals Authority (No. 71427/99 [2000] INLR 608) declining to follow it:

"... this interpretation of the Refugee Convention is at odds with the fundamental obligation of non-refoulement. Article 33(1) is explicit in prohibiting return in any manner to a country where the life or freedom of the refugee would be threatened for a Convention reason. This obligation cannot be avoided by a process of interpretation which measures the sufficiency of state protection not against the absence of a real risk of persecution, but against the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate that system. ... *If* the net result of a state's 'reasonable willingness' to operate a system for the protection of the citizen is that it is incapable of preventing a real chance of persecution of a particular individual, refugee status cannot be denied that individual." [my italics]

36. Accordingly, in my view, the Immigration Appeal Tribunal in *Kacaj* was correct in equating the *Horvath* test with that applicable to human rights claims. In my view also, the adjudicator correctly applied the test in this case. As it happens, he expressed his

finding in words that fall squarely within Article 3, whether or not garnished by any fine distinction drawn from *Horvath:* For convenience, I repeat them:

> "... the Appellant has failed to show that he would not in reality be able to look to the Albanian Authorities, and in particular to the police, for proper protection against Lushaku family if he were to return to Albania. For that reason alone, I am satisfied that his human rights appeal must be dismissed.

37. If it were necessary to consider the question of margin of appreciation, which I doubt given the imprecision of both formulations of the test and the differing circumstances capable of satisfying them both, I would hold that they are so close to each other as to satisfy it; cf. Kacaj, at para. 19.

43. Although not by reference to *Horvath*, the Court of Appeal had considered the effectiveness of protection in the context of Article 3 in *McPherson v Secretary of State for the Home Department* [2001] EWCA Civ 1955, 19th December in a case involving return to Jamaica of a woman whose Article 3 claim related to her fear of renewed and serious personal violence at the hands of her ex-partner Philip Blackwood, who had repeatedly assaulted her in earlier years.

44. Sedley LJ states as follows:

19. Ms. Judith Farbey for the appellant submits that civil remedies of the kind evidently provided by the Domestic Violence Act 1995 are not enough to meet the state's positive obligation under Article 3. For this, she says, only criminal sanctions will suffice. She relies upon the Opinion of the Commission in *A v. United Kingdom* (1988) 27 EHRR 611, para 47:

> "The Commission observes at the outset that, while the choice of means designed to secure compliance with Convention rights in the sphere of the relations between individuals themselves is in principle a matter that falls within the Contracting States' margin of appreciation, the effective protection of vulnerable individuals such as children against treatment or punishment falling within Article 3 of the Convention requires the deterrent effect of the criminal law. As the court noted, in the different context of the protection of the Article 8 rights of a mentally handicapped child,. "effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions..." [*X and Y v. The Netherlands* (1985) 8 EHRR 235, para 27]."

The Court, in general agreement with the Commission, also required "effective deterrence" as a condition of compliance.

20. Mr. Fordham, however, points out that earlier in its judgment *X and Y v. The Netherlands* (para 24) the Court had said:

> "... there are different way of ensuring "respect for private life", and the nature of the State's obligation will depend on the particular aspect of private life that is at issue. Recourse to the criminal law is not necessarily the only answer."

21. In my judgment neither Article 3 nor the jurisprudence of the Court of Human Rights on the positive obligation of states to protect individuals from other individuals goes as far as Ms. Farbey contends. What matters is that protection should be practical and effective, not that it should take a particular form. Indeed, to insist on the latter might very well be to frustrate the former. What perhaps matters more is the standard of protection which the state is expected to afford. The higher the standard, the less the individual will have to establish in order to show non-compliance with it. Our attention has been drawn in this regard to the formulation in *HLR v. France* (1997) 26 EHRR 29:

> "Owing to the absolute character of the right guaranteed, the court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving state are not able to obviate the risk by providing appropriate protection. (Para 40, cited in Grosz, Beatson and Duffy on *Human Rights* (2000, C 3-11))."

22. On the face of it this appears to require the state to obviate risks which fall within Article 3, but this cannot be right. What the state is expected to do is take reasonable measures to make the necessary protection available. It is not, as counsel agree, a guarantor of safety or non-violation. To the extent that a state can be shown to be unable or unwilling to take such measures, the positive obligation of protection will not be met. I respectfully adopt the judgment of Arden LJ. as amplifying my reasoning on this question.

45. Arden LJ states as follows:

> 36. My second point is that Article 3 requires a state to provide machinery to deter a violation of that article which attains a satisfactory degree of effectiveness. The jurisprudence of the European Court of Human Rights provides support for this conclusion. In *Osman v United Kingdom* [1999] 1 FLR 193 at 222, the Court said:
>
> > "(115) The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *LCB v the United Kingdom* judgment of 9 June 1998, Reports of Judgments and Decisions 1998). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. ....."
>
> 37. The second sentence makes it clear that the provisions of the law required to safeguard the right to life must be "effective". Although this paragraph relates to Article 2, in my judgment the same principle applies to Article 3. The right to life under Article 2 and the

right to freedom from torture and inhuman and degrading treatment under Article 3 are both non-derogable rights. (The third sentence in paragraph 115, above, which is in tentative terms, is not applicable because the situation under consideration is not one where the state has some special knowledge of an extreme situation, as in *Osman* itself). Likewise, in *X and Y v Netherlands* (1985) EHRR 235 at 241, the European Court of Human Rights, referred to the need for "effective deterrence". This was a decision on Article 8 of the European Convention on Human Rights but it was subsequently applied by the European Court of Human Rights to a violation of Article 3: see *A v United Kingdom* (1998) 27 EHRR 611 at 629, paragraph 22.

38. Accordingly, to be "effective", measures for the purposes of Article 3 must be those which attain an adequate degree of efficacy in practice as well as exist in theory. If the appellant were able to show to the requisite standard of proof that the remedies provided under the law of Jamaica against domestic violence are unlikely to be an effective deterrent, in my judgment she would have shown that her removal from the United Kingdom to Jamaica would violate her rights under Article 3 of the European Convention on Human Rights. On this appeal, there is no dispute about what in general the law of Jamaica provides, and the appellant has not suggested on the hearing of this appeal that if regard can be had to non-criminal sanctions, the package of sanctions provided by the Domestic Violence Act 1995 of Jamaica is not by and in itself capable of being "effective measures" for the purposes of Article 3, i.e. an effective deterrent against domestic violence, including violence between former co-habitants.

39. It is accepted that article 3 does not require a state to guarantee the appellant's safety. Argument was not, however, addressed to the question of what the appellant would have to show to establish (to the requisite standard of proof) that the measures were not "effective" in practice. Accordingly, final resolution of this issue will have to await another case.

EXTRATERRITORIALITY AND EXPULSION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. INTRODUCTION

1. This part of the course looks at the question of the extent of the UK's responsibility under the ECHR for expelling non-citizens to a country in which they might face violations of Convention rights. The label 'extraterritorial effect', although used frequently in this context, is in fact misleading. The issue is the **direct liability** of the Contracting State (ie the UK) for its own action in expelling a person in circumstances where he or she may be subjected to violations of the Convention in another state.

2. The Home Office has accepted that the UK's responsibility can be engaged in relation to extra-territorial breaches of Article 3 of the Convention but it is denied in relation to all other Articles.

3. In Kacaj **(Secretary of State for the Home Department v Kacaj, Appeal no. 23044/2000, 19 July 2001)** the Immigration Appeal Tribunal reviewed these issues and rejected some aspects of the Secretary of State's submissions in relation to the extra-territorial effect of the Convention.

B. GENERAL PRINCIPLES

4. In general there is no reason why all rights protected by the Convention could not be applied "extraterritorially".

   Article 1 ECHR requires Contracting States to secure all the rights contained within the ECHR to **"everyone within their jurisdiction"**

5. It is important to distinguish between those articles not capable of derogation in any circumstances; those capable of derogation only in accordance with Article 15 and subject to strictly applied inherent limitations; and those qualified rights where the interests of public safety, public order, or rights and freedoms of others may impose a limitation on a person's rights.

6. Application of Extra-territorial concept to different categories of rights:

ABSOLUTE RIGHTS: Article 2 (except in respect of deaths resulting from lawful acts of war), 3, 4 (1) and 7 and, where relevant, Protocol 4 and Article 4 of Protocol 7 the only question for the expelling state is whether or not there is substantial evidence to suggest that there is a real risk that the expulsion will subject a person to a violation of one of those rights.

No further reasoning or balancing permitted since no derogation whatsoever is permitted in relation to these articles. The interests of the expelling State are irrelevant.

RIGHTS SUBJECT TO INHERENT LIMITATIONS/ DEROGABLE RIGHTS: Articles 4(2) and (3), 5, 6, 12, 14, and, where relevant, articles 1, 2 and 3 of protocol 1, articles 1, 3, 4 of protocol 4, and articles 2, 3, 5 of protocol 7) the only possible derogation permitted is in accordance with Article 15 of the Convention, which is in extremely narrow and precise terms. These rights may be subject to inherent limitation eg article 5 provides a general right to liberty, but article 5(1) provides for the limitations to this and the narrow and specific circumstances in which an individual may be deprived of their liberty. This has no

As with absolute rights the only question for the Contracting State is whether the evidence suggests that there is a real risk that a person will be subjected to a violation of one of these Convention rights in the country to which the Contracting State proposes to

expel him or her. Except where specific derogation has been entered under Article 15 the interests of the expelling State are irrelevant.

QUALIFIED RIGHTS: Articles 8-11 - This is ONLY category of rights where the expelling State's interests may be balanced against the rights of the individual.

The expelling state justify the expulsion on the basis of legitimate immigration control, economic well-being of the nation, public order. This is because it is only in relation to the articles comprising this category that the protected rights can be limited by lawful measures which are 'necessary in a democratic society in the interests if public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.

C. SPECIFIC APPLICATION OF EXTRA-TERRITORIALITY

(1) DEATH PENALTY AND THREATS TO LIFE: ARTICLE 2 EHCR, ARTICLE 1 of PROTOCOL 6

7. The question of liability of a Contracting State (eg United Kingdom) for an expulsion/deportation that might subject a person to a breach of Article 2 in a third state has not been examined by the Strasbourg organs. In many of the cases in which the question has arisen the Court has found a violation of Article 3 and has thus declined to consider violations of other Convention articles[1].

[1] See for example *Case of D v. the United Kingdom*, 146/1996/767/964, 2 May 1997, where the Court concluded that, "[h]aving regard to its finding that the removal of the applicant to St. Kitts would give rise to a violation of Article 3...the Court considers that it is not necessary to examine his complaint under Article 2" (at para 59).

8. However the Commission has repeatedly affirmed that Article 2 is capable of giving rise to extraterritorial application

9. In **Shammsuddin Bahaddar v. the Netherlands** (Application No. 25894/94, decision of 13 September 1996) the Commission found

> "The Commission recalls that Article 2 contains two separate though interrelated basic elements. The first sentence of paragraph 1 sets forth the general obligation that the right to life shall be protected by law. The second sentence of this paragraph contains a prohibition of intentional deprivation of life, delimited by the exceptions mentioned in the second sentence itself and in paragraph 2...The Commission finds nothing to indicate that the expulsion of the applicant would amount to a violation of the general obligation contained in the first sentence of paragraph 1. As to the prohibition of intentional deprivation of life, **the Commission does not exclude that an issue might be raised under Article 2 in circumstances in which the expelling State knowingly puts the person concerned at such high risk of losing his life as for the outcome to be a near-certainty"** (at paras 74-78).

7. Note however that the near certainty test is higher than the "real risk" test for Article 3 cases. In **Launder v. the United Kingdom** (App. No. 27279/95, 8 December 1997) the Commission stated

> "As regards intentional deprivation of life the Commission further recalls its case-law according to which it is not excluded that an issue might be raised under Article 2 in circumstances in which an expelling State knowingly puts the person concerned at such high risk of losing his life as for the outcome to be a near-certainty. However, there must be a "near-certainty" of loss of life to make expulsion an "intentional deprivation of life" prohibited by Article 2. Allegations of the existence of a "real risk" only fall to be examined under the prohibition of inhuman treatment as enshrined in Article 3."

8. The most recent approval of the Commission's case law has been in **Dougoz v Greece** (Judgment of 6 March 2001) the Court explained:

> "Moreover, the Commission did not exclude that an issue might arise under Article 2 of the Convention in circumstances in which the expelling State knowingly puts the person concerned at such a high risk of losing his life that the outcome is a near-certainty (*Bahaddar v. the Netherlands*, Comm. Report 13.9.96, *Reports of Judgments and Decisions 1998-I*, § 78, p. 271). According to the case-law of the Court, the existence of the risk is assessed primarily with reference to those facts that were known or ought to have been known to the Contracting Party at the time of the expulsion (the above-mentioned *Vilvarajah and Others v. the United Kingdom* judgment, p. 36, § 107)."

9. It is established that an expulsion to face the death penalty will be in breach of Article 1 of Protocol 6: **Aylor-Davis v France** (22742/93, 20 January 1994).

(2) FAIR TRIAL AND THE RISK OF DETENTION: ARTICLES 5 AND 6 ECHR

10. In **Soering v UK** ((1989) 11 EHRR 439) the Court established that principle that there would be a breach of Article 6 ECHR by a Contracting State which had made an extradition or expulsion decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.

11. BUT the standard of review by the Contracting State into the fairness of a trial which has already taken place in the receiving state was for some time quite low.

12. In **Drozd and Janousek v. France and Spain** (26 June 1992, (1992) 14 EHRR 745 at para 110) the Court stated

"As the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their cooperation if it emerges that the conviction is the result of a flagrant denial of justice...." (para 110).

13. The approach of the Court to the requirements of Article 6 has recently become more robust. It found a Contracting State in breach of Article 6 for failing properly to scrutinise the fairness of a trial conducted in a third state before giving effect to the resulting judgment: **Pellegrini v Italy** (Application no. 30882/96, 20 July 2001). The Court held that it was incumbent upon Italy, a contracting State, to have verified that the procedure

    NB the applicant had not been notified of the case against her nor had a lawyer to assist

14. Persuasive evidence that a person will not receive a fair trial will be required in order to establish a violation of Article 6 in the expulsion context. Even so, it is arguable that where there is sufficient evidence that one of the key constituent elements of Article 6 will be violated, then the State's responsibility is engaged.

15. It is important to remember how important Article 6 is to the ECHR as a whole: **Delcourt**, 17 January 1970, A 11 p 15, (1980) 1 EHRR 355; **De Cubber**, 26 October 1984, A. 86 at p 16, (1985) 7 EHRR 236

'[i]n a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision.

16. Article 5 has not been considered by the Court in this context. The Commission has assumed that Article 5 can have the same type of application: **M.A.R. against the United Kingdom** (App. No. 23038/95, 19 September 1997), where the applicant argued that his expulsion to Iran by the United Kingdom government would involve violations by the UK of Articles 2, 3, 5 and 6 of the Convention. The application was declared admissible but settled.

(3) RIGHT TO PRIVATE and FAMILY LIFE: ARTICLE 8 ECHR

17. In considering Article 8 in the deportation/expulsion context there are two possible applications.
    A) Where the very fact of removal may interfere with a person's private or family life, for example, by separating the person from family members who may remain in the deporting country. In such a case, the application of Article 8 does not have an extra-territorial element.
    B) Where a person might face violations of Article 8 in the country to which he or she is being deported. In such a case, the responsibility of the deporting country for a violation of Article 8 is by virtue its 'extra-territorial' application.

Almost all of the cases in which the Commission or Court have considered Article 8 in fact fall within the first category (A) and are thus not truly cases of 'extra-territorial' application. They are considered in the next section.

18. However the second category (B) may come into play particularly where treatment or punishment in the receiving country consitutes an interference with a person's physical

or mental integrity but is not grave enough to reach the threshold of severity of Article 3, for instance:-

a) Where a lack of treatment in the receiving country might cause a deterioration in health: **Bensaid v the United Kingdom**, Judgment February 2001

b) Where the individual would be subject to discriminatory punishment eg as a homosexual: **Dudgeon v United Kingdom**, Judgment 22 October 1981

19. However the extra-territorial application is complicated by the fact that the rights are **not absolute**, but may be subject to limitations.

20. Home Office should determine:-

a) whether the evidence establishes that a person's rights under Article 8 will be violated in the country to which he or she is being expelled, and, if yes
b) whether the subjection of the person to this violation is justified by the UK in accordance with Article 8(2).

BUT any balancing exercise undertaken by the expelling State must be in relation to its own legitimate interests in immigration control and maintainence of public order and not to any potential justification that the state to which the person will be returned may have in restricting the exercise of the relevant rights

(D) FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION; FREEDOM OF EXPRESSION; FREEDOM OF ASSOCIATION: ARTICLES 9, 10 and 11

21. The Court and Commission have never dealt directly with the question of the responsibility of a contracting State for breaches of Articles 9-11 which might occur on expulsion to another country although they have not ruled out that application: **Beatrice**

Ngalola Kashama against the Netherlands, (Application. No. 33708/96, dated 25 February) the Commission stated, "[e]ven assuming that the applicant's expulsion could raise issues under these provisions of the Convention, the Commission notes that this complaint has remained unsubstantiated."

22. There is no reason in principle why these provisions could not be engaged in the expulsion context. However as with Article 8, an expulsion that did engage these issues may be more amenable to justification by the expelling State, given the inherent limitations in these articles.

ARTICLE 8 OF THE CONVENTION: RIGHT TO PRIVATE AND FAMILY LIFE IN IMMIGRATION CASES

A) INTRODUCTION

1. Article 8 of the Convention provides:

> *"1. Everyone has the right to respect for his private life and family life, his home and his correspondence.*
> *2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevent of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

2. Article 8 protects a wide range of personal interests - family and private life, home and correspondence. In the context of immigration cases it will embrace a number of issues including family reunion and the rights of the long term residents and is therefore potentially of great significance in immigration cases.

3. Article 8 is a "qualified" right. Article 8(2) provides for a number conditions upon which a State may interfere with the enjoyment of a protected right and the European Court of Human Rights has afforded States a "margin of appreciation" in deciding whether an interference is necessary. This means that Article 8 can be difficult to apply and the outcome disappointing.

B: GENERAL CONSIDERATIONS FOR THE APPLICATION OF ARTICLE 8: Assessing compliance with Article 8: Example of family life

4. Compliance with Article 8 will turn on several issues which are generally examined by the Strasbourg organs in turn and it is necessary to consider each of the issues in order to assess the compatibility of a decision with Article 8. The example of family life is used here as this right is the one most usually relevant to immigration cases.

(i) Is there family life?

(ii) Has there been an interference with it?

(iii) Is that in accordance with the law?

(iv) Is it necessary in a democratic society and on what basis?

(v) Is it proportionate to the legitimate aim pursued?

(i) The existence of family life

5. The central relationships of family life are those of husband and wife and parent and child. However also applicable are relationships between siblings: **Moustaquim v Belgium** (1993, Series A no. 193, para. 56) and between grandparents and grandchildren: **Marckx v Belgium** (1979, Series A no. 31, para. 45)

6. Family life in Strasbourg jurisprudence is now also understood as extending beyond formal or legal relationships. Where there is a union between two persons, whether that may be regarded as family life will depend on the facts. In general however

> *"The question of the existence or non-existence of "family life" is essentially a question of fact depending upon the real existence of practice of close personal ties and "respect" for family life in this sense implies an obligation for the State to act in a manner calculated to allow these ties to develop normally*" (**Marckx v Belgium**, 1979, Series A no.31, para. 45)

7. The Court is willing to take into account of developments in social practices and scientific progress in relation to the protection of family life: **G v the Netherlands** (Application no. 16944/90).

8. BUT despite their liberal approach to informal relationships, have not accepted that homosexual relationships constitute "family life" within the meaning of Article 8: **Roosli v Germany** ((1996) Application no. 28318/95, 83A DR 151) the Commission confirmed that

> *"despite the modern evolution of attitudes towards homosexuality, a stable homosexual relationship between two men does not fall within the scope of the right to respect for family life ensured by Article 8"*

(ii) The interference with the family life

9. The Court and Commission have consistently treated adverse immigration measures such as removal as affording the potential at the very least for an interference with family life, even when that interference is merely threatened: **Beldjoudi v France** (1992, Series A no.234-A).

10. Whether or not there has been an interference with family life will depend upon whether the family is able to live together elsewhere. The Commission has repeatedly stated that whether the removal of a family member from a Contracting State is incompatible with the requirements of Article 8 depends on

> "*whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them*" (**Sorabjee v the United Kingdom,** 1995, Application no. 23938/94, p.8)

11. The Strasbourg organs have tended to apply this test very strictly, affording applicants little possibility of overcoming this hurdle. Applicants have sought to

argue that to follow family members to another country would involve them leaving their businesses of employment or would affect their health but none have been successful: **Riaz v the United Kingdom,** (admissibility decision); **Kamara v the United Kingdom** (application no. 24831/94, 31 August 1994).

12. In the case of **Gul v Switzerland** (19 February 1996, 1996-I RJD) the Turkish father had been granted leave to remain in Switzerland on humanitarian grounds. He and his wife applied to have their seven-year-old son join them. The Court found that although it would not be easy for the parents to return to Turkey particularly given the length of time spent away, it would not be impossible for them to do so.

13. However more recently in the case of **Boultif v Switzerland** (Application no. 54273/00, 2 August 2001) the Court has considered that language difficulties and a lack of social ties would constitute real obstacles to a Swiss national relocating to Algeria; and that potential lack of legal status in a third country would prevent them relocating there:

> *"The Court has considered, first, whether the applicant and his wife could live together in Algeria. The applicant's wife is a Swiss national. It is true that the applicant's wife can speak French and has had contacts by telephone with her mother-in-law in Algeria. However,* ***the applicant's wife has never lived in Algeria, she has no other ties with that country, and indeed she does not speak Arabic.*** *In these circumstances she cannot, in the Court's opinion, be expected to follow her husband, the applicant, to Algeria.*
>
> *There remains the question of establishing family life elsewhere and notably in Italy. In this respect the Court notes that the applicant lawfully resided in Italy from 1989 until 1992 when he left for Switzerland, and it appears that he is now again residing with friends in Italy, albeit without regular status. In the Court's opinion,* ***it has not been established that both the applicant and his wife could obtain the authorisation to reside lawfully and, as a result, to lead their family life in Italy.*** *In that context, the Court has noted that the*

Government have argued that the applicant's current whereabouts are irrelevant in view of the nature of the offence which he had committed".

(iii) The interference must be in accordance with law

14. The measure in issue must have some basis in domestic law: **Malone v United Kingdom** (2 August 1984, Series A, no. 82)

15. The law must be of sufficient quality that it is accessible and enables the individual to forsee with reasonable degree of certainty the consequences of his actions or the circumstances in which, and the conditions where, authorities may take certain steps: **Amuur v France** (25 June 1996)

(iv) **The interference must be justifiable as being necessary in a democratic society**

16. The Court and Commission have long recognised the right of Contracting States to prevent disorder and maintain a fair but firm immigration policy. There may be economic and social considerations why a Contracting Party wishes to remove a person illegally on its territory.

17. Other considerations of public order such as where a person has committed serious or persistent offences may also justify the expulsion of an individual from a Contracting State: **Boughanemi v France** (24 April 1996, 1996-II RJD).

18. The Court has now laid down the central factors which should be taken into account where a person as regards a person's criminal offence: **Boultif v Switzerland**

a) the nature and seriousness of the offence committed by the applicant;
b) the time elapsed since the offence was committed;
c) the applicant's conduct in that period;
d) whether the spouse knew about the offence at the time that they entered into the relationship

(v) The Proportionality Test

19. Whether or not an interference with family life is justified will depend on whether it is proportionate to the legitimate aim pursued. The proportionality test is something best considered on a case by case basis. However in general the stronger the family ties and the more unlikely it is that the family can live together elsewhere the more likely that the interference with the family life will outweigh the legitimate aims of the State.

C: OTHER CONSIDERATIONS UNDER ARTICLE 8

1. The Rights of the Long Term Displaced and Second Generation migrants

20. It may be for some reason that a non-national remains in her host country for a long period of time without necessarily being afforded any immigration status. Such a person would undoubtedly develop personal ties within the community which may not necessarily constitute "family life".

21. The Commission has found on a number of occasions now that the expulsion or removal of a person raises the question whether there has been a lack of respect for private life: **Tanko v Finland** (1994) 77A DR 133).

22. Encompassed within the concept of "private life" is the possibility of the effective enjoyment of a social life being an aspect of it and relationships beyond the narrow ambit of the concept of a "family" being included - most importantly here homosexual relationships: **Mark Roosli v Germany** ((1996) Application no. 28318/95; 83-A DR 149)

23. Concurring opinion of Judge Martens of the Court in **Beldjoudi v France** ((1992) Series A no. 234-A) explains the private life aspects of immigration decisions:

> *"In a Europe where a second generation of immigrants is already raising children (and where violent xenophobia is increasing to an alarming extent) it is high time to ask ourselves whether the ban [on the expulsion of nationals]*

should not apply equally to aliens who were born and bred in a member State ***or who have otherwise, by virtue of long residence, become fully integrated there*** *(and, conversely, become completely segregated from their country of origin)"* (emphasis added).

24. It is certainly arguable that integrated aliens without families in the Contracting State may have as much to lose as those who do have families and that in any case all persons have a degree of "private life", which can be interfered with upon removal. As Judge Martens states:

"expulsion severs irrevocably all social ties between the deportee and the community he is living in and.... the totality of those ties may be said to be part of the concept of private life, within the meaning of Article 8"

25. Some judges of the Court have been very keen to emphasis the fact that long term residents in a country have a "private life" in that country that would be interfered with if they were to be expelled (see Judges De Meyer in **Beldjoudi v France** (1992), Judge Morenilla in **Nasri v France,**1995, *and* Wildhaber in **Nasri v France** 1995.

26. BUT this is not a present the majority view and although there is a willingness now for the Court to consider both the family and private life aspects of an expulsion: **Boughanemi v France** (24 April 1996) it will take careful persuasion for the Court to fully accept these arguments.

27. There had been a hardening of the Court's attitude towards long term migrants who commit crimes in Contracting States. In **Boughanemi v France** (24 April 1996, 1996-II RJD, No.8) the applicant had four convictions for theft. In **Bouchelkia v France** (29 January 1997, 1997-I RJD) the applicant had lived in France since the age of two but a conviction for rape outweighed his personal interests.

28. However note the recent case of **Boultif v Switzerland** where the family life considerations outweighed the State's interests in refusing to renew the residence permit of a person with convictions for robbery and assault.

For consideration - The fact that this was a renew of a residence permit (rather than a refusal to regularise) is significant and gives rise to problems in a United Kingdom context where a person's status is not automatically or routinely legalised upon marriage to a settled person.

2. Negative and Positive Obligations: Refusal to grant entry

29. Negative obligations - It is incumbent on a Contracting State not to interfere with the rights of an individual protected by the Convention. However this negative obligation on the State will not necessarily afford protection of that individual's rights. In fact the rights become meaningless if the State tolerates the interference with those rights by other private individuals or fails to take positive steps to ensure enjoyment of the rights.

30. Positive obligations - firstly to take steps to ensure that the enjoyment of the right is not interfered with by other private persons and secondly to ensure that the enjoyment of the right is effective.

31. This may mean that the State is obliged to have in place laws that grant individuals the legal status, rights and privileges required to ensure, for example, that their family life is properly respected: **Marckx v Belgium** (3 June 1979, Series A no.31, para. 36).

32. In **Sen v the Netherlands** (Application no. 31465/96, 21 December 2001) the Court determined that the Dutch authorities had the positive obligation to admit a child to live with her parents in the Netherlands even where they had left the child with relatives and the child had spent her whole life in Turkey. The legal residence of the couples other two children in the Netherlands presented a major obstacle to the family living in Turkey.

ARTICLE 5 ECHR - THE RIGHT TO LIBERTY

1. Article 5 (so far as is of particular relevance in an immigration context) provides as follows:

> *(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedures prescribed by law:*
> *(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*
>
> *(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*
>
> *(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful*

2. The approach to immigration detention may be thought to be at odds with the principles otherwise applicable. Certainly this appears to have been the approach of the Court of Appeal in *R (on the application of Saadi and others) v Secretary of State for the Home Department* [2001] 4 All ER 961treating 'aliens' as a special category for the purposes of Article 5 (see further below). But it is an approach arguably reflected also by judgment of the Strasbourg Court in *Chahal v United Kingdom* [1997] 23 EHRR 413.

Some generalisations

3. Some generalisations without reference to 'immigration' detention are first made; thereafter consideration is given to the 'immigration' case-law on Article 5(1)(f).

4. The guarantees contained in Article 5 are of 'fundamental importance' for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. See paragraphs 122-123 of *Kurt v Turkey* [1998] 27 EHRR 91).

> 122. The Court notes at the outset the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It is precisely for that reason that the Court has repeatedly stressed in its case-law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness (see, among many other authorities, the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports* 1996-V, p. 1864, § 118). This insistence

on the protection of the individual against any abuse of power is illustrated by the fact that Article 5 § 1 circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom (see, *mutatis mutandis*, the Quinn v. France judgment of 22 March 1995, Series A no. 311, p. 17, § 42).

123. It must also be stressed that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptitude and judicial control assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention (see, *mutatis mutandis,* the above-mentioned Aksoy judgment, p. 2282, § 76). What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.

See also *Chahal v UK* and *Brogan v UK* 1988] EHRR 117 (at para. 58 referring to one of the fundamental principles of a democratic society being that a State must strictly observe the rule of law when interfering with the right to personal liberty).

5. Analysis of the text of Article 5(1) itself – which sets out an exhaustive list of exceptions to the right to liberty – shows the need for a narrow interpretation which has been consistently emphasised.

6. For an example of such narrow interpretation see *Winterwerp v Netherlands* [1979] 2 EHRR 387:

35. There is no dispute that since 1968, except for a few periods of interruption, the applicant has been deprived of his liberty in pursuance of the Mentally Ill Persons Act (see paragraphs 23 to 31 above). He claims to be the victim of a breach of Article 5 para. 1 (art. 5-1) which, insofar as relevant for the present case, reads as follows: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (e) the lawful detention ... of persons of unsound mind ...; ..." A. "The lawful detention of persons of unsound mind"

36. Mr. Winterwerp maintains in the first place that his deprivation of liberty did not meet the requirements embodied in the words "lawful detention of persons of unsounf mind". Neither the Government nor the Commission agrees with this contention.

37. The Convention does not state what is to be understood by the words "persons of unsound mind". This term is not one that can be given a definitive interpretation: as was pointed out by the Commission, the Government and the applicant, it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread. In any event, sub-paragraph (e) of Article 5 para. 1 (art. 5-1-e) obviously cannot be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society. To hold otherwise would not be reconcilable with the text of Article 5 para. 1 (art. 5-1) which sets out an exhaustive list (see the Engel and others judgment of 8 June 1976, Series A no. 22, p. 24, para. 57, and the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 74, para. 194) of exceptions calling for a narrow interpretation (see,

> mutatis mutandis, the Klass and others judgment of 6 September 1978, Series A no. 28, p. 21, para. 42, and the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 41, para. 65). Neither would it be in conformity with the object and purpose of Article 5 para. 1 (art. 5-1), namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion (see the Lawless judgment of 1 July 1961, Series A no. 3, p. 52, and the above-mentioned Engel and others judgment, p. 25, para. 58). Moreover, it would disregard the importance of the right to liberty in a democratic society (see the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 36, para. 65, and the above-mentioned Engel and others judgment, p. 35, para. 82 in fine).

It is manifest that detention is only permissible where it can be justified by reference to one of the six headings in the paragraph.

7. Fundamental to Article 5(1) is the requirement that the deprivation of liberty is lawful. Lawfulness in this context means in accordance with national law and procedure but also confers protection against arbitrariness. A detention will only be lawful within the meaning of Article 5(1) if:-

i) the detention pursues a legitimate purpose permitted by one of the exceptions to the right to liberty laid down in Article 5(1) ;
ii) the law is of sufficient quality and the detention is not arbitrary; and
iii) the detention is proportionate and is not unduly prolonged.

8. There must be a precise and clear connection between the permissible purpose and the detention. Thus detention for educational purposes must promote a specific regime promoting education (*Bouamar v Belgium* [1987 11 EHRR 11) and mental patients must have a sufficient severity of disorder to warrant detention or any necessary treatment (*Winterwerp*). Where a detention is motivated by a reason other than that put forward by the authorities the detention will be unlawful even where on its face the detention falls within one of the exceptions permitted by Article 5(1). See *Bozano v France* ([1986] 9 EHRR 297 where detention and deportation by the French government of an Italian national to Switzerland (from where he was successfully extradited to Italy) was held to breach article 5(1)(f) because the deportation was a disguised form of extradition (an Italian application to a French court for extradition having been previously refused on the ground that the trial procedure had been incompatible with French public policy).

9. As a generalisation at least detention must be necessary. See *NC -v- Italy* [2001] 11th January No. 24952/94) where at paragraph 41 the Court states as follows:

> 1. It does not suffice that the deprivation of liberty is executed in conformity with national law; it must also be necessary in the circumstances. Article 5 also requires that any measure depriving the individual

> of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (*Witold Litwa v. Poland*, no. 26629/95, § 73, ECHR 2000- ; K.-F. v. Germany judgment of 27 November 1997, *Reports* 1997-VII, p. 2674, § 63). In a democratic society subscribing to the rule of law, no detention that is arbitrary can ever be regarded as "lawful" (see the *Winterwerp v. the Netherlands* judgment of 24 October 1979, Series A no. 33, p. 18, § 39).

10. Furthermore, in respect of the entitlement in Article 5(3) to "trial within a reasonable period or release pending trial", where the danger of absconding is in issue such danger cannot be assessed only by reference to the severity of sentence risked but must be assessed by reference to other factors either confirming such risk or making it so slight as not to justify detention. Other alternative less severe measures should be considered and reasons given why they might be inappropriate. See paragraph 98 of *Tomasi v France* [1992] 15 EHRR 1:

> 98. The Court notes in the first place that the reasoning put forward by the Government in this respect did not appear in the contested judicial decisions. The latter were admittedly based for the most part on the need to ensure that Mr Tomasi remained at the disposal of the judicial authorities (see paragraphs 16, 22, 31 and 35 above), but only one of them - the decision of the Poitiers indictments division of 22 May 1987 - referred to a specific element in this connection: the help which members of the ex-FLNC could have given the applicant to enable him to evade trial (see paragraph 35 above). In addition, the Court points out that the danger of absconding cannot be gauged solely on the basis of the severity of the sentence risked; it must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial (see, inter alia, the Letellier v. France judgment of 26 June 1991, Series A no. 207, p. 19, para. 43). In this case, the decisions of the judicial investigating authorities contained scarcely any reason capable of explaining why, notwithstanding the arguments advanced by the applicant in his applications for release, they considered the risk of his absconding to be decisive and why they did not seek to counter it by, for instance, requiring the lodging of a security and placing him under court supervision.

13. In *McVeigh, O'Neill & Evans v United Kingdom* [1981] 5 EHRR 71 Commission considered the detention in February 1977 for 45 hours of three applicants for 'examination' under the Prevention of Terrorism (Supplemental Temporary Provisions) Order 1976. Their detention was sought to be justified under Article 5(1)(b) on the ground that it was "in order to secure the fulfilment of [an] obligation prescribed by law" (namely 'examination' under the 1976 Order). The Commission emphasised that the purpose of detention was authorised only to 'secure the fulfilment of the obligation'. Assuming it to be to secure fulfilment of an obligation there must be "specific circumstances which warrant the use of detention as a means of securing the fulfilment of the obligation". Whilst the wording of Article 5(1)(b) did not expressly require that there had been deliberate or negligent failure on the part of the detainee, in general only refusal or neglect to comply could justify detention in order to secure fulfilment . Short of this, only limited circumstances of a pressing

nature could justify such detention. The decision of the Commission continues (at paragraph 191):

> In considering whether such circumstances exist, account must be taken, in the Commission's opinion, of the nature of the obligation. It is necessary to consider whether its fulfilment *is a matter of immediate necessity and whether the circumstances are such that no other means of securing fulfilment is reasonably practicable.* A balance must be drawn between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty.

The 'immigration' exception: article 5(1)(f)

14. Article 5(1)(f) recognises the 'lawful arrest or detention of a person' as a lawful exception to the right to liberty in (only) two discrete circumstances:

(a) 'to prevent his effecting an unauthorised entry into the country'; or

(b) 'of a person against whom action is being taken with a view to deportation or extradition'.

Each limb would appear to provide a different level of protection. It may be thought that (a) detention must be necessary. This might be said to flow not only from general principles, from the wording of the particular limb itself, namely that it must be to prevent the unauthorised entry. By contrast under (b), however, all that is required (subject always to general principles) is that the person is someone against whom action is being taken with a view to deportation or extradition.

15. The correctness of these propositions based on analysis of the decisions in *Amur v France* [1996] 22 EHRR 533 and *Chahal* was considered in the decision of the Court of Appeal in *Saadi and others*. Whatever else is said about article 5(1)(f), detention thereunder must in fact be for the purpose relied on (*Bozano*) and it must not be impossible (*Ali v Switzerland* Application 24881/94).

16. In *Amuur* asylum seekers were held in the airport transit zone which was open airside but closed on the French side. The Court held that holding asylum seekers in these circumstances was equivalent in practice to a deprivation of liberty (paragraphs 42-49). There was a real concern in those cases that the asylum applicants would effect an "unauthorized entry" in the sense described above: the French government alleged that there was justification for keeping the asylum seekers separate from other residents as the Hotel Arcade (where they were lodged during the night and returned to the airport's 'Espace' lounge

very early in the morning) on the grounds of a "concern to prevent them from evading surveillance by the airport and border police and settling unlawfully in France" (para 39 – below). The Court observed that the deprivation of liberty that it found which fell within the scope of article 5 rather than being a "restriction" on liberty within the meaning of Protocol 4, was only acceptable for the reasons it set out in para. 43, namely "to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to get around immigration restrictions must not deprive asylum seekers of the protection afforded by these Conventions". The Court found there to be violation of Article 5 on the basis that the detention was not lawful since the domestic "law" providing for their detention was not of sufficient "quality" and there was inadequate legal protection against arbitrariness (see paras. 51-54). The relevant extract of the judgment is set out.

II. ALLEGED VIOLATION OF ARTICLE 5 PARA. 1 (art. 5-1) OF THE CONVENTION

37. According to the applicants, holding them in the international zone at Paris-Orly Airport constituted deprivation of liberty contrary to Article 5 para. 1 (f) of the Convention (art. 5-1-f), which provides: "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

A. Existence of a deprivation of liberty

38. The applicants complained of the physical conditions of their "detention" in the transit zone. They maintained that these did not comply with Resolution (73) 5 of the Committee of Ministers of the Council of Europe on Standard Minimum Rules for the Treatment of Prisoners, or the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (see paragraph 28 above), or Recommendation No. R (94) 5 of the Committee of Ministers of 21 June 1994 (see paragraph 27 above). In addition, these conditions had been aggravated by the excessive length of their "detention", which was a decisive factor for assessment of the "deprivation of liberty" issue. They also emphasised that under the relevant international conventions and national legislation they should, as asylum-seekers, have enjoyed special protection and more favourable treatment than unlawful immigrants. The detention of asylum-seekers could not be justified unless their application for asylum was considered manifestly ill-founded, which was clearly not so in the applicants' case, as the other members of their family were granted refugee status by the French Office for the Protection of Refugees and Stateless Persons (see paragraph 11 above).

39. According to the Government, the applicants' stay in the transit zone was not comparable to detention. They had been lodged in part of the Hôtel Arcade where the "physical conditions" of the accommodation were described as satisfactory even in the CPT's report. Their separation from the hotel's other residents had been justified by the concern to prevent them from evading surveillance by the airport and border police and settling unlawfully in France. The original reason why they were held and for the length of time they were held had been their obstinacy in seeking to enter French territory despite being refused leave to enter. They could not therefore "validly complain of

a situation which they had largely created", as the Court itself had held in the Kolompar v. Belgium judgment of 24 September 1992 (Series A no. 235-C).

40. While admitting that the applicants' stay in the international zone was no different - when its length was taken into account - from "detention" in the ordinary meaning of that term, the Commission concluded that Article 5 (art. 5) was not applicable. It considered that the degree of physical constraint required for the measure concerned to be described as "deprivation of liberty" was lacking in this case.

41. The Court notes in the first place that in the fourth paragraph of the Preamble to its Constitution of 27 October 1946 (incorporated into that of 4 October 1958), France enunciated the right to asylum in "the territories of the Republic" for "everyone persecuted on account of his action in the cause of freedom". France is also party to the 1951 Geneva Convention Relating to the Status of Refugees, Article 1 of which defines the term "refugee" as "any person who [has a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". The Court also notes that many member States of the Council of Europe have been confronted for a number of years now with an increasing flow of asylum-seekers. It is aware of the difficulties involved in the reception of asylum-seekers at most large European airports and in the processing of their applications. The report of the Parliamentary Assembly of the Council of Europe, of 12 September 1991, is revealing on this point (see paragraph 26 above). Contracting States have the undeniable sovereign right to control aliens' entry into and residence in their territory. The Court emphasises, however, that this right must be exercised in accordance with the provisions of the Convention, including Article 5 (art. 5).

42. In proclaiming the right to liberty, paragraph 1 of Article 5 (art. 5-1) contemplates the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. On the other hand, it is not in principle concerned with mere restrictions on the liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 (P4-2). In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 (art. 5), the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance (see the Guzzardi v. Italy judgment of 6 November 1980, Series A no. 39, p. 33, para. 92).

43. Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions. Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty - inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered - into a deprivation of liberty. In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country. Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. Above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status.

44. The applicants arrived at Paris-Orly Airport from Damascus on 9 March 1992. They stated that they had fled their country of origin, Somalia, because they had been persecuted by the regime in power and their lives were in danger (see paragraph 7 above). As their passports had been falsified, the airport and border police refused them leave to enter French territory. They were then held in the airport's transit zone (and its extension, the floor of the Hôtel Arcade adapted for the purpose) for twenty days, that is to say until 29 March, when the Minister of the Interior refused them leave

to enter as asylum-seekers (see paragraph 11 above). They were immediately sent back to Syria without being able to make an effective application to the authority having jurisdiction to rule on their refugee status (see paragraph 9 above).

45. The Court notes that for the greater part of the above period the applicants, who claimed to be refugees, were left to their own devices. They were placed under strict and constant police surveillance and had no legal and social assistance - particularly with a view to completing the formalities relating to an application for political refugee status - until 24 March, when a humanitarian association, which had in the meantime been informed of their presence in the international zone, put them in contact with a lawyer. Moreover, until 26 March neither the length nor the necessity of their confinement were reviewed by a court (see paragraph 10 above). The applicants' lawyer applied on that date to the Créteil tribunal de grande instance, which, in making an order under the expedited procedure on 31 March (see paragraph 12 above), described the applicants' confinement as an "arbitrary deprivation of liberty". In a more general context, namely consideration of the constitutionality of the Law of 6 September 1991, the Constitutional Council had already noted on 25 February 1992 the restriction on personal liberty caused by "the combined effect of the degree of restriction of movement [holding an alien in the transit zone] entails and its duration" (see paragraph 21 above). The period of confinement criticised by the Constitutional Council on that occasion was equivalent to the length of time the applicants were held.

46. In concluding that there was no deprivation of liberty, the Government and the Commission attached particular weight to the fact that the applicants could at any time have removed themselves from the sphere of application of the measure in issue. More particularly, the Government argued that although the transit zone is "closed on the French side", it remains "open to the outside", so that the applicants could have returned of their own accord to Syria, where their safety was guaranteed, in view of the assurances which the Syrian authorities had given the French Government. The Commission added that the applicants had not shown that their lives or physical integrity were in danger in Syria or that the French authorities had prevented them from boarding a plane bound for that country.

47. The applicants maintained that such reasoning would amount to binding the application of Article 5 (art. 5) to that of Article 3 of the Convention (art. 3); this would be to ignore the specific object of Article 5 (art. 5), and its wording, which had to be strictly construed; it would also deprive Article 5 (art. 5) of any useful effect, particularly with regard to asylum applications.

48. The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention (P4). Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in. Sending the applicants back to Syria only became possible, apart from the practical problems of the journey, following negotiations between the French and Syrian authorities. The assurances of the latter were dependent on the vagaries of diplomatic relations, in view of the fact that Syria was not bound by the Geneva Convention relating to the Status of Refugees.

49. The Court concludes that holding the applicants in the transit zone of Paris-Orly Airport was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty. Article 5 para. 1 (art. 5-1) is therefore applicable to the case. B. Compatibility of the deprivation of liberty found established in the case with paragraph 1 of Article 5 (art. 5-1)

50. It remains to be determined whether the deprivation of liberty found to be established in the present case was compatible with paragraph 1 of Article 5 (art. 5-1). Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness (see, among many other authorities, the Kemmache v. France (no. 3) judgment of 24 November 1994, Series A no. 296-C, pp. 19-20, para. 42). In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 para. 1 (art. 5-1) primarily requires any arrest or detention to have a legal basis in

domestic law. However, these words do not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2), they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that where a national law authorises deprivation of liberty - especially in respect of a foreign asylum-seeker - it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness. These characteristics are of fundamental importance with regard to asylum-seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies.

51. The applicants asserted that their detention had no legal basis, whether under the French legislation in force at the time or under international law. They had found themselves in a legal vacuum in which they had neither access to a lawyer nor information about exactly where they stood at the time. In support of the above argument, they rely on the reasons for the judgment of the Créteil tribunal de grande instance, ruling on their application for an order under the expedited procedure.

52. The Court notes that even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945, holding them in the international zone of Paris-Orly Airport made them subject to French law. Despite its name, the international zone does not have extraterritorial status. In its decision of 25 February 1992 the Constitutional Council did not challenge the legislature's right to lay down rules governing the holding of aliens in that zone. For example, the Law of 6 July 1992 (see paragraph 23 above) provides, inter alia, for the intervention of the ordinary courts to authorise holding for more than four days, the assistance of an interpreter and a doctor and the possibility of communicating with a lawyer. The Decree of 15 December 1992 (see paragraph 24 above) lays down the procedural rules applicable to proceedings brought in accordance with that Law. The Decree of 2 May 1995 (see paragraph 25 above) gives the delegate of the United Nations High Commissioner for Refugees or his representatives and humanitarian associations permanent access to the zone. However, these rules - which postdate the facts of the case - were not applicable at the time to the applicants.

53. The Court emphasises that from 9 to 29 March 1992 the applicants were in the situation of asylum-seekers whose application had not yet been considered. In that connection, neither the Decree of 27 May 1982 nor the - unpublished - circular of 26 June 1990 (the only text at the material time which specifically dealt with the practice of holding aliens in the transit zone) constituted a "law" of sufficient "quality" within the meaning of the Court's case-law; there must be adequate legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention (see the Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82, p. 32, para. 67). In any event, the Decree of 27 May 1982 did not concern holding aliens in the international zone. The above-mentioned circular consisted, by its very nature, of instructions given by the Minister of the Interior to Prefects and Chief Constables concerning aliens refused leave to enter at the frontiers. It was intended to provide guidelines for immigration control at ports and airports. Moreover, the brief section it devoted to holding in the international zone and aliens' rights contains no guarantees comparable to those introduced by the Law of 6 July 1992. At the material time none of these texts allowed the ordinary courts to review the conditions under which aliens were held or, if necessary, to impose a limit on the administrative authorities as regards the length of time for which they were held. They did not provide for legal, humanitarian and social assistance, nor did they lay down procedures and time-limits for access to such assistance so that asylum-seekers like the applicants could take the necessary steps.

54. The French legal rules in force at the time, as applied in the present case, did not sufficiently guarantee the applicants' right to liberty. There has accordingly been a breach of Article 5 para. 1 (art. 5-1).

17. *Chahal* was plainly a 'second limb' 5(1(f) case. In *Saadi and others* the Secretary of State for the Home Department relied on the case as authority for the proposition that detention under Article 5(1)(f) need not be 'necessary'. The claimants had made (inter alia) the following submissions about *Chahal* in the Court of Appeal.

Defendant's submissions: Second limb of paragraph 5(1)(f)

7.7 Reliance was not placed on the second limb article 5(1)(f) as a justification for the detention either in his detailed grounds for contesting the claim (B/5 at pps141-144), evidence (A/4), skeleton argument for hearing below (A/13) or indeed at the time of the initial hearing of the matter on 21st and 22nd June 2001. At those stages, the Secretary of State sought to justify the detention entirely on the basis that it prevented unauthorized entry.

7.8 The first reliance upon the second limb came at the reconvened hearing of the claim for judicial review in July 2001 following its adjournment during the course of the Secretary of State's submissions.[2] The Secretary of State (paragraphs 18-22 of current skeleton argument) relies upon the second limb and submits that the "substance and reality" of the existing appellants' claims are the same as any other asylum seekers who, for example, claim while subject to enforcement action, including those in the position of Mr. Chahal (below), that it would be thus surprising if they were not covered by the same provisions of article 5(1)(f) and that the two "limbs" can "in reality, be two sides of the same coin" and accordingly surprising if the two limbs offered differential levels of protection, which the Secretary of State contends, they do not.

7.10 The claimants submit:

(1) The rationale for the separate limbs is plain and is set out above.

(2) The Secretary of State's approach in seeking to deprive the two limbs of discrete application, is contrary to the plain wording of article 5(1)(f); indeed it would appear that, on the Secretary of State's analysis all asylum seekers and others whose detention is realistically contemplated by article 5(1)(f), may be made subject to the second limb regime.

7.11 The Secretary of State relies for his submissions upon the decision of the Court in *Chahal -v- UK* [1996] 23 EHRR 413 (C/6) albeit the Secretary of State has submitted that it is good authority for the proposition that article 5(1)(f) (both limbs) as a whole is not concerned with necessity, the risks of absconding or fleeing and that a submission to the contrary in respect of that case, which was made in the Commission (paragraphs [117-123]), was dropped at the Court stage. The claimants make the following submissions in response:

(1) *Chahal* is unambiguously concerned with article 5(1)(f) second limb, not first limb (see Commission at [116] and Court at [108] where article 5(1)(f) is recited with the wording of the first limb *excised*).

(2) The two limbs are discrete and distinct. The plain wording of article 5(1)(f) simply cannot be read as involving the same test as the Defendant implies. If the first limb was to be given the interpretation for which the defendant contends by reference to *Chahal* and *Sezek -v- SSHD*, it would read along the lines of: "the lawful arrest or detention of a person while action is being taken to determine his eligibility for entry into the country". The Defendant's approach ignores the plain wording which engages the first limb where detention is required to "prevent **his** [the subject's]" unauthorized entry.

(3) *There is a plain rationale for the different approach to detention under the two limbs (above).* In all probability a "second limb" person would be unlikely to effect a voluntarily departure hence the deportation action and may be unlikely to comply with procedures to effect the same (see above). Such persons are likely also to have committed criminal offences (whether immigration or other offences). *In these circumstances,* the effect of the second limb of article 5(1)(f) is to strike the specific balance between the interests of the community and the interest of the individual by the authorisation of his detention in all cases (subject to the caveats and restrictions identified in *Chahal*) where the power is used.

(4) The above explains the assumption made by the Court (at paragraph [112]) upon which the defendant relies that article 5(1)(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing. However, it is noteworthy that the correctness of this proposition was not in itself in issue before the Court in *Chahal* (see analysis below) and was strictly obiter.

(5) Whilst *Chahal* made a claim for asylum (and to this limited extent his case is analogous), it is important to keep in mind that this was a claim made as a response to the initiation of deportation proceedings (namely after the Secretary of State had decided that he ought to be deported on 'national security' grounds). While three claimants were treated as illegal entrants, each is detained at Oakington pending examination and an initial decision whether to give entry. Each is a new arrival, seeking entry. None are persons in respect of whom any substantive decision has been taken about entry, let alone removal. *Chahal* fell within the second limb for the reasons given by the Commission at paragraph [119] which reasoning, however, is plainly inapt to apply to the claimants in these cases:

> it would be unduly narrow to interpret article 5(1)(f) as confined to cases where the person is detained solely to enable the deportation order to be implemented. The words of the provision are broad enough to cover the case where the person is originally detained with a view to deportation, but challenges that decision or claims asylum, and continues to be detained pending determination of that challenge or claim.

(6) The facts of *Chahal* in the foregoing respect warrant repetition. Deportation proceedings were afoot and action was being taken prior to the claim (see pps 422-426 of report paras 12, 25, 26 of the 'Facts'). Mr Chahal had come to the UK in 1971 and obtained settlement in 1974. He was arrested, charged and acquitted in the 1980s. On 14th August 1990 the Secretary of State signed a notice of intention to deport on conducive to public good grounds for reasons of national security. This was served on 16th August 1990 when he was also detained in order to effect the deportation purpose, which was *then* the trigger for the asylum application.

(7) It cannot be inferred that in *Chahal*, the applicant "dropped" a discrete unsuccessful submission which related to absconding between the Commission and Court. The central argument dropped was the submission that the applicant was not being detained "with a view to deportation" at all because

consideration was given to his asylum claim and judicial review (Commission para [117]). It was this submission which those representing Mr Chahal doubtless considered to have been fully answered by the Commission in paragraph [119]. Partly presumably as a result of the Commission's decision that the detention was excessive under article 5(1), (Commission at [120-122]), the applicant proceeded on that basis, rather than by seeking to resurrect the "with a view to deportation" point (decision of the Court at para [109]). Any subsidiary "absconding" point would have fallen with the decision to drop the "view to deportation" point, once acknowledged that he fell within the second limb. Certainly "absconding" was not dealt with separately by the Commission, which suggests that the case for Mr Chahal was not presented on the basis that the absence of risk of absconding could provide a discrete basis on which to maintain that the second limb of article 5(1)(f) was inapplicable.

(8) Furthermore, any sustained argument on the facts in *Chahal* that he was not likely to abscond would surely have been futile in any event. His submission was no more than that it was never alleged that he would abscond or not answer bail (Commission [117]). But this was plainly met by the Secretary of State's observation that release on bail was inappropriate since he constituted a national security risk (Commission [118] – and see also the reference to the habeas corpus proceedings before MacPherson J at pp430 of the report from which SSHD's position is also clear). It would have been wholly unrealistic to maintain that detention could not justified be on the facts of such a case: a national security risk will almost inevitably give rise to an absconding risk and detention would, in any event be justified under article 5(1)(c). On the facts of *Chahal* of course, the Court found that the national security considerations were sufficient to show that his detention was not arbitrary under article 5(1)(f) (see paragraphs [120-122] of the decision of the Court).

(9) *Chahal* was, on any view, a wholly exceptional case, a fact acknowledged by the Court itself at paragraph [123]. Nor was it without some disquiet, even amongst the 13-6 majority (see for example short concurring opinion of Judge Valticos at page 476), that there was held to be no violation of article 5(1) by reason of the length of detention. In such circumstances it would be quite wrong to extract the proposition that *Chahal* provides the 'green light' to the detention of asylum seekers, <u>without regard to either the individual circumstances of their cases or whether they are likely to seek to make an unauthorised entry</u>, thereby justifying detention under the first limb. Indeed, the defendant's submission makes the first limb an irrelevance.

7.12The defendant further seeks to suggest that it would be anomalous for an asylum seeker who has been in the UK for some time to be provided with less protection than an asylum seeker who arrives out of the blue and presents themselves as such. For the reasons advanced above, such a proposition provides no reason for surprise and the reason for such is that a second limb case is very likely to have exhausted the need for such additional protection. It would, however, be truly anomalous were a person in Mr. Chahal's position able, merely by the act of claiming asylum, to *avoid* the second limb regime into which he clearly falls and thereby land himself within the first limb regime. *That* would be a remarkable outcome (and one not countenanced as a matter of domestic law either (see *Rehmat Khan* [1995] Imm AR 348 (D/9)).

7.13The defendant's submissions are advanced no further forward by *Sezek* (Unreported) 25th May 2001 CA (C/12) except to the limited extent that the case is authority for the proposition that 'absconding' is not a requirement before a case falls within the scope of the second limb of article 5(1)(b). But this proposition is one that the claimants do not put in issue in any event.

18. The relevant paragraphs of the Court's judgment in *Chahal* are set out below.

> II. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION (art. 5) A. Article 5 para. 1 (art. 5-1)
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> 108. The first applicant complained that his detention pending deportation constituted a violation of Article 5 para. 1 of the Convention (art. 5-1), which provides (so far as is relevant): "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (f) the lawful arrest or detention ... of a person against whom action is being taken with a view to deportation ..."
>
> 109. Mr Chahal has been held in Bedford Prison since 16 August 1990 (see paragraph 25 above). It was not disputed that he had been detained "with a view to deportation" within the meaning of Article 5 para. 1 (f) (art. 5-1-f). However, he maintained that his detention had ceased to be "in accordance with a procedure prescribed by law" for the purposes of Article 5 para. 1 (art. 5-1) because of its excessive duration. In particular, the applicant complained about the length of time (16 August 1990 - 27 March 1991) taken to consider and reject his application for refugee status; the period (9 August 1991 - 2 December 1991) between his application for judicial review of the decision to refuse asylum and the national court's decision; and the time required (2 December 1991 - 1 June 1992) for the fresh decision refusing asylum.
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> 110. The Commission agreed, finding that the above proceedings were not pursued with the requisite speed and that the detention therefore ceased to be justified.
>
> 111. The Government, however, asserted that the various proceedings brought by Mr Chahal were dealt with as expeditiously as possible.
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> 112. The Court recalls that it is not in dispute that Mr Chahal has been detained "with a view to deportation" within the meaning of Article 5 para. 1 (f) (art. 5-1-f) (see paragraph 109 above). Article 5 para. 1 (f) (art. 5-1-f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5 para. 1 (f) (art. 5-1-f) provides a different level of protection from Article 5 para. 1 (c) (art. 5-1-c). Indeed, all that is required under this provision (art. 5-1-f) is that "action is being taken with a view to deportation". It is therefore immaterial, for the purposes of Article 5 para. 1 (f) (art. 5-1-f), whether the underlying decision to expel can be justified under national or Convention law. 113. The Court recalls, however, that any deprivation of liberty under Article 5 para. 1 (f) (art. 5-1-f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1 (f) (art. 5-1-f) (see the Quinn v. France judgment of 22 March 1995, Series A no. 311, p. 19, para. 48, and also the Kolompar v. Belgium judgment of 24 September 1992, Series A no. 235-C, p. 55, para. 36). It is thus necessary to determine whether the duration of the deportation proceedings was excessive. 114. The period under consideration commenced on 16 August 1990, when Mr Chahal was first detained with a view to deportation. It terminated on 3 March 1994, when the domestic proceedings came to an end with the refusal of the House of Lords to allow leave to appeal (see paragraphs 25 and 42 above). Although he has remained in custody until the present day, this latter period must be distinguished because during this time the Government have refrained from deporting him in compliance with the request made by the Commission under Rule 36 of its Rules of Procedure (see paragraph 4 above).
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> 115. The Court has had regard to the length of time taken for the various decisions in the domestic proceedings. As regards the decisions taken by the Secretary of State to refuse asylum, it does not

consider that the periods (that is, 16 August 1990 - 27 March 1991 and 2 December 1991 - 1 June 1992) were excessive, bearing in mind the detailed and careful consideration required for the applicant's request for political asylum and the opportunities afforded to the latter to make representations and submit information (see paragraphs 25-27 and 34-35 above).

116. In connection with the judicial review proceedings before the national courts, it is noted that Mr Chahal's first application was made on 9 August 1991 and that a decision was reached on it by Mr Justice Popplewell on 2 December 1991. He made a second application on 16 July 1992, which was heard between 18 and 21 December 1992, judgment being given on 12 February 1993. The Court of Appeal dismissed the appeal against this decision on 22 October 1993 and refused him leave to appeal to the House of Lords. The House of Lords similarly refused leave to appeal on 3 March 1994 (see paragraphs 34, 38 and 40-42 above).

117. As the Court has observed in the context of Article 3 (art. 3), Mr Chahal's case involves considerations of an extremely serious and weighty nature. It is neither in the interests of the individual applicant nor in the general public interest in the administration of justice that such decisions be taken hastily, without due regard to all the relevant issues and evidence. Against this background, and bearing in mind what was at stake for the applicant and the interest that he had in his claims being thoroughly examined by the courts, none of the periods complained of can be regarded as excessive, taken either individually or in combination. Accordingly, there has been no violation of Article 5 para. 1 (f) of the Convention (art. 5-1-f) on account of the diligence, or lack of it, with which the domestic procedures were conducted.

118. It also falls to the Court to examine whether Mr Chahal's detention was "lawful" for the purposes of Article 5 para. 1 (f) (art. 5-1-f), with particular reference to the safeguards provided by the national system. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness.

119. There is no doubt that Mr Chahal's detention was lawful under national law and was effected "in accordance with a procedure prescribed by law" (see paragraphs 43 and 64 above). However, in view of the extremely long period during which Mr Chahal has been detained, it is also necessary to consider whether there existed sufficient guarantees against arbitrariness.

120. In this context, the Court observes that the applicant has been detained since 16 August 1990 on the ground, essentially, that successive Secretaries of State have maintained that, in view of the threat to national security represented by him, he could not safely be released (see paragraph 43 above). The applicant has, however, consistently denied that he posed any threat whatsoever to national security, and has given reasons in support of this denial (see paragraphs 31 and 77 above).

121. The Court further notes that, since the Secretaries of State asserted that national security was involved, the domestic courts were not in a position effectively to control whether the decisions to keep Mr Chahal in detention were justified, because the full material on which these decisions were based was not made available to them (see paragraph 43 above).

122. However, in the context of Article 5 para. 1 of the Convention (art. 5-1), the advisory panel procedure (see paragraphs 29-32 and 60 above) provided an important safeguard against arbitrariness. This panel, which included experienced judicial figures (see paragraph 29 above) was able fully to review the evidence relating to the national security threat represented by the applicant. Although its report has never been disclosed, at the hearing before the Court the Government indicated that the panel had agreed with the Home Secretary that Mr Chahal ought to be deported on national security grounds. The Court considers that this procedure provided an adequate guarantee that there were at least prima facie grounds for believing that, if Mr Chahal were at liberty, national security would be put at risk and thus that the executive had not acted arbitrarily when it ordered him to be kept in detention.

123. In conclusion, the Court recalls that Mr Chahal has undoubtedly been detained for a length of time which is bound to give rise to serious concern. However, in view of the exceptional circumstances of the case and the facts that the national authorities have acted with due diligence throughout the

deportation proceedings against him and that there were sufficient guarantees against the arbitrary deprivation of his liberty, this detention complied with the requirements of Article 5 para. 1 (f) (art. 5-1-f). It follows that there has been no violation of Article 5 para. 1 (art. 5-1). B. Article 5 para. 4 (art. 5-4)

124. The applicant alleged that he was denied the opportunity to have the lawfulness of his detention decided by a national court, in breach of Article 5 para. 4 of the Convention (art. 5-4), which provides: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." He submitted that the reliance placed on national security grounds as justification for his detention pending deportation prevented the domestic courts from considering whether it was lawful and appropriate. However, he developed this argument more thoroughly in connection with his complaint under Article 13 of the Convention (art. 13) (see paragraphs 140-41 below).

125. The Commission was of the opinion that it was more appropriate to consider this complaint under Article 13 (art. 13) and the Government also followed this approach (see paragraphs 142-43 below).

126. The Court recalls, in the first place, that Article 5 para. 4 (art. 5-4) provides a lex specialis in relation to the more general requirements of Article 13 (art. 13) (see the De Jong, Baljet and Van den Brink v. the Netherlands judgment of 22 May 1984, Series A no. 77, p. 27, para. 60). It follows that, irrespective of the method chosen by Mr Chahal to argue his complaint that he was denied the opportunity to have the lawfulness of his detention reviewed, the Court must first examine it in connection with Article 5 para. 4 (art. 5-4).

127. The Court further recalls that the notion of "lawfulness" under paragraph 4 of Article 5 (art. 5-4) has the same meaning as in paragraph 1 (art. 5-1), so that the detained person is entitled to a review of his detention in the light not only of the requirements of domestic law but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 para. 1 (art. 5-1) (see the E. v. Norway judgment of 29 August 1990, Series A no. 181-A, p. 21, para. 49). The scope of the obligations under Article 5 para. 4 (art. 5-4) is not identical for every kind of deprivation of liberty (see, inter alia, the Bouamar v. Belgium judgment of 29 February 1988, Series A no. 129, p. 24, para. 60); this applies notably to the extent of the judicial review afforded. Nonetheless, it is clear that Article 5 para. 4 (art. 5-4) does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 para. 1 (art. 5-1) (see the above-mentioned E. v. Norway judgment, p. 21, para. 50).

128. The Court refers again to the requirements of Article 5 para. 1 (art. 5-1) in cases of detention with a view to deportation (see paragraph 112 above). It follows from these requirements that Article 5 para. 4 (art. 5-4) does not demand that the domestic courts should have the power to review whether the underlying decision to expel could be justified under national or Convention law.

129. The notion of "lawfulness" in Article 5 para. 1 (f) (art. 5-1-f) does not refer solely to the obligation to conform to the substantive and procedural rules of national law; it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5 (art. 5) (see paragraph 118 above). The question therefore arises whether the available proceedings to challenge the lawfulness of Mr Chahal's detention and to seek bail provided an adequate control by the domestic courts.

130. The Court recollects that, because national security was involved, the domestic courts were not in a position to review whether the decisions to detain Mr Chahal and to keep him in detention were justified on national security grounds (see paragraph 121 above). Furthermore, although the procedure before the advisory panel undoubtedly provided some degree of control, bearing in mind that Mr Chahal was not entitled to legal representation before the panel, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed (see paragraphs 30, 32 and 60 above), the panel could not be considered as a "court" within the meaning of Article 5 para. 4 (art. 5-4) (see, mutatis mutandis, the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 26, para. 61).

131. The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved (see, mutatis mutandis, the Fox, Campbell and Hartley v. the United Kingdom judgment of 30 August 1990, Series A no. 182, p. 17, para. 34, and the Murray v. the United Kingdom judgment of 28 October 1994, Series A no. 300-A, p. 27, para. 58). The Court attaches significance to the fact that, as the intervenors pointed out in connection with Article 13 (art. 13) (see paragraph 144 below), in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.

132. It follows that the Court considers that neither the proceedings for habeas corpus and for judicial review of the decision to detain Mr Chahal before the domestic courts, nor the advisory panel procedure, satisfied the requirements of Article 5 para. 4 (art. 5-4). This shortcoming is all the more significant given that Mr Chahal has undoubtedly been deprived of his liberty for a length of time which is bound to give rise to serious concern (see paragraph 123 above).

133. In conclusion, there has been a violation of Article 5 para. 4 of the Convention (art. 5-4).

19. The Court of Appeal allowed the appeal of the Secretary of State in *Saadi and others*. In relation to 5(1)(f), the Court's approach was predicated on the 'firmly entrenched principle of public international law' that a state has the right to determine whether aliens should enter its territory. The exception to the right to liberty in Article 5(1)(f) was intended to preserve this right and permitted detention whilst the state considered whether to authorise entry, provided always that such detention was accompanied by suitable safeguards and is not prolonged excessively. Neither limitation applied, nor was the detention disproportionate. The relevant paragraphs of its judgment follow:

32. At the heart of this part of the appeal is an issue as to what is meant by 'unauthorised entry'. The case of the Secretary of State is simple. Unauthorised entry is an entry which has not been authorised. Under international law, every state has the right to decide who may enter its territory. When an alien sets foot on the territory of a state, that state can do two things. It can authorise entry, with or without restrictions, or it can refuse entry. Unless and until it authorises entry, the alien will, if he or she moves within the territory, be effecting unauthorised entry. Article 5(1)(f) recognises the right of a state to prevent this by detaining the person seeking to enter.

33. Collins J. rejected this submission. He held:

"Once it is accepted that an applicant has made a proper application for asylum and there is no risk that he will abscond or otherwise misbehave, it is impossible to see how it could reasonably be said that he needs to be detained to prevent his effecting an unauthorised entry. He is doing all that he should to ensure that he can make an authorised entry."

34. Mr Scannell submitted that this analysis was correct. We put to him that this meant that Article 5 required a state to grant temporary admission into its territory to any applicant for asylum who

is not expected to abscond or otherwise misbehave for as long as is necessary to resolve that person's application for asylum. After reflecting, he agreed with this and reduced his submissions on the point to writing. He did so in the context of our domestic legislation.

"There can be no dispute but that both 'leave' (s4 1971 Act) and 'temporary admission' are forms of lawful authority for a person who is subject to immigration control to be present in the UK. This provides the inevitable and necessary context in which to examine the meaning of article 5(1)(f) in these cases.

There can therefore be no question that the grant of leave or the grant of temporary admission constitute an 'unauthorised entry' simply because they are both 'authorised'.

The grant of temporary admission is a form of 'entry' within the meaning of 5(1)(f). Seen as such, in respect of asylum seekers who will not 'abscond or otherwise misbehave', there is indeed an obligation upon the Secretary of State to grant such temporary admission since it cannot be said that detention will be 'to prevent his effecting an unauthorised entry'."

35. The conclusions that the intervenors invited us to draw were to similar effect:

"Where a foreigner exercises the international humanitarian right to seek asylum and does so in compliance with national law provisions for claims to enter the territory, he or she is not seeking unauthorised entry, and should not in principle and without more be subject to a deprivation of liberty. While a restriction of liberty may be appropriate in such cases, a deprivation should be reserved only for cases where there is evidence of absconding or of non-co-operation with determination procedures. Detention must be a rational response to the facts of the case rather than born out of administrative convenience. On ordinary principles and consistently with the case law of the European Court of Human Rights, the permissible limbs for detention under Article 5(1)(f) must be narrowly construed.

Thus there must be a rational connection between the detention and the enumerated limbs under Article 5(1)(f). Where an asylum seeker makes a claim in compliance with national law procedures for entry, he or she is not to be regarded as unlawfully present nor as seeking unauthorised entry, and detention thus cannot prevent that which in law is not being sought. Detention cannot be permitted under the first limb."

36. The European Convention is a living instrument and when interpreting it and considering the Strasbourg jurisprudence, it is necessary to bear in mind that its effect may change in step with changes in the standards applied by the member States. As a starting point, however, it seems to us sensible to consider the position in 1951, when the Convention was agreed. In agreeing to Article 5, were member States binding themselves to grant to aliens a licence to enter their territories and to enjoy liberty, albeit subject to some restrictions, within them, pending the determination of applications for a more formal authority to enter? We do not believe that they were. The right of a State to determine whether aliens should enter its territory was a firmly entrenched principle of public international law.

37. In *Attorney-General for Canada v Cain* [1906] AC 542 at 546, Lord Atkinson, when giving the decision of the Privy Council, said:

"One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests: Vattel, Law of Nations, book 1, s.231; book 2, s.125."

38. The 8th edition of Oppenheim, published in 1955, stated at paragraph 314:

"The reception of aliens is a matter of discretion, and every State is by reason of its territorial supremacy competent to exclude aliens from the whole, or any part, of its territory."

39. We have no reason to believe that the signatories to the Convention intended to make inroads into that discretion for those awaiting a decision on an application for leave to enter. The problem of what to do about large numbers of asylum seekers, some of whose applications require many months to process, was not a live one at the time. We were told by counsel that even at the time that the 1971 Act was passed, applications for asylum were running at the rate of only around 200 a year, and it is significant that that Act makes no express reference to applicants for asylum. The same edition of Oppenheim comments at paragraph 316:

"Now the so-called right of asylum is certainly not a right possessed by the alien to demand that the State into whose territory he has entered with the intention of escaping prosecution in some other State should grant protection and asylum. For such State need not grant such demands. The Constitutions of a number of countries expressly grant the right of asylum to persons persecuted for political reasons, but it cannot yet be said that such a right has become a 'general principle of law' recognised by civilised States and as such forming part of International Law."

40. Our conclusion is that the exception to the right to liberty in Article 5(1)(f) was intended to preserve the right of the member States to decide whether to allow aliens to enter their territories on any terms whatsoever. Article 5(1)(f) carried, initially at least, the meaning for which the Secretary of State contends.

41. In *Abdulaziz, Cabales and Balkandani v United Kingdom* (1985) 7 EHRR 471 at p.497 the European Court observed:

"Moreover, the court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well established international law and subject to its treaty obligations, a state has the right to control the entry of non-nationals into its territory."

42. In the field of immigration, the Court gives considerable weight to the right of States to control immigration. It has, however, on occasion held that this right is subordinated to the right to family life.

43. It is possible that the approach of the Court to the position of asylum applicants has changed over the years as more States have agreed to recognise the right to asylum and the volume of asylum seekers has grown. So far as general principles of international law are concerned the position has not changed. The current (4th) edition of Halsbury's Laws, reissued in 2000, states in paragraphs 984 and 985 of volume 18(2):

"'In customary international law a state is free to refuse the admission of aliens to its territory or to annex whatever conditions it pleases to their entry... a state may expel an alien from its territory at its discretion."

44. Turning more specifically to asylum seekers, in the second (1996) edition of Goodwin-Gill on The Refugee in International Law, the author refers, at p.250, to a Plenary Session of the Executive Committee of the United Nations Committee on Human Rights in 1986 which recognised that:

"...if necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order."

45. The intervenors referred us to Communication No 560/1993 of the Human Rights Committee expressing views under Article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights in relation to the detention of boat people by Australia. In relation to the issue of whether detention was arbitrary under the Covenant, the Committee commented:

"...that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention. The Committee agrees that there is no basis for the author's claim that it is *per se* arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary. The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal."

46. The intervenors also placed before us some information, hastily obtained, of the way asylum seekers are treated in certain Western European countries. While these demonstrated the use of reception centres, and restrictions on freedom of movement, they did not evidence a practice of detaining asylum seekers. The Attorney-General told us that the adequacy of this information was in issue as his instructions were that at least some Western European countries did detain asylum seekers.

47. Having regard to the various matters referred to above, it would have been possible for the European Court of Human Rights to restrict the ambit of the operation of Article 5(1)(f), insofar as it considered that its terms permitted the Court to do so. We turn to the jurisprudence to see to what extent it supports the respondents' contention that the right to detain recognised by Article 5(1)(f) does not now apply to aliens seeking leave to enter, provided always that they demonstrate that they will comply with such lesser restrictions as may be placed upon them by the immigration authorities. That jurisprudence is sparse. There are two important decisions; the Secretary of State relied on one and the respondents on the other.

48. In *Chahal v United Kingdom* (1996) 23 EHRR 413 Chahal alleged that a number of Articles of the Convention had been violated, including Article 5(1). He was a Sikh separatist leader whom the Home Secretary was seeking to deport on the ground that he was a threat to national security. Deportation proceedings were protracted over a period of some five years. During the whole of this period Chahal was held in detention. One of the issues before the Court was whether this deprivation of liberty was permitted under the terms of Article 5(1)(f).

49. In giving its opinion the Commission made the following statement of principle:

"...the Commission considers that, in principle, the first applicant has been lawfully detained under Article 5(1)(f) of the Convention as a 'person against whom action is being taken with a view to deportation'. It would be unduly narrow to interpret Article 5(1)(f) as confined to cases where the person is detained solely to enable the deportation order to be implemented. The words of the provision are broad enough to cover the case where the person is originally detained with a view to deportation, but challenges that decision or claims asylum, and continues to be detained pending determination of that challenge or claim. The first applicant was detained with a view to deportation in August 1990. The deportation order was made in July 1991. The applicant continues to be detained for the purpose of giving effect to that order. The fact that implementation of the decision to deport was suspended while the Secretary of State considered the asylum request and reconsidered the request after the judicial review proceedings, does not affect the purpose or lawfulness of the detention."

50. The Commission went on to conclude that the detention was not justified under Article 5(1)(f) because the deportation proceedings had not been pursued, as they should have been, with due expedition.

51. The Court did not agree with this conclusion. Before considering the facts, it also made observations of principle which are important in the present context:

"The Court recalls that it is not in dispute that Mr Chahal has been detained 'with a view to deportation' within the meaning of Article 5(1)(f). Article 5(1)(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5(1)(f) provides a different level of protection from Article 5(1)(c). Indeed, all that is required under this provision is that 'action is being taken with a view to deportation'. It is therefore immaterial, for the purposes of Article 5(1)(f), whether the underlying decision to expel can be justified under national or Convention law. The Court recalls, however, that any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5(1)(f)"

52. The Court, after considering the facts, concluded that the domestic procedures had been conducted with due diligence. It went on to observe, however:

"It also falls to the Court to examine whether Mr Chahal's detention was 'lawful' for the purposes of Article 5(1)(f), with particular reference to the safeguards provided by the national system. Where the 'lawfulness' of detention is in issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness. There is no doubt that Mr Chahal's detention was lawful under national law and was effected 'in accordance with a procedure prescribed by law'. However, in view of the extremely long period during which Mr Chahal has been detained, it is also necessary to consider whether there existed sufficient guarantees against arbitrariness."

53. The Court went on to consider evidence relating to the question of whether Chahal was, indeed, a risk to national security and concluded that:

"...there were at least prima facie grounds for believing that if Mr Chahal were at liberty, national security would be put at risk and thus, that the executive had not acted arbitrarily when it ordered him to be kept in detention."

54. We would make the following observations about this decision. First, it is inconsistent with any contention that the justification for detaining a person with a view to deportation is that this is necessary to prevent absconding or other misbehaviour. Secondly it demonstrates that detention with a view to deportation can only be justified if the deportation proceedings are pursued with due diligence. Thirdly it suggests that, even where deportation proceedings are proceeding with due diligence, if they continue for an exceptional length of time some justification for detention needs to be advanced if the detention is not to constitute arbitrary treatment.

55. *Chahal* involved consideration of the second limb of Article 5(1)(f) - detention with a view to deportation. It was referred to by the Commission in *Ali v Switzerland* (1998) 28 EHRR 304 at 310 to support the proposition that:

"The Commission recalls that Article 5(1) of the Convention requires only that 'action is being taken with a view to deportation'. It is therefore immaterial, for the purposes of Article 5(1)(f), whether the underlying decision to expel can be justified under national or Convention law."

56. In that case the deportation order that had been made could not be enforced and the Commission decided that in those circumstances detention could not be considered to be of a person "against whom action is being taken with a view to deportation".

57. The Attorney General argued that a general principle was to be derived from *Chahal* that was applicable to the whole of Article 5(1)(f). This was that detention did not have to be *necessary* for the particular process that was in train, whether this was consideration of an application for leave to enter or deportation. Provided that the process was being pursued with due diligence and was not proving unduly protracted, detention could be justified. He argued that it would be quite extraordinary if detention could be justified where a deportation order was made before an application was made for asylum, but not where the deportation order would follow as a matter of course if the asylum application failed.

58. Mr Scannell argued that a different approach applied where applicants had asked for asylum against whom there was no order for deportation. That approach he suggested was demonstrated by the decision in *Amuur v France* (1992) 22 EHRR 533. In that case, asylum seekers from Somalia were held in the international zone of Paris-Orly airport and a nearby hotel for 20 days. No impediment was placed in the way of their leaving the country, but they did not do so and were finally deported to Syria, having been refused leave to enter France. The restraints to which they were subjected were contrary to French domestic law. France was thus not in a position to contend that this was 'lawful' detention under Article 5(1)(f). France argued, however, that because the applicants were free to leave the country, they had not been deprived of their liberty.

59. The Court concluded that:

"...holding the applicants in the transit zone of Paris-Orly Airport was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty. Article 5(1) is therefore applicable to the case"

60. The restrictions referred to included being placed under strict and constant police surveillance, having no legal and social assistance - particularly with a view to completing the formalities relating to

an application for political refugee status - and no court review of the length of or necessity for their confinement.

61. In the course of considering whether the applicants had experienced deprivation of liberty, the Court said this:

[Judgment sets out oparagraphs 42 and 43]

62. Mr Scannell's submissions, and indeed the conclusion of Collins J., turn largely on this passage. Mr Scannell submitted that the Court were equating 'unauthorised entry' in Article 5(1)(f) with 'unlawful immigration' and that 'unlawful immigration' was equivalent to 'getting round immigration restrictions'. Thus, an applicant who was prepared to abide by any restrictions imposed by the immigration authorities could not lawfully be detained pursuant to Article 5(1)(f).

63. It is not appropriate to treat a passage in a judgment of the European Court as if it were a statutory provision and to resort to minute textual analysis for this purpose. At the same time, it is not easy to derive general principles from a passage that we have found far from clear.

64. The Court is expressly comparing 'mere restriction on liberty', which does not infringe Article 5, with 'deprivation of liberty', which does. Yet the examples of what constitutes 'mere restriction of liberty' look very like 'lawful detention to prevent unauthorised entry, or while action is being taken with a view to deportation', which is permitted by Article 5(1)(f). It seems to us that the Court contemplates that it will be lawful to confine aliens in a centre of detention pending deportation or in an international zone for the time that is inevitably needed to organise the practical details of the alien's repatriation or while his application for leave to enter the territory in order to be afforded asylum is considered, provided always (1) that confinement is accompanied by suitable safeguards and (2) that it is not prolonged excessively.

65. It is significant that the Court treats together both detention of the person seeking to enter and detention of the person awaiting deportation. *Amuur* must be read with the later decision in *Chahal*. It seems to us that the Court is considering as lawful detention pending the consideration of an application for leave to enter or the making of arrangements for deportation and not applying a test of whether the detention is necessary in order to carry out those processes. The inroad that we believe that the European Court has made into the right of immigration authorities to detain aliens pending consideration of the applications for leave to enter, or their deportation, is that these processes must not be unduly prolonged. It is in relation to the duration of detention that the question of proportionality arises.

66. Although Collins J. held that detention at Oakington did not fall within Article 5(1)(f) at all, he went on to consider proportionality. In so doing the test that he applied was whether detention was proportionate to the need to process applicants speedily. He decided that it was not because he was not satisfied that it was necessary to achieve that object. We consider that the test of proportionality required by Article 5(1)(f) requires the Court simply to consider whether the process of considering an asylum application, or arranging a deportation, has gone on too long to justify the detention of the person concerned having regard to the conditions in which the person is detained and any special circumstances affecting him or her. Applying that test no disproportionality is demonstrated in this case.

67. The Secretary of State has determined that, in the absence of special circumstances, it is not reasonable to detain an asylum seeker for longer than about a week, but that a short period of detention can be justified where this will enable speedy determination of his or her application for leave to enter.

In restricting detention to such circumstances he may well have gone beyond what the European Court would require. We are content that he should have done so. The vast majority of those seeking asylum are aliens who are not in a position to make good their entitlement to be treated as refugees. We believe, nonetheless that most right thinking people would find it objectionable that such persons should be detained for a period of any significant length of time while their applications are considered, unless there is a risk of their absconding or committing other misbehaviour.

68. We started this judgment by remarking that it was artificial to consider English domestic law and the Human Rights Convention separately. The Human Rights Act has made the Convention part of the constitution of the United Kingdom, but the Convention sets out values which our laws have reflected over centuries. The need, so far as possible, to interpret and give effect to statutory provisions in a matter which is compatible with Convention rights is now a mandatory discipline, but it is not a novel approach.

69. The policies that have constrained, and still constrain, the exercise of the statutory power to detain aliens who arrive on our shores do not result from any conscious application of Article 5 of the Convention. They result from a recognition, that is part of our heritage, of the fundamental importance of liberty. The deprivation of liberty with which this appeal is concerned falls at the bottom end of the scale of interference with that right. It is right, nonetheless, that its legitimacy should have received strict scrutiny. Our conclusion is that it is lawful. This appeal is, accordingly, allowed.

20. The Court of Appeal granted permission to appeal to the House of Lords which will hear the appeal in early May 2002.

21. For an altogether more encouraging decision (from Strasbourg) on immigration detention, see *Conka and others v. Belgium* (No. 51564/99). In November 1998 the applicants and their children, all Slovakian nationals of Romany origin, left Slovakia for Belgium, where they applied for political asylum on the ground that they had been repeatedly attacked by skinheads in Slovakia. On 18 June 1999 their asylum applications were declared inadmissible by the General Commission for Refugees and Stateless Persons and they were ordered to leave Belgium within five days. They appealed unsuccessfully. In September 1999 Ghent police summoned several dozen Slovakian Romany families, including Mr and Mrs Conka and their children, to report to them on 1 October 1999 so that missing information could be added to their asylum applications. At the police headquarters, the Conkas were served with fresh orders to leave Belgian territory and warrants for their arrest. They were then taken with other Romany families to the closed transit centre at Steenokkerzeel, near Brussels. On 5 October 1999 they were escorted to an aeroplane bound for Slovakia, with around 70 other Romany refuges whose asylum applications had also been refused. They alleged breaches of Article 5(1), (2) and (4)

Article; 13 (right to an effective remedy) and Article 4 of Protocol No. 4 (prohibition of collective expulsions of aliens).

22. The Court found a violation of Article 5.1 for the following reasons:

2. The Court notes that it is common ground that the applicants were arrested so that they could be deported from Belgium. Article 5 § 1(f) is thus applicable in the instant case. Admittedly, the applicants contest the necessity of their arrest for that purpose; however, Article 5 § 1(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing. In this respect Article 5 § 1(f) provides a different level of protection from Article 5 § 1 (c): all that is required under sub-paragraph (f) is that "action is being taken with a view to deportation" (see the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1862, § 112).

3. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (see, among other authorities, the Bozano v. France judgment of 18 December 1986, Series A no. 111, p. 23, § 54, and the Chahal judgment cited above, p. 1864, § 118).

4. In the present case, the applicants received a written notice at the end of September 1999 inviting them to attend Ghent Police Station on 1 October to "enable the file concerning their application for asylum to be completed". On their arrival at the police station they were served with an order to leave the territory dated 29 September 1999 and a decision for their removal to Slovakia and for their arrest for that purpose. A few hours later they were taken to a closed transit centre at Steenokkerzeel.

5. The Court notes that, according to the Government, while the wording of the notice was admittedly unfortunate, as had indeed been publicly recognised by the Minister of the Interior (see paragraph 23 above), that did not suffice to vitiate the entire arrest procedure, or to warrant its being qualified as an abuse of power.
While the Court has reservations about the compatibility of such practices with Belgian law, particularly as the practice in the instant case was not reviewed by a competent national court, the Convention requires that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (see paragraph 39 above). Although the Court by no means excludes its being legitimate for the police to use stratagems in order, for instance, to counter criminal activities more effectively, acts whereby the authorities seek to gain the trust of asylum seekers with a view to arresting and subsequently deporting them may be found to contravene the general principles stated or implicit in the Convention.
In that regard, there is every reason to consider that while the wording of the notice was "unfortunate", it was not the result of inadvertence; on the contrary, it was chosen deliberately in order to secure the compliance of the largest possible number of recipients. At the hearing, counsel for the Government referred in that connection to a "little ruse", which the authorities had knowingly used to ensure that the "collective repatriation" (see paragraph 23 above) they had decided to arrange was successful.

6. The Court reiterates that the list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision (see, *mutatis mutandis*, the K.-F. v. Germany judgment of 27 September 1997, *Reports* 1997-VII, p. 2975, § 70). In the Court's view, that requirement must also be reflected in the reliability of communications such as those sent to the applicants, irrespective of whether the recipients are lawfully present in the country or not. It follows that, even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5.

7. That factor has a bearing on the issue to which the Court must now turn, namely the Government's preliminary objection, which it has decided to join to the merits. In that connection, the Court reiterates

that by virtue of Article 35 § 1 of the Convention normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, § 66).

8. In the instant case, the Court identifies a number of factors which undoubtedly affected the accessibility of the remedy which the Government claim was not exhausted. These include the fact that the information on the available remedies handed to the applicants on their arrival at the police station was printed in tiny characters and in a language they did not understand; only one interpreter was available to assist the large number of Romany families who attended the police station in understanding the verbal and written communications addressed to them and although he was present at the police station, he did not stay with them at the closed centre; in those circumstances, the applicants undoubtedly had little prospect of being able to contact a lawyer from the police station with the help of the interpreter and, although they could have contacted a lawyer by telephone from the closed transit centre, they would no longer have been able to call upon the interpreter's services; despite those difficulties, the authorities did not offer any form of legal assistance at either the police station or the centre.

9. Whatever the position – and this factor is decisive in the eyes of the Court – as the applicants' lawyer explained at the hearing without the Government contesting the point, he was only informed of the events in issue and of his clients' situation at 10.30 p.m. on Friday 1 October 1999, such that any appeal to the committals division would have been pointless because, had he lodged an appeal with the division on 4 October, the case could not have been heard until 6 October, a day after the applicants' expulsion on 5 October. Thus, although he still regarded himself as acting for the applicants (see paragraph 21 above), he was unable to lodge an appeal with the committals division.

10. The Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective (see, *mutatis mutandis*, the Matthews v. the United Kingdom judgment [GC], no. 24833/94, § 34, ECHR 1999-I). As regards the accessibility of a remedy invoked under Article 35 § 1 of the Convention, this implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy. That did not happen in the present case and the preliminary objection must therefore be dismissed.
Consequently, there has been a violation of Article 5 § 1 of the Convention.

23. The Article 5(2) complaint failed since the reasons for arrest were found to have been given through an interpreter at the police station. But the Article 5(4) complaint succeeded. Although released (after five days) in Solovakia (sic), the applicants were prevented from making any meaningful appeal to the committals division and there was thus a breach of Article 5(4).

24. The case is of particular interest also because of the finding of breach of the prohibition in Article 4 of protocol No. 4 of the collective expulsion of aliens for the reason given in the following paragraphs of its judgment.

IV. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL N° 4

11. The applicants complained of a violation of Article 4 of Protocol No. 4, which provides:

"Collective expulsion of aliens is prohibited."

In their submission, the expression "collective expulsion" must be understood as meaning any "collective implementation of expulsion measures". The provision would become meaningless if a distinction were drawn between the prior decision and the execution of the measure, since the legislation of every member State now required a specific formal decision before expulsion, such that a distinction of that kind would mean that it would no longer be possible to challenge a collective expulsion and Article 4 of Protocol No. 4 would be deprived of all practical effect.

The applicants considered, in particular, that the orders for their expulsion reflected the authorities' determination to deal with the situation of a group of individuals, in this instance Roma from Slovakia, collectively. They submitted that there was evidence of that in certain official documents, including letters sent on 24 August 1999 by the Director-General of the Aliens Office to the Minister of the Interior and the Commissioner-General for Refugees and Stateless Persons, in which the Director-General had announced that requests for asylum by Slovakian nationals would be dealt with rapidly in order to send a clear signal to discourage other potential applicants. The applicants also referred to a "Note providing General Guidance on Overall Policy in Immigration Matters", which was approved on 1 October 1999 by the Cabinet and containing the following passage: "A plan for collective repatriation is currently under review, both to send a signal to the Slovakian authorities and to deport this large number of illegal immigrants whose presence can no longer be tolerated" (see paragraph 31 above). Likewise, on 23 December 1999, the Minister of the Interior had declared in response to a parliamentary question: "Owing to the large concentration of asylum seekers of Slovakian nationality in Ghent, arrangements have been made for their collective repatriation to Slovakia" (see paragraph 23 above).
In the applicants' submission, those elements revealed a general system intended to deal with groups of individuals collectively from the moment the decision to expel them was made until its execution. In that connection, it was significant that the process had been christened "Operation Golf" by the authorities. Accordingly, irrespective of the formal appearance of the decisions that had been produced, it could not be said that there had been "a reasonable and objective examination of the particular circumstances of each of the aliens forming the group" in the instant case.

12. In response to that complaint, the Government objected that the applicants had failed to challenge the decisions which they alleged constituted a violation, namely those taken on 29 September 1999, in the *Conseil d'État*, notably by way of an application for a stay under the extremely urgent procedure.
The Court notes that that remedy is the same as the remedy relied on by the Government in connection with the complaint under Article 13 taken together with Article 4 of Protocol No. 4. Consequently, the objection must be joined to the merits and examined with the complaint of a violation of those provisions.

13. As to the merits of the complaint of a violation of Article 4 of Protocol No. 4 taken alone, the Government referred to the Court's decision in the case of Andric v. Sweden (no. 45917/99, [Section 1] 23.02.99, unpublished), in which the complaint was declared inadmissible, in support of their submission that there was no collective expulsion when an alien's immigration status was individually and objectively examined in a way that allowed him to put forward his case against expulsion. Although the orders made on 29 September 1999 to leave the territory had replaced the earlier orders, both the Aliens Office and the Commissioner-General's Office for Refugees and Stateless Persons, an independent, impartial and quasi-judicial body, had afforded the applicants an opportunity to set out their cases. The decision concerning Mrs Čonková comprised three pages of detailed reasoning typed in small characters and explaining why she was at no risk of treatment contrary to Article 3 of the Convention in her country of origin. As for Mr Čonka, he had not even taken the trouble to attend his appointment with the Commissioner, despite receiving due notification.
Further consideration had been given to the aliens' cases at Ghent Police Station, since some asylum seekers whose applications had been refused were nevertheless allowed to walk free from the police station, notably on humanitarian grounds or for administrative reasons. The examination of some individual cases, including the Čonkas', had even continued until the applicants were about to board the aircraft, since a social-security payment had been made for October to each head of household, calculated to the nearest Belgian franc by reference to the number of people in each family. In short, the requirements of Article 4 of Protocol No. 4 had been amply satisfied.

14. The Court reiterates its case-law whereby collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the

particular case of each individual alien of the group (see Andric v. Sweden, cited above). That does not however mean that where the latter condition is satisfied, the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4.

15. In the instant case, the applications for asylum made by the applicants were rejected in decisions of 3 March 1999 that were upheld on 18 June 1999. The decisions of 3 March 1999 contained reasons and were accompanied by an order made on the same day requiring the applicants to leave the territory. They were reached after an examination of each applicant's personal circumstances on the basis of their depositions. The decisions of 18 June 1999 were also based on reasons related to the personal circumstances of the applicants and referred to the order of 3 March 1999 to leave the territory, which had been stayed by the appeals under the urgent procedure.

16. The Court notes, however, that the detention and deportation orders in issue were made to enforce an order to leave the territory dated 29 September 1999; that order was made solely on the basis of section 7, paragraph 1, (2) of the Aliens Act, and the only reference to the personal circumstances of the applicants was to the fact that their stay in Belgium had exceeded three months. In particular, the document made no reference to their application for asylum or to the decisions of 3 March and 18 June 1999. Admittedly, those decisions had also been accompanied by an order to leave the territory, but by itself, that order did not permit the applicants' arrest. The applicants' arrest was therefore ordered for the first time in a decision of 29 September 1999 on a legal basis unrelated to their requests for asylum, but nonetheless sufficient to entail the implementation of the impugned measures. In those circumstances and in view of the large number of persons of the same origin who suffered the same fate as the applicants, the Court considers that the procedure followed did not enable it to eliminate all doubt that the expulsion might have been collective.

17. That doubt was reinforced by a series of factors: firstly, prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation (see paragraphs 30 and 31 above); secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms; fourthly, it was very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed.

18. In short, at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion did the procedure afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account. In conclusion, there has been a violation of Article 4 of Protocol No 4.

WITHDRAWAL AND REDUCTION OF SUPPORT: COMPATIBILITY WITH THE ECHR

INTRODUCTION

1. Under the Asylum Support Regulations 2000 ("the Regulations") support may be suspended or discontinued in certain circumstances, if

> "20(1)(a) the Secretary of State has reasonable grounds to suspect that the supported person or any dependant of his has failed without reasonable excuse to comply with any condition subject to which the asylum support is provided;
>
> (b) the Secretary of State has reasonable grounds to suspect that the supported person or any dependent of his has committed an offence under Part VI of the Act;
>
> (c) the Secretary of State has reasonable grounds to suspect that the supported person has intentionally made himself and his dependants destitute;
>
> (d) the supported person or any dependant of his for whom asylum support is being provided ceases to reside at the authorised address; or
>
> (e) the supported person of any dependant of his for whom asylum support is being provided is absent from the authorised address;
>
> (i) for more than seven consecutive days and nights, or
>
> (ii) for a total of more than 14 days and nights in any six month period, without the permission of the Secretary of State

2. Under Part VI of the Immigration and Asylum Act 1999 ("the 1999 Act") offences include making false representations, dishonest representations or causing delay or obstruction when asked to provide information or documentation with regard support.

3. It is the compatibility of these provisions with Articles 3 and 8 ECHR which are of interest here.

WHETHER EXPOSURE TO DESTITUTION CONSTITUTES A VIOLATION OF ARTICLE 3 and 8 ECHR

4. There is very little case-law on this precise point. It is therefore necessary to draw principles from other case law of the European Court and Commission of Human Rights. In principle treatment or punishment which is inhuman and degrading is a breach of Article 3; if that treatment or punishment does not reach the threshold of severity it may be an interference with a person's physical and moral integrity in violation of Article 8.

5. It is clear from the Strasbourg jurisprudence that exposure to conditions of severe destitution can constitute a violation of Article 3: **Fadele v UK** (App 13078/87 (1990) HRCD Vol 1(1) 15), the Commission held admissible under both Articles 3 and 8 the refusal of admission to the UK of a Nigerian father with a bad immigration history after the mother of the UK-based children was killed, leading to the children having to live in Nigeria in poor conditions which jeopardised their health and education. A friendly settlement resulted.

6. UK case law provides support for the contention that severe destitution is wrong in and of itself: **R v. Secretary of State for Social Security, ex p. JWCI** ([1997] 1 WLR 292) regarding the limitation of benefits provided to asylum-seekers that "so basic are the human rights here at issue it cannot be necessary to resort to the European Convention of Human Rights to take note of their violation. See also **R v London Borough of Hammersmith and Fulham and others ex parte M** (1996) 1 CCLR 69

WHETHER THE BEHAVIOUR OF THE INDIVIDUAL IS RELEVANT

3. The real problem lies in the fact that the withdrawal of benefits may be 'self-inflicted'. Some have taken the view that the withdrawal of benefits in accordance with the 1999 Act and the Regulations would not breach Article 3 ECHR because any resulting destitution was self inflicted to the extent that arises from a failure to comply with conditions laid down in the 1999 Act.

4. However see Burnton J in **R v Asylum Support Adjudicator and the Secretary of State for the Home Department ex parte Hamid Ali Husain** [5th October 2001] to the effect that that could be a violation of article 3 where support is withdrawn and where no alternative means of support are available.

5. This concords with the Commission's limited jurisprudence on punishment of prisoners for engaging in "unlawful" protests: **McFeeley v the United Kingdom** (1981) 2 EHRR 161

> "*State is not absolved from its obligation under the Convention and Article 3 in particular, because prisoners are engaged in what is regarded as an unlawful challenge to the authority of the prison administration*"

and that the prison authorities had a duty "*to safeguard the health and well-being of all prisoners including those engaged in protest insofar as that may be possible in the circumstances.*"

6. The essence of the test is look to the consequences of the breach of Article 3, even where the individual has brought the punishment down upon himself.

7. Article 1 ECHR imposes a responsibility on the Contracting States to secure the rights contained with the ECHR to all persons within their jurisdictions regardless of their immigration status and regardless of their character: **D v the United Kingdom** ((1997) 24 EHRR 423, at para. 49) which concerned the expulsion of a

person convicted for importing drugs, who had never lawfully entered the UK but who had AIDS, the Court stated

> *"Regardless of whether or not he ever entered the United Kingdom in the technical sense ... is to be noted that he has been physically present there and thus within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention since 21 January 1993. It is for the respondent State therefore to secure to the applicant the rights guaranteed under Article 3 irrespective of the gravity of the offence which he committed"*

8. Whether the protection of Article 3 will be afforded to those with reprehensible characters was also considered in **Chahal v the United Kingdom** ((1996) 23 EHRR 413, 1996-V) where the expulsion of a Sikh activist on national security grounds was threatened

> *"Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention ... Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation"*

12. It is very clear that if the actions or omissions on the part of State would result in an individual suffering treatment contrary to Article 3, it does not matter what the justification is for those actions or omissions or whether the individual's own conduct lead to that actions or omission.

REACHING THE MINIMUM LEVEL OF SEVERITY FOR ARTICLE 3

13. The real question then arises as to what constitutes treatment contrary to Article 3. It is well-established in the case law of the European Court and Commission of Human Rights that ill-treatment must attain a minimum level of severity if it to fall within the scope of Article 3: **Soering v the United Kingdom**, Series A no. 161 (1989) 11 EHRR 439; **Ireland v United Kingdom**, Series A no. 25, (1978) 2 EHRR 25. The Court has suggested that

> "*The assessment of this minimum is, in the nature of things, relative: it depends on all the circumstances of the case such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and in some cases, the sex, age and state of health of the victim*"

14. The Strasbourg organs have considered the type of treatment which is "inhumane" for the purposes of Article 3. Treatment has been held by the Court to be both "**inhuman**" because it was premeditated and caused, if not actual bodily injury, at least intense physical and mental suffering. "**Degrading treatment**" is that which it arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

15. Whether the withdrawal of support would constitute treatment contrary to Article 3 requires essentially a factual assessment of the degree of suffering likely to be felt by the asylum applicant.

16. It will be necessary to account of all the circumstances such as the applicant's age, sex, state of health and clearly his or her financial situation and ability to support himself. If taking account all of the circumstances it is considered that level of

suffering reaches that of "inhuman or degrading treatment" then the withdrawal of support, for whatever reason, would be a breach of Article 3.

17. Not every case of withdrawal of support would be a potential breach of Article 3. It is uncontroversial that support can be withdrawn without risking a potential Article 3 violation where alternative means of support are available and there is no risk as to "inhuman or degrading treatment".

WHERE A CASE FALLS BELOW THE MINIMUM THRESHOLD OF SEVERITY SET OUT IN ARTICLE 3: LOOKING TO ARTICLE 8

18. If the level of destitution does not meet the threshold of severity of Article 3, then it may still be a violation of Article 8, the right to physical or moral integrity: **Costello-Roberts v. the United Kingdom** (23 February 1993)

> "*The Court does not exclude the possibility that there might be circumstances in which Article 8 could be regarded as affording in relation to disciplinary measures a protection which goes beyond that given by Article 3 . Having regard, however, to the purpose and aim of the Convention taken as a whole, and bearing in mind that the sending of a child to school necessarily involves some degree of interference with his or her private life, the Court considers that the treatment complained of by the applicant did not entail adverse effects for his physical or moral integrity sufficient to bring it within the scope of the prohibition contained in Article 8*".

19. It is important to remember that Article 8 is not an absolute right but is one which is qualified by the needs of society and the legitimate aims of the State.

20. Whether the withdrawal or reduction of support is a breach of Article 8 will depend on the consequences for the individual, the degree of the interference with their physical and moral integrity which will be weighed against the aims of the State. Clearly some of the reasons for withdrawing support under the Regulations are more serious than others: criminal behaviour will weigh more heavily than a failure for instance to live at a certain address.