HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Regina *v.* Secretary of State for the Home Department (Respondent) *ex parte* Bagdanavicius (FC) and another (Appellants)

[2005] UKHL 38

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have the advantage of reading in draft the speech of my noble and learned friend Lord Brown of Eaton-under-Heywood. For the reasons he gives, with which I agree, I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Brown of Eaton-under-Heywood. For the reasons which he has given, with which I agree, I too would dismiss this appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

3. I am in full agreement with the opinion of my noble and learned friend, Lord Brown of Eaton-under-Heywood, which I have had the advantage of reading in draft, and for the reasons given by Lord Brown I too would dismiss this appeal.

BARONESS HALE OF RICHMOND

My Lords,

4. For the reasons given in the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood, with which I agree, I too would dismiss this appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

5. Article 3 of the European Convention on Human Rights ("the ECHR") enshrines one of the fundamental values of democratic societies and the protection it provides is absolute. It states that:

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

6. Ordinarily, of course, article 3 operates to constrain the actions of a contracting state within its own borders—"domestic cases" as Lord Bingham of Cornhill called them in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, 340-341 paras 7 and 9.

7. It has long been established, however, that article 3 implies in addition an obligation on the part of the contracting state not to expel someone from its territory (whether by extradition, deportation or any other form of removal and for whatever reasons) where substantial grounds are shown for believing that upon such expulsion he will face a real risk of being subjected to treatment contrary to article 3 in the receiving country. I shall call this the *Soering* principle since it was first decided by the European Court of Human Rights ("ECtHR") in *Soering v United Kingdom* (1989) 11 EHRR 439, an extradition case. In these cases ("foreign cases" to adopt Lord Bingham's dichotomy in *Ullah*) the act of expulsion, committed of course in the contracting state's own territory, itself constitutes proscribed ill-treatment.

8. Ordinarily in these foreign cases, the risk which the individual runs of being subjected following expulsion to the proscribed form of treatment emanates from intentionally inflicted acts on the part of the public authorities in the receiving country. As, however, was first stated by the ECtHR in *HLR v France* (1997) 26 EHRR 29, 50, para 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 state are not able to obviate the risk by providing appropriate protection."

HLR was a deportation case where the source of the alleged risk to the applicant in Colombia was not the public authorities but rather drug traffickers allegedly threatening reprisals. Almost identical language was used by the Court in *Ammani v Sweden* Application No 60959/00 (unreported) 22 October 2002 where the alleged risk of ill-treatment was "not only by the Algerian authorities but also by the Islamic armed organisation GIA."

9. Although *HLR* was put simply (26 EHRR 29, 50, para 40) in terms of the court "not rul[ing] out the possibility" of the *Soering* principle applying in non-state agent cases, the court just three days later stated in its well-known judgment in the AIDS case, *D v United Kingdom* (1997) 24 EHRR 423, 447, at para 49:

> "It is true that this principle [the *Soering* 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."

10. Rightly, therefore, the Secretary of State accepts that the *Soering* principle can indeed apply in cases where the risk arises from the actions of non-state agents. Footnoted to that passage in *D* was a reference to *Ahmed v Austria* (1996) 24 EHRR 278, 291, para 44, where the court

noted that Somalia (the country to which Austria had proposed expelling the applicant):

> "was still in a state of civil war and fighting was going on between a number of clans vying with each other for control of the country. There was no indication that the dangers to which the applicant would have been exposed in 1992 had ceased to exist or that any public authority would be able to protect him."

11. Para 40 of *HLR* and para 49 of *D* bring me at last to the critical issue arising for determination on the present appeal, another case where the risk arising is that of harm threatened by non-state agents. The issue may be formulated as follows: to avoid expulsion on article 3 grounds must the applicant establish only that in the receiving country he would be at real risk of suffering serious harm from non-state agents or must he go further and establish too that the receiving country does not provide for those within its territory a reasonable level of protection against such harm? Mr Nicol QC for the appellants, a Lithuanian couple with a young child, submits that they need establish only a real risk of harm on return. For the Secretary of State, Miss Carss-Frisk QC's principal submission is that the appellants must also establish that the receiving country would fail to discharge the positive obligation inherent in article 3 to provide a reasonable level of protection.

12. It is, of course, implicit in the formulation of the issue in this way that a real risk of injury may remain despite the state's provision of a reasonable level of protection against it and such, indeed, I understand to be the agreed position on the facts of this very case. The Secretary of State concedes (certainly for the purposes of this litigation) that on return to Lithuania the appellants would be at real risk of serious injury by non-state agents; Mr Nicol for his part concedes that Lithuania provides a reasonable level of protection against violence of the sort threatened here. That, indeed, is why the stated issue is properly described as critical: its outcome is determinative of this appeal.

13. I should perhaps record at this point Miss Carss-Frisk's alternative submission. This, as put in para 96(3) of the Secretary of State's printed case, is that "the sufficiency of state protection is an integral part of the 'real risk' test: the reality of risk is assessed by reference to the sufficiency of such protection. Where a reasonable level of protection is provided, the threshold for the engagement of

article 3 will not be met." It rather seems as if this essentially fallback submission was the main basis of the Court of Appeal's decision in the Secretary of State's favour—see [2004] 1 WLR 1207, 1230-1231, para 55(7) – (16). For my part, however, I prefer to decide the appeal by reference to the issue earlier formulated. On this basis, of course, the detailed facts of the case are of no particular importance and it is quite sufficient to summarise them as follows.

14. The appellants are nationals of Lithuania, a husband and wife aged respectively 29 and 31, with a 3-year-old son. The husband is of Roma ethnic origin; the wife is not. Because of this they have been subjected to persistent harassment and violence in particular at the hands of the wife's brother and various of his associates, all stemming from the brother's objection to his sister having married a Roma.

15. The appellants left Lithuania with their son and arrived in the UK on 7 December 2002. They immediately claimed asylum under the Refugee Convention and in addition asserted that the UK would be in breach of its obligations under article 3 if they were returned to Lithuania.

16. On 14 December 2002 the appellants' applications for leave to enter the UK were refused by the Secretary of State who also certified their claims under section 115 of the Nationality, Immigration and Asylum Act 2002 as "clearly unfounded." On 16 April 2003 Maurice Kay J dismissed the appellants' judicial review application seeking to quash the Secretary of State's decision to certify their claims. On 11 November 2003 the Court of Appeal (Lord Woolf CJ, Auld and Arden LJJ) dismissed the appellants' appeal. A substantially fuller exposition of the facts of the case is to be found in the judgments below.

17. The *Soering* principle has been repeatedly re-stated in a whole series of subsequent Strasbourg cases: *Cruz Varas v Sweden* (1991) 14 EHRR 1, 33-34, para 69, *Vilvarajah v United Kingdom* (1991) 14 EHRR 248, 286-287, para 103, *Chahal v United Kingdom* (1996) 23 EHRR 413, 453, para 80, *Ahmed v Austria*, 24 EHRR 278, 290, para 39, *HLR v France* 26 EHRR 29, 49, para 34, *Tomic v United Kingdom* Application No 17837/03 (unreported) 14 October 2003, *Ammari v Sweden* (unreported) 22 October 2002 and *Nasimi v Sweden* Application No 38865/02 (unreported) 16 March 2004, in the last five of those cases in almost identical terms as follows:

> "[T]he 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. In these circumstances, article 3 implies the obligation not to expel the person in question to that country."

18. That statement of the principle requires on its face that the person in question, to avoid being expelled, must show substantial grounds for believing that he would face a real risk of being subject to treatment contrary to article 3 ("the proscribed forms of treatment" as the court put it in para 49 of *D v United Kingdom*) in the receiving country. Central to Mr Nicol's whole argument, however, is that in cases where violence in the receiving country is threatened by non-state agents, expulsion is barred irrespective of whether or not the receiving state itself would thereby be in breach of article 3 (or, if not itself a contracting state, in what has been called "notional" breach of article 3). All that Mr Nicol says need be established is that the person concerned is at substantial risk of suffering harm to a degree sufficient to engage article 3. In other words the member state expelling the person can be in breach of article 3 because of the risk of injury he runs on return even though, were that risk to eventuate, the receiving country itself would not be.

19. At first blush this is a surprising contention. Mr Nicol seeks to justify it, however, by reference to the different kinds of obligation which article 3 places on member states. Member states are under an absolute obligation not to take steps which would expose people to the risk of article 3 ill-treatment, a negative obligation. They are also under a positive obligation to take reasonable steps to protect people against serious harm. This obligation, however, is not absolute: the "obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities"—see the ECtHR's judgment in *Osman v United Kingdom* (1998) 29 EHRR 245, 305, para 116 (an article 2 case). The obligation not to expel someone at substantial risk in the receiving country is, submits Mr Nicol, a negative obligation and thus absolute.

20. Mr Nicol's argument rests heavily upon paragraph 91 of the court's judgment in *Soering* 11 EHRR 439, 468-469 and it is necessary to set this out in full (numbering the sentences for convenience):

> "(1) In sum, the decision by a contracting state to extradite a fugitive 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 concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.
>
> (2) The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of article 3 of the Convention.
>
> (3) 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.
>
> (4) 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."

21. It is the third sentence of that paragraph which Mr Nicol principally focuses upon. In that sentence, he submits, the court was making it plain that there is no need for the person concerned to establish that the feared risk is of harm such as would place the receiving country itself in actual or notional breach of article 3.

22. In my judgment the argument is a hopeless one. The principle stated in paragraph 91 of *Soering* is that which in the more recent Strasbourg cases appears in the form set out in paragraph 17 above. All that the third sentence of paragraph 91 is saying is that the court need not and should not reach any decision as to whether the receiving country (a sovereign state which in any event is not represented before the court) actually is or notionally would be in breach of article 3. All that need be decided is whether there are "substantial grounds . . . for believing" that there would be "a real risk" of this. To that end, of course, it *is* necessary, as the second sentence points out, to make "an assessment of conditions in the [receiving] country", ("the requesting country" in *Soering* since that was an extradition case). This is necessary so that the court may determine whether or not there is a real risk that the person concerned will suffer harm involving an actual or

notional violation of article 3 in the receiving country. That this is the effect of sentences 2 and 3 is to my mind clear: for good measure they are run together as a single sentence in paragraph 69 of the court's subsequent judgment in *Cruz Varas v Sweden* 14 EHRR 1, 34.

23. It is noteworthy that the risk referred to in the first sentence of paragraph 91 is of "being subjected to torture or to inhuman or degrading treatment or punishment" ("proscribed ill-treatment" as that is conveniently summarised in the fourth sentence); the later formulation speaks of "a real risk of being subjected to treatment contrary to article 3". All these expressions in terms refer to harm which, if it eventuates, would involve a violation (actual or notional) of article 3. The position surely is plain. There is no warrant whatever for reading *Soering* or any of the other cases as barring expulsion where the real risk is not of "proscribed ill-treatment" but is merely of harm, however serious.

24. The plain fact is that the argument throughout has been bedevilled by a failure to grasp the distinction in non-state agent cases between on the one hand the risk of serious harm and on the other hand the risk of treatment contrary to article 3. In cases where the risk "emanates from intentionally inflicted acts of the public authorities in the receiving country" (the language of para 49 of *D v United Kingdom* 24 EHRR 423, 447) one can use those terms interchangeably: the intentionally inflicted acts would without more constitute the proscribed treatment. Where, however, the risk emanates from non-state bodies, that is not so: any harm inflicted by non-state agents will not constitute article 3 ill-treatment unless in addition the state has failed to provide reasonable protection. If someone is beaten up and seriously injured by a criminal gang, the member state will not be in breach of article 3 unless it has failed in its positive duty to provide reasonable protection against such criminal acts. This provides the answer to Mr Nicol's reliance on the UK's obligation under article 3 being a negative obligation and thus absolute. The argument begs the vital question as to what particular risk engages the obligation. Is it the risk merely of harm or is it the risk of proscribed treatment? In my judgment it is the latter. The very identification of the issue for determination by the House in the agreed statement of facts and issues illustrates the confusion:

> "If, on removal to another country, there is a real risk that a person would suffer torture or inhuman or degrading treatment or punishment from non-state agents, will removal violate article 3 ECHR, or must the person concerned also show that there is in that country an

> insufficiency of state protection against such ill-treatment?"

Non-state agents do not subject people to torture or the other proscribed forms of ill-treatment, however violently they treat them: what, however, would transform such violent treatment into article 3 ill-treatment would be the state's failure to provide reasonable protection against it.

25. Is there anything in the Strasbourg jurisprudence in non-state agent cases suggesting the contrary? In my judgment there is not. *Ahmed v Austria* 24 EHRR 278 appears to be the only such case where the court has in fact concluded (as by then Austria too had concluded) that "the applicant's deportation to Somalia would breach article 3 of the Convention for as long as he faces a serious risk of being subjected there to torture or inhuman or degrading treatment." (p 292, para 47). As, however, had already been pointed out at p 291, para 44 (see para 10 above), there existed in Somalia both danger and a complete absence of state protection.

26. In *HLR v France* 26 EHRR 29, where the application in fact failed, the case was again put on the basis of the twin requirements for its success, the risk of harm and the lack of reasonable protection:

> "In the present case the source of the risk on which the applicant relies is not the public authorities. According to the applicant, it consists in the threat of reprisals by drug traffickers, who may seek revenge because of certain statements that he made to the French police, coupled with the fact that the Colombian state is, he claims, incapable of protecting him from attacks by such persons." (p 50, para 39).

I have already set out paragraph 40 of the court's judgment (see para 8 above). At p 50, para 42 the court concluded on the first limb of the case: "Although drug traffickers sometimes take revenge on informers, there is no relevant evidence to show in *HLR's* case that the alleged risk is real." At p 51, para 43 the court found against the applicant also on the second limb of his claim: "The applicant has not shown that they [the Colombian authorities] are incapable of according him appropriate protection."

27. Mr Nicol seeks to argue that these two conclusions were merely opposite sides of the same coin ie that by definition if there was no real risk there was no adequate protection and vice versa. He stresses in this regard the word "obviate" in para 40. Again, however, I find the argument impossible. As Sedley LJ pointed out in *McPherson v Secretary of State for the Home Department* [2002] INLR 139, 147, para 22, the court's apparent requirement that the protection is sufficient to "obviate" the risk "cannot be right. What the state is expected to do is take reasonable measures to make the necessary protection available."

The key to understanding the meaning of the word "obviate" in paragraph 40 of *HLR* was provided by my noble and learned friend, Lord Hope of Craighead, who pointed to the Collins Robert 4th edn dictionary translation of the French verb obvier as "to take precautions against." Nothing in the court's reasoning suggests that it regarded its conclusion on the issue of "appropriate protection" as affected, let alone determined, by its already stated conclusion on risk. To my mind it is clear that the applicant had to succeed on two independent points to establish his article 3 claim and in fact he succeeded on neither.

28. Although I have now said enough to dispose of this appeal I would nevertheless wish to touch briefly on three other matters. The first is *D v United Kingdom* 24 EHRR 423. *D,* of course, was a case where article 3 was found to be engaged notwithstanding that the risk of harm (amounting there to the certainty of imminent death) involved no actual or notional breach of article 3 on the part of the receiving state. *D,* however, was a very exceptional case—just how exceptional has recently been made clear by the decision of this House in *N (FC) v Secretary of State for the Home Department* [2005] UKHL 31—and the present appellants cannot and do not seek to rely upon it.

29. Secondly, the Convention and Protocol relating to the Status of Refugees (1951) (Cmd 9171) and (1967) (Cmnd 3906) ("the Refugee Convention"). A large part of the judgment below—and a good deal of the argument before your Lordships—was devoted to the relationship between the question presently for decision and the concepts of a well-founded fear of persecution and the sufficiency of state protection arising under the Refugee Convention. It is, of course, plainly established that, in cases under the Refugee Convention where the well-founded fear of persecution emanates from non-state agents, the asylum seeker must establish not merely the risk of severe ill-treatment but also that his home state was unwilling or unable to provide a reasonable level of protection from it—see *Horvath v Secretary of State for the Home*

Department [2001] 1 AC 489. As, however, Mr Nicol was at pains to emphasise, that is a different Convention from the ECHR, providing in certain respects narrower, though in others wider, protection than the ECHR, the one founded on the principle of surrogacy, the other on more general humanitarian considerations, one (the ECHR) subject to the rulings of a supranational court, the other (the Refugee Convention) not. Moreover, not all those party to the Refugee Convention recognise even the concept of persecution by non-state agents.

30. All that said, however, it is perhaps not surprising that where, as in the UK, the concept of persecution by non-state agents *is* recognised, a broadly similar approach is adopted under both Conventions to the requirement for the person concerned to demonstrate in addition to the risk of harm a failure in the receiving state to provide a reasonable level of protection. It may also be helpful, in any future case under article 3 where the threatened harm emanates not (as here) from non-state agents, nor (as expressly envisaged in the *Soering* line of cases) "from intentionally inflicted acts of the public authorities" (to quote para 49 of *D v United Kingdom* 24 EHRR 423, 447), but rather from non-conforming behaviour by (perhaps quite junior) official agents, to apply by analogy the approach adopted by the majority of the Court of Appeal in the asylum case of *Svazas v Secretary of State for the Home Department* [2002] 1 WLR 1891. Certainly your Lordships should state for the guidance of practitioners and tribunals generally that in the great majority of cases an article 3 claim to avoid expulsion will add little if anything to an asylum claim.

31. Finally to be mentioned is the fact that on 1 May 2004 (following the Court of Appeal's decision in the present case) Lithuania became a member of the European Union whereby the appellants acquired certain rights of free movement. True, these rights depend upon one or other of them obtaining employment in the UK. But it is hard to suppose that that will prove an insuperable obstacle. (Indeed, after this opinion was written, your Lordships were informed that the first appellant had now obtained employment.) All this, however, is by the way.

32. For the reasons given earlier I would dismiss this appeal.