Case Nos: C5/2008/0667 and C5/2008/0819

Neutral Citation Number: [2009] EWCA Civ 630

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 26/06/2009

Before :
LORD JUSTICE LAWS
LORD JUSTICE HOOPER
and
LORD JUSTICE STANLEY BURNTON

- -

Between :

EN (Serbia)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**
and between	
The Secretary of State for the Home Department	**Appellant**
- and -	
KC (South Africa)	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

- -

Manjit Gill QC and **Basharat Ali** (instructed by **Aman Solicitors-Advocates**) for **EN**
Tim Eicke and **Alan Payne** (instructed by **the Treasury Solicitor**) for the **Secretary of State** in **EN (Serbia)**
Tim Eicke, **John-Paul Waite** and **Alan Payne** (instructed by **the Treasury Solicitor**) for **the Secretary of State** in **KC (South Africa).**
Raza Hussain and **Kathryn Cronin** (instructed by **Messrs Wesley Gryk)** for **KC**

Hearing dates: 16, 17 and 18 March 2009

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Judgment

Lord Justice Stanley Burnton:

Introduction

1. These appeals have been heard together because they raise points of some importance as to the effect of section 72 of the Nationality, Immigration and Asylum Act 2002 and the statutory instrument made under it. The section creates presumptions that persons convicted of offences and sentenced to a term of imprisonment of at least 2 years have committed particularly serious offences and are a danger to the community for the purposes of Article 33(2) of the Geneva Refugee Convention ("the Convention"). In addition, the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 (the 2004 Order"), made under section 72(4)(a), specifies a large number of criminal offences as offences to which the presumptions apply irrespective of the sentence imposed by the court.

2. Within hours after the completion of oral submissions, the Court received a letter from Mr Eicke, counsel for the Secretary of State, enclosing a copy of the determination of the Asylum and Immigration Tribunal in *IH (s. 72 "Particularly Serious Crime") Eritrea* [2009] UKAIT 00012, which had been promulgated on 9 March 2009 but published by the Tribunal on 18 March 2009, the last day of the hearing before this Court. In that case the Tribunal, consisting of Deputy President Ockelton and Senior Immigration Judges Lane and Grubb, considered and decided most of the issues concerning section 72 and the Regulations that are before us. Their determination includes an extensive citation of authorities, which renders it unnecessary for us to refer to all the authorities cited to us bearing on the issues before us. We invited, and received, the parties' written submissions on *IH*.

3. There are before the Court three appeals:

   (a) EN's appeal against the determination of Senior Immigration Judge Batiste promulgated on 21 January 2008.

   (b) The Secretary of State's appeal against the determination of the President of the Tribunal, Hodge J, and Senior Immigration Judge Jordan dated 5 February 2008 in so far as they held that KC would be at risk of persecution if he was deported to South Africa.

   (c) KC's cross-appeal against that determination.

4. For convenience, I shall refer to both EN and KC as the Appellants, it being unnecessary for many purposes to distinguish between their submissions.

The provisions of the Refugee Convention and section 72

5. In order to understand the issues in these appeals, it is necessary to set out certain provisions of the Refugee Convention as well as those of section 72, and in addition Council Directive 2004/83/EC ("the Qualification Directive"), implemented in this country by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 ("the Qualification Regulations").

6. The principal provisions of the Refugee Convention that are relevant are Articles 1A(2), 1C and 33:

Article 1A: For the purposes of the present Convention, the term "refugee" shall apply to any person who:

…

(2) Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Article 1C: This Convention shall cease to apply to any person falling under the terms of section A if:

.....

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;..."

Article 33 – Prohibition of expulsion or return ('refoulement')

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

7. Section 72 of the 2002 Act, as amended by the United Kingdom Borders Act 2007, is as follows.

72 **Serious criminal**

(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).

(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is—

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years.

(3) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if—

(a) he is convicted outside the United Kingdom of an offence,

(b) he is sentenced to a period of imprisonment of at least two years, and

(c) he could have been sentenced to a period of imprisonment of at least two years had his conviction been a conviction in the United Kingdom of a similar offence.

(4) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if—

(a) he is convicted of an offence specified by order of the Secretary of State, or

(b) he is convicted outside the United Kingdom of an offence and the Secretary of State certifies that in his opinion the offence is similar to an offence specified by order under paragraph (a).

(5) An order under subsection (4)—

(a) must be made by statutory instrument, and

(b) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.

(7) A presumption under subsection (2), (3) or (4) does not apply while an appeal against conviction or sentence—

(a) is pending, or

(b) could be brought (disregarding the possibility of appeal out of time with leave).

(8) Section 34(1) of the Anti-terrorism, Crime and Security Act 2001 (c. 24) (no need to consider gravity of fear or threat of

persecution) applies for the purpose of considering whether a presumption mentioned in subsection (6) has been rebutted as it applies for the purpose of considering whether Article 33(2) of the Refugee Convention applies.

(9) Subsection (10) applies where—

(a) a person appeals under section 82, 83 or 101 of this Act or under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) wholly or partly on the ground that to remove him from or to require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention, and

(b) the Secretary of State issues a certificate that presumptions under subsection (2), (3) or (4) apply to the person (subject to rebuttal).

(10) The Tribunal or Commission hearing the appeal—

(a) must begin substantive deliberation on the appeal by considering the certificate, and

(b) if in agreement that presumptions under subsection (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a).

(11) For the purposes of this section—

(a) 'the Refugee Convention' means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol, and

(b) a reference to a person who is sentenced to a period of imprisonment of at least two years—

(i) does not include a reference to a person who receives a suspended sentence <u>(unless a court subsequently orders that the sentence or any part of it is to take effect)</u>,

<u>(ia) does not include a reference to a person who is sentenced to a period of imprisonment of at least two years only by virtue of being sentenced to consecutive sentences which amount in aggregate to more than two years,</u>

(ii) includes a reference to a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in

> particular, a hospital or an institution for young offenders), and
>
> (iii) includes a reference to a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period (provided that it may last for two years).

The insertions made by the 2007 Act are underlined.

8. The purpose of the Qualification Directive "on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted" is "to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted": see Article 1. Article 2 contains a number of definitions. "Refugee" is defined in effectively the same terms as in Article 1A(2) of the Refugee Convention. "Refugee status" means "the recognition by a Member State of a third country national or a stateless person as a refugee". For immediate purposes, it is sufficient to refer to paragraphs 4 to 6 of Article 14 of the Qualification Directive:

> 4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body when:
>
> (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;
>
> (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.
>
> 5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.
>
> 6. Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31 and 32 and 33 of the Geneva Convention in so far as they are present in the Member State.

9. It can be seen that the requirements set out in Article 14.4(a) and (b) are identical to those of Article 33 of the Convention. As to the references in paragraph 6, Article 3 of the Convention requires it to be applied without discrimination as to race, religion or country of origin; Article 4 requires freedom of religion; Article 16 access to courts; Article 22 confers a right to education; and Article 31 prohibits penalisation on account of illegal entry or presence when coming directly from the country of persecution. Article 32, headed "Expulsion", prohibits expulsion of a refugee lawfully in the territory of a Member State save on grounds of national security or public order.

EN: the facts in outline and the Tribunal proceedings

10. EN is a national of Serbia. He claimed asylum shortly after arriving in the United Kingdom on 15 January 2002. The Secretary of State refused his application for asylum by letter dated 5 March 2002, but granted him Exceptional Leave to Remain (ELR) until his 18th birthday (4 September 2005). EN appealed against this decision to an Adjudicator who allowed the appeal "under the Geneva Convention". Thereafter, on 13 March 2003 the Secretary of State granted him Indefinite Leave to Remain (ILR).

11. In 2002, EN was convicted of motoring offences and, in 2005 he was convicted of placing an advertisement relating to prostitution in a public phone box. Neither of these convictions resulted in a custodial sentence. However, on 17 August 2006 he was convicted of three counts of burglary and one count of being in possession of an offensive weapon. On 11 October 2006 he was sentenced to three concurrent terms of 12 months' detention in a young offender's institution, and a concurrent term of 2 months for the offence relating to possession of an offensive weapon. The sentencing Judge did not make a recommendation for deportation.

12. By letter dated 22 December 2006 the Secretary of State notified EN that, on account of his convictions, consideration was being given to deporting him under section 3(5)(a) of the Immigration Act 1971 ("the 1971 Act"), i.e., on the ground that she deemed his deportation to be conducive to the public good. In an undated letter EN provided his reasons for resisting his proposed deportation. By letter dated 16 January 2007 the Secretary of State notified EN that, having considered his representations, she had nevertheless decided to make a deportation order against him on the grounds that by reason of his criminal convictions it was conducive to the public good for him to be deported. On 18 January 2007 EN exercised his statutory right of appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

13. By letter dated 14 February 2007, entitled "Application of Article 33(2) to a Recognised Refugee", the Secretary of State informed EN that it had been decided (i) to issue a certificate under section 72(9) of the 2002 Act against him and (ii) that he was not considered to be entitled to Humanitarian Protection under paragraph 339D of the Immigration Rules.

14. EN's statutory appeal was first heard by the AIT (Immigration Judge Lester and Mrs Holt) on 2 July 2007. The Tribunal took into account the pre-sentence reports and the sentencing remarks of the Crown Court Judge who had commented that the crimes were serious; they concluded that the evidence demonstrated that, since EN's grant of asylum, there had been a considerable improvement in the situation of his country of nationality, and that EN no longer faced a real risk of persecution or of inhuman or degrading treatment contrary to Article 3 of the European Convention on Human Rights, or an infringement of his rights under Article 8 if returned to Serbia; and they dismissed the appeal.

15. On 24 July 2007 EN sought reconsideration of the AIT's determination. He raised 5 discrete grounds of appeal; none of which sought to challenge the construction or validity of section 72 of the 2002 Act. On 3 October 2007 the AIT (Senior Immigration Judge Waumsley) ordered reconsideration limited to challenging the issue of whether the Tribunal had materially erred in law in concluding that he had

been convicted of "a particularly serious crime". He *inter alia* refused to order reconsideration in relation to the finding by the original AIT that the appellant would not be at risk of ill-treatment contrary to Article 3 ECHR on the basis that it was "without merit".

16. The reconsideration hearing took place on 16 January 2008 before Senior Immigration Judge Batiste. In his decision promulgated on 21 January 2008, he held that the AIT had not made a material error of law. This is the decision currently under challenge. In reaching his decision SIJ Batiste:

    (a) refused EN's renewed application for permission to advance the grounds in relation to which he had been previously refused permission;

    (b) rejected his grounds of appeal on the basis that:

        (i) EN had been convicted of a crime specified in the the 2004 Order as a particularly serious crime for the purposes of Article 33(2) of the Convention; and

        (ii) any error in the consideration of the issue of refoulement was immaterial given the AIT's conclusion that EN did not face a real risk of persecution on return to Serbia.

17. EN sought leave to appeal to the Court of Appeal against the determination of Senior Immigration Judge Batiste. On 13 March 2008 the Tribunal refused EN leave. EN renewed his application to the Court of Appeal on the following grounds, among others:

    (a) S. 72 of the 2002 Act is *ultra vires* section 2 of the Asylum and Immigration Appeals Act 1993.

    (b) The AIT erred in relation to its construction of "particularly serious crime" under section 72 of the 2002 Act because the Appellant had not been sentenced to a sentence of imprisonment of two years or more.

    (c) The 2004 Order is *ultra vires* its enabling section "because many of the offences contained in that order are not particularly serious".

18. By Order dated 30 June 2008 Buxton LJ granted EN permission to appeal on these grounds so that issues surrounding the statutory definitions of what amounts to "particularly serious crime" for the purposes of Article 33(2) could be explored, and refused permission to appeal on the other grounds he had put forward.

KC: the facts in outline and the Tribunal proceedings

19. KC is a national of South Africa. He was a member of the "Mandela United Football Club" ("MUFC") during the 1980s, a group who acted as bodyguards and servants to Winnie Mandela. He alleges that, as a member of the MUFC, he was ordered by her to take part in a number of atrocities against suspected informers and others of her perceived opponents. He was a witness to the notorious murder of Stompie Moeketsi (who had been suspected of being a police informer) on 31 December 1988 and was

himself involved in Mr Moeketsi's kidnap. He also states that Mrs Mandela played a direct role in this murder, stabbing the victim on two occasions.

20. On 21 February 1989 KC was charged in South Africa with the kidnap and assault of Mr Moeketsi. Another member of the gang, Mr Richardson, was charged with his murder. On 24 September 1990 Mrs Mandela was added as defendant to the charges of kidnapping and assault.

21. On 8 February 1991 KC was taken by force and placed in a Zambian jail. The South African Truth and Reconciliation Commission ("the TRC") later (in 1997) found that senior members of the African National Congress were responsible for this. On 14 May 1991 Mrs Mandela was convicted of kidnap and being an accessory to the assault of Mr Moeketsi. She was sentenced to six years' imprisonment. The conviction for assault was quashed on appeal and the sentence for kidnap reduced to a suspended term of two years (and a fine).

22. KC was released from jail in Zambia on 15 December 1993 and moved to Sierra Leone under the protection of the UNHCR. He was recognised by it as a refugee, and was thus a mandate refugee as defined in the Home Office Asylum Policy Instructions. He arrived in the United Kingdom in 1995 on a visitor visa secured through the assistance of Emma Nicholson MP. Whilst in this country he was interviewed by the South African police in relation to Mrs Mandela.

23. After spending four months in the United Kingdom KC travelled to Guinea. He returned to the United Kingdom in 1997 and was granted ELR until 13 November 1998. He briefly returned to South Africa in 1997 to give evidence against Mrs Mandela before the TRC. On 20 September 1999 he was granted an extension of his ELR until 12 July 2002. Before the expiry of that leave he applied for ILR. This was refused and he was granted a further period of one year's ELR on 18 January 2004.

24. On 6 August 2003 KC was charged with wounding with intent to do grievous bodily harm. On 9 December 2003 he made another application for ILR. On 2 June 2004 he was convicted of wounding with intent to do grievous bodily harm and sentenced to a community punishment and rehabilitation order.

25. KC broke the terms of his community rehabilitation order. As a result, on 17 December 2004 he was re-sentenced for the offence of wounding with intent and received a three year prison sentence. In addition on 23 December 2004 he was convicted by Croydon Magistrates' Court of possession of a bladed article and sentenced to a concurrent term of two months imprisonment.

26. On 31 August 2006 KC applied for asylum. The Secretary of State refused his application for asylum on 5 March 2007 both on its substantive merits and under section 72(2) of the Nationality, Immigration and Asylum Act 2002. On 19 April 2007 the reasons for deportation letter was served enclosing a notice of a decision to make a deportation order.

27. KC appealed against those decisions. His appeal was dismissed by the Tribunal (Immigration Judge Braybrook and Mr Smith) in its determination promulgated on 26 May 2007. The Tribunal held that KC had not rebutted the presumption that he was a danger to the community. It also held that he did not have a well-founded fear of

persecution or ill-treatment on return, and therefore did not qualify for either asylum or humanitarian protection.

28. Reconsideration was ordered. At the first stage reconsideration it was decided that the first Tribunal had made a material error of law. The case proceeded to a second stage reconsideration on all of the grounds put forward by KC. He challenged the finding that he had committed a particularly serious crime, but did not expressly contend that the statutory presumption in section 72(2) was rebuttable, and he challenged the finding that he had failed to rebut the presumption that he was a danger to the community. Given the seriousness of his crime, it is possible that the omission of a challenge to the first of these findings was not due to the apparent irrebuttability of the presumption arising from a sentence of imprisonment of 2 years or more, but I suspect that that was the reason. He did not contend that section 72 was inconsistent with the Convention.

29. The Tribunal, consisting as mentioned above of the President and Senior Immigration Judge Jordan, dismissed the appeal in relation to the Refugee Convention, but allowed the appeal pursuant to Article 3 of the European Convention. (They understandably referred to the matter before them as an appeal, although technically it may have been a reconsideration, but nothing turns on this.) The basis of the rejection of the asylum appeal was, as I understand the determination, that the Secretary of State had established that the requirements of Article 33(2) had been met. The Tribunal also found that he was excluded from humanitarian protection under paragraph 339D of the Immigration Rules because the Secretary of State had been entitled to be satisfied that he constituted a danger to the community or to the security of the United Kingdom, by reason of his offending.

30. The Secretary of State's ground of appeal is that in assessing whether deporting KC to South Africa the Tribunal failed to consider the sufficiency of protection which he would be afforded there, or at least failed to give adequate reasons for its decision as to risk because their reasons did not adequately address that issue. KC appeals against the failure of the Tribunal to determine his claim to refugee status and against the findings made against him on the basis of section 72, and against the finding that he constituted a danger to the community or to the security of the United Kingdom.

The requirements of Article 33(2) of the Refugee Convention and of section 72: the submissions of the parties

31. On behalf of the Appellants, it was submitted:

    (a) The Refugee Convention has been incorporated into English Law, albeit informally.

    (b) Article 33(2) should be given a narrow construction, consistent with its being an exception to the general right of international protection created by the Convention. It lays down two conditions to be satisfied by the country of refuge: a conviction for a particularly serious offence and danger to the community.

    (c) The effect of the application of section 72 is to permit the country of refuge to refoule (i.e., deport) a refugee. It does not deprive him of refugee status. If,

therefore, the country of refuge is unable to deport the refugee, whether because of other international obligations or a provision of its internal law or because it is not practical to do so, his refugee status is unaffected.

(d) In the case of KC, he had a right to have his refugee status recognised, and the Tribunal had erred in failing to find that he was a refugee.

(e) The Qualification Directive is directly enforceable by the individual under English Law. It is however *ultra vires* because it is inconsistent with the requirements of the Convention in permitting a Member State not to grant refugee status to a person who has been convicted of a particularly serious crime and constitutes a danger to the community of that Member State. This provision, in Article 14(5) of the Directive, fails to reflect the fact that Article 33 of the Convention is concerned only with refoulement and does not affect the status of an individual as a refugee or his right to be recognised as such.

(f) Any presumption such as those in section 72(2) is incompatible with the Convention and the Directive, even if rebuttable, because it imposes a burden of proof on the individual when those instruments require it to be satisfied by the state.

(g) Any irrebuttable presumption is incompatible with both instruments since it results in a deemed satisfaction of a Convention requirement which has not in fact been satisfied.

(h) If the submission referred to at (f) is not well founded but that at (g) is well founded, and if section 72 provides for the presumption in subsection (2) as to conviction of a particularly serious crime to be irrebuttable, in order to render the section compatible it must be read down so as to permit both that presumption and that referred to in subsection (6) to be rebutted by the individual.

(i) The 2004 Order is *ultra vires*, because it renders crimes that cannot reasonably be regarded as particularly serious into particularly serious crimes for the purposes of deportation, and is therefore outside the statutory power conferred on the Secretary of State by subsection (4) properly construed, and also because it is incompatible with the Refugee Convention and the Qualification Directive.

32. On behalf of the Secretary of State it was submitted:

(a) The Refugee Convention has not been incorporated into English Law, save to the qualified extent provided in section 2 of the Asylum and Immigration Appeals Act 1993.

(b) This Court cannot find that the Directive is *ultra vires*: only the European Court of Justice is competent so to find.

(c) The effective requirement for refoulement under Article 33(2) is that the individual constitutes a threat to the community. If he does not, he cannot be

refouled in breach of Article 33(1) even if he has been convicted of a particularly serious crime.

(d) Furthermore, the two requirements in Article 33(2) are connected: on its proper construction, a conviction for a particularly serious crime gives rise to a presumption that the offender constitutes a danger to the community.

(e) Presumptions such as those in section 72 are compatible with both the Convention and the Directive, which say nothing about the procedure for establishing whether their requirements are satisfied in any particular case.

(f) In these circumstances, section 72 is compatible with both the Convention and the Directive. The individual is sufficiently protected by the fact that the presumption normally arising from his conviction is expressly made rebuttable.

(g) She accepted, for the purposes of these appeals, that the relevant provisions of the Qualification Directive are directly effective, and that section 72 is therefore to be interpreted in conformity with the interpretative obligation described in judgments of the European Court of Justice, and in particular Case C-106/89 *Marleasing* [1990] ECR I-4135. It was however unnecessary to have recourse to this principle, since the natural and ordinary meaning of section 72 is compatible with the Directive.

(h) Section 72 does not limit the jurisdiction of the Tribunal to find that a person is a refugee.

(i) However, neither the Convention nor the Directive confers a right on an individual to have his refugee status recognised if the conditions for his refoulement under Article 33(2) of the former and Article 14.4(b) of the latter are satisfied.

The requirements of Article 33(2) of the Refugee Convention and of section 72: the issues

33. It follows that the principal issues concerning section 72 and the 2004 Order are:

(a) What are the requirements of Article 33(2) apart from those imposed by section 72?

(b) What are the requirements of the Directive and the Regulations?

(c) Can this Court consider whether the Directive is *ultra vires*?

(d) Are presumptions such as those imposed by section 72(2) compatible with (i) the Refugee Convention and (ii) the Qualification Directive?

(e) Has the Refugee Convention been incorporated into English Law?

(f) Interpretation: on the true construction of section 72, leaving aside the application of the *Marleasing* principle, is the only presumption that is rebuttable the second presumption in section 72(2), namely that the person

constitutes a danger to the community of the United Kingdom, or is the presumption that he has committed a particularly serious offence also rebuttable?

(g) Is the *Marleasing* principle applicable to section 72, and if so what is the proper construction of the section?

(h) Is section 72, properly construed, compatible with (i) the Refugee Convention and (ii) the Qualification Directive?

(i) Is the 2004 Order *ultra vires* in whole or in part?

34. Other issues arise as to the effect of the application of Article 33(2) conformably with English Law. In particular, what are the consequences of the application of that Article to a refugee or a person who seeks to be recognised as a refugee in a case in which he cannot be lawfully refouled? In the case of a person recognised as a refugee, does the satisfaction of the requirements of Article 33(2) result in his ceasing to have refugee status? Does a person claiming refugee status to whom it applies have a right to have his status determined?

35. Mr Hussain submitted that the Qualification Directive is at least in part incompatible with the Refugee Convention and is in consequence *ultra vires*. We address that submission and its consequences below.

36. The law resulting from my determination of these issues must then be applied to the individual cases of EN and KC.

The requirements of Article 33(2) of the Refugee Convention: discussion

37. It is common ground that the Convention falls to be interpreted in accordance with the provisions of the Vienna Convention on the Law of Treaties. Its relevant provisions are set out in the speech of Lord Steyn in *R (Adan and others) v Secretary of State for the Home Department* [2001] 2 AC 477, 516. I would also respectfully adopt his summary at 516H to 517B.

38. Mr Eicke submitted that there is in effect only one requirement for the application of Article 33(2). He said that the requirement of a conviction for a particularly serious crime is a threshold requirement, leading to the presumption, rebuttable under the Act, that a person is a danger to the community. The effective requirement, for the purposes of Article 33(2), is that a person is a danger to the community.

39. I cannot accept this submission. In my judgment, it is clear that Article 33(2) imposes two requirements on a state wishing to refoule a refugee in the circumstances referred to in paragraph 1: his conviction by a final judgment of a particularly serious crime and his constituting a danger to the community. A Member State that can show that a person who has not been convicted of a particularly serious crime is nonetheless a danger to the community cannot rely on Article 33(2).

40. In *Adan* the House of Lords held that Article 1A(2) of the Convention has an autonomous meaning. Like the Tribunal in *IH* at [72], I have no doubt that the expression "particularly serious crime", in an international treaty, similarly has an autonomous meaning. This is not to mean, however, that what is a particularly serious

crime must be the same in every member state, and again I am in agreement with the Tribunal in *IH* on this. The criminal laws of member states vary. What are crimes under the laws of one member state are not crimes under the laws of another. To take a subject of topical interest, to assist a person to commit suicide is a crime under the laws of some member states (including the United Kingdom) but not under the laws of others. Abortion is a crime under the laws of some member states, but is permitted under our law. Even more obviously, acts that were criminal when the Convention was entered into are so no longer. Until the Abortion Act 1967 abortion was always a crime in this country; the Act regulated the medical termination of pregnancy; homosexual acts between consenting adults were criminal until the passing of the Sexual Offences Act 1967. Similar considerations apply to assessing the seriousness of crimes. We now regard some crimes, such as causing death by dangerous driving, rape and sexual offences involving children, more seriously than was the case 50 years ago. So I do not think that the crimes that are particularly serious are a constant, not varying from member state and not varying in time. Rather, the expression "particularly serious crime" must be applied to what is a crime under the domestic law of the member state when the question of refoulement arises.

41. The Appellants submitted that it is necessary to interpret Article 33(2), narrowly and restrictively. Their submission has the support of impressive authority. Sir Elihu Lauterpacht QC and Daniel Bethlehem QC state in their Joint Opinion to the UNHCR *The Scope and Content of the Principle of Non-Refoulement* (2001, revised 2003):

> 186. This double qualification – particularly and serious – is consistent with the restrictive scope of the exception and emphasises that refoulement may be contemplated pursuant to this provision only in the most exceptional of circumstances …'
>
> …
>
> 191 … Regarding the word "danger", as with the national security exception, this must be construed to mean very serious danger. This requirement is not met simply by reason of the fact that the person concerned has been convicted of a particularly serious crime. An additional assessment is called for which will hinge on an appreciation of issues of fact such as the nature and circumstances of the particularly serious crime for which the individual was convicted, when the crime in question was committed, evidence of recidivism or likely recidivism, etc.

42. In *The Rights of Refugees under International Law* (2005), Professor James Hathaway stated:

> … the Refugee Convention accepts that in extreme and genuinely exceptional cases, the usual considerations of humanity must yield to the critical security interests of the receiving state. Thus, if the demanding criteria of Art. 33(2) are satisfied, an asylum state may, assuming there is no other

> option, remove a refugee convicted of a particularly serious crime who poses a danger to the host community's safety – even if the only option is to send the refugee to his or her country of origin.

43. In my judgment, these authorities, and in particular the Lauterpacht and Bethlehem Joint Opinion, add an unjustified gloss to Article 33(2). To construe "danger" as restricted to "very serious danger" is to add words that the Member States did not include. It is to change the meaning of a negotiated settlement. In *Brown v Stott* [2003] 1 AC 681, 703, Lord Bingham said, with reference to the European Convention on Human Rights:

> In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure. This does not mean that nothing can be implied into the Convention. The language of the Convention is for the most part so general that some implication of terms is necessary, and the case law of the European court shows that the court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so. But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept.

44. This passage was cited by Lord Brown of Eaton-under-Heywood in his speech in *R (Hoxha) v Special Adjudicator* [2005] UKHL 19 [2005] 1 WLR 1063 with reference to the present Convention:

> 85 It is one thing to invite this House to construe the Convention as a living instrument generously and in the light of its underlying humanitarian purposes; quite another to urge your Lordships effectively to rewrite it so as to create a fresh entitlement to refugee status based upon no more than historic fear and present compelling reasons for non-return, with no need at all for any current fear of persecution. That would be to distort entirely the language and structure of the text and in my judgment do a serious disservice to the cause of human rights generally.

45. These remarks apply with equal force here. Moreover, I see no need for any gloss on the express words of Article 33(2). The words "particularly serious crime" are clear, and themselves restrict drastically the offences to which the Article applies. So far as "danger to the community" is concerned, the danger must be real, but if a person is

convicted of a particularly serious crime, and there is a real risk of its repetition, he is likely to constitute a danger to the community.

46. The Appellants submitted that Article 33(2) requires that the danger to the community must be causally connected to the particularly serious crime of which the person has been convicted. I would accept that normally the danger is demonstrated by proof of the particularly serious offence and the risk of its recurrence, or of the recurrence of a similar offence. I would also accept that the wording of Article 33(2) reflects that expectation. But it does not expressly require a causal connection, and I do not think that one is to be implied. By way of example, I do not see why a person who has been convicted of a particularly serious offence of violence and who the State can establish is a significant drug dealer should not be liable to refouled under Article 33(2). In any event, it seems to me that a disregard for the law, demonstrated by the conviction, would be sufficient to establish a causal connection between the conviction and the danger. If so, the suggested added requirement of a causal connection has little if any practical consequence.

47. I would add that I have no doubt that particularly serious crimes are not restricted to offences against the person. Frauds, thefts and offences against property, for example, are capable of being particularly serious crimes, as may drug offences, particularly those involving class A drugs. In addition, matters such as frequent repetition or a sophisticated system or the participation of a number of offenders may aggravate the seriousness of an offence.

48. Mr Eicke referred us to examples of the application of Article 33(2) by other parties to the Convention. It appears from the judgment of the Federal Court of Appeal in *Nagalingam v The Minister of Citizenship and Immigration* [2008] FCA 153 at [70] that the Canadian legislation provides that "serious criminality" is sufficient to satisfy the first requirement, and that it defines "serious criminality" as convictions relating to "an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed". The US Code provides that conviction of an aggravated felony for which a sentence of at least 5 years' imprisonment has been imposed is considered to have committed a particularly serious crime. The Migration Act 1958 of Australia provides that a particularly serious crime is an offence involving violence against a person, or is a serious drug offence or one involving serious damage to property or is an offence relating to immigration detention which if committed in Australia is punishable by imprisonment for life, or by imprisonment for a fixed term of not less than 3 years or by imprisonment for a maximum term of not less than 3 years.

49. We were also referred to a survey of practice among the Member States of the European Union, published by the European Legal Network on Asylum. In relation to the definition of particularly serious crimes, it discloses little uniformity. In Austria "According to jurisprudence a particularly serious crime can be e.g. murder, rape, child maltreatment, and similar crimes". In the Czech Republic "The criminal code defines a particularly serious crime as one that incurs a punishment of imprisonment with upper limit 8 years". In Germany "Section 60(8) Residence Act requires somewhat more precisely that the person in question has been sentenced to more than three years' imprisonment, on account of either a 'crime', or a 'particularly serious offence'. … As examples, murder, manslaughter, kidnapping, serious cases of rape,

hostage-taking, malicious arson as well as other similarly serious crimes have been mentioned in the jurisprudence". In Italy, there is "a specific list of serious crimes (such as murder, mafia affiliation, terrorism, import of guns, some sexual crimes, some drug crimes)".

50. These examples were cited in order to show that the statutory presumption that a sentence of at least 2 years' imprisonment relates to a particularly serious crime is compatible with the Convention. I confess that I do not find them particularly helpful. There is no uniform interpretation sufficient to establish "a subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of Article 31.3(b) of the Vienna Convention. Nor, for the reasons adumbrated in paragraph 40 above, would I expect to see uniformity of application. Moreover, without knowing more about the criminal legislation and penal policy of the state concerned is it not possible to assess the relative seriousness of an offence from its punishment.

51. I, therefore, would simply apply what I consider to be the plain and clear words of Article 33(2) and the Directive, subject to any applicable mandatory statutory provision.

Has the Refugee Convention been incorporated into English Law?

52. However, the question before us is whether the Convention has a far greater status under our law. The provisions of a statute that has been formally incorporated into our law are law. The European Convention on Human Rights, incorporated by the Human Rights Act 1998, is a good example of an incorporated treaty. The provisions of the treaty have the force of statute.

53. In this connection, the Appellants rely on judicial pronouncements of the highest authority. In *Sivakumaran v SSHD* [1988] AC 958, Lord Keith of Kinkel said at 990:

> The United Kingdom having acceded to the Convention and Protocol, their provisions have for all practical purposes been incorporated into United Kingdom law. Rules 16, 73 and 165 of the Statement of Changes in Immigration Rules (1983) (H.C. 169) (made under section 3(2) of the Immigration Act 1971) provide:
>
> > "16. Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees (Cmd. 9171 and Cmnd. 3906). Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments...."

54. Subsequently, the Asylum and Immigration Act 1993 made express reference to the Convention. Sections 1 and 2 are as follows:

> 1. Interpretation
>
> In this Act-

> "the 1971 Act" means the Immigration Act 1971;
>
> "claim for asylum" means a claim made a by a person (whether before or after the coming into force of this section) that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or required to leave, the United Kingdom; and
>
> "the Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and the Protocol of that Convention.
>
> 2. Primacy of Convention
>
> Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.

55. This enactment led to the references to the Convention in the speeches in *R (European Roma Rights Centre & Ors) v Immigration Officer at Prague Airport & Anor* [2005] 2 AC 1. Lord Bingham of Cornhill said:

> [7] Under rule 16 of the Statement of Changes in Immigration Rules (1983)(HC 169) it was formerly provided:
>
> > "Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees (Cmd 9171 and Cmnd 3906). Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments …"
>
> Despite this somewhat informal mode of incorporation Lord Keith of Kinkel, in *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958, 990, observed that the provisions of the Convention and Protocol had for all practical purposes been incorporated into United Kingdom law. But in 1993 steps were taken to strengthen the mode of incorporation by providing in primary legislation, in section 2 of the Asylum and Immigration Appeals Act 1993, headed "Primacy of Convention", that "Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention" [defined to mean the 1951 Convention and the Protocol]. Plainly the Rules cannot provide for asylum applications to be handled less favourably to the applicant than the Convention requires.

56. Lord Steyn said:

> 40. …. In *R v Secretary of State for the Home Department, Ex p Singh* The Times, 8 June, 1987, the Divisional Court held that

the Refugee Convention had "indirectly" been incorporated under English law. Later in the same year in *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958, 990 Lord Keith of Kinkel observed that "The United Kingdom having acceded to the Convention and Protocol, their provisions have for all practical purposes been incorporated into United Kingdom law." Lord Bridge of Harwich, Lord Templeman and Lord Griffiths agreed with the opinion of Lord Keith. The difficulty is, however, that Immigration Rules are not law but merely instructions to immigration officers. *By themselves* they cannot effect an incorporation.

41 Against this background, Parliament decided to make reference to the Refugee Convention in primary legislation. Parliament was informed that the new provision was to be "an additional safeguard": Hansard, Standing Committee A, 19 November 1992, col 151. Section 2 of the Asylum and Immigration Appeals Act 1993 provides: "Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention." It is necessarily implicit in section 2 that no administrative practice or procedure may be adopted which would be contrary to the Convention. After all, it would be bizarre to provide that formal immigration rules must be consistent with the Convention but that informally adopted practices need not be consistent with the Convention. The reach of section 2 of the 1993 Act is therefore comprehensive.

42 Parliament must be taken to have been aware, in enacting the 1993 Act, that the courts had treated references in the immigration rules to the Refugee Convention as "indirectly" or "for practical purposes" incorporating it into domestic law: *Bennion , Statutory Interpretation* , 4th ed (2002), p 469. In the context of the decisions of the Court of Appeal and House of Lords in 1987 Parliament must have intended that the strengthened reference to the Refugee Convention in primary legislation would be treated by the courts as an incorporation of the Refugee Convention into domestic law. Moreover, the heading of section 2 is "Primacy of the Convention". This is a relevant and significant pointer to the overriding effect of the Convention in English law: *R v Montila* [2004] 1 WLR 3141, paras 31-37, per Lord Hope of Craighead. It is true, of course, that a convention may be incorporated more formally by scheduling it to an enactment, e g the Carriage of Goods by Sea Act 1971 which enacted the Hague-Visby Rules. But there is no rule specifying the precise legislative method of incorporation. It is also possible to incorporate a treaty in part, e.g. the European Convention on Human Rights was incorporated into our law without article 13: see Human Rights

> Act 1998. In my view it is clear that the Refugee Convention has been incorporated into our domestic law.

57. However, these statements were *obiter dicta.* In *Sivakumaran* it was sufficient that the Convention was referred to in the Immigration Rules and had the effect prescribed in the then rule 16. The appellants in the *European Roma Rights Centre* case succeeded on the basis of non-discrimination. Their claims under the Refugee Convention failed. More importantly, Lord Bingham himself in *R v Asfaw* [2008] 1 AC 1061 said:

> 29. The appellant sought to address this disparity by submitting that the Convention had been incorporated into our domestic law. Reliance was placed on observations of Lord Keith of Kinkel in *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958, 990g ; Lord Steyn in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees Intervening)* [2005] 2 AC 1, paras 40-42; section 2 of the Asylum and Immigration Appeals Act 1993; and rule 328 of Statement of Changes in Immigration Rules (1994) (HC 395). It is plain from these authorities that the British regime for handling applications for asylum has been closely assimilated to the Convention model. But it is also plain (as I think) that the Convention as a whole has never been formally incorporated or given effect in domestic law. While, therefore, one would expect any government intending to legislate inconsistently with an obligation binding on the United Kingdom to make its intention very clear, there can on well known authority be no ground in domestic law for failing to give effect to an enactment in terms unambiguously inconsistent with such an obligation.

Lord Hope of Craighead agreed with Lord Bingham. He added:

> 69. … The giving effect in domestic law to international obligations is primarily a matter for the legislature. It is for Parliament to determine the extent to which those obligations are to be incorporated domestically. That determination having been made, it is the duty of the courts to give effect to it.

Lord Carswell agreed with both Lord Bingham and Lord Hope.

58. I fully accept that the Convention has been incorporated into our law for some purposes. It defines a claim for asylum under our law. It has been given a status superior to the Immigration Rules, but they are not law of the status of a statutory instrument but something rather less: see *R v Home Secretary ex parte Hosenball* [1977] 1 WLR 766, 780-781, 785, 788. But the question arises: for what purposes and to what extent has it been incorporated? The rule that the provisions of a treaty entered into by the executive branch of government are not without more part of our domestic law, save for the purposes of interpretation in the application of the rule enunciated in *Salomon*, reflects the important, indeed basic, constitutional principle that the executive cannot without Parliamentary authority change the law. A change to

our law requires Parliamentary authority, i.e., legislation or the conferment of authority by primary legislation to make delegated legislation. So far as the Convention as a whole is concerned, Parliament has legislated in section 2 of the Asylum and Immigration Act 1993, but it did not do so in terms that would give the Convention the force of statute for all purposes. It expressly limited the force given to the Convention to the Immigration Rules. The Convention also affects the lawfulness of administrative practices and procedures, because, as Lord Steyn put it: "It is necessarily implicit in section 2 that no administrative practice or procedure may be adopted which would be contrary to the Convention." But to give the Convention any greater force or status under our law would be to go further than section 2 requires or permits, and in my judgment this is something the court cannot do.

59. It follows that the Convention does not have the force of statute under our law. I reject the Appellants' submission that the Convention has been informally incorporated. It has not. Indeed, I doubt that there can be such a thing as informal incorporation.

60. If, therefore, Parliament has enacted a statute that is unambiguously in conflict with the Convention, then subject to any other statutory or equivalent authority the courts must enforce the statute: because, as Lord Diplock said in *Salomon*, the sovereign power of the Queen in Parliament extends to breaking treaties.

61. At this stage I mention a contention advanced in EN's grounds that has not been pursued in the Appellants' skeleton arguments or orally before us. It is that section 72 is *ultra vires* section 2 of the Asylum and Immigration Appeals Act 1993. I am bound to say that this contention was wholly devoid of legal foundation, which is no doubt why it has not been pursued. These two provisions are not inconsistent. If they were, no question of the later statute being *ultra vires* could arise. The Court would be driven either to seek to interpret them compatibly with each other or, if that is not possible, to conclude that the later statute impliedly amended the earlier.

The status of the Qualification Directive

62. The Secretary of State accepts, for the purposes of this appeal, that the relevant provisions of the Qualification Directive are directly effective. I discuss the consequences of this concession, which it seems to me was inevitable, below. For present purposes, it is sufficient to note that the requirements of Article 14.4(b) of the Directive are the same as those of Article 33(2) of the Convention: conviction of a particularly serious crime and danger to the community.

63. However, Mr Hussain, for KC, submitted that the Directive is itself incompatible with the Convention, and is in consequence *ultra vires*, at least to the extent of the incompatibility. His submission relates to Article 14(4) and (5), and consequentially to (6). He submitted that the incompatibility arises because Article 33(2) of the Convention, which is reflected in Article 14(4)(b) of the Directive, is solely a prohibition on refoulement, and does not disqualify a refugee from recognition of his status as such and his enjoyment of the rights conferred on a refugee by the Convention pending his refoulement. In this connection, he submitted that the Convention impliedly confers on a refugee the right to be recognised as such. The Directive is *ultra vires*, he argued, because it does not recognise that right, and it extends the consequences of a person's conviction of a particularly serious crime and his constituting a danger to the community beyond refoulement to the revocation of or

the refusal of his refugee status. Thus, if the requirements of Article 33(2) are satisfied in relation to a person, the Directive extends the consequences beyond refoulement to his exclusion from the status of a refugee and some (but not all: see Article 14.6) of the rights which the Convention requires to be conferred on refugees. The Directive is *ultra vires* because it was adopted pursuant to the power conferred by Article 63 of the Treaty establishing the European Community, which so far as material provides:

> 63. The Council, acting in accordance with the procedure referred to in Article 67, shall … adopt:
>
> 1. measures on asylum in accordance with the Geneva Convention ….

It follows, it is submitted, that if and to the extent that the Directive is not "in accordance with the Geneva Convention" it is outwith the power conferred by Article 63.

64. However, this Court does not have jurisdiction to declare that an act of the Community is invalid. That jurisdiction is reserved to the European Court of Justice: *Foto-Frost v Hauptzollamt Lubeck-Ost* [1987] ECR 4199. In its judgment in *The Queen on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* Case C-344/04 [2006] ECR I-00403 at paragraphs 27 to 31 the Court stated:

> 27. It is settled case-law that national courts do not have the power to declare acts of the Community institutions invalid. The main purpose of the jurisdiction conferred on the Court by Article 234 EC is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly vital where the validity of a Community act is in question. Differences between courts of the Member States as to the validity of Community acts would be liable to jeopardise the very unity of the Community legal order and undermine the fundamental requirement of legal certainty (Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 15; Case C-27/95 *Bakers of Nailsea* [1997] ECR I-1847, paragraph 20; and Case C-461/03 *Gaston Schul Douane-expediteur* [2005] ECR I-0000, paragraph 21). The Court of Justice alone therefore has jurisdiction to declare a Community act invalid (Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 17, and Case C-6/99 *Greenpeace France and Others* [2000] ECR I-1651, paragraph 54).
>
> 28 Article 234 EC does not constitute a means of redress available to the parties to a case pending before a national court and therefore the mere fact that a party contends that the dispute gives rise to a question concerning the validity of Community law does not mean that the court concerned is compelled to consider that a question has been raised within the meaning of Article 234 EC (see, to this effect, Case 283/81

> *Cilfit* [1982] ECR 3415, paragraph 9). Accordingly, the fact that the validity of a Community act is contested before a national court is not in itself sufficient to warrant referral of a question to the Court for a preliminary ruling.
>
> 29 The Court has held that courts against whose decisions there is a judicial remedy under national law may examine the validity of a Community act and, if they consider that the arguments put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the act is completely valid. In so doing, they are not calling into question the existence of the Community act (*Foto-Frost*, paragraph 14).
>
> 30 On the other hand, where such a court considers that one or more arguments for invalidity, put forward by the parties or, as the case may be, raised by it of its own motion (see, to this effect, Case 126/80 *Salonia* [1981] ECR 1563, paragraph 7), are well founded, it is incumbent upon it to stay proceedings and to make a reference to the Court for a preliminary ruling on the act's validity.

65. No application has been made to this Court for a reference, but in any event, this Court could not make one. Provision as to asylum is the subject of Title IV of the Treaty establishing the European Community. Article 68.1 is as follows:

> Article 234 shall apply to this title under the following circumstances and conditions: where a question on the interpretation of this title or on the validity or interpretation of acts of the institutions of the Community based on this title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

There is a judicial remedy under national law against the decisions of this court, namely by way of appeal to the House of Lords. In these circumstances, it seems to me that this Court must apply the Directive without regard to the contention that it is *ultra vires*.

Are presumptions such as those imposed by section 72(2) compatible with (i) the Refugee Convention and (ii) the Qualification Directive?

66. I see no reason why a rebuttable presumption, imposed for the purposes of a decision as to whether removal would be in breach of Article 33(1), should be incompatible with Article 33(2) of the Convention, at least in cases in which it may reasonably be inferred that a conviction gives rise to a reasonable likelihood that a person's conviction is of a particularly serious crime and that he constitutes a danger to the community. The Convention does not prescribe the procedure by which the conditions

required by Article 33(2) are to be established; and the creation of a rebuttable presumption is a matter of procedure rather than of substance. I accept that the Convention places an onus on the State of refuge. Under section 72, it is for the Secretary of State to establish that the person in question has been convicted of a relevant offence. In practice, once the State has established that a person has been convicted of what is on the face of it a particularly serious crime, it will be for him to show either that it was not in fact particularly serious, because of mitigating factors associated with its commission, or that because there is no danger of its repetition he does not constitute a danger to the community.

67. I can also conceive of an irrebuttable presumption that would not be incompatible with the Convention, because it was dependent on facts so tightly circumscribed as to lead necessarily to the satisfaction of the Article 33(2) requirements. Those facts would, however have to include recidivism if both of the requirements were to be satisfied.

68. But what in my judgment is incompatible with the Convention and with the Directive is an irrebuttable presumption that arises from facts that do not necessarily involve the satisfaction of the Article 33(2) requirements but which requires those deciding whether they have been satisfied to determine that they have been satisfied when, untrammelled by the presumption, they would decide that they have not been.

69. I do not think that every crime that is punished with a sentence of 2 years imprisonment is particularly serious. One only has to appreciate that determinate sentences may be many times longer than 2 years for it to be obvious that a sentence of 2 years' imprisonment is not necessarily indicative of a particularly serious crime. If, therefore, section 72 requires conviction and sentence to 2 years imprisonment to result in irrebuttable presumptions that the requirement of both Article 33(2) of the Convention and of Article 14.4(b) of the Directive of conviction for such a crime have been satisfied, it is incompatible with one or both. On the other hand, if the presumptions are rebuttable, I would hold that there is no incompatibility.

The interpretation of section 72

70. With these considerations in mind, I turn to consider the interpretation of section 72, and in particular the question whether on its true construction section 72(6) is a comprehensive statement of the rebuttable nature of the presumptions in subsection (3). To put it in other words, does it follow from the express provision that the presumption that a person constitutes a danger to the community is rebuttable that the presumption that he has been convicted of a crime that is particularly serious is irrebuttable?

71. In addition to the normal principles of statutory construction that apply where no question of international obligations arises, there are two principles in play here. The first is that legislation giving effect to the United Kingdom's obligations under an international convention should be construed so as to be compatible with that convention. The second is what is conveniently referred to as the *Marleasing* principle.

72. If international obligations were irrelevant to the interpretation of section 72, it would be difficult to construe it as creating a presumption in relation to conviction of a

particularly serious crime that is rebuttable. In *TB (Jamaica)* [2008] EWCA Civ 977 this was assumed. I said, at [37]:

> Mr Gill and Miss Rothwell [counsel for the Respondent individual] accept that the presumptions in section 72(2), (3) and (4) as to what convictions are of "particularly serious" crimes are irrebuttable. This is, I assume, because subsection (6) provides only that the presumption of dangerousness in those subsections is rebuttable, and, to use the Latin maxim, *expressio unius est exclusion alterius*. I have assumed that this is correct, notwithstanding that the words in parentheses in subsection (9)(b) are unqualified.

73. However, section 72 cannot be construed in isolation from this country's international obligations. In *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116, Lord Denning MR said, at 141:

> … In 1950 there was a convention between many of the European countries. … I think we are entitled to look at it, because it is an instrument which is binding in international law: *and we ought always to interpret our statutes so as to be in conformity with international law*. Our statute does not in terms incorporate the convention, nor refer to it. But that does not matter. …

Diplock LJ said, at 143:

> … The Convention [on the Valuation of Goods for Customs Purposes of December 15, 1950] is one of those public acts of state of Her Majesty's Government of which Her Majesty's judges must take judicial notice if it be relevant to the determination of a case before them, if necessary informing themselves of such acts by inquiry of the appropriate department of Her Majesty's Government. Where, by a treaty, Her Majesty's Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations. Once the Government has legislated, which it may do in anticipation of the coming into effect of the treaty, as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see *Ellerman Lines* ***v.*** *Murray; White Star Line and U.S. Mail Steamers Oceanic Steam Navigation Co. Ltd. v. Comerford* [1931] A.C. 126; *sub nom. The Croxteth*

> *Hall; The Celtic*, 47 T.L.R. 147, H.L.(E.) , and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption.

74. The following year, Diplock LJ returned to this subject. In *Post Office v Estuary Radio* [1968] 2 QB 740, he said, at 756:

> … there is a presumption that the Crown did not intend to break an international treaty (see *Salomon v. Commissioners of Customs and Excise*), and if there is any ambiguity in the Order in Council, it should be resolved so as to accord with the provisions of the Convention in so far as that is a plausible meaning of the express words of the order. …

75. Section 72 expressly applies for the purpose of the construction and application of Article 33(2) of the Convention. It follows that if there is any ambiguity the section must be construed so as to accord with the provisions of the Convention.

76. In *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135 the European Court of Justice held:

> …, it should be observed that, as the Court pointed out in its judgment in Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, *whether the provisions in question were adopted before or after the directive*, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.

The italics are mine.

77. The *Marleasing* principle imposes a stronger requirement than the *Salomon* principle. It justifies and requires a national court to interpret a national measure so as to achieve the result required by a directive. That being so, if it applies to section 72, it is unnecessary to consider what would be the result of applying the *Salomon* principle on its own. Two questions arise in the present connection. First, does the principle apply to section 72? If so, how is section 72 to be construed?

78. As to the first question, I do not think that the Secretary of State contended that the *Marleasing* principle is inapplicable to section 72, and I think that she was right not to do so. It is correct that section 72 refers only to Article 33(2) of the Convention, and does not refer to the Qualification Directive, doubtless because the statute predates the Directive. But Article 14.4 of the Directive and Article 33(2) of the Convention cover the same ground: both define the circumstances in which a refugee may be refouled to a territory where he is at risk of persecution. There is no other national instrument implementing Article 14.4. The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 do not include any relevant provision, and I note that the Explanatory Note to the Regulations stated:

> Many parts of the Directive do not require implementation as consistent provision is already made in existing domestic legislation.

If section 72 is not construed compatibly with the Directive, this country would be in breach of its obligation to implement it; if it is applied consistently with the Directive, no question of a breach arises. Hence, the *Marleasing* principle must be applied.

79. Applying the *Marleasing* principle, there is in my judgment a sufficient degree of ambiguity, to which I hinted in my judgment in *TB (Jamaica)*, in section 72. Subsection (6) may be regarded as declaratory or emphatic. The conclusion that it is an exclusive statement of what is rebuttable depends on the *expressio unius* rule of interpretation, which is not a particularly strong rule, and itself depends on the assumption that what is expressly stated impliedly excludes what is not mentioned. Subsection (9)(b) does not specify that only one of the presumptions to which it refers is subject to rebuttal, and subsection (10)(b) is in terms that suggest that the appellant is to be given an opportunity to rebut both presumptions.

80. I conclude that section 72 can be and is to be interpreted conformably with Article 14(4) of the Directive, and therefore as creating rebuttable presumptions in relation to both of the relevant requirements of Article 33(2), i.e. in relation to the seriousness of the crime and in relation to danger to the community, and I would reject the Secretary of State's submission to the contrary. Parenthetically, it is interesting to note that this result is consistent with the Explanatory Notes to the Bill, which stated at paragraph 198 in relation to section 72:

> A person may rebut the presumption that they have committed a particularly serious crime and are a danger to the community.

We were told that this was an error, corrected by the Minister during the course of the Parliamentary proceedings on the Bill.

The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004

81. The 2004 Order specifies a large number of offences, listed in the Schedules, as offences to which section 72(4)(a) applies, irrespective of the sentence imposed. They include not only offences that can sensibly be regarded as particularly serious crimes, such as the offence under section 2 of the Explosive Substances Act 1883 (unlawfully and maliciously doing an act, intending or conspiring to cause an explosion likely to endanger life or cause serious injury to property), but also many that cannot. By way of example only, there are the following: theft, with no qualification as to the nature or value of the item or items stolen (so that theft of a bottle of milk is sufficient); an offence under section 9(1)(a) of the Theft Act 1968 (entering a building as a trespasser, intending to steal, inflict or attempt to inflict grievous bodily harm or rape), which would include someone who enters a building without permission intending to steal a bottle of milk; an offence under section 9(1)(b) of that Act (having entered a building as a trespasser, stealing or attempting to steal or inflicting or attempting to inflict grievous bodily harm), which again would include the offence committed by someone who enters a house without permission and then steals a milk bottle; an offence under section 1(1) of the Criminal Damage Act 1971 (destroying or damaging, without lawful excuse, another's property intending to destroy or damage it or being reckless as to that), which would include the offence committed by someone who scratched the paintwork of another person's car. The offence under section 44 of the Magistrates' Court Act 1980, namely (aiding, abetting, counselling or procuring the commission of a summary offence, provided that the offence in question is described in Schedule 1 or 2 to the Order is specified. It is at best very difficult indeed to see how abetting the commission of a summary offence could be a particularly serious crime.

82. If the presumption that an offence described in a schedule to the 2004 Order is a particularly serious crime were irrebuttable, as indeed the Secretary of State contends, the Order would be manifestly irrational. However, even on the basis that the presumption is rebuttable, the 2004 Order is objectionable. The power conferred by section 72(4)(a) may not be expressly qualified, but it is impliedly qualified by its context and purpose. It cannot be inferred that Parliament conferred on the Secretary of State the power to specify any offence she or he wanted as one giving rise to the statutory presumptions, irrespective of its seriousness. In my judgment, the power conferred by section 72(4)(a) is restricted to offences that the Secretary of State could reasonably consider as giving rise to the statutory presumptions. The Secretary of State could not reasonably or, I would add, rationally, have considered theft, unqualified as to the value or nature of what is stolen, as an offence that is a particularly serious crime or that gives rise to a presumption that the offender is a danger to the community. The same applies to a number of other offences in the Schedules to the 2004 Order, including those I have mentioned above. I conclude that the Secretary of State misunderstood the extent and purpose of the statutory power when formulating the schedules to the Order, and that in making the Order she exceeded the statutory power.

83. I do not think the Court should or can edit the Order by blue-pencilling the offences the inclusion of which is objectionable. To do so would be to assume and to exercise

the legislative power that Parliament has conferred on the Secretary of State. It follows that in my judgment the 2004 Order is *ultra vires* and unlawful.

84. Does it follow that the Tribunal, in the case of EN, erred in law? The conventional view used to be that a subordinate judicial body, and especially an administrative tribunal, did not have jurisdiction to question the validity of delegated legislation. This question was addressed by the Tribunal in *IH*. They said:

> 92. Were it not for the decision in *Foster* and another decision of the House to which we were referred, *Boddington v British Transport Police* [1999] 2 AC 143, we would have no hesitation in rejecting Mr Draycott's submissions and accepting those of Mr Patel to the effect that the Tribunal has no power to disregard a statutory instrument such as the 2004 Order because it considers it to be *ultra vires*. The Tribunal only has statutory jurisdiction (so far as relevant for these purposes) to determine whether an immigration decision is "not in accordance with the law" (s.84(1)(e) and s.86(3)(b)). That "law" includes any statutory instrument unless and until it is held to be invalid by the High Court. The legal 'metewand' by which the Tribunal determines the legality of the 'immigration decision' is that "law". A challenge that entails the argument that the "law" itself is unlawful is a more deep-rooted and fundamental challenge going beyond the legality of the 'immigration decision' itself. It is not one which we consider to be contemplated by the 2002 Act. It is properly the domain of judicial review. It is true that in *AA and others* [2008] UKAIT 00003 the Tribunal took the view that the ground of appeal in s.84(1)(e) permitted challenges based upon public law principles, for example of fairness and legitimate expectation (see especially at [55]). That, however, was intended as a general statement of the scope of the statutory ground: it did not purport to deal with the issue in this appeal. The Tribunal was not concerned with the *vires* of a statutory instrument or of an immigration rule. Indeed, at para [51] the Tribunal specifically noted that such challenges fell exclusively within the jurisdiction of the Administrative Court (or Court of Session). That is also, in our view, a complete answer to Mr Draycott's reliance upon the dicta in *E v SSHD* [2004] 2 WLR 1351 where the Court of Appeal stated that the grounds of challenge in a case on appeal on a point of law were the same as those available on judicial review. The Court simply did not have in mind the issue raised here.

85. However, having reviewed the decisions of the House of Lords in *Boddington* and in *Foster v Chief Adjudication Officer* [1993] AC 794, the Tribunal concluded:

> 112. … it is difficult to avoid the conclusion as a result of *Foster* that if a decision-maker (or lower tribunal) in the social security context errs in law by applying "law" derived from an *ultra vires* statutory instrument, so too, it would seem, the

> decision-maker acts "not in accordance with the law" in applying *ultra vires* "law" in the immigration or asylum context. We recognise the significance of this if correct. It would not, however, be our view unless we were driven to reach it by *Foster*. For the reasons we are about to develop, it is not necessary for us to reach any concluded view in this appeal on the impact of *Foster* to the AIT's jurisdiction because we have concluded that the 2004 Order is not in fact *ultra vires* the enabling power in s.72 of the 2002 Act.

86. Given the Tribunal's lengthy consideration of this question, I do not propose to address it at length. I agree with the Tribunal's conclusion, although not with its reasoning. It seems to me that both the decision of the House of Lords in *Boddington*, as well as that in *Foster*, point powerfully to the conclusion that a Tribunal decision that depends on the lawfulness of *ultra vires* subordinate legislation is "not in accordance with the law", and is liable to be set aside on appeal or reconsideration. The consequences of an adverse decision of the AIT for the individual may be greater than the consequences of the conviction for a summary criminal offence that was the subject of the appeal in *Boddington*. The practical difficulties of a finding by a tribunal that a statutory instrument is unlawful are no greater than those of such a finding by an inferior criminal court, such as the magistrates' court in *Boddington*.

87. However, a tribunal cannot quash delegated legislation. Its decision is not binding on the courts. It may not command universal agreement. Where a tribunal considers that there is a real prospect of a statutory instrument being *ultra vires* or unlawful, it should give serious consideration to adjourning its proceedings in order to give the party challenging its lawfulness an opportunity to issue judicial review proceedings before the Administrative Court, if necessary seeking an expedited hearing. It is far more appropriate that such issues be litigated before and decided by the Courts. However, this is likely to change if and when the AIT becomes part of the new tribunal structure, with an appellate structure and an Upper Tribunal of which the panel may include a High Court judge, with appeals to the Court of Appeal.

The Tribunal's decision in *IH*

88. All of my above conclusions as to the effect of section 72 are similar to those reached by the Tribunal in *IH*, with one exception. At [112] of the determination, the Tribunal concluded that the 2004 Order is not *ultra vires* the enabling power in section 72. As I read the determination, the Tribunal's conclusion on this issue was based on their finding that on the application of the *Marleasing* principle section 72 is to be interpreted as creating rebuttable presumptions both as to the seriousness of a crime and danger to the community. For the reasons I have given, I have reached a contrary conclusion.

The consequences of these conclusions for the appeal of EN

89. I find the reasoning of Immigration Judge Lester and Mrs Holt confusing. Since EN had been granted refugee status, there were a number of distinct issues that could have been considered by the Secretary of State:

(a) Should his refugee status be revoked under Article 1.C (5) of the Convention and the materially identically worded Article 11.1(e) of the Directive?

(b) If so, subject to (d), is his deportation in the public interest?

(c) If his refugee status has not been revoked, are the requirements of Article 33(2) of the Convention and Article 14.4 of the Directive satisfied?

(d) If the answers to (a) and (b), or those to (b) and (c) are affirmative, will his deportation infringe his rights under the European Convention on Human Rights, and in particular Articles 2, 3 and 8?

90. Very different issues have to be considered under (a) and (c). Revocation is primarily concerned with contemporary conditions in the refugee's country of nationality. Refoulement under Article 33(2) of the Convention (and Article 14.4 of the Directive) depends on the personal conduct and characteristics of the refugee. A decision that a refugee can lawfully be refouled under Article 33(2) will be largely ineffective if he can show that his rights under the Human Rights Convention will be infringed by his deportation.

91. The Immigration Rules make specific provision for the revocation of asylum:

> **Revocation or refusal to renew a grant of asylum**
>
> 339A. A person's grant of asylum under paragraph 334 will be revoked or not renewed if the Secretary of State is satisfied that:
>
> …
>
> (v) he can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality;
>
> …
>
> (ix) there are reasonable grounds for regarding him as a danger to the security of the United Kingdom; or
>
> (x) having been convicted by a final judgment of a particularly serious crime he constitutes danger to the community of the United Kingdom.
>
> In considering (v) and (vi), the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.
>
> Where an application for asylum was made on or after the 21st October 2004, the Secretary of State will revoke or refuse to

> renew a person's grant of asylum where he is satisfied that at least one of the provisions in sub-paragraph (i)-(vi) apply.
>
> 339B. When a person's grant of asylum is revoked or not renewed any limited leave which they have may be curtailed.
>
> 339BA. Where the Secretary of State is considering revoking refugee status in accordance with these Rules, the person concerned shall be informed in writing that the Secretary of State is reconsidering his qualification for refugee status and the reasons for the reconsideration. That person shall be given the opportunity to submit, in a personal interview or in a written statement, reasons as to why his refugee status should not be revoked. If there is a personal interview, it shall be subject to the safeguards set out in these Rules.

92. We were told by Mr Eicke that before exercising the power to revoke a grant of asylum under Rule 339A(v) (corresponding to Article 33(2) of the Convention and Article 11.1(e) of the Directive) it is the practice of the Secretary of State to inform the UNHCR of her intention to do so. He said that the power is rarely exercised. Why this is so was not explained.

93. In dealing with liability to refoulement under Article 33(2) as a ground for revocation of asylum, the Rules accord with the Directive, which as I have held must be regarded as binding, notwithstanding the Appellants' contention that it is inconsistent with the Convention in this respect.

94. Before us, it was submitted on behalf of EN that the Tribunal wrongly assumed that his refugee status had been revoked by the Secretary of State pursuant to Article 1.C (5) of the Convention and Immigration Rule 339A(v). I think that this is so. The decision letter of the Secretary of State dated 5 September 2007 does not refer to that provision of the Immigration Rules or to the language of that paragraph. The Secretary of State dealt with conditions in the country to which she proposed to return EN under the rubric of his rights under the European Convention on Human Rights. In paragraph 47 of their determination, Immigration Judge Lester and Mrs Holt referred to the revocation of refugee status when addressing conditions in Serbia, and concluded in paragraph 48 that he "would not be at risk of persecution [or] inhuman or degrading treatment contrary to article 3 on return to Kosovo". (The reference to Kosovo was a slip: Serbia was the subject of their consideration in paragraph 47 and in the paragraphs following paragraph 48.) Thus they did not expressly address the requirements of Rule 339A(v).

95. EN's ground for reconsideration of the determination of Immigration Judge Lester and Mrs Holt relating to paragraphs 47 and 48 contended that the Tribunal had materially erred in law because the change in the situation in Serbia was not fundamental. The contention that the change in the situation was required by the Convention to be fundamental was based on paragraph 135 of the UNHCR Handbook, which addresses Article 1.C (5):

> 135. "Circumstances" refer to fundamental changes in the country, which can be assumed to remove the basis of the fear

> of persecution. A mere -- possibly transitory -- change in the facts surrounding the individual refugee's fear, which does not entail such major changes of circumstances, is not sufficient to make this clause applicable. A refugee's status should not in principle be subject to frequent review to the detriment of his sense of security, which international protection is intended to provide.

96. I do not think that the UNHCR was seeking to add a requirement of "fundamental change" to Article 1.C (5), but rather to interpret its requirements. I would add, however, that what may fairly be considered to be a durable change in conditions in a country of nationality that results in a refugee having no genuine fear of persecution on his return may fairly be regarded as fundamental.

97. Senior Immigration Judge Batiste upheld the determination of the Immigration Judge Lester and Mrs Holt on the basis that EN had been convicted of an offence listed in the 2004 Order and had therefore been convicted of a particularly serious crime for the purposes of the Convention. He rejected the contention that the 2004 Order was *ultra vires*. For reasons I have already given, I think that he erred in law in so doing. In addition, neither he nor Immigration Judge Lester and Mrs Holt considered whether any presumptions under section 72(4)(a) had been rebutted.

98. Senior Immigration Judge Batiste too did not consider the requirements of Immigration Rule 339A(v). He stated:

> The third flaw in Mr. Ali's submission arises under article 33 in itself and upon the unchallenged findings of fact by the Tribunal in this case. Article 33 (1) provides that no contracting states shall refoule a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The findings of the Tribunal were that the circumstances in Serbia have changed dramatically for the better since the Appellant was granted indefinite leave to remain, and he would not now be at real risk on return. It follows therefore that his life and freedom will not be threatened for a Convention reason on return to his home country.

However, the point of Article 33 is that a state may refoule a refugee if its requirements are satisfied even though he will be the subject of persecution on return. If its requirements are satisfied, it is the European Convention on Human Rights that precludes refoulement if there is a risk of ill treatment on return.

99. For the reasons I have given above, I would allow EN's appeal, and remit the matter to the Tribunal. The Secretary of State should decide whether to revoke his refugee status under Immigration Rule 339A(v). If he does, he will have to comply with Rule 339BA, and there may be an appeal against her decision. If he does not, the Tribunal will have to decide whether EN's convictions were of particularly serious crimes and whether he is a danger to the community. I see no reason why the Tribunal should

reopen the findings of primary fact made by Immigration Judge Lester and Mrs Holt and upheld by Senior Immigration Judge Batiste.

KC: the Secretary of State's appeal

100. The Tribunal's finding that KC would be at risk if returned to South Africa is not challenged. To a considerable extent, of course, the issue of risk on return and that of sufficiency of protection are two sides of the same coin. This is what I think Senior Immigration Judge Jordan meant when he stated, in refusing leave to appeal, that "the determination of risk is an holistic exercise in which the sufficiency of state protection arises as an integral part of the consideration of risk and as a matter of law does not require separate handling in the determination". Furthermore, the concepts are inter-dependent: the degree of risk on return will depend on what protection is to be expected, and what protection is sufficient will depend on the nature and extent of the risk. The Tribunal cannot assess risk without assessing protection.

101. The determination of the Tribunal must demonstrate that its conclusions on risk on return and sufficiency of protection are based on a correct application of the law. The determination as to risk in the present case was the subject of paragraph 63, in which they concluded that there would be a risk because KC's return would excite public interest and:

> (iv) The presence in South Africa of those who would benefit from the appellant's continued silence, including those involved in the kidnapping and assault of Stompie Moeketsi who were never questioned, arrested or prosecuted and might be apprehensive that, in the process of securing indemnity for himself, the appellant would implicate them ….
>
> …
>
> (vi) The fact that the purpose of the appellant's abduction was not only to prevent the appellant testifying against Mrs Mandela but others as well.

102. Protection was the subject of subparagraph (v):

> That in the event of threats, there is likely to be inadequate protection, [paragraphs 20 and 27].

103. Paragraphs 20 and 27 are as follows:

> 20. Mr Pigou (a witness called by KC who had been an investigator for the Truth and Reconciliation Commission in South Africa) also points out that neither Mrs Mandela nor other members of the Football Club have been questioned or charged about other credible allegations of misconduct including the kidnapping and the disappearance of Lolo Sono and Sibusio Tshabalala. He accepts that the South African authorities might try to afford some protection to the appellant if he were threatened or intimidated. He advocates, however, a

> sense of realism: whatever witness protection program currently exists, he considers that it is likely to be very limited.
>
> 27. (Mr Bridgland, a witness called by KC who had been involved with him for a considerable time and written a book about him) also points out that the appellant was given special police protection for the period of his return to South Africa in recognition of the risk that he faced of attack. He was provided with a safe house to ensure his safety and quickly taken out of the country after he had given his evidence. It is his view that the appellant would not enjoy such protection as a deportee from Britain. Mrs Mandela, despite the implication of her involvement in serious crime, still has strong supporters and a considerable residual sympathy: "she remains a reduced but still powerful and influential player." On his return, it is Mr. Bridgland's view that the appellant would have no safe haven from which he could escape attention.

104. My difficulty with these passages is that they suggest that the Tribunal applied too high a test for the sufficiency of protection, one which required the home state to guarantee the safety of KC. In *Horvath* [2001] AC 489 Lord Hope, giving the principal speech with which the majority agreed, said at 499:

> To sum up therefore … the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals."

105. Lord Clyde, with whom Lord Browne-Wilkinson agreed, said at 510:

> A question arises, and it has been canvassed in some detail in the oral and written submissions before us, as to the level of protection which is to be expected of the home state. This was identified by the applicant as the third of three issues which he set out in his case. Priority was however given to it in the useful written submission which was provided on behalf of the Refugee Legal Centre, who regarded it as the principal issue in the appeal. I do not believe that any complete or comprehensive exposition can be devised which would precisely and comprehensively define the relevant level of protection. The use of words like "sufficiency" or "effectiveness", both of which may be seen as relative, does not provide a precise solution. Certainly no one would be entitled to an absolutely guaranteed immunity. That would be beyond any realistic practical expectation. Moreover it is relevant to note that in *Osman v United Kingdom* (1998) 29 EHRR 245 the European Court of Human Rights recognised that account should be taken of the operational responsibilities and the constraints on the provision of police protection and accordingly the obligation to protect must not be so interpreted as to impose an impossible or disproportionate burden upon the authorities. At the least, as is noted in condition (iii) in rule 334 which I have

quoted earlier, the person must be able to show that if he is not granted asylum he would be required to go to a country where his life and freedom would be threatened. There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case.

It seems to me that the formulation presented by Stuart-Smith LJ in the Court of Appeal may well serve as a useful description of what is intended, where he said [2000] INLR 15, 26, para 22:

> "In my judgment there must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and courts, to detect, prosecute and punish offenders."

And in relation to the matter of unwillingness he pointed out that inefficiency and incompetence is not the same as unwillingness, that there may be various sound reasons why criminals may not be brought to justice, and that the corruption, sympathy or weakness of some individuals in the system of justice does not mean that the state is unwilling to afford protection. "It will require cogent evidence that the state which is able to afford protection is unwilling to do so, especially in the case of a democracy." The formulation does not claim to be exhaustive or comprehensive, but it seems to me to give helpful guidance.

106. These principles are equally applicable to the issue whether the return of a person to his home state will breach this country's obligations under Article 3. In *Osman* (1998) 29 EHRR 245 the European Court of Human Rights emphasised the qualified nature of the obligation of a state to protect the life of a person within its territory:

> 115. … 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. The scope of this obligation is a matter of dispute between the parties.

> 116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.
>
> In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), *it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.* The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the above-mentioned *McCann and Others* judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.

The italics are mine.

107. It cannot be the case that this country would be in breach of its obligations under Article 2 or Article 3 if the state to which a person is to be returned would not itself be

in breach of its obligations under those Articles if that state were a party to the European Convention on Human Rights. The obligation of this country under the Human Rights Convention must be equally qualified.

108. It does not appear from the Tribunal's determination that they applied the principles explained in *Osman* and *Horvath*. The Secretary of State's decision letter dated 5 March 2007 had addressed the question of protection at some length. Its contentions were not addressed in the determination. One cannot see from the determination, for example, whether the Tribunal considered that there would be "a real and immediate risk to the life of" KC, or whether if so the South African authorities would be unwilling or unable to afford such protection to KC as would be reasonable in the circumstances.

109. I would therefore allow the Secretary of State's appeal on the basis that the Tribunal's determination is insufficiently reasoned, such that it does not appear that the Tribunal applied a correct legal test to the assessment of protection, or indeed that the Tribunal addressed appropriately the factual contentions put forward by the Secretary of State.

KC's cross-appeal

110. KC contends that the Tribunal wrongly applied an irrebuttable presumption that he had been convicted of a particularly serious crime and in any event applied an incorrect test, asking only whether he had been convicted of a serious crime; and that it failed to address the issue whether he was a danger to the community.

111. In my judgment, these contentions are well founded. The Tribunal expressed its conclusion on the first requirement of Article 33(2) and the first presumption mentioned in section 72 as follows:

> 72. … we are satisfied that the Tribunal was correct in applying the presumption that this was a serious crime.

Clearly, the Tribunal whose determination was under appeal had correctly applied the presumption arising from KC's conviction that had resulted in a sentence of three years' imprisonment, although the presumption is of a conviction for a crime that is particularly serious. On appeal the Tribunal did not in the section of the determination dealing with the Secretary of State's certificate under section 72 give consideration to the issue whether KC was a danger to the community. However, at [62], when considering whether he was excluded from humanitarian protection under paragraph 339D of the Immigration Rules, the Tribunal found that without applying a presumption his offending established such a danger.

112. In these circumstances, I would allow the Secretary of State's appeal against the Tribunal's determination. Since the Tribunal's decision was based on what I have held to be an incorrect view of the law, I would also allow KC's appeal. I would set aside the Tribunal's determination, and remit his appeal/second stage reconsideration to be heard before a differently constituted Tribunal. On reconsideration, it will be open to KC to dispute both the seriousness of his crime and that at the date his case falls to be considered by the Tribunal he is a danger to the community. If the Tribunal finds that he satisfies the requirements of Article 1A(2) of the Refugee Convention

and regulation 2 of the Qualification Regulations, and is not excluded by Article 33(2), he will be entitled to refugee status.

113. It is strictly unnecessary to determine the questions referred to in paragraph 34 above, but I shall briefly indicate my opinion. Article 14(5) of the Qualification Directive expressly authorises a Member State to refuse refugee status to a person to whom paragraph (4) applies. Doubtless this is because the Member States consider that the application of paragraph (4) is inconsistent with refugee status; a view with which I respectfully agree. Paragraphs 334 and 339A of the Immigration Rules are consistent with this. It follows that if the Tribunal finds that KC committed a particularly serious crime and that he constitutes a danger to the community, he will not be entitled to refugee status even if his Convention rights preclude his removal.

Lord Justice Hooper

114. I agree.

Lord Justice Laws:

115. I agree that these appeals should be resolved as proposed by my Lord Stanley Burnton LJ for the reasons given by him. No doubt counsel will assist us as to the appropriate orders we should make.

116. I should say that for my part I had greater difficulty than I apprehend did my Lord as to the correct construction of section 72(6) of the Nationality, Immigration and Asylum Act 2002. However having had the advantage of considering his judgment in draft I am persuaded by his reasoning at paragraphs 77 to 80 that the subsection does not have effect so that the presumptions stipulated in s.72(2) – (4) that the subject has been convicted of a particularly serious crime are irrebuttable.

117. I desire, if only for the purpose of emphasis, to comment on two other points made in the course of Stanley Burnton LJ's judgment. Both concern the law relating to international treaties. The first concerns the need, when the court is engaged upon the interpretation of such a treaty, to bear in mind and respect the limits of what the States Parties were prepared to agree. At paragraph 39 Stanley Burnton LJ cited Lord Bingham in *Brown v Stott* [2003] 1 AC 681 at 703, where he said, referring to the European Convention on Human Rights:

> "In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure."

118. This passage, with great respect, reflects the importance of the fact that a treaty usually represents a negotiated settlement, a compromise, whose terms will have been carefully chosen so as to identify the limits of what has been agreed. True it is that sometimes the edges are left unclear; that, too, may be deliberate, the parties

preferring to leave some matters to the chance of judicial interpretation rather than run the risk of losing the agreement altogether. Overall however, as Lord Bingham went on to state, any issue of what may be implied into the treaty's express terms has to be approached by the courts with great caution. We are not to overstep what was agreed after painstaking negotiation. I entirely agree with my Lord's conclusion (paragraph 40) that this approach applies with undiminished force to the Refugee Convention, and that any gloss on the express words of Article 33(2) is to be avoided.

119. The second point to which I wish to draw attention concerns the means by which an international treaty may be incorporated in domestic law. At paragraph 59 Stanley Burnton LJ observed that:

> "the Convention does not have the force of statute under our law. I reject the Appellants' submission that the Convention has been informally incorporated. It has not. Indeed, I doubt that there can be such a thing as informal incorporation."

So, with great respect, do I. A treaty may only be incorporated into the domestic law of the United Kingdom by legislation, and therefore expressly. It is important to remember that under our Constitution, subject to certain arcane exceptions, the Executive is not a source of law save as the maker of subordinate legislation which, however, must be authorised by Act of Parliament. Since treaties are entered into by the Executive, there must be a distinct legislative act if any such measure is to take its place in the body of English law. This is particularly important where the treaty's provisions are sought to be relied on as conferring rights in our courts. The source of the *domestic* law relied on must be clear.