Case No: C4/2004/2432

Neutral Citation Number: [2005] EWCA Civ 629
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 24th May 2005

Before :

LORD JUSTICE BROOKE
VICE-PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION
LORD JUSTICE DYSON
and
LORD JUSTICE LLOYD

- -

Between :

J	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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Mr Joseph Middleton (instructed by Messrs A. J Paterson Solicitors) for the Appellant
Mr Kieron Beal (instructed by the Treasury Solicitor) for the Respondent

- -

Judgment

LORD JUSTICE DYSON : this is the judgment of the Court.

Introduction

1. This is an appeal against the decision of the Immigration Appeal Tribunal ("IAT") dated 22 September 2004. The appellant is a citizen of Sri Lanka and an ethnic Tamil. He alleges that he would commit suicide if he were returned to Sri Lanka, and for that reason he claims that the decision by the Secretary of State to remove him to Sri Lanka violated his rights under articles 3 and 8 of the European Convention on Human Rights ("ECHR").

2. The IAT dismissed his appeal against a determination by Mr D A Radcliffe as adjudicator, which was promulgated on 13 August 2003. The adjudicator rejected an appeal against the Secretary of State's refusal of his claim for asylum. He also rejected his appeal on human rights grounds under section 65 (1) of the Immigration and Asylum Act 1999.

3. The adjudicator accepted that the appellant was a credible witness in relation to the events that led to his leaving Sri Lanka. He had been working for the Liberation Tigers of Tamil Eelam ("LTTE") under duress (effectively as a prisoner) from 1991 to 1993. He was then released on payment of a bribe. He was detained by the Sri Lankan army in 1995, when he was interrogated and tortured. He was released by the army in 1997 when the army had no further interest in him. The LTTE detained him from 1998 until May 2000, when he was able to escape. In September 2000, he left Sri Lanka, travelling on a false passport, and arrived in the UK. He had been subjected to the most horrific torture at the hands of the Sri Lankan army and bad treatment at the hands of the LTTE.

4. The adjudicator held that the appellant had no well–founded fear of persecution for a Refugee Convention reason in respect of either the Sri Lankan army or the LTTE. He rejected the appeal based on article 3 of the ECHR for the same reasons as he rejected the asylum appeal. In relation to the claim based on article 8, he accepted that the appellant suffered from post traumatic stress disorder ("PTSD") and depression. He was satisfied that on 3 October 2002 the appellant was admitted to hospital in Tooting for depression, but did not accept that the appellant had attempted to take his own life on that date. He accepted the evidence contained in a CIPU Report dated April 2003 that there were adequate medical facilities in Sri Lanka for the treatment of the appellant's PTSD. If returned, the appellant would be able to take advantage of palliative care and support provided by his mother. The adjudicator, therefore, also dismissed the appeal in so far as it was based on article 8.

5. The IAT granted the appellant permission to appeal against the adjudicator's dismissal of the human rights appeal. They held that the adjudicator was wrong to find that the appellant had not attempted to take his own life on 3 October 2002. Accordingly, they reviewed the evidence that was before the adjudicator, as well as other evidence that was adduced before them apparently without objection. Before I come to the IAT's determination, we need to refer to the salient features of this evidence.

6. Dr Kanagaratnam, a consultant psychiatrist, has at all material times been treating the appellant for his mental illness in this country. In his report of 20 November 2002, he

referred to the appellant's admission to hospital on 3 October 2002 with a history of having taken an overdose of Buspirone. A precipitating factor was said to have been the refusal of asylum by the Home Office after an asylum interview. Dr Kanagaratnam stated that the appellant had "features of severe depressive disorder and had attempted suicide for which he required inpatient treatment". He was suffering from PTSD. In his "further observations", he said:

> "His prognosis is presently extremely uncertain. It is a matter of concern that he had attempted suicide. Though the shock of being refused asylum had been a precipitant, the significant predisposing factors relate to his traumatic experiences. These had then led to his depressive illness the onset of which could be established to the period when he was detained by the Sri Lankan army.
>
> He was admitted to inpatient psychiatric care on the 3 October 2002 and discharged from hospital on the 7 November 2002.
>
> He continues to present with a risk of suicide. This could be aggravated if he had to return to Sri Lanka. Such risk would be high as a result of his knowing that the Home Office would return him to Sri Lanka."

7. Upon his discharge from hospital, he continued to take medication and receive treatment. His progress was monitored by the psychiatric services. For the purposes of the appeal before the adjudicator, the appellant's solicitors instructed Dr Anne Patterson, a consultant psychiatrist in psychotherapy, to write a report on the appellant's mental state. She agreed with the diagnosis made by Dr Kanagaratnam. She noted that the appellant had lost close contact with his mother upon whom he felt reliant for emotional support. She said that the appellant's statement that he might kill himself in the UK rather than be returned to Sri Lanka if he were told for certain that he must be returned to Sri Lanka "should be taken very seriously". In relation to the risk of suicide associated with being returned to Sri Lanka, she said:

> "if [J] is sent back to Sri Lanka the risk of exacerbating his existing suicidal ideation is greatly increased because he is likely to have lost all hope. Hopelessness has a serious, significant association with completed suicide.
>
> In my opinion, if he does not manage to kill himself in the UK there is a high risk that he would try to commit suicide en route and may therefore pose a threat to other passengers in his desperation to kill himself.
>
> If he is prevented from killing himself either in the UK or while being returned I think it is likely that he would commit suicide upon his arrival in Sri Lanka to avoid falling into the hands of the authorities from whom he perceives he is in mortal danger".

8. She concluded that the appellant's symptoms of mental disturbance had been exacerbated by his experience of trying to claim asylum in the UK. Accordingly, "his fragile psychological functioning would be seriously undermined if he were returned

to Sri Lanka, he would be unable to cope with everyday life, access the necessary treatment and is in grave danger of suicide".

9. Following the adjudicator's decision of 13 August 2003, further medical reports were produced. Dr Patterson wrote a supplementary report dated 15 May 2004. She recorded that the appellant continued to take antidepressant medication as before, and that he had been attending psychiatric out-patient appointments for review of his mental state and the Traumatic Stress Clinic for psychological treatment. He had told her that he still thought that it was not safe in Sri Lanka, and that he was convinced that he would be arrested at the airport by the Sri Lankan authorities if he were sent back. He said that he might kill himself in the UK if he were told for certain that he must go back. Dr Patterson stated that the appellant's mental state was little changed since her last assessment in 2002, despite continuing psychiatric treatment. He continued to remain "at a significant risk of committing suicide in the UK if he knew for certain that he would be returned to Sri Lanka". If he were returned to Sri Lanka, that would be likely to be a severe setback for the appellant, especially if he were returned to Colombo where he had no one to support him and the risk of suicide would be "high".

10. Finally, Dr Kanagaratnam wrote a further report dated 19 May 2004 in which he said:

> "In my opinion there is a very significant risk of completed suicide in the United Kingdom if [J] knows for certain that he is to be removed to Sri Lanka. He has as mentioned already made one serious attempt at suicide here.
>
> He has found support and sympathy from his relatives in the United Kingdom which to a large extent has provided him with a sense of stability".

11. In addition to the medical evidence there was also evidence before the adjudicator and the IAT from the appellant himself and his uncle. In his statement dated 29 June 2003, the appellant's uncle said of the appellant: "he is very close to me and my wife and our children and is now like one of our immediate family".

12. The IAT stated at para 8 of their decision that they were applying the principles set out by the IAT in *P (Yugoslavia)* [2003] UKIAT 00057. We think this is a reference to the IAT's decision in *SP (Yugoslavia) v Secretary of State for the Home Department* [2003] UKIAT 00017 where at para [17] it was said in the context of a risk of suicide case:

> "….Although suicide is a form of self-harm and is to be distinguished from harm inflicted by others, if the real risk of it is a foreseeable consequence of a removal decision, then that may well be enough to establish serious harm under both Conventions. Under the Human Rights Convention we would accept in principle that if the evidence in a case establishes that a removal decision will expose a person to a real risk upon return of committing suicide, then a decision requiring him to return could give rise to a violation of Article 3 and Article 8. So much we understand to be established by cases such as *D v UK* (1997) 24 EHRR 423 and

> *Bensaid v UK* [2001] INLR 325. In *Bensaid* at paragraphs 36 and 37 it was accepted that in principle deterioration in mental condition causing the risk of self-harm resulting from difficulties in obtaining medication, could fall within the scope of Art 3."

13. In summary, the IAT held that there was no real risk of a breach of articles 3 or 8 because there was no real risk that the appellant would respond to a removal decision by committing suicide in the UK before removal or that he would commit suicide en route to, or following his arrival in, Sri Lanka. We shall examine the decision in more detail later in this judgment.

The grounds of appeal

14. On behalf of the appellant, Mr Middleton challenges the IAT's decision on 4 grounds. He submits that:

    i) the IAT applied the wrong test for deciding whether the removal of an immigrant is in breach of article 3 because of a risk of suicide. The correct test is whether the removal gives rise to a real risk of an increased risk of suicide, and not whether there is a real risk that suicide will be the foreseeable consequence of the removal;

    ii) if the IAT applied the correct test, the decision that there was no real risk that the appellant would commit suicide in the UK was perverse;

    iii) the IAT failed to consider the risk of deterioration of his mental state under threat of his being removed to Sri Lanka; and

    iv) their decision that there was no real risk of suicide en route or in Sri Lanka was perverse.

15. We shall first deal with the first ground of appeal. It will then be convenient to take the second and fourth grounds together before we finally turn to the third ground.

The first ground of appeal: the correct test for article 3 in a suicide case

16. In our judgment, Mr Beal is right to submit that it is necessary to draw a clear distinction between "foreign cases" and "domestic cases". These are the labels which, for convenience, Lord Bingham used in *Ullah v Secretary of State for the Home Department* [2004] UKHL 26, [2004] 2 AC 323 paras [7] and [9]. By "foreign cases" he meant those cases where it is not claimed that the state complained of has violated the applicant's ECHR rights within its own territory, but where it is said that the conduct of the state in removing a person from its territory to another territory will lead to a violation of the person's ECHR rights in that other territory. By "domestic cases" he meant cases concerning claims based on the ECHR where a state is said to have acted within its own territory in a way which infringes the enjoyment of an ECHR right within that territory.

17. This has been recognised as an important distinction both in Strasbourg and in our own jurisprudence. In cases such as the present case the risk of a violation of article 3 or 8 must be considered in relation to three stages. By reference to the claim made in this case, these are: (i) when the appellant is informed that a final decision has been

made to remove him to Sri Lanka; (ii) when he is physically removed by airplane to Sri Lanka; and (iii) after he has arrived in Sri Lanka. In relation to stage (i), the case is plainly a domestic case. In relation to stage (iii), it is equally clearly a foreign case. The classification of the case in relation to stage (ii) is less easy. Since in practice arrangements are made by the Secretary of State in suicide cases for an escort it is safer to treat this as a domestic case.

Foreign cases

18. We shall start with the test applicable in foreign cases. It has been repeatedly stated by the ECtHR that the relevant test in removal or expulsion cases where the risk of ill-treatment at the hands of the receiving state is in issue is whether "substantial grounds have been shown for believing in the existence of a real risk of treatment contrary to article 3": see *Soering v United Kingdom* (1989) 11 EHRR 439 para [91]; *Cruz Varas v Sweden* (1991) 14 EHRR 1, para [75] and 82; *Vilvarajah v United Kingdom* (1992) 14 EHRR 248, para [103]. As Lord Bingham put it in *Ullah* at para [24]:

> "In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment."

19. This test has not only been applied in cases where the issue is whether the receiving state would commit positive acts of torture or inhuman or degrading treatment or punishment. It has also been applied where the issue is whether the effect of the applicant's removal will be to expose him or her to other consequences of such an extreme kind as to amount to a violation of article 3. Thus in *Bensaid v United Kingdom* (2001) 33 EHRR 10, the ECtHR was concerned with an Algerian national who was a schizophrenic suffering from a psychotic illness for which he was receiving treatment in the UK. He argued that his proposed expulsion to Algeria would have such a damaging effect on his mental health that it would place him at risk of inhuman and degrading treatment and would violate his rights under articles 3 and 8 of the ECHR. In assessing the claim under article 3, the ECtHR said at para [35] that it had examined "whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3 in view of his present medical condition." At para [37], the court said:

> "Deterioration in the applicant's already existing mental illness could involve relapse into hallucinations and psychotic delusions involving self-harm and harm to others, as well as restrictions in social functioning (eg withdrawal and lack of motivation). The Court considers that the suffering associated with such a relapse could, in principle, fall within the scope of article 3."

20. Having found that the risk that the applicant would suffer a deterioration if he were returned to Algeria was to a large extent speculative, the court continued at para [40]:

> "The Court accepts the seriousness of the applicant's medical condition. Having regard however to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the

> applicant's removal in these circumstances would be contrary to the standards of Article 3. It does not disclose the exceptional circumstances of the D case (cited above) where the applicant was in the final stage of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St. Kitts."

21. In *D v United Kingdom* (1997) 24 EHRR 423, the ECtHR noted at para [49] that the principle that article 3 could be violated in foreign cases has been applied only in cases where the risk to the individual of being subjected to any of the proscribed forms of treatment has emanated from "intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection." The court went on to say:

> "….Aside from these situations and given the fundamental importance of Article 3 in the convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State.
>
> 50. Against this background the Court will determine whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3 in view of his present medical condition. In so doing the Court will assess the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on his state of health."

22. The case of *D* was considered in detail by the House of Lords in *N(FC) v Secretary of State for the Home Department* [2005] UKHL 31. At para [80], Lord Brown said that the decision in *D* supported the following propositions at least:

> "1). Article 3 enshrines one of the fundamental values of democratic societies and constitutes an absolute prohibition on article 3 ill-treatment irrespective of how reprehensibly the applicant may have behaved.
>
> 2). Notwithstanding that ordinarily a state is entitled to extradite, expel or deport aliens, whether to honour extradition treaties, combat crime, safeguard its own population, or more generally in the interests of immigration control, the exercise of such a power may itself in certain circumstances constitute article 3 ill-treatment. This will be so if the applicant would be at substantial

> risk of article 3 ill-treatment in the receiving country (a proposition previously established by the Court in cases such as *Soering v United Kingdom* (1989) 11 EHRR 439 and *Chahal v United Kingdom* (1997) 23 EHRR 413) or even exceptionally (as on the facts of *D* itself) if the applicant's removal would sufficiently exacerbate the suffering flowing from a naturally occurring illness (see for this formulation of the nature of the violation, *Pretty* at para 52).
>
> 3) In this latter exceptional class of case the Court will assess whether the applicant's removal is itself properly to be characterised as article 3 ill-treatment in the light of the applicant's present medical condition. The mere fact that the applicant is fit to travel, however, is not of itself sufficient to preclude his removal being characterised as article 3 ill-treatment.
>
> 4) An alien otherwise subject to removal cannot in principle claim any entitlement to remain in order to benefit from continuing medical, social or other assistance available in the contracting state."

23. His reference to "a naturally occurring illness" is a reference to para [52] in *Pretty v United Kingdom* (2002) 35 EHRR 1, where the ECtHR said in relation to the types of "treatment" which fall within the scope of article 3 that the court's case law refers to ill-treatment "that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering". It added:

> "The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible."

24. At para [87] of his speech, Lord Brown endorsed the statement in the Court of Appeal that *D* represented an extension of an extension to the article 3 obligation. Having noted the reference in the passage at para [40] of *Bensaid* to the high threshold set by article 3 where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, Lord Brown continued:

> "….The threshold must if anything be higher still where the Contracting State not only has no direct responsibility for the infliction of harm but rather is contemplating a decision falling at the very opposite end of the spectrum from those article 3 cases which involve State-sponsored violence. It was in *Limbuela v Secretary of State* [2004] QB 1440 (a case involving the refusal of asylum support) that Laws LJ suggested the metaphor of a spectrum and he later carried the analysis further in *Gezer v Secretary of State for the Home Department* [2004] EWCA Civ 1730 (where an asylum seeker was challenging his dispersal to Glasgow). *Gezer*, particularly at paras 24-29, usefully explores the categories and sub-categories of article 3 cases falling within the

> spectrum and also the kind of action required in any given case to exonerate the State from liability under article 3, action which reflects but is not identical with the distinction between the different categories."

25. In our judgment, there is no doubt that in foreign cases the relevant test is, as Lord Bingham said in *Ullah,* whether there are strong grounds for believing that the person, if returned, faces a real risk of torture, inhuman or degrading treatment or punishment. Mr Middleton submits that a different test is required in cases where the article 3 breach relied on is a risk of suicide or other self-harm. But this submission is at odds with the Strasbourg jurisprudence: see, for example, para [40] in *Bensaid* and the suicide cases to which we refer at para 30 below. Mr Middleton makes two complaints about the real risk test. First, he says that it leaves out of account the need for a causal link between the act of removal and the ill-treatment relied on. Secondly, the test is too vague to be of any practical utility. But as we explain at para 27 below, a causal link is inherent in the real risk test. As regards the second complaint, it is possible to see what it entails from the way in which the test has been applied by the ECtHR in different circumstances. It should be stated at the outset that the phrase "real risk" imposes a more stringent test than merely that the risk must be more than "not fanciful". The cases show that it is possible to amplify the test at least to the following extent.

26. First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity. The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case. But the ill-treatment must "necessarily be serious" such that it is "an affront to fundamental humanitarian principles to remove an individual to a country where he is at risk of serious ill-treatment": see *Ullah* paras [38-39].

27. Secondly, a causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's article 3 rights. Thus in *Soering* at para [91], the court said:

> "In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which *has as a direct consequence the exposure of an individual to proscribed ill-treatment."*(emphasis added).

See also para [108] of *Vilvarajah* where the court said that the examination of the article 3 issue "must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka…"

28. Thirdly, in the context of a foreign case, the article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental. This is made clear in para [49] of *D* and para [40] of *Bensaid.*

29. Fourthly, an article 3 claim can in principle succeed in a suicide case (para [37] of *Bensaid*).

30. Fifthly, in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3.

31. Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her article 3 rights.

32. We were shown a number of cases which were declared inadmissible at Strasbourg: *A.G v Sweden* Appl No 27776/95; *Kharsa v Sweden* Appl No 28419/95; *Nikovic v Sweden* Appl No 28285/95; *Ammari v Sweden* Appl No 60959/00; *Nasimi v Sweden* Appl No 38865/02. The sixth factor which we have identified above was considered to be relevant in each of these cases. The fifth factor was considered to be an additional relevant factor in *Kharsa*, *Ammari* and *Nasimi*.

Domestic cases

33. In relation to domestic cases, it is apparent that Strasbourg applies a somewhat different approach, since the concern to avoid or minimise the extra-territorial effect of the ECHR (ie the third of the 6 factors we have just mentioned) is absent. But the remaining factors are equally applicable in domestic cases. The sixth factor is of particular significance. This is not surprising because the signatories to the ECHR have sophisticated mechanisms in place to protect vulnerable persons from self-harm within their jurisdictions. Although someone who is sufficiently determined to do so can usually commit suicide, the fact that such mechanisms exist is an important, and often decisive, factor taken into account when assessing whether there is a real risk that a decision to remove an immigrant is in breach of article 3.

34. We must now refer to *Soumahoro v Secretary of State for the Home Department* [2003] EWCA Civ 840, [2003] Imm AR 529, a decision relied on by Mr Middleton in support of his submission that it is authority binding on this court that the relevant test is not as we have sought to explain it above. In *Soumahoro*, the Secretary of State had certified as manifestly unfounded a claim that to remove the appellant to France would be a breach of article 3 because it would give rise to a real risk that she would commit suicide. It is submitted by Mr Middleton that, in giving the judgment of the court, we propounded a test which the IAT failed to apply in the present case. At para [11] of the judgment, we said in relation to article 3 that "there must also be substantial grounds for believing that there is a real risk of ill-treatment in the receiving state before article 3 is engaged: see *Soering* para 91 and *Chahal* paras 74 and 80". Neither Mr Beal nor Mr Middleton takes issue with this formulation so far as it goes. Mr Beal says that it is a classic statement of the correct test. As we have already said, Mr Middleton submits that this test is in truth no test at all: it is simply too vague, and does not help the adjudicator focus on the fact that it is the harm *caused* by the making and implementation of the final removal decision which potentially engages article 3. The real risk test does not reflect the causal connection.

He submits that the relevant test is: "would the communication and implementation of a final removal decision give rise to a real risk of a significantly increased risk of suicide?" He derives this formulation from *Soumaroho* and submits that this is the test that the IAT was bound to apply and it is binding on this court.

35. The first mention of a "significant increase in the possibility of completed suicide" occurs in para [69] of the judgment. Put in their context, these words merely reflect the opinion of Dr Bell, the consultant psychiatrist, that there would be an increase in the possibility of suicide. Dr Lloyd was of the same opinion (see para [79] of the judgment). The phrase "increased likelihood of suicide" appears at para [82] where it is stated that the judge had said that the issue was "the degree of risk involved in relation to the increased likelihood of suicide." On the facts of that case, this was indeed the issue. At para [84], we reiterated that the issue was whether the claim advanced on behalf of the appellant, namely that "there was a real risk that her article 3 rights would be violated" was bound to fail.

36. At para [85], we said:

> "We agree with the judge that the issue was the degree of risk that there would be an increased likelihood of suicide. If it was arguable on the evidence that there was a real risk of a significantly increased risk that, if she were removed to France, the appellant would commit suicide, then in our view her claim based on article 3 could not be certified as manifestly unfounded."

37. This statement reflected the nature of the medical evidence that was before the court. It did not represent a modification of the core test that we set out at paras [11] and [84]. The appellant had already taken two overdoses. She therefore had already presented as a suicide risk in this country. Part of the medical evidence was that the risk of suicide would remain high in France. In order to establish the causal link between removal and the threatened breach of article 3, it was necessary *on the facts of that case* to show that the proposed removal significantly increased any suicide risk that was already present. As Mr Beal points out, this approach only becomes factually relevant where there is a risk of suicide both in the UK and in the receiving state.

38. We would, therefore, reject the submission of Mr Middleton that *Soumahoro* enunciates a different test from the core test to which reference is repeatedly made in the Strasbourg jurisprudence.

39. Before leaving the first ground of appeal, we should refer to two recent decisions of the President of the IAT (Ouseley J) sitting with Dr Storey and Mr Warr (Vice-Presidents) which have considered the issue of suicide in relation to articles 3 and 8. These are *AA v Secretary of State for the Home Department* [2005] UKIAT 00084 and *JS v Secretary of State for the Home Department* [2005] UKIAT 00083. In the first of these decisions, at paras [36] to [41], the IAT identified 5 stages of removal against which various degrees of risk may need to be considered. These are (i) when the appellant is told of any adverse decision; (ii) during pre-removal detention; (iii) during transit to the receiving country; (iv) upon arrival; and (v) upon release in the receiving country. At para [42] they said:

> "42. Putting that analysis into ECHR terms, nothing involves treatment by the United Kingdom which itself breaches Article 3. The treatment involved in informing the Appellant of the decision, detaining and then actually removing him does not involve such a breach. Merely increasing the risk of suicide through those actions, against which suitable protection is then available, involves no breach of Article 3. In Algeria, the degree of risk or of increase, weighing the reduction in risk factors against the fact of return and short term detention with the possibility of some low level physical ill treatment, can be described as speculative. But a better answer is that there has not been shown to be a real increased risk of suicide in those circumstances compared to the risk he would face on release in the United Kingdom. We do not therefore see any basis for a breach of Article 3."

40. It is interesting to observe that the IAT here are considering whether there has been shown to be a real increased risk of suicide compared to the risk the appellant would face on release in the UK (an approach similar to that stated at para [85] of *Soumahoro*). At para [45] the IAT caution that *Bensaid* does not suggest that an increased risk of suicide itself is a breach of article 3, although in certain circumstances it is capable of being a breach. We agree. At para [47], they make the point that it is difficult to see that risks of self-harm or suicide for mental illness should be approached "very differently" from other illnesses which may lead to a painful death in an awareness that such a death is increasingly imminent.

41. We refer to the second decision only to mention para [25]. The IAT said:

> "Although this case involves a mental illness and risk of suicide, that does not bring in any different test for the purposes of Article 3. The extremity of circumstances to engage Article 3 does not vary. The nature of suicide from mental illness, with the associated despair or anguish, may more readily excite humanitarian considerations than a physical illness, but the answers are unlikely to be much clearer in an individual case by attributing any preconceived differential weight to the different forms of illness which may face judges."

42. We note the words "very differently" at para [47] of the first decision and "unlikely to be much clearer" at para [25] of the second decision. In our view, suicide cases should be approached in the manner that we have explained earlier. Cases concerning the risk of death resulting from the non-availability of treatment in the receiving state are not precisely analogous to those concerning the risk of suicide. The scope of article 3 in relation to the former has now been explained by the House of Lords in *N(FC).*

43. But for the reasons we have given, we consider that the IAT applied the correct test in the present case and we would reject the first ground of appeal. Before we come to the remaining grounds of appeal, we need to set out the IAT's reasoning.

The reasoning of the IAT

44. Having referred to the medical evidence which we have summarised at paras 6 to 8 above, the IAT said at para 15:

> "15. In relation to the risk of suicide in the UK, we do not consider that the medical evidence, even taken at its highest, demonstrates a real risk that the appellant would commit suicide in the UK. We say this because it is clear that there has been and continues to be excellent cooperation between the appellant's uncle, who supervised him closely, and the medical authorities in the UK. In particular, the events of August 2003 demonstrated that precautionary steps had been successfully taken in the past to ensure he was not at immediate risk of suicide – by re-admitting him to hospital – and there was no reason to suppose that similar steps could not be taken in the future. (In order to further ensure that precautionary measures could be taken, we agreed to Mr Cox's request that the appellant's copy of our determination be relayed through his representatives)."

45. They then turned to consider the risk of suicide upon return to Sri Lanka. They said (para 16) that it was important to note that the appellant's claim to face a real risk of serious harm from the authorities on return to Colombo had been found to be wanting. The adjudicator had found (para 17) that he would be able to return to his home village and there have palliative care and moral support from his mother. He had also been entitled to find that the appellant would no longer be of interest to the LTTE. Even if he had not been able to return to his home area, it would still not have been reasonably likely that he would have to live in Sri Lanka without family support. At para 19, they concluded: "The adjudicator was quite entitled when assessing the implications for this appeal of the appellant's mental health to find that he would have family support on return."

46. They also said that it was open to the adjudicator to find that the appellant would have access to medical treatment in Sri Lanka if he needed it.

47. They then turned to consider the medical evidence. They made the point that doctors are not experts in conditions in destination countries, nor are they expert in or familiar with the criteria of real risk that have to be applied in these cases. They noted (para 22) that the medical evidence was that the appellant's suicidal ideation was very closely linked to his fears about risk on return, and yet the adjudicator had for valid reasons found that his subjective fears were not objectively justified. They continued:

> "23. Mr Cox's response to this finding is to argue that it does not matter what the objective reality will be for the appellant on return to Sri Lanka: it does not matter because the medical evidence is that, irrespective of objective reality, he believes he will be subjected (again) to serious harm. However, even though the medical evidence does state that he is at risk of suicide, it does not demonstrate that this appellant is delusional or unable to distinguish between reality and fantasy. In the absence of medical evidence of this kind, we do not think it can be assumed that, once the appellant realises he is required to

return and that there is no prospect of further appeal, he will not take stock by reference to objective realities.

24. This is an important point in this appeal because in large part the appellant has overtly put his case on the following footing: "If you (the appellate authorities) refuse me, I will harm myself. I did it once before when I learnt of a refusal, and I will do it again".

25. In concluding that the appellant could be expected to come to terms with the fact of removal and to take cognisance of changed circumstances in Sri Lanka, we would re-emphasise the significance in our view of the fact that throughout the time he continues to remain in the UK, it is reasonably likely he will be in receipt of family and medical supervision, and that, upon arrival in Sri Lanka he will have family support, and medical support if needed."

48. At para 26, they dealt with the risk of suicide en route to Sri Lanka, and said:

"26. As regards the concerns raised about the appellant's conduct en route by aeroplane to Sri Lanka, we do not accept that these could not be allayed by action on the part of the appellant's uncle in the UK, in cooperation if necessary with medical and immigration authorities. If there was any continuing concern on the part of his uncle, the latter could if need be purchase a ticket and accompany him. It is quite absurd, in our view, to voice concerns of this kind without at the same time being practical about what could be done to allay them."

49. They concluded:

"27. In reaching our conclusions we have to take careful account of Mr Cox's submissions based on Kurtoli and Soumahoro. However, not only were these cases concerned essentially with the arguability of a claim as opposed to its merits, but both decisions are fact-specific and fact-sensitive. We are not persuaded that they establish that the Adjudicator's conclusions in this case were erroneous. Nor have we found that the further medical evidence adduced in this case demonstrates that return of this appellant would cause a breach of his fundamental human rights.

28. Even though the Adjudicator did not address Article 3 separately, we consider that his conclusion as to the lack of serious threat to the appellant's physical and moral integrity under Article 8 were sufficient in themselves to establish that the decision did not violate his Article 3 rights either.

29. For the above reasons this appeal is dismissed."

The second and fourth grounds of appeal

50. Mr Middleton submits that the IAT's decision that there was no real risk that the appellant would commit suicide in the UK was unreasonable in the *Wednesbury* sense [1948] 1 KB 223. He points out that the reports of Dr Kanagaratnam and Dr Patterson provided clear support for a conclusion that there would be a real risk of suicide if the appellant were told for certain that he was to be removed to Sri Lanka. That evidence had not been contradicted by any evidence from the Secretary of State. Unlike the adjudicator, the IAT had accepted that the appellant had attempted to commit suicide on 3 October 2002. The main reason given by the IAT for rejecting the doctors' opinions appears to have been the "excellent co-operation between [the appellant's] uncle, who supervised him closely, and the medical authorities in the UK" (para 13).

51. Mr Middleton submits that this discloses an irrational approach. It supposes that the doctors had failed to take into account the existence of mechanisms to restrain the appellant from self-harm. But he says that there is no reason to suppose that they were ignorant of, or ignored, the family and medical arrangements that might come into play. They must both have had in mind the possibility of admitting the appellant under the Mental Health Act 1983 when they expressed their views about the risk of a successful suicide. Their reports were clearly based on an assessment of risk of the appellant's suicide despite the family/medical arrangements.

52. Mr Middleton criticises the IAT's statement that "Doctors are not expert in conditions in destination countries, nor are they expert in or familiar with the criteria of real risk that Adjudicators have to apply under Refugee and Human Rights Conventions." He says that the first part of this statement is true but irrelevant. The second part rests upon the false assumption that the phrase "real risk" carries some special meaning in this context which differs from that in ordinary usage.

53. Finally, Mr Middleton refers to the fact that the IAT concluded that in the absence of evidence of psychosis "it cannot be assumed that, once [the appellant] realises he is to return and that there is no prospect of a further appeal, he will take not take stock by reference to objective realities" (para 23). He says that the IAT were not asked to make any such assumption. The appellant's statements to the psychiatrists, his serious suicide attempt, his conduct and the psychiatrists' assessment of these matters all showed a real risk that he would not "take stock" of the position as suggested by the IAT. The IAT should have realised that some people are too ill or too damaged to be persuaded to face the situations which caused them such terror in the past. As they accepted, he was mentally ill. He was not choosing to be suicidal: on the contrary, he had sought treatment.

54. For all these reasons, Mr Middleton submits that the IAT's conclusion that there was no real risk of suicide was perverse.

55. He also criticises the IAT for the way in which they dealt with the risk of suicide en route to Sri Lanka. We have referred to para 26 of the decision at para 48 above. Mr Middleton submits that this was a wholly inadequate treatment of the clear psychiatric evidence about the "high risk" that the appellant posed to himself en route to Sri Lanka. It was for the Secretary of State to identify the measures he proposed to take which would remove any real risk. There was no basis in the evidence for the IAT's

assumption that the appellant's uncle would fly with him to Sri Lanka. This suggestion was made for the first time in the IAT's decision. It was rebutted by a statement from the uncle which accompanied the application for permission to appeal.

56. A further criticism is that there was insufficient evidence to justify the finding at para 19 that the appellant would have all the necessary family support on his arrival in Sri Lanka.

57. We would reject these grounds of appeal largely for the reasons given by Mr Beal. The IAT were right to consider separately the risk of treatment contrary to article 3 in the UK, in transit and in Sri Lanka. As earlier stated, the article 3 threshold is higher in relation to the risk in Sri Lanka than in relation to the risk in the UK. We start with the risk in the UK. The reasons given at para 15 of their decision (see para 44 above) were rational and ones which they were entitled to rely on for their conclusions They were entitled to conclude that the risk of suicide in the UK upon his learning of a final decision to remove him would be adequately managed in the UK by the relevant authorities. His first and only attempt at suicide was more than 4 weeks after removal directions were issued against him, and more than 2 weeks after his notice of appeal against the decision had been lodged. There had been no attempt at self-harm or suicide when the appellant was informed of the adjudicator's decision to dismiss the appeal. It is true that he was readmitted to hospital for 2 days. But he was discharged because his mood improved and because he was "thought to be at low risk of self-harm or suicide" (see discharge summary dated 11 September 2003). There is no evidence of any attempt by the appellant at self-harm or suicide following the communication of the IAT's decision dismissing his appeal.

58. Moreover, Dr Kanagaratnam, the appellant's treating psychiatrist, is approved under section 12(1) of the Mental Health Act 1983 ("the 1983 Act"). The appellant is in regular contact with his treating clinicians. It is open to Dr Kanagaratnam to re-admit the appellant if he presents an immediate risk of suicide in the future, for example, upon learning of a final decision to remove him.

59. We do not accept that in evaluating the risk of suicide, the appellant's 2 doctors were performing the same exercise as that undertaken by the adjudicator and the IAT. It is common ground that it is necessary to take into account the mechanisms which are or will be in place to minimise the risk of suicide. There is no indication that Dr Kanagaratnam or Dr Patterson had regard to these mechanisms when assessing the risk. They were not asked to take them into account, and there is no sign in their reports that they did in fact do so. The IAT were entitled to conclude on the material before them that a combination of the support provided by the appellant's uncle and the medical authorities would reduce the risk of suicide in the UK sufficiently to bring it below the article 3 threshold.

60. Further, the IAT were entitled to take into account the fact that the appellant's fears of ill-treatment on return to Sri Lanka are objectively without foundation. As we have said, the ECtHR has repeatedly stated that this is a relevant factor.

61. As regards the risk of suicide en route to Sri Lanka, the IAT's finding was not perverse. They were entitled to infer from the fact that the appellant's uncle had been so supportive of him in the past that, in co-operation with the medical and immigration authorities, he would assist the appellant to make suitable arrangements

for his return to Sri Lanka. We have already referred to his statement dated 29 June 2003 (see para 11 above). The IAT were perhaps unwise to say that the uncle "could if need be purchase a ticket and accompany him", since this possibility had not been raised in the evidence. But it is clear that this was something of a throw-away remark. They did not decide that the risk of suicide en route to Sri Lanka would be reduced below the article 3 threshold because the uncle *would* accompany him. They did not base their reasoning solely on the co-operation of the appellant's uncle. They made it clear that the authorities in the UK would be involved in the arrangements. The IAT were entitled to infer that the Secretary of State would take all reasonable steps to discharge his obligations under section 6 of the Human Rights Act 1998 ("the 1998 Act"). As the IAT said in *AA v Secretary of State for the Home Department* at para [39]:

> "Third stage-transit: there are no reasons to suppose that the Secretary of State would not provide appropriately qualified escorts. This is known to be done. Other measures in other cases may include accompanying family members."

62. In our judgment, the IAT were entitled to take judicial notice of the arrangements that, no doubt conscious of his obligations under section 6 of the 1998 Act, the Secretary of State makes to escort vulnerable persons who are removed to their countries of origin. This is reflected in a document that we were shown which sets out Home Office policy for dealing with claimants who threaten suicide.

63. As regards the criticisms made of the finding in relation to the risk upon arrival in Sri Lanka, the IAT were entitled to conclude on the evidence before them that the appellant would have family support on his return to Sri Lanka. Having regard to the very high threshold for article 3 in foreign cases of this kind, the IAT's decision cannot be characterised as perverse. In particular: (i) the adjudicator had found that any subjective fears which the appellant might have on return were not objectively justified; (ii) he would have family support on his return; and (iii) he would have access to medical treatment in Sri Lanka which it was conceded was adequate (the IAT noted in this regard that most of the treatment in the UK had consisted in the prescription of anti-depressant medication; he had only been placed in an institutional setting on two occasions).

64. For all these reasons, we would reject the second and fourth grounds of appeal.

The third ground of appeal

65. Mr Middleton submits that the IAT failed to decide whether the harm done to the appellant's mind would breach articles 3 or 8. Thus, for example, even if he might be prevented from committing suicide by being detained in a mental hospital under the 1983 Act, a determination by the appellant to kill himself would, according to the medical reports, be accompanied by a serious deterioration in his mental state during his stay in the UK. The IAT failed to address this issue.

66. In our judgment, Mr Beal has provided a complete answer to these submissions. First, the grounds of appeal to the IAT related only to the risk of inhuman treatment arising from the risk of suicide. It is true that there is a paragraph on page 15 of Dr Patterson's first report in which she states that, if the appellant were returned to the

Colombo area, this would precipitate a worsening of his PSTD and depression and "further undermine his already vulnerable mental state". But in our view, this was not sufficient to alert the IAT to the fact that a discrete ground of appeal was based on ill-treatment falling short of suicide.

67. But in any event, there is no reason to suppose that the measures that would be put in place in the UK to protect the appellant from self-harm would not include measures to mitigate his PTSD and depression. He has been treated for these conditions in this country for a few years, and there is no indication that this treatment will not continue for so long as is necessary. It is conceded on behalf of the appellant that there are adequate facilities in Sri Lanka, and there is no reason to suppose that his treatment would not be continued there.

68. Thus, even if the IAT ought to have dealt with the appeal (both in relation to articles 3 and 8) on the alternative basis of serious deterioration in mental health, we are satisfied that they would have been bound to dismiss the appeal.

Overall conclusion

69. We would, therefore, reject all grounds of appeal and dismiss the appeal.

Postscript: fresh evidence

70. Mr Middleton sought to adduce fresh evidence before this court. There is a further statement from the appellant's uncle which is relied on to rebut the remark made by the IAT that the uncle could purchase a ticket and accompany the appellant to Sri Lanka (para 61 above). But counsel concedes that this fresh evidence does not show that the IAT made an error of law, and for reasons already given, there was no error of law.

71. There is also fresh evidence concerning what has happened to the appellant's family since the *tsunami* disaster of 26 December 2004. In a statement of 14 January 2005, the appellant's uncle says that the family moved to Mallaithivu in about May 2004. Mullaithivu town and the surrounding area were devastated by the *tsunami.* The appellant says that 6000-7000 people were killed. In a statement dated 9 May 2005, Mr Anthony Paterson, the appellant's solicitor, says that on 15 February 2005, he wrote to the Red Cross in Sri Lanka in an attempt to establish whether the appellant's family had survived the *tsunami.* He has received no reply. He has also checked a website on which the Red Cross posts the names of survivors. The names of the appellant's family are not there.

72. This material is not relied on by Mr Middleton as fresh evidence to prove an error of law on the part of the IAT. It was adduced so that, if we found that there had been an error of law, we would be able to make an informed decision as to what relief to grant. Since we have found no error of law, the evidence is not admissible.

73. But it is a matter of great concern that the appellant's family may have perished in the *tsunami*, and that this might cause a serious deterioration in the appellant's mental health or render him significantly more vulnerable on his return to Sri Lanka than the adjudicator and the IAT supposed would be the case. We think that the Home Office

should assist this vulnerable appellant to find out what has happened to his family before deciding whether he ought to be sent back to Sri Lanka.