Case No: C4/2004/0814 PTA

Neutral Citation Number: [2004] EWCA Civ 1344
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT) SULLIVAN J)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 October 2004

Before :

LORD PHILLIPS OF WORTH MATRAVERS, MR
LORD JUSTICE CHADWICK
and
LORD SLYNN OF HADLEY

- -

Between :

The Queen on the Application of "B" & ORS	**Appellants**
- and -	
SECRETARY OF STATE FOR THE FOREIGN & COMMONWEALTH OFFICE	**Respondent**

- -
- -

Lord Kingsland QC & Angela Ward (instructed by **Hickman & Rose Solicitors**) for the Appellants
Tim Eicke (instructed by **The Treasury Solicitor**) for the Respondent

Hearing dates : Monday 19 July 2004 - Wednesday 21 July 2004

- -

JUDGMENT

Lord Phillips, MR :

This is the judgment of the Court

Introduction

1. This appeal raises the question of whether and in what circumstances the Human Rights Act 1998 requires British diplomatic or consular officials to afford what has been described as 'diplomatic asylum' to fugitives whose fundamental human rights are under threat. The matter came before us as an application for permission to appeal against the refusal by the Administrative Court to grant permission to bring a claim for judicial review. Moses J refused the paper application on 8 October 2003. Legal aid was withdrawn at this point and the applicants were not present or represented before Sullivan J on 10 March 2004 when the matter was listed for an oral hearing. Sullivan J dismissed the application in their absence.

2. Because the issue raised was both novel and important we decided, in the course of the hearing, that it would be appropriate to grant permission and to reserve to ourselves the application for judicial review. Mr Tim Eicke, for the Secretary of State, took the point that the application was well out of time. So it was, but there were extenuating circumstances and we have decided that it is right that we should deal with the application on its merits.

3. Lord Kingsland QC, for the applicants, contended that their rights under Article 6 of the European Convention on Human Rights ('the Convention') had been infringed at more than one stage of the story. We can see no merit in that contention. What is at issue in this case is whether substantive human rights have been infringed. If these are properly to be classified as 'civil rights', the three day hearing that the applicants have had before this court clearly satisfies their right, under Article 6, to a fair and public trial.

The facts

4. The applicants are, or at least claim to be, of Afghan origin. They claim to be members of the Hazara ethnic minority from the Urizghan province. When the events giving rise to their claim occurred Alamdar was thirteen years old and his brother Muntazar twelve. It is their case that in March 1998 their father left Afghanistan and travelled to Rawalpindi in Pakistan and that a little later their mother took them to join him. Their father then left Pakistan with the intention of travelling to Germany. Those arranging for his travel conveyed him instead to Indonesia. From there he took a boat to Australia, where he arrived without documentation in October 1999 and claimed asylum. He was detained until August 2000 when he was granted a Protection Visa by the Australian Immigration Authorities on the basis of his Afghan nationality and Hazara ethnicity. He went to live in Sydney.

5. The applicants, with their mother and three sisters, followed their father to Australia. They arrived without documentation in January 2001 and sought asylum. Pursuant to

section 189 of the Migration Act 1958 they were detained in the Woomera Detention Centre in South Australia. On 21 February 2001 the applicants' mother applied for a Temporary Protection Visa for herself and her five children on humanitarian grounds. The application was refused. Appeals, including a judicial challenge to this refusal, were not successful, ending in a rejection of a final appeal by the High Court of Australia on 23 February 2003. Meanwhile, on 12 April 2002 the Australian Department of Immigration gave the applicants' father Notice of Intention to cancel his visa on the ground that he was from Quetta in Pakistan and not Afghanistan. He was returned to detention in December 2002. Judicial challenges to this decision have failed.

6. The Woomera Detention Centre opened in 1999 as one of a number of centres for the detention, pursuant to the Migration Act 1958, of those who arrived in Australia by sea without authorisation. By 2001 the conditions in which immigrants, and especially children, were detained in Woomera and other detention centres were giving rise to well publicised concern. On 28 November 2001 the Australian Human Rights Commissioner announced the commencement of an Inquiry into Children in Immigration Detention. The Inquiry reported on 14 May 2004. The Report found:

> "Children in immigration detention for long periods of time are at high risk of serious mental harm. The Commonwealth's failure to implement the repeated recommendations by mental health professionals that certain children be removed from the detention environment with their parents, amounted to cruel, inhumane and degrading treatment of those children in detention."

7. On or about 29 June 2002 35 detainees escaped from the Woomera Detention Centre. They included the two applicants, but not the other members of their family. At about 1000 on 18 July 2002 the applicants entered the waiting area of the British Consulate in Melbourne, escorted by a nun. The receptionist asked if she could help them and they replied that they had come to seek asylum. The media had plainly been tipped off, for media representatives arrived and sought, unsuccessfully, permission to interview the nun and the applicants and to take photographs.

8. The applicants had clearly had the benefit of legal assistance, for they had each been provided with a statement in the following terms:

> "I request asylum, refugee and humanitarian protection from the Government of the United Kingdom of Great Britain.
>
> Please bring our urgent request to the immediate attention of your High Commissioner or his or her most senior representative.
>
> The United Kingdom of Great Britain is a signatory to the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol relating to the status of Refugees.

> The United Kingdom of Great Britain is also a signatory to other international human rights instruments that apply to my case including but not limited to the Universal Declaration of Human Rights, the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the United Nations Convention Against Torture and other Forms of Cruel, Inhuman and Degrading Punishment and the International Covenant on Economic, Social and Cultural Rights.
>
> The United Kingdom of Great Britain is represented on the Executive Committee (EXCOM) of the United Nations High Commissioner for Refugees (UNHCR). The United Kingdom of Great Britain is also a party to the European Convention of Human Rights which now forms part of the domestic law of the United Kingdom through the passage of the Human Rights Act 1998.
>
> We request that you abide by the very important international and domestic human rights and refugee law principles which the government of the United Kingdom of Great Britain has entered into and not remove either myself or my brother from this consulate or embassy. "

9. The applicants gave their statements to the receptionist, who read them and returned them to the applicants. She then went to the office of Mr Philip Mudie, the Vice-Consul, and informed him of what had occurred. Mr Mudie telephoned Mr Robert Court, the Deputy High Commissioner, who happened to be in Melbourne at the time, accompanying Ms Patricia Hewitt, the Secretary of State for Trade and Industry. He took the call on his mobile telephone and may well have explained what had occurred to, or within the hearing of, the Federal and State Police who were escorting him and the Minister.

10. Mr Mudie led the applicants from the reception area to his office, where they were joined by two lawyers, Mr Vardalis and Mr Burt, who had been instructed to represent the applicants. Mr Vardalis had been given a briefing note about each of the boys, and he conveyed the information contained in these to Mr Mudie.

11. Alamdar's experiences were described in the briefing note as follows:

> "Alamdar has related a catalogue of incidents of an extremely traumatic nature which he has either directly experienced or witnessed.
>
> Alamdar has witnessed numerous riots at Woomera and has been himself repeatedly exposed to tear gas and water cannons. On one occasion when ACM were deploying tear gas canisters in Woomera Alamdar found a live canister which was emitting tear gas in Donga (accommodation hut) No.18 where his uncle was sleeping. Alamdar immediately grabbed a blanket that he

placed over the live canister and threw it out of the donga. He has described the experience of being exposed to tear gas as akin to being 'blinded – I cannot see and I cannot breathe'.

On another occasion Alamdar was located near the perimeter fence when a disturbance was in progress. Alamdar relates an incident when an ACM officer using his shield pushed him into razor wire near the perimeter fence. Alamdar sustained a laceration to his right forearm from contact with the razor wire. A raised and healed scar on the right forearm is clearly visible and distinguishable from other scars, which have been the results of acts of self-harm.

Alamdar has frequently engaged in acts of self-harm while at Woomera. Previous to his detention in Woomera Alamdar had never self-harmed. Alamdar has cut both his arms using razor blades and has engaged in two prolonged hunger strikes.

Furthermore Alamdar has recounted graphic eyewitness accounts of acts of self-harm and attempted suicide undertaken by other detainees in close proximity to him. These include witnessing approximately ten hanging attempts, incidents of self-harm involving detainees swallowing shampoo and detainees swallowing splinters of glass from broken light globes. Alamdar also witnessed detainees lying on coils of razor wire as a form of protest and self-harm.

Alamdar witnessed his uncle leaping from the top of a building into razor wire coils in the perimeter fencing in a desperate attempt to draw attention to the family's plight in detention. The uncle sustained very serious injuries, which required over one hundred stitches.

Alamdar recounts memories of the mental collapse of other detainees: 'they were going crazy' and the practice of isolating detainees at risk of suicide and self-harm in isolation rooms that are understood to be attached to the medical centre. Alamdar explained that while placed in these rooms the air conditioning was left switched on thus creating freezing conditions for the detainees. These rooms are fitted with close circuit television camera (CCTV) for constant visual surveillance. Alamdar explains that this regime was employed as a de facto punishment and deterrent for detainees not to self-harm in the future."

12. Muntazar's experiences were described in the briefing note as follows:

"While in Woomera, Muntazar has attempted to hang himself on two occasions; once prior to Easter and once after Easter. On both occasions he utilised a bed sheet and attempted to hang

himself once on playground equipment and on the other occasion from a tree. He was rescued by ACM staff and treated in the medical centre and on one occasion transferred to the Woomera hospital before being returned to the detention centre. After his hanging attempts Muntazar advises that former Woomera psychologists Harry Bilboe and Lynne Bender counselled him. Muntazar continues to complain of back pain (mid-lumbar) flowing from injuries sustained in one of the hanging attempts. He has also engaged in other forms of self-harm, namely self-inflicted cuts to the forearms that appear to have healed substantially.

Muntazar has also been repeatedly exposed to tear gas and water cannon. In one instance Muntazar recalls a live tear gas canister landing in close proximity to an elderly female detainee and that he grabbed the canister and threw it away. On another occasion Muntazar relates that during a disturbance he was struck on the hand by an ACM officer wielding a baton. A raised scar is clearly visible at the base of his right index finger on the right hand.

Impact of indeterminate Detention on the Family Unit:

Muntazar reports that his family has become progressively sadder in detention. He reports that one of his sisters has learnt how to self-harm in detention. He also was an eyewitness to his Uncle's leap from a building into the razor wire coils. This incident was captured by national and international news media.

Muntazar gravely fears the loss of his own and his siblings' opportunity for formal education. He is very articulate in equating the losses of opportunities for formal education because of his detention with the learning of new things like self-harm: '*we wouldn't have learned these things if we were free. I saw everything – I never saw anything like this (Woomera) in my country. I never dreamed that I would cut and hang myself – but now I know all these things'*."

13. Mr Mudie told the applicants that he would have to seek guidance from his superiors as to the appropriate course of action, but that while they were in the Consulate they would be kept safe. At 1046 they were returned to the reception area.

14. At 1100 the applicants said that they would like a drink and something to eat. Mr Mudie asked one of his staff to provide this. Unfortunately she took the applicants down to a café in the public part of the building where, it seems, they received considerable media attention and were photographed by television cameras. Soon after this it was decided that the applicants should be brought into the office area rather than the reception area. Mr Mudie made it clear to Mr Vardalis and Mr Burt that this did not confer on the boys any special privilege.

15. Meanwhile Mr Court had arrived. He conducted a meeting with Mr Vardalis and Mr Burt, at which Mr Mudie was also present. It is clear from the evidence that the major topic at this meeting was the applicants' claim to asylum. Mr Court explained that he would seek instructions from London as to whether the asylum claims could be received and considered.

16. Mr Court then telephoned the Resident Clerk at the Foreign and Commonwealth Office in London. It was 0200 there, and the Clerk indicated that a decision would have to wait until the working day started, when expert advice would be sought. Preparations were made to accommodate the applicants until the decision was taken. Communication was then received from the Australian Government expressing understanding for the Consulate's position but making it plain that a formal approach would be made seeking the earliest possible return of the applicants to the care of the Government. Mr Court then contacted the Resident Clerk in London again and informed him that an urgent decision was needed.

17. The Foreign Secretary, Mr Jack Straw, happened to be in a plane on his way to Hong Kong. He was informed of the situation. Shortly after 1600 Melbourne time Mr Court was informed from London that there were no grounds to consider an asylum request other than in the country of first asylum. Mr Court then telephoned the Australian Federal and State authorities and told them that he wished to return the applicants to their care. There was then some delay while the Australian authorities made arrangements to receive the applicants. Mr Court then conducted a meeting at which the applicants, their lawyers and Mr Mudie were present. Mr Court made it plain that there was no possibility of the applicants being permitted to remain in the Consulate or that the United Kingdom would intervene in any way in the consideration of their case by the Australian authorities. He stated that unless they left voluntarily he would need to find some other way to return them to the Australian authorities. Thereupon, to his considerable relief, they left of their own accord. As soon as they were in the lift lobby, the Australian authorities took them into custody.

18. After being detained in Melbourne for the night, the applicants were returned to Woomera. On the 2 August 2002 an application was made to the Family Court of Australia for their release. Initially this application was refused. Early in 2003 the applicants were moved from Woomera to the Baxter detention centre. The Woomera Detention Centre was closed later in the year following inspection by the regional adviser to the United Nations Human Rights Commissioner. The applicants' sisters were not moved to Baxter. They were detained at the Woomera Housing Project. Their mother was admitted to hospital in Adelaide on 29 July 2003. She was subsequently placed, under detention, at a motel in Fullarton, Adelaide, where she gave birth to another son.

19. On 25 August 2003, after a series of applications and appeals before the Family Court, the full bench of the Family Court ordered the release of the applicants and, at the same time, their sisters. They then went to live in a house in a suburb of Adelaide close to the motel where their mother was detained. This house is owned by Centacare, a Catholic Welfare Agency, which has also paid for the children to be

enrolled in private schools and provided carers to live with and provide support to the children.

20. On 29 April 2004 the High Court of Australia ruled that the Family Court had acted beyond its jurisdiction in ordering the release of the applicants and their sisters. The Immigration Minister then placed them under Community Detention in the house in which they were living. The Centacare workers were appointed as Migration Officers, but they were subsequently replaced by Family and Youth Services workers, who have also been appointed Migration Officers. As the children are required always to be escorted by a Migration Officer, their school teachers have also been appointed Migration Officers to satisfy this requirement.

21. On 4 July 2004 the Minister gave permission for the applicants' mother to move from the motel where she was detained to live with her children. Their father continues to be detained at the Baxter detention centre, some 350 kilometres away. The applicants complain that the change in their regime, with the restrictions that this entails, has revived the anxieties that they felt when in Woomera, has placed them under stress and has made them feel that they are in prison again.

The applicants' claim and the issues raised

22. At some stages of this case it had appeared that the case advanced on behalf of the applicants was that the Secretary of State was at fault for refusing to entertain an application on behalf of the applicants that they should be granted asylum in the United Kingdom. Lord Kingsland made it plain, however, that this is not the applicants' case. Their contentions are as follows. The Consular officials initially afforded the applicants protection in the Melbourne Consulate. The applicants were then under real threat of being subjected to inhuman and degrading treatment by being returned to Woomera, treatment of sufficient severity to infringe Article 3 of the Convention, if applicable. Equally, they were at risk of indefinite and arbitrary detention which would amount to a flagrant breach of their rights under Article 5 of the Convention. In these circumstances the Secretary of State and his Consular officials were in breach of the Convention and the Human Rights Act in refusing to permit the applicants to remain in the Consulate, rather than, as they should have done, initiating a process with the object of preventing the return of the applicants to Woomera. Lord Kingsland submitted that this process would initially have involved entering into negotiations with the Australian authorities for an undertaking that the applicants would no longer be held in detention. If these were unsuccessful, the Secretary of State might, ultimately, have had no alternative but to make arrangements for the applicants to be given safe passage to an airport and leave to enter the United Kingdom.

23. The relief initially sought by the applicants was as follows:

> "(a) A Declaration that the Secretary of State for the Foreign and Commonwealth Office, through his consular officers, acted unlawfully.

> (b) A mandatory order obliging the Secretary of State for the Foreign and Commonwealth Office to make available British Consular offices and/or other premises in Australia falling within UK jurisdiction to the claimants should they be able to return.
>
> (c) A mandatory order requiring the Secretary of State for the Foreign and Commonwealth Office to facilitate the claimants' journey to the British consular and/or other premises falling within UK jurisdiction.
>
> (d) A mandatory order requiring the relevant UK authority to consider the claimants' asylum applications.
>
> (e) Damages."

24. Lord Kingsland recognised, however, that the position had altered since the applicants and their sisters had been joined by their mother and her new baby at Adelaide. The applicants' situation would not be improved if they left this family unit and the educational facilities which they were enjoying and moved into the Consulate. Lord Kingsland submitted, however, that the applicants were still under detention contrary to Article 5 of the Convention and at risk at any moment of being returned to a detention centre that would violate their Article 3 rights. In these circumstances he submitted that this Court should direct the Secretary of State to enter into negotiations with the Australian authorities for the release of the applicants from Community Detention and that the applicants should have permission to apply to the Court if these negotiations did not bear fruit. The applicants persist in their application for a declaration that the Secretary of State acted unlawfully and for damages.

25. This application raises the following issues:

i) Could the actions of the United Kingdom diplomatic and consular officials in Melbourne fall 'within the jurisdiction' of the United Kingdom within the meaning of that phrase in Article 1 of the Convention?

ii) Could the Human Rights Act apply to the actions of the United Kingdom diplomatic and consular officials in Melbourne?

(iii) Did the actions of the United Kingdom diplomatic and consular officials in Melbourne infringe a) the Convention and b) the Human Rights Act?

Could the actions of the United Kingdom diplomatic and consular officials in Melbourne fall 'within the jurisdiction' of the United Kingdom within the meaning of that phrase in Article 1 of the Convention?

26. Article 1 of the Convention provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention"

27. It was Lord Kingsland's submission that the area of application of the Human Rights Act was co-extensive with the jurisdiction of the United Kingdom referred to in Article 1 of the Convention. Lord Kingsland's submissions were, accordingly, advanced without distinction between the first and the second issues. He submitted that the actions of the diplomatic officials in Melbourne fell both 'within the jurisdiction' of the United Kingdom for the purposes of Article 1 and within the ambit of application of the Human Rights Act. We have thought it right to treat the second issue as distinct from the first.

28. The foundation of Lord Kingsland's submissions was the following passage from the speech of Lord Steyn in the recent decision of the House of Lords in *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26 paragraph 29, which was addressing the scope of Article 1 of the Convention. Under the heading '*Uncontroversial matters'* he said:

> "The notion of jurisdiction is essentially territorial. However, the ECtHR has accepted that in exceptional cases acts of contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of article 1 of the ECHR: *Öcalan v Turkey* (2003) 37 EHRR 238, 274-275, para 93; *Bankovic v Belgium* (2001) 11 BHRC 435. The effect of the decision of the ECtHR in *Soering v United Kingdom* (1989) 11 EHRR 439 was that the extraditing or deporting state is itself liable for taking action the direct consequence of which is the exposure of an individual abroad to the real risk of proscribed treatment. The Court of Appeal rightly stated that *Soering* is an exception to the essentially territorial foundation of jurisdiction. It is important, however, to bear in mind that apart from specific bases of jurisdiction such as the flag of a ship on the high seas or consular premises abroad, there are exceptions of wider reach which can come into play. Thus contracting states are bound to secure the rights and freedoms under the ECHR to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad: *Cyprus v Turkey* (1976) 4 EHRR 482, at p 586, para 8. Moreover, the doctrine of positive obligations under certain guarantees of the ECHR may in exceptional cases require states to protect individuals from exposure to foreseeable flagrant risks of violations of core guarantees caused by expulsions: *D v United Kingdom* (1997) 24 EHRR 423."

29. Lord Kingsland relied, naturally, on the express reference to 'consular premises' and on the final sentence of this passage. He did not submit that the Melbourne Consulate

constituted part of the territory of the United Kingdom. He submitted, however, that international law recognised the right of Consular authorities to exercise the authority of the State that they represent and that where they did so this fell within the jurisdiction of the state for the purposes of Article 1 of the Convention. He submitted that in the present case the Consular officials took the applicants under their responsibility. The refusal thereafter to continue to provide them with protection was an exercise of authority that fell within the jurisdiction of the United Kingdom. He relied particularly on Lord Steyn's statement that the Convention imposed obligations on contracting states to all persons under their authority and responsibility, '*whether that authority is exercised within their own territory or abroad'.* We turn to the Strasbourg jurisprudence to see the extent to which it supports this proposition. It is a developing jurisprudence, and we shall summarise the relevant authorities in chronological order before discussing their effect.

The Strasbourg jurisprudence

30. We were concerned during the course of the hearing that we might not have been referred to all the relevant jurisprudence in relation to this aspect of the appeal. Junior counsel for the applicants subsequently referred us to a number of relevant articles and this has assisted us to identify some of the authorities to which we are about to refer.

31. In *X v Federal Republic of Germany* (Application No 1611/62; 25 September 1965) the applicant, who was a German national, brought a claim against the German consular and embassy officials in Morocco, alleging that they procured the Moroccan authorities to deport him from the country. The circumstances alleged by the applicant were bizarre in the extreme, and one of the several reasons why the Commission held his application inadmissible was that he had not furnished sufficient proof in support of his allegations. The significance of the case for present purposes is this observation made by the Commission:

> "Whereas, in certain respects, the nationals of a Contracting State are within its "jurisdiction" even when domiciled or resident abroad; whereas, in particular, the diplomatic and consular representatives of their country of origin perform certain duties with regard to them which may, in certain circumstances, make that country liable in respect of the Convention."

32. *East African Asians v United Kingdom* (1973) 3 EHRR 76 involved applications by a group of Asian men who were United Kingdom citizens and who complained that, among other things, their Article 8 rights to respect for family life were infringed when they were refused permission to enter the United Kingdom to join their wives. The Commission upheld their complaint.

33. *Soering v United Kingdom* (1989) 11 EHRR 439 raised the question of whether the extradition of a West German national from Britain to the United States, where he

would be exposed to the so called 'death row phenomenon', would infringe Article 3 of the Convention. The Court summarised the issue as follows at paragraph 85:

> "What is at issue in the present case is whether Article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State."

The Court reached the following conclusion in paragraph 87:

> "It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article."

34. *Drozd & Janousek v France & Spain* (1992) 14 EHRR 745 raised the issue of whether France and Spain were liable under the Convention for the actions of judges seconded by them to sit in Andorra. The Commission held that the judges were acting on behalf of Andorra and not exercising the sovereign authority of France or Spain. It followed that neither France nor Spain had responsibility under the Convention.

35. *WM v Denmark* (14 October 1992) was a decision of the Commission that held the applicant's claim to be inadmissible. In the course of their decision, however, the Commission made some comments on jurisdiction which, having regard to the facts of that case, require analysis. The applicant lived in what was then the German Democratic Republic ('DDR'). He wished to move to the Federal Republic of Germany, but the DDR authorities refused him permission. At 1115 on 9 September 1988, together with 17 other DDR citizens, he entered the premises of the Danish embassy and requested negotiations with the DDR authorities. Certain negotiations did take place, but at 0230 on 10 September the Danish Ambassador requested the DDR police to come into the Embassy to remove the applicant and the other DDR citizens. The applicant was then arrested by the DDR police. He and the other male members of the party were detained for 33 days and then released on 'conditional imprisonment', which subjected him to the risk of 18 months imprisonment if he failed to comply with the conditions set.

36. The applicant complained that the conduct of the Danish Ambassador which we have described infringed his rights under Article 5 of the Convention. On the question of jurisdiction the Commission ruled as follows in paragraph 1:

> "The Commission notes that these complaints are directed mainly against Danish diplomatic authorities in the former DDR. It is clear, in this respect, from the constant jurisprudence of the Commission that authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.
>
> Therefore, in the present case the Commission is satisfied that the acts of the Danish ambassador complained of affected persons within the jurisdiction of the Danish authorities within the meaning of Article 1 of the Convention."

37. In relation to the claim under Article 5, the Commission observed that it was the DDR authorities, not the Danish diplomatic authorities, which were responsible for the applicant's detention. The Commission continued:

> "The Commission recalls, however, that an act or omission of a Party to the Convention may exceptionally engage the responsibility of that State for acts of a State not party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention. The Commission finds, however, that what happened to the applicant at the hands of the DDR authorities cannot in the circumstances be considered to be so exceptional as to engage the responsibility of Denmark. "

38. The Commission went on to consider complaints that Denmark had infringed various Protocol provisions which were only applicable if the Embassy fell to be considered as part of the territory of Denmark. The Commission held that these complaints were not admissible as it was clear that the Embassy premises were not part of the territory of Denmark.

39. In a series of decisions in relation to the Turkish presence in Northern Cyprus the ECtHR held that, by virtue of the fact that the Turkish army exercised "effective overall control over that part of the island", Turkey's jurisdiction under Article 1 of the Convention extended to securing the entire range of substantive Convention rights in Northern Cyprus: *Loizidou v Turkey* (23 March 1995 and 18 December 1996); *Cyprus v Turkey* (2002) 35 ECHR 30.

40. On 11 January 2001 a Chamber of the ECtHR ruled inadmissible the applications of 16 Albanians in *Xhavara and others v Italy and Albania* (application 39473/98) in

respect of which we have only managed to obtain a report in French, although the case is very shortly summarised in (2001) 12 HRCD. The applicants were survivors from a vessel which had sunk after collision with an Italian warship 35 miles of the coast of Italy. The background to the collision was a treaty between Albania and Italy intended to stem the flow of illegal immigrants from Albania to Italy. This gave Italian warships the right to arrest and search vessels emanating from Albania, whether in Albanian territorial waters or on the high seas, and require them to return to Albania if found to be carrying immigrants destined for Italy.

41. The applicants brought proceedings on their own behalf and as parents of children drowned in the shipwreck. The Articles of the Convention allegedly infringed included 2, 3 and 5.1. The applicants alleged that the Italian warship had deliberately rammed and sunk the *Kater I Rades.* At the time of their application prosecutions for manslaughter were in progress against the captains of each of the vessels involved.

42. The ECtHR ruled that the treaty between Italy and Albania did not involve Albania in any responsibility for the collision. So far as Italy was concerned there seems to have been accepted without challenge that this fell within the jurisdiction of Italy under Article 2. The Court ruled that there was no evidence to support the allegation that the sinking of the *Kater I Rades* had been deliberate. It accepted that Article 2 entitled the applicants to a judicial inquiry into the circumstances of the deaths of those who had drowned, but held that, having regard to the ongoing prosecutions, the applicants had not exhausted domestic remedies in respect of this. These were the principal reasons why the applications were ruled inadmissible.

43. In *Bankovic and others v Belgium and others* (12 December 2001) the Grand Chamber, in a decision on admissibility, gave detailed consideration to the ambit of the jurisdiction of the Court and to the area of application of the Convention, making the point that the two are not identical. The applications arose out of air strikes carried out by NATO forces against radio and television facilities in Belgrade on 23 April 1999. The claims of five of the applicants arose out of the deaths of relatives who were killed by this raid. The sixth claimed on his own account in respect of injuries sustained during the raid. The claimants alleged that Articles 2, 10 and 13 of the Convention had been infringed.

44. The NATO states contended that "jurisdiction" in Article 1 should be interpreted in accordance with principles of public international law. The exercise of jurisdiction involved the assertion or exercise of legal authority over persons owing some form of allegiance to the State or who had been brought within the State's control. The applicants founded on the *Loizidou* case to argue that jurisdiction depended upon effective control and contended that in so far as a State was in a position by reason of control to secure the observation of Convention rights the State was under a duty to do so.

45. The Court considered the *travaux preparatoires* to the Convention, which clearly indicated that those who drafted it intended the concept of jurisdiction to be territorial.

The Court went on to consider the ordinary meaning of jurisdiction under principles of public international law. It concluded in paragraph 59:

> "As to the "ordinary meaning" of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States."

This led the Court to the following conclusion in paragraph 61:

> "The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case."

46. The Court went on to consider the exceptional circumstances where Article 1 jurisdiction was established on a basis that was not territorial. It considered the cases to which we have already referred and concluded in paragraphs 71 and 73:

> "in sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government."

> "Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State."

47. In *Öcalan v Turkey* (12 March 2003) the applicant had led Kurdish separatists against the State of Turkey, training and leading a gang of armed terrorists. Warrants for his arrest had been taken out in Turkey. He had lived for many years in Syria but then sought political asylum in Greece, Russia and Italy, none of which countries was prepared to allow him to stay. Ultimately, he achieved a temporary refuge in the home

of the Greek Ambassador in Nairobi. He was then tricked into believing that arrangements had been made for him to fly to the Netherlands, where he would be given refuge. Instead, when he got to Nairobi airport he was arrested by Turkish officials and put on a plane to Turkey. The ECtHR found that this took place with the agreement of the Kenyan authorities. In Turkey he was tried, convicted and sentenced to death, a sentence which was subsequently commuted.

48. The relevant issue for present purposes was whether his arrest by the Turkish authorities at Nairobi airport infringed the applicant's Article 5 rights. Before dealing with the question of jurisdiction the Court considered the principles governing the question of whether the arrest was lawful. It observed at paragraph 88:

> "The Court accepts that an arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the person's individual rights to security under Article 5 (1)."

49. The Court distinguished *Bankovic* at paragraph 93 as follows:

> "Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. The Court considers that the circumstances of the present case are distinguishable from those in the aforementioned *Bankovic and Others* case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey (see in this respect the aforementioned decisions in the cases of *Illich Sanchez Ramirez v France* and *Freda v Italy*)."

Only at this point did the Court proceed to consider whether the acts of the Turkish officials were permissible under international law. It commented in paragraph 95:

> "The Court must decide in the light of the parties' arguments whether the applicant's detention in Kenya resulted from acts of the Turkish officials that violated Kenyan sovereignty and international law (as the applicant has submitted) or from cooperation between the Turkish and Kenyan authorities (as the Government have submitted)."

50. The Court went on to conclude that the Kenyan authorities had been party to the plan that the Turkish officials should arrest the applicant, which led to the conclusion that his arrest was an exercise of extradition which was not unlawful, so that it did not infringe Article 5.

Discussion

51. In *Bankovic* the Grand Chamber sat to consider the issue of jurisdiction raised in the light of previous authority, and its decision is of paramount importance on this aspect of the case. The EctHR equated the jurisdiction referred to in Article 1 with the jurisdiction enjoyed by a State under principles of public international law. It observed that this jurisdiction is primarily territorial. This conclusion was hardly surprising. Article 1 requires contracting States to secure to everyone within their jurisdiction the Convention rights and freedoms. For the most part this is an obligation that can only be performed by the State which has jurisdiction over the territory in which those rights and freedoms are enjoyed.

52. The cases that we have cited include some rare instances where the Strasbourg Court or Commission has held that obligations under Article 1 applied notwithstanding that the applicants were not within territory over which the defendant State exercised jurisdiction under international law.

53. *Soering,* on analysis, was not such a case, although the decision effected a dramatic extension of the scope of the Convention. It extended the ambit of Article 1 beyond any previous decision in that it recognised a duty not to expose a person to inhuman or degrading treatment that would take place outside the territorial jurisdiction of the contracting state. But, as Lord Bingham of Cornhill pointed out in *Ullah* at paragraph 9, such a case involves "an exercise of power by the state affecting a person physically present within its territory". In *Al-Adsani v UK* (21 November 2001), the ECtHR commented at paragraph 39 that in the *Soering* judgment:

> "… it was emphasised, however, that in so far as any liability under the Convention might be incurred in such circumstances it would be incurred by the expelling Contracting State by reason of its having taken action which had as a direct consequence the exposure of an individual to proscribed ill-treatment."

54. The Cyprus cases were the product of the unique circumstances that have prevailed on that island since the Turkish invasion. In fact, if not in law, Northern Cyprus falls within the territorial jurisdiction of Turkey. Both Turkey and Cyprus are signatories to the Convention. The Strasbourg Court, which is always pragmatic, recognised the necessity of adapting the principle of territorial jurisdiction in order to ensure that human rights were protected in the northern part of the island.

55. The Court in *Bankovic* recognised none the less that there were circumstances where the jurisdiction referred to in Article 1 was not territorial in nature. Such jurisdiction still fell to be identified according to principles of public international law. The Court referred to the exercise by a State of jurisdiction in relation to 'activities … on board craft and vessels registered in, or flying the flag of'' the State in question. The jurisdiction recognised under public international law in relation to activities on board vessels bears a close comparison with territorial jurisdiction – see *Oppenheim's*

International Law edited by the late Sir Robert Jennings QC and Sir Arthur Watts QC 9th Edition Vol 1 paragraph 287 and following - although the authority of the flag State extends not merely to what is done within the ship but to what is done with the ship. Thus the facts of *Xhavara* can be brought within a jurisdiction recognised under public international law.

56. The other type of exceptional jurisdiction recognised by the Court in *Bankovic* is jurisdiction that, under public international law, States enjoy over individuals who are outside their territory. The obligation that the Court appears to recognise is an obligation to exercise such jurisdiction in a manner that respects Convention rights. The fact that the individual is abroad, however, will necessarily limit the potential for the conduct of the State to impact on the individual's rights. The obvious example of the exercise of jurisdiction on those outside a State's territory is the right recognised by International Law for a State to enact legislation affecting its citizens. *Oppenheim* describes the position as follows at paragraph 138:

> "International law does not prevent a state from exercising jurisdiction, within its own territory, over its nationals travelling or residing abroad, since they remain under its personal authority. Accordingly, it may legislate with regard to their conduct when abroad, levy taxes in respect of their assets or earnings abroad, or legislate in respect of their foreign property. In all such cases, however, the state's power to enforce its laws depends upon its national being in, or returning to, its territory or having there property against which they can be enforced."

The jurisdiction over nationals may be the explanation why the *East African Asians* case fell within Article 1; the report of the case unfortunately does not disclose the basis upon which the Commission had earlier ruled that the applicants' complaint was admissible.

57. *Drodz* was a case where the Commission appears to have accepted that, had the judges seconded from France and Spain been lawfully exercising in Andorra the judicial authority of their respective States, jurisdiction would have existed for the purpose of Article 1.

58. It is possible for a State to violate some of the rights protected by the Convention rights by subjecting an individual to harmful treatment whether he is within or outside the territorial jurisdiction of the State in question; we have in mind, for example, rights under Articles 2, 3, 4 and 5. In *Bankovic* the applicants sought to extend the concept of jurisdiction to cover any situation where, and to the extent that, State action was capable of affecting Convention rights. Thus, so they argued, the NATO air strike brought those killed within the control, and thus the jurisdiction of the States involved, to the extent that Article 2, 10 and 13 were engaged. This argument was rejected by the Court. It held that before Convention rights can be engaged it is

necessary to show that the applicants were subject to a category of jurisdiction of the defendant State that was recognised by international law.

59. We have had difficulty in reconciling the reasoning of the ECtHR in *Öcalan* with the decision in *Bankovic*, for the Court appears to have accepted in *Öcalan* that the actions of the Turkish officials would have created jurisdiction under Article 1 even if unlawful under international law. At all events we do not see that the decision in *Öcalan* has any bearing on the issue that we have to decide. Our concern is to identify the nature of the exceptional jurisdiction recognised by the Grand Chamber in *Bankovic* in relation to 'the activities of its diplomatic or consular agents abroad'. Can it be said that the activities of Mr Court and Mr Mudie brought Alamdar and Muntazar within the jurisdiction of the United Kingdom for the purposes of Article 1? This question requires consideration of the nature of the jurisdiction that diplomatic and consular agents of the sending State can exercise in the receiving State.

Diplomatic and consular activities

60. *Oppenheim* has this to say of some of the functions of diplomatic envoys:

> "**s485 Protection**
>
> A third task is the protection in the receiving state of the interests of his home state and of its nationals, within the limits permitted by international law. If such nationals are wronged without being able to find redress in the ordinary way of justice, and if they ask help of the diplomatic envoy of their home state, he must be allowed to afford them protection. It is, however, for the laws, regulations and practices of his home state, and not for international law, to prescribe the extent of the envoy's obligations to afford protection to his compatriots.
>
> **s486 Miscellaneous functions**
>
> Negotiation, observation, and protection are tasks common to all diplomatic envoys. The envoy will also usually try to promote friendly relations between his own state and the receiving state, and develop their economic, cultural and scientific relations. But a state may order its permanent envoys to perform other tasks more usually thought of as forming part of consular functions, such as the registration of deaths, births, and marriages of subjects of the home state, legalisation of their signatures, issue of passports for them, and the like. In doing this, a state must be careful not to order its envoys to perform tasks which are by the law of the receiving state exclusively reserved to is own officials.
>
> …

> A line must, however, be drawn between functions which it is proper that a diplomatic mission may exercise, and those which it may not, although it has to be recognised that it is not always easy to draw such a line. The question may assume practical importance, for example, in connection with the entitlement to treatment as diplomatic premises of buildings used by an embassy for non-diplomatic purposes, … ."

61. Consular functions are described by *Oppenheim* as follows:

> "**s544 Consular functions in general**
>
> Although consuls are appointed chiefly in the interests of commerce, industry, and navigation, they also perform many other functions. Custom, commercial and consular treaties, national laws, and national consular instructions prescribe detailed rules regarding these functions. The principal functions are promotion of commerce and industry, supervision of navigation, protection, and notarial functions. The receiving state must accord full facilities for the performance of the functions of a consular post."

62. The status of consular premises is now governed by the 1963 Convention on Consular relations. Article 2 of that Convention provides that a consular post may only be established in the territory of the receiving State with that State's consent. Article 31 provides for the inviolability of the consular premises. The authorities of the receiving State are not permitted to enter the working part of the consular post except with permission of the head of the post or the head of the diplomatic mission of the sending State. Article 43 provides that consular officers and consular employees are not amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions. Article 55 provides that those who enjoy consular privileges and immunities are under a duty to respect the laws and regulations of the receiving State. They have a duty not to interfere with the internal affairs of that State. The Article further provides that consular premises shall not be used in any manner incompatible with the exercise of consular functions.

63. In summary, international law recognises that embassy and consular authorities are entitled, in the territory of the receiving State, to exercise the authority of the sending State to a limited extent, particularly over the nationals of the sending State. The premises on which this limited authority is exercised are inviolable. It is not easy to see that the exercise of this limited authority gives much scope for the securing, or the infringing, of Convention rights. This no doubt explains why there is no recorded case of an infringement of the Convention having occurred in the course of exercising consular authority. In *X v Federal Republic of Germany* the Commission recognised that the authority that consular and embassy officials exercise over their own nationals could engage the Convention but found that there was no case that the Convention had been infringed. It is possible to envisage that the manner of exercise by such officials

of their functions in relation to their nationals might infringe the Article 8 right to respect for family life, or the Article 12 right to marry. In general, however, the authority exercised by consular and embassy officials is unlikely to engage Convention rights.

64. The Strasbourg decision which affords the applicants most assistance, and upon which Lord Kingsland particularly relied, was *WM v Denmark.* There the Commission dealt both with the issue of jurisdiction and with the issue of whether there had been a breach of the Convention. As to jurisdiction the Commission applied the test of whether the acts of the Danish Ambassador constituted an exercise of authority over the applicant to an extent sufficient to bring him within the jurisdiction of the Danish authorities and held that this test was satisfied. The acts in question consisted of initially giving the applicant shelter in the embassy while conducting negotiations with the DDR authorities on his behalf and subsequently inviting the DDR police into the embassy to remove him and his associates.

65. Lord Kingsland drew a comparison between the facts in *WM v Denmark* and the facts in the present case. He suggested that, just as the Danish Ambassador had exercised his authority by calling in the DDR police, Mr Court had exercised his authority by disclosing to the Australian authorities that the applicants were in the Melbourne Consulate. We do not consider that this analogy is apt. If Mr Court disclosed to his escorts that he had been informed by mobile of the arrival of the applicants at the Consulate, the evidence suggests that this was only by way of casual comment and not in the exercise of a diplomatic function. In any event, the arrival of the applicants at the Consulate appears to have been well publicised.

66. In contrast to the facts in *WM v Denmark,* no one at the Melbourne Consulate entered into any negotiations in relation to the applicants with the State authorities. They were, however, given temporary shelter in the Consulate while consideration was given to their written requests for assistance and, in particular, for the grant of asylum. In this respect the facts of the present case do have a close resemblance to the facts in *WM v Denmark*. But there is the obvious distinction that, on the reported facts in *WM v Denmark*, the embassy officials appear to have conducted negotiations with the DDR authorities on behalf of the applicant and, in that context, may be said to have assumed some responsibility (or exercised some authority) in respect of the applicant. There is no directly comparable element in the present case. We have considered whether we should decide the issue of jurisdiction against the applicants on the basis that there is a material distinction: and that, without assumption of responsibility by the consular officials for the protection of the applicants in the present case, there was nothing to bring them within the jurisdiction of the Untied Kingdom for the purposes of Article 1 of the Convention. But we have concluded that it would be unsatisfactory to determine this application on that basis. We have in mind that the applicants were told that while they were in the Consulate they would be kept safe: and that they were given some protection by being brought from the reception area into the office area. We are content to assume (without reaching a positive conclusion on the point) that while in the Consulate the applicants were sufficiently within the authority of the consular staff to be subject to the jurisdiction of the United Kingdom for the purpose of Article 1. Whether the conduct of Mr Court and Mr Mudie in fact infringed the

Convention is a question that we shall consider when we come to the third of the issues raised by this appeal.

Does the Human Rights Act apply to the actions of the United Kingdom diplomatic and consular officials in Melbourne?

67. Lord Kingsland submitted that the provisions of the Human Rights Act applied not merely within the United Kingdom but wherever Article 1 of the Convention imposed obligations on the United Kingdom to secure the enjoyment of Convention rights. Mr Eicke challenged this submission. He argued that the Human Rights Act only applied within the United Kingdom.

68. Mr Eicke relied first and foremost upon the presumption that a United Kingdom statute does not take effect beyond the territory of the United Kingdom. He referred us to a number of passages in the Fourth Edition of *Bennion on Statutory Interpretation* which amply supported this submission, in particular:

> "**Section 106. Presumption of United Kingdom extent**
>
> Unless the contrary intention appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom."
>
> "**Section 128. General principles as to application**
>
> Unless the contrary intention appears, and subject to any privilege, immunity or disability arising under the law of the territory to which an enactment extends (that is within which it is law), and to any relevant rule of private international law, an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters."

69. Secondly Mr Eicke relied upon the following provisions of the Human Rights Act:

> 11(a) "A person's reliance on a Convention right does not restrict-
>
> (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom;
>
> 22(7) "Section 21(5), so far as it relates to any provision contained in the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957, extends to any place to which that provision extends."

Mr Eicke submitted that the clear implication of these provisions was that the application of the Act did not extend beyond the United Kingdom.

70. Lord Kingsland urged that we should follow the approach of Lord Drummond Young in the recent decision of the Outer House in *Al Fayed* [2004] SLT 319. Mr Al Fayed petitioned for judicial review of the decision of the Lord Advocate to refuse to institute a public inquiry into the death of his son in Paris on 31 August 1997. He contended that the decision was incompatible with Article 2 of the Convention. Without expressly addressing the point, Lord Drummond Young appears to have proceeded on the basis that the reach of the Human Rights Act was co-extensive with the 'jurisdiction' of the United Kingdom within the meaning of Article 1 of the Convention. Thus, he observed at paragraph 5 in relation to the Convention:

> "Section I, which comprises arts 2-18, sets out the substantive rights that are guaranteed by the Convention. Article 1 is not incorporated into the domestic law of the United Kingdom by the Human Rights Act 1998. The reason for that is obvious; art 1 is the provision that renders the Convention binding on the high contracting parties but it does not of itself confer any specific rights on persons who find themselves within the jurisdiction of any high contacting party. Thus it has no place in domestic law. Nevertheless, it is appropriate for the court to have regard to art 1 in considering the scope of the United Kingdom's obligations under the Convention because that is the provision that defines the obligations undertaken by the United Kingdom as a high contracting party. In particular, it is clear that art 1 defines the geographical or other extent of the obligations so undertaken by the United Kingdom and other contracting parties."

Thereafter he proceeded to consider whether, under the Convention, the relevant events fell within the jurisdiction of the United Kingdom under Article 1, concluding that they did not.

71. It seems to us that the passage from Lord Steyn's speech in *Ullah*, which we have cited at paragraph 28 above, also proceeded on the tacit assumption that, so far as jurisdiction is concerned, the reach of the Human Rights Act is the same as the reach of the Convention.

72. In *R (on the application of Abbasi and another) v Secretary of State for Foreign and Commonwealth Affairs and another* [2002] EWCA Civ 1598 this Court proceeded to consider whether the events in respect of which relief was claimed fell within the jurisdiction of the United Kingdom under Article 1 without considering the separate question of whether duties arose in respect of those events under the Human Rights Act. This question was, however, addressed by Richards J at first instance [2002] EWHC 651. He observed at paragraph 31:

> "In any event, the direct concern in this case is not the territorial scope of the European Convention, but rights and duties arising under the Human Rights Act 1998 through which alone the European Convention has an effect in domestic law. As to that, I accept the submissions advanced by Mr Sales that the 1998 Act extends, with limited exceptions, only to the territory of the United Kingdom. The usual presumption as to the territorial scope of an Act of Parliament applies. It is reinforced by the specific extension of the territorial scope of the Act to Northern Ireland by Section 22(6) and by the further limited extension of the Act in Section 22(7)."

The question for us is whether this conclusion is correct.

73. Mr Eicke relied on a passage in the speech of Lord Nicholls of Birkenhead in *In re McKerr* [2004] 1UKHL 12; [2004] 1WLR 807 at paragraph 25, where he emphasised that it was important:

> "…to keep clearly in mind the distinction between (1) rights arising under the Convention and (2) rights created by the 1998 Act by reference to the Convention. These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the 1998 Act and they continue to exist. They are not as such part of this country's law because the Convention does not form part of this country's law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the 1998 Act. The latter came into existence for the first time on 2 October 2000. They are part of this country's law. The extent of these rights, created as they were by the 1998 Act, depends upon the proper interpretation of that Act. It by no means follows that the continuing existence of a right arising under the Convention in respect of an act occurring before the 1998 Act came into force will be mirrored by a corresponding right created by the 1998 Act. Whether it finds reflection in this way in the 1998 Act depends upon the proper interpretation of the 1998 Act "

74. Lord Hoffman made some similar observations at paragraph 63:

> "It should no longer be necessary to cite authority for the proposition that the Convention, as an international treaty, is not part of English domestic law. *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696 and *R v Lyons* [2003] 1 AC 976 are two instances of its affirmation in your Lordships' House. That proposition has been in no way altered or amended by the 1998 Act. Although people sometimes speak of the Convention having been incorporated into domestic law,

> that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg."

75. These observations were made in the context of the question of whether the Human Rights Act had retrospective effect. They are, however, applicable to the issue before us. We have to look at the Act in order to decide its ambit of application. In so doing it is necessary to bear in mind that the object of the Act was to give effect to obligations of the United Kingdom under the Convention. The White Paper CM3782 introducing the Human Rights Bill stated:

> "**Bringing Rights Home**
>
> 1.18 We therefore believe that the time has come to enable people to enforce their Convention rights against the State in the British courts, rather than having to incur the delays and expense which are involved in taking a case to the European Human Rights Commission and Court in Strasbourg and which may altogether deter some people from pursuing their rights. Enabling courts in the United Kingdom to rule on the application of the Convention will also help to influence the development of case law on the Convention by the European Court of Human Rights on the basis of familiarity with our laws and customs and of sensitivity to practices and procedures in the United Kingdom. Our courts' decisions will provide the European Court with a useful source of information and reasoning for its own decisions."

76. It is true that other parts of this White Paper focussed on the effect that the Act was going to have on British subjects, but they were those who seemed likely to be primarily affected by it and no one contemplated that its benefits would be restricted to British nationals. The passage that we have quoted applies with equal force to claims brought against the United Kingdom for breaches of Convention rights outside the territory of the United Kingdom, albeit that under the Convention jurisprudence such claims can only arise in exceptional circumstances.

77. Furthermore section 3(1) of the Act provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights"

Section 6 of the Act provides that it is unlawful for a public authority to act in a way that is incompatible with a Convention right.

The Convention Rights are defined in section 1 as follows:

> "(1) In this Act 'the Convention rights' means the rights and fundamental freedoms set out in-
>
> (a) Articles 2 to 12 and 14 of the Convention,
>
> (b) Articles 1 to 3 of the First Protocol, and
>
> (c) Articles 1 and 2 of the Sixth Protocol.
>
> As read with Articles 16 to 18 of the Convention."

78. The Strasbourg Court, when considering whether a Convention right has been infringed, will consider whether the events in issue have fallen within the jurisdiction of the Contracting State, within the meaning of Article 1. It is not realistic to divorce the right from the circumstances in which the right is enjoyed. It seems to us that we are under a duty, if possible, to interpret the Human Rights Act in a way that is compatible with the Convention rights, as those rights have been identified by the Strasbourg Court. This duty precludes the application of any presumption that the Human Rights Act applies within the territorial jurisdiction of the United Kingdom, rather than the somewhat wider jurisdiction of the United Kingdom that the Strasbourg Court has held to govern the duties of the United Kingdom under the Convention.

79. For these reasons we have reached the conclusion that the Human Rights Act requires public authorities of the United Kingdom to secure those Convention rights defined in Section 1 within the jurisdiction of the United Kingdom as that jurisdiction has been identified by the Strasbourg Court. It follows that the Human Rights Act was capable of applying to the actions of the diplomatic and consular officials in Melbourne. It remains to consider whether those actions infringed the Convention and the Act.

Did the actions of the diplomatic and consular officials in Melbourne infringe the Convention and the Human Rights Act?

80. We are here concerned, not with the treatment of the applicants by diplomatic and consular officials that has directly infringed their Convention rights, but with a claim that the consular officials were required by the Convention to permit the applicants to remain within the protection of the consulate because requiring them to leave would expose them to the risk that the Australian authorities would treat them in a manner inconsistent with the rights recognised by the Convention.

81. In *WM v Denmark* the Danish Ambassador placed the applicant in the hands of the DDR police. In the present case, by refusing to permit the applicants to remain on the

consular premises, Mr Court and Mr Mudie effectively delivered the applicants into the hands of the Australian police. We do not consider that there is a material distinction to be drawn between the facts of the two cases as to the conduct which was alleged to have infringed the Convention. In each case the issue was whether the Convention required the diplomatic officials to continue to afford the applicants refuge in the diplomatic premises.

82. In *WM v Denmark* the principle that the Commission applied to the issue of liability was that:

> "…an act or omission of a Party to the Convention may exceptionally engage the responsibility of that State for acts of a State not party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention."

83. The Commission went on to find that what happened to the applicant at the hands of the DDR authorities could not in the circumstances be considered to be so exceptional as to engage the responsibility of Denmark. The language used by the Commission was that of *Soering*. Lord Kingsland relied on *Soering*. Does the principle in *Soering* apply to the act of expelling fugitives from consular premises and, if so, what is the extent of the risk that the fugitives must be facing before the principle comes into play?

84. In a case such as *Soering* the Contracting State commits no breach of international law by permitting an individual to remain within its territorial jurisdiction rather than removing him to another State. The same is not necessarily true where a State permits an individual to remain within the shelter of consular premises rather than requiring him to leave. It does not seem to us that the Convention can require States to give refuge to fugitives within consular premises if to do so would violate international law. So to hold would be in fundamental conflict with the importance that the Grand Chamber attached in *Bankovic* to principles of international law. Furthermore, there must be an implication that obligations under a Convention are to be interpreted, insofar as possible, in a manner that accords with international law. What has public international law to say about the right to afford 'diplomatic asylum'?

85. *Oppenheim* deals with this topic at paragraph 495, from which we propose to quote at a little length:

> "**s495 So-called diplomatic asylum**
>
> The practice of granting diplomatic asylum in exceptional circumstances is of long-standing, but it is a matter of dispute to what extent it forms part of general international law.
>
> There would seem to be no general obligation on the part of the receiving state to grant an ambassador the right of affording asylum to a refugee, whether criminal or other, not belonging to

> this mission. Of course, an ambassador need not deny entrance to refugees seeking safety in the embassy. But as the International Court of Justice noted in the *Asylum* case …. in the absence of an established legal basis, such as is afforded by treaty or established custom, a refugee must be surrendered to the territorial authorities at their request and if surrender is refused, coercive measures may be taken to induce it. Bearing in mind the inviolability of embassy premises, the permissible limits of such measures are not clear. The embassy may be surrounded by soldiers, and ingress and egress prevented; but the legitimacy of forcing an entry in order forcibly to remove the refugee is doubtful, and measures involving an attack on the envoy's person would clearly be unlawful. Coercive measures are in any case justifiable only in an urgent case, and after the envoy has in vain been requested to surrender the refugee.
>
> It is sometimes suggested that there is, exceptionally, a right to grant asylum on grounds of urgent and compelling reasons of humanity, usually involving the refugee's life being in imminent jeopardy from arbitrary action. The practice of states has afforded instances of the grant of asylum in such circumstances. The grant of asylum 'against the violent and disorderly action of irresponsible sections of the population' is a legal right which, on grounds of humanity, may be exercised irrespective of treaty; the territorial authorities are bound to grant full protection to a diplomatic mission providing shelter for refugees in such circumstances. There is some uncertainty how far compelling reasons of humanity may justify the grant of asylum in other cases. The International Court's judgment in the *Asylum* case suggests that the grant of asylum may be justified where 'in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims'. However, the Court went on to emphasise that 'the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals'. Thus it would seem not to be enough to show that a refugee is to be tried for a 'political' offence: it must be shown that justice would be subordinated to political dictation and the usual judicial guarantees disregarded. Even where permissible, asylum is only a temporary expedient and may only be afforded so long as the reasons justifying it continue to subsist."

86. The propositions in *Oppenheim* are based, to a large extent, on what seem to be the only juridical pronouncements on the topic to carry authority. On 20 November 1990 the International Court of Justice gave judgment in a dispute between Colombia and Peru that the two States had referred to the Court - *Asylum Case (Columbia v Peru)* (1950) ICJ Rep. 206. Colombia had given refuge in its embassy in Peru to the leader of a military rebellion, which had been almost instantaneously suppressed. At issue

was the effect of two Conventions to which both Colombia and Peru were party which made provision in relation to the grant of asylum to political refugees but not to criminals. Colombia's arguments included the contention that by customary international law it was open to Columbia unilaterally to determine that the fugitive fell to be classified as a political refugee. Much of the judgment related to the effects of the two Conventions, but the Court made some general comments in relation to 'diplomatic asylum':

> "The arguments submitted in this respect reveal a confusion between territorial asylum (extradition), on the one hand, and diplomatic asylum, on the other.
>
> In the case of extradition, the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State.
>
> In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of the State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case."

87. In 1984 six fugitives who were subject to detention orders issued by the South African government sought refuge in the British Consulate in Durban. They became known as the Durban six. The British government decided that it would not compel them to leave but that it would not intervene on their behalf with the South African authorities. They were told that they could not stay indefinitely and, eventually they left. Five of them were immediately arrested and charged with high treason, which carried the death penalty. We were referred to an article in Human Rights Quarterly 11 (1989) by Susanne Riveles, which included the following propositions:

> "There exists no universally accepted international agreement to assure a uniform response by states to grant refuge in a mission in an emergency. Most countries, with the exception of those in Latin America, deny outright the claim to diplomatic asylum because it encroaches upon the state's sovereignty.
>
> Some countries give limited recognition to the practice, allowing "temporary safe stay" on a case-by-case basis to persons under threat of life and limb. It should be recognised that a state has the permissible response of granting temporary sanctuary to individuals or groups in utter desperation who face repressive measures in their home countries. Moreover, this

> should be considered a basic human right, to be invoked by those fleeing from the persecution for reasons of race, religion, or nationality, or for holding a political opinion in an emergency situation involving the threat of violence."

Discussion

88. We have concluded that, if the *Soering* approach is to be applied to diplomatic asylum, the duty to provide refuge can only arise under the Convention where this is compatible with public international law. Where a fugitive is facing the risk of death or injury as the result of lawless disorder, no breach of international law will be occasioned by affording him refuge. Where, however, the receiving State requests that the fugitive be handed over the situation is very different. The basic principle is that the authorities of the receiving State can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from their territorial jurisdiction; see Article 55 of the 1963 Vienna Convention. Where such a request is made the Convention cannot normally require the diplomatic authorities of the sending State to permit the fugitive to remain within the diplomatic premises in defiance of the receiving State. Should it be clear, however, that the receiving State intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending state to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment. In such circumstances the Convention may well impose a duty on a Contracting State to afford diplomatic asylum.

89. It may be that there is a lesser level of threatened harm that will justify the assertion of an entitlement under international law to grant diplomatic asylum. This is an area where the law is ill-defined. So far as Australian law was concerned, the applicants had escaped from lawful detention under the provisions of the Migration Act 1958. On the face of it international law entitled the Australian authorities to demand their return. We do not consider that the United Kingdom officials could be required by the Convention and the Human Rights Act to decline to hand over the applicants unless this was clearly necessary in order to protect them from the immediate likelihood of experiencing serious injury.

90. A substantial body of evidence was put before us to demonstrate that the details of conditions at Woomera were in the public domain. In March 2001 a Report was published of an Own Motion Investigation by the Commonwealth Ombudsman into Immigration Detention Centres pursuant to section 35A of the Ombudsman Act 1976. This recorded:

> "DIMA (Department of Immigration and Multicultural Affairs) is aware of the consequences of long-term detention and has incorporated into its detention standards requirements for ACM staff to be trained to recognise and deal with symptoms of depression and psychiatric disorders and to minimise the

> potential for detainees to inflict self-harm. However, it would appear to be a growing source of problems and unrest within the detention environment."

It went on to comment that Woomera was a stark place, lacking warmth or a sense of community. Later the Report observed:

> "… DIMA has a duty of care to ensure that detainees are kept and maintained in a safe and secure environment. The report of the Parliamentary Joint Standing Committee on Migration titled *Immigration Detention Centres Inspection Report* supported this view when it stated that "… the Australian Government and ACM, as service provider, have a duty of care to detainees and all actions relating to the detention and care of detainees must be consistent with the relevant Commonwealth and State laws"."

Australian law does not, however, include a right to challenge a failure to secure the enjoyment of human rights. The domestic law has not incorporated the following relevant treaties to which Australia is a party: the United Nations Convention on the Rights of the Child; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the Convention Relative to the Status of Refugees and its amending Protocol.

91. The Ombudsman's Report was closely followed by a Report of Visits to Immigration Detention Facilities by the Human Rights Commissioner. This painted a gloomy view of the effects of long term detention, particularly on children. The special needs of children led the Commissioner to launch a National Inquiry into Children in Immigration Detention. Evidence given to this Inquiry was made public in the course of the period that followed, right up to the time of the events with which this appeal is concerned. On 6 February 2002 there was a media release in respect of a visit to Woomera by HREOC Officers as part of the Inquiry. They reported:

> "The official statistics provided to HREOC officers by ACM indicated the following incidents of self-harm occurred over a two week period:
>
> - Lip sewing: 5 children (one 14 year old sewed his lips twice)
> - Slashing: 3 children (the above child also slashed "freedom" into his forearm)
> - Ingestion of shampoo: 2 children
> - Attempted hanging: 1 child
> - Threats of self hurt: 13 children

> This is a significant proportion of the total child population of 236 at the Centre. It would indicate that, not unsurprisingly, children are responding to the atmosphere of despair in which they live. It is self-evident that manifestations such as these are likely to permanently mark the psychological outlook of these children. HREOC officers in discussion with ACM found no evidence of parents encouraging children to engage in acts of self harm.
>
> Interviews of HREOC officers with children produced many responses that indicated a propensity for self harm and suicidal thoughts.
>
> …
>
> … Woomera IRPC is now enveloped in a self-reinforcing miasma of despair and desperation, and there was a wide spread sense of despair due to the length of time in detention and the concomitant uncertainty over status. It is this uncertainty that asylum seekers have indicated is at the root cause of fire and property destruction in November and hunger strikes and incidents of self-harm in late January. This is not an appropriate environment for children.
>
> The Commission has written to Immigration Minister Mr Philip Ruddock bringing these breaches to his attention. The Commission now awaits the Minster's response as to how these breaches will be immediately rectified."

Other witnesses to the Inquiry gave accounts of the adverse effects on children of long term detention which fully corroborated this picture.

92. In February 2002 it was announced that the Australian Government had decided to accept a visit to Woomera by Justice Bhagwati, as envoy of the United Nations High Commissioner for Human Rights. The High Commissioner's Working Group on Arbitrary Detention was also invited to visit Australia.

93. It was in the context of the above publicised events that the applicants arrived at the Melbourne consulate with their written accounts of their own harsh experiences. There was considerable debate at the hearing as to whether the treatment experienced by the applicants, both before and after their escape, reached the degree of severity necessary to qualify as inhuman and degrading treatment contrary to Article 3. This is not an easy question, for the Strasbourg jurisprudence indicates that a high threshold has to be crossed before ill-treatment amounts to a violation of Article 3, and each case turns very much on its own circumstances. This is not, however, the critical question. The critical question is whether the perceived threat to the physical safety of the applicants when they sought refuge in the Melbourne Consulate was so immediate and severe that the officials could have refused to return them to the Australian authorities without violating their duties under international law.

94. We have concluded that the answer to this question is 'no'. In February 2002 Mr Nicholas Poynder, a barrister practising in Sydney with special experience in the field of immigration and human rights was instructed on behalf of the applicants' family. He stated that he was not in a position to give expert advice to the family on whether conditions in Woomera violated Article 7 of the International Covenant on Civil and Political rights, which is in similar terms to Article 3 of the Convention. This was because he did not have the necessary resources for the necessary research, collation and consideration of evidence as to whether conditions in Woomera met the threshold for inhuman and degrading treatment. It seems to us that Mr Court and Mr Mudie were in the same position. What would have been known to them, however, was that conditions in Woomera were undergoing public scrutiny of the nature that we have described above. That is not all. Earlier in our judgment we described some of the judicial proceedings in which the applicants' detention was under challenge. Proceedings were also being pursued in relation to their claim for asylum. At the time that they sought refuge in the Consulate a hearing was pending in the High Court of Australia, which had ruled that there was an arguable case for judicial review of the decision refusing them refugee status. Ultimately the applicants and their sisters were released from the detention centre. They have been reunited with their mother. They are attending school. Efforts have been made to ensure that the detention that Australian law requires should be as unobtrusive as possible.

95. All of these matters evidence the fact that Australia is a country which observes the rule of law and where diplomatic officials would not expect the authorities knowingly to impose or permit a regime where children were exposed to inhuman and degrading treatment. After the hearing we were referred by the applicants' counsel to three judgments delivered by the High Court of Australia on 6 August 2004: *Al-Kateb v Goodwin [2004] HCA 37*; *Minister for Immigration and Multicultural and Indigenous Affairs v Al-Khafaji [2004] HCA 38*; and *Behrooz v Minister for Immigration and Multicultural and Indigenous Affairs [2004] HCA 36*. It was submitted in writing that these cases were significant because they showed that indefinite detention of aliens was lawful under the Australian Constitution and that the existence of harsh or inhuman detention conditions was not a defence under Australian criminal law for those prosecuted for escaping from detention. As to the first point, we have already concluded that the threat of indefinite detention would not, of itself, suffice to justify under international law, or require under the Human Rights Convention, the grant of diplomatic asylum. As to the second point we found it particularly significant that the High Court in *Behrooz* emphasised that Australian criminal, civil and administrative law provided avenues of redress to aliens who alleged that they had suffered mistreatment while in detention – see Gleeson CJ at paras 9 and 21, Mc Hugh, Gummow and Heydon JJ at paras 94-53 and Callinan J at paras 219-220.

96. The applicants were not subject to the type and degree of threat that, under international law, would have justified granting them diplomatic asylum. To have given the applicants refuge from the demands of the Australian authorities for their return would have been an abuse of the privileged inviolability accorded to diplomatic premises. It would have infringed the obligations of the United Kingdom under public international law.

97. The facts of this appeal do not establish the first known case in which a Contracting State has, through the acts abroad of its diplomatic officers, been held to have infringed the Convention. No infringement of the Convention occurred and this appeal is, accordingly, dismissed.