Case Nos: C/2002/1599 and C/2002/0911

Neutral Citation Number [2002] EWCA Civ 1856

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Hon Mr Justice Harrison
And
IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16th December 2002

B e f o r e :

LORD PHILLIPS OF WORTH MATRAVERS, MR
LORD JUSTICE KAY
and
LORD JUSTICE DYSON

- -

AHSAN ULLAH
Appellant

- and -

SPECIAL ADJUDICATOR
Respondent

and between:

THI LIEN DO
Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

- -

Nicholas Blake, QC and Martin Soorjoo (instructed by **Thompson & Co** for the Appellant Ullah)
Monica Carss-Frisk, QC and Lisa Giovannetti (instructed by **The Treasury Solicitor** for the Respondent)
Manjit S. Gill, QC and Christa Fielden (instructed by **Sheikh & Co** for the Appellant Do)
Monica Carss-Frisk, QC and Miss Kassie Smith (instructed by **The Treasury Solicitor** for the Respondent)

- -

JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Lord Phillips, MR :

This is the judgment of the Court.

Introduction

1. There are before the court two conjoined appeals. Common to each is the following question. Does the Human Rights Act 1998 ('HRA'), together with Article 9 of the European Convention on Human Rights ('the Convention'), require this country to give a refuge to immigrants who are prevented from freely practising, and in particular from preaching or teaching, their religion in their own countries? This question reflects a wider issue. To what extent does the HRA inhibit the United Kingdom from expelling asylum seekers who fall short of demonstrating a well-founded fear of persecution?

2. Article 9 of the Convention provides:

> '**Freedom of Thought, Conscience and Religion**
>
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The Facts

Mr Ullah's Appeal

3. This is an appeal from a judgment of Harrison J. dated 16 July 2002 in which he refused Mr Ullah's application to quash the decision of an immigration adjudicator, promulgated on 17 September 2001. The adjudicator dismissed Mr Ullah's appeal against the Secretary of State's refusal to grant him asylum and rejected a claim that it would be contrary to the HRA to remove him to his home country, Pakistan. Permission to seek judicial review was granted by Mr Jack Beatson QC, sitting as a Deputy High Court Judge on 12 April 2002. Permission was, however, restricted to a single point – Mr Ullah's reliance on Article 9 of the Convention. Harrison J., in his turn, gave permission to appeal 'on the basis of the importance of some of the points involved in the case'.

4. Mr Ullah is a citizen of Pakistan. He is an active member of the Ahmadhiya faith. In particular, on 28 December 1998 he was appointed 'secretary of teaching' in order to spread the beliefs of the Ahmadhiya faith' and thereafter carried on what he has described as 'preaching duties' and 'preaching activities' in Pakistan.

5. On 15 January Mr Ulah arrived at Heathrow on a plane from Karachi. He entered the country on false documents that he had purchased in Karachi. He applied for asylum two days later. He claimed to have a well-founded fear of persecution as a result of persecution that he had suffered as a result of practising his faith. In particular, he alleged that he had been harassed, intimidated and, on two occasions attacked by members of a religious terrorist group called Khatme Nabuwait, in whose activities the local police were complicit. On one occasion he said that he had been beaten and left for dead. On the other occasion he said that his house was burnt down. Faced with further death threats he fled to England.

6. The Secretary of State found some aspects of Mr Ullah's account to be implausible. He did not accept that Mr Ullah had demonstrated that he had a well-founded fear of persecution under the terms of the 1951 United Nations Convention relating to the Status of Refugees ('the Refugee Convention'). He dismissed the claim for asylum. He further concluded that Mr Ullah had not demonstrated that he qualified for permission to remain in this country by reason of any of the Articles of the Convention.

7. Mr Ullah appealed against the Home Secretary's decision. With the assistance of Thompson & Co, solicitors, he filed detailed grounds of appeal. Most of these were in terms that applied to the position of all Ahmadis in Pakistan. They alleged that Ahmadis were subject to persistent and organised persecution and that the Government of Pakistan failed to provide protection to Ahmadis against religious extremists.

8. We set out in Annex A to our judgment the relevant findings of the adjudicator, Mrs Nichols, in relation to Mr Ullah's asylum application. We set out in Annex B her findings in relation to Mr Ullah's claim under the HRA. In summary, the adjudicator did not find credible much of Mr Ullah's evidence and concluded that he did not have a well-founded fear of persecution. So far as his claim under the Convention is concerned, the adjudicator found that Articles 9, 10 and 11 of the Convention were engaged. She found that Ahmadis were a religious minority and that if Mr Ullah returned to Pakistan he would not enjoy the same rights as the majority. He would nonetheless be able to practice his religion. The Articles invoked gave qualified rights. In refusing to permit Mr Ullah to remain in this country the Secretary of State was acting lawfully in pursuance of the legitimate aim of immigration control. The act of removing Mr Ullah to Pakistan was proportionate to any difficulties he might face on his return.

9. On the application to Harrison J. for judicial review, counsel for Mr Ullah submitted that the adjudicator had been wrong to find that, by reason of Article 9(2) of the Convention, immigration control was a legitimate aim which could justify interference with the Article 9 rights. Counsel for the Secretary of State challenged this assertion, but argued that the adjudicator had erred in finding that Article 9 was engaged at all. She submitted that, where

Article 9 was invoked as a bar to removal from the jurisdiction, it could only be engaged if the alleged violation was 'flagrant'. This it was not.

10. Harrison J. accepted the submissions made on behalf of the Secretary of State. He ruled that the alleged violation of Article 9 was not flagrant. He further ruled that immigration control fell within the legitimate aims that were recognised by Article 9(2).

Miss Do's Appeal

11. This is an appeal from the final determination of the Immigration Appeal Tribunal ('the Tribunal') dated 7 January 2002. The Tribunal had upheld the decision of an immigration adjudicator, promulgated on 5 September 2001. The adjudicator had upheld the refusal of the Secretary of State to grant Miss Do asylum. She also rejected a claim that it would be contrary to Articles 3 and 5 of the Convention to remove Miss Do to her home country, Vietnam. The Tribunal considered also whether Miss Do had a case under Article 9, and concluded that she did not. Permission to appeal to this Court was granted by Tuckey LJ, who remarked 'the Article 9 point may be of some importance'.

12. Miss Do is a citizen of Vietnam, where she was born in 1979. On 20 November 2000 she arrived in the United Kingdom clandestinely and without travel documents. On 13 December 2000 she claimed asylum. The basis of her claim was that she had a well-founded fear of persecution in Vietnam as a result of her religious beliefs as a Catholic. The Secretary of State rejected her claim to asylum. He remarked that when questioned she had showed ignorance of the basic beliefs of the Catholic Church. She had never been arrested, detained or charged by the police in Vietnam. The Secretary of State considered whether Miss Do qualified for protection under any of the Articles of the Convention and decided that she did not.

13. Miss Do supported her appeal to the adjudicator with an Appeal Statement, prepared with the assistance of Sheikh & Co, Solicitors. This included the following statements:

> "It is correct that recently the Vietnamese government has eased its control over church activities. There might be a certain freedom of religion in Vietnam in comparison with the past, but this is only the case for big cities. In the villages and in the countryside, Catholic Christians are still harassed by the Vietnamese authorities. For example in my village the Church never got permission from the local authorities to be refurbished. The local authorities also confiscated the building where we were teaching catechism. When I was teaching Catholicism I was harassed by the authorities and suffered discrimination. The police came to my house many times and took me to the police station. In June 2001 I was taken twice to the police station. The police told me to stop teaching Catholicism or I would be arrested. I carried on teaching as my faith was stronger and because I thought that they could not find out what I was doing. I did not feel safe anywhere in Vietnam and that

> is why I decided to leave the country. The communist government wants children to be raised and taught according to Communist beliefs. Teaching Catholicism is believed to be acting against the government. If I were to be returned to Vietnam I could not practice my religion freely and I could not teach Catholicism, as it is my wish. The Vietnamese authorities would eventually arrest me and put me in prison. This happened to a lot of Christians in Vietnam and is still happening.
>
> ….
>
> I suffered discrimination and threat to my life in my country of origin. If I was to be returned to Vietnam I could not practice my religion freely and I will not be allowed to teach Catholicism to the children, as it is my wish. Furthermore the Vietnamese authorities are suspicious towards people coming from abroad. I would be watched by the police even more closely. I fear for my safety and my freedom as I could be put into prison if I am required to return to Vietnam. I therefore request that I should be allowed to remain in the United Kingdom as a Refugee recognised under the convention."

14. We set out in Annex C the relevant findings of the adjudicator. In summary, the adjudicator accepted Miss Do's evidence that she had practised the Catholic religion in Vietnam. That evidence included the statement that Miss Do taught the Catholic religion to children. The Adjudicator found that, as a practising Catholic, Miss Do had suffered from discrimination and harassment, but that this fell short of persecution or violation of the human rights invoked by Miss Do. Miss Do could still practise her religion 'albeit under reduced circumstances'.

15. Before the Tribunal Miss Do was represented by counsel. The Tribunal recorded her counsel's submission that, because Miss Do's ability to teach children about the Catholic faith was curtailed, there was a substantial interference with her right to practice a religion of her choice. In short, but adequate, reasons the Tribunal expressed the view that the adjudicator had reached the correct decision for the reasons that she had given. In relation to Article 9 the Tribunal commented that the 'reduced circumstances' identified by the adjudicator appeared to relate to Miss Do's suggested difficulties in teaching young children. The Tribunal was not satisfied that these were sufficient to amount to a violation of Miss Do's Article 9 rights.

Issues and Submissions

16. Mr Gill QC, who appeared for Miss Do, argued briefly that the treatment that she had received in Vietnam was sufficient to cause her a well-founded fear of persecution. For reasons that will become apparent in due course, we are in no doubt that the adjudicator and the Tribunal were right to dismiss Miss Do's claim to asylum under the Refugee Convention. The important issue raised by her appeal relates to the application of Article 9

of the Human Rights Convention. On this issue, Mr Gill's submissions were in harmony with those of Mr Blake QC, who appeared for Mr Ullah.

'Territoriality'

17. Article 1 of the Convention requires the contracting states to secure to everyone *'within their jurisdiction'* the Convention rights and freedoms. Section 6 of the HRA provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The courts of this country have proceeded on the basis that the obligation imposed by section 6 is subject to the same limitation as that which results from the words that we have emphasised in Article 1 of the Convention. It applies only in relation to persons *within the jurisdiction* of the United Kingdom. So far as we are aware, this interpretation of section 6 has never been challenged, and certainly neither Mr Blake nor Mr Gill has challenged it in the present case. The issue that has been explored on this appeal is the manner in which the words 'within their jurisdiction' limit the obligations of the contracting parties to the Convention and of public authorities under the HRA.

18. Both Mr Ullah and Miss Do are within this jurisdiction. The act of removing either will, if it takes place, be an act of a public authority done to a person within the jurisdiction. If the consequence of this act will be that the person will be removed to a country where his or her Article 9 rights will not be respected, will this infringe the Convention and the HRA? To this question Mr Blake suggested a qualified answer. 'Yes', provided that the restriction on religious freedom is *severe*. Mr Gill was not prepared to accept such a qualification. His primary submission was that all that Miss Do had to demonstrate was that there was 'real risk' that, if she were removed to Vietnam, her Article 9(1) rights would be infringed.

19. For the Secretary of State Miss Carss-Frisk QC's primary submission was that removal of a person from this country pursuant to our immigration laws was not capable of engaging Article 9 of the Convention. Alternatively, she submitted that Article 9 would only be engaged, if removal would be likely to lead to a 'flagrant' breach of the individual's Article 9 rights.

20. The debate in relation to these contentions focused both on Strasbourg and domestic jurisprudence. Each Counsel submitted that, if the test were apprehension of 'flagrant' violation of Article 9, his client could readily satisfy that test. We propose first to consider the law before turning to the facts of the individual cases.

Strasbourg jurisprudence

21. The Convention was opened for signature in November 1950. Most signatories to that Convention also subscribed to the Refugee Convention. It is notable that Article 33(2) of the latter Convention permitted a state to remove someone convicted of a particularly serious crime, or constituting a danger to the community, notwithstanding that removal would be to a country where that person's life would be threatened. We do not believe that the signatories

to the Convention conceived that it would impact on their rights under international law to refuse entry to or to remove aliens from their territory.

22. Our belief receives support from the terms of the Convention itself. The right of immigration control is recognised by Article 5.1(f) which qualifies the right to liberty by permitting arrest or detention of a person 'to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. Nowhere else in the qualifications to those Convention rights which are not absolute is there any reference to the right of a state to control immigration. We do not believe that this was because this right would, or would arguably, be covered by express limitations, such as 'the interests of national security, public safety or the economic well being of the country', which justify derogation from Article 8 rights. We believe that it was because the contracting states had no intention of restricting their rights of immigration control. The Convention was not designed to impact on the rights of states to refuse entry to aliens or to remove them. The Convention was designed to govern the treatment of those living within the territorial jurisdiction of the contracting states.

23. The Convention is, however, a living instrument. If, initially, it was not designed to impact on the right to control immigration it has, to a degree, been interpreted by the Strasbourg Court in a manner which does have that effect. The task of identifying the principles which govern the application of the Convention in this context is not an easy one.

24. In cases involving expulsion or refusal of entry the Strasbourg Court has repeatedly emphasised the following principle:

> 'Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens'

See, for instance, *Bensaid v United Kingdom* (2001) 33 EHRR 10. As we consider the authorities, it will become apparent that the Court does not consider that the Convention will be engaged simply because the effect of the exercise of immigration control will be to remove an individual to a country where the Convention rights are not fully respected. Equally, where the Court finds that removal or refusal of entry engages the Convention, the Court will often treat the right to control immigration as one that outweighs, or trumps, the Convention right.

25. The first case to which we turn is, perhaps, the most significant, and we propose to analyse it at some length. In *Soering v United Kingdom* (1989) 11 EHRR 439 the applicant was a German national, detained in the United Kingdom pending extradition to the United States of America to face charges of murder in the Commonwealth of Virginia. If extradited and convicted he would face the death penalty and the stresses and rigours associated with prolonged detention on 'death row'. He alleged that this prospect was so severe that extradition would violate his Article 3 right not to be subjected to inhuman or degrading treatment or punishment. He further contended that he would not be entitled to legal

representation in Virginia and that this meant that extradition would violate his Article 6 rights to a fair trial.

26. The United Kingdom contended that the Convention was not engaged. An extraditing state could not be held responsible for acts which occurred outside its territorial jurisdiction. To surrender a fugitive criminal was not to 'subject' him to any treatment that he might thereafter receive in the receiving state.

27. The Court made the following statement of general principle:

> "86. Article 1 of the Convention, which provides that "the high Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I" sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting state is confined to 'securing' (*'reconnaìtre'* in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of states not Parties to it, nor does it purport to be a means of requiring the contracting States to impose convention standards on other states. Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safe guards of the Convention."

28. Despite this general principle, the Court held that, where extradition exposes an individual to a real risk of being subjected to inhuman or degrading treatment or punishment proscribed by Article 3, that Article will be violated. The reasoning of the Court appears in the following passages:

> "88. Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency. This absolute prohibition on torture and on inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.
>
> The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would

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

29. It is often said that the effect of the passages that we have quoted is to give to Article 3 'extra-territorial effect'. This phrase is not wholly apposite. The act which infringes Article 3 is the act of extradition which takes place within the jurisdiction in relation to an individual who is within the jurisdiction. But the act of removal does not itself constitute inhuman treatment. It is the foreseeable consequences of the act which the Court held engaged Article 3. It seems to us that this reasoning involved a significant extension of the ambit of the Convention. Had Mr Soering been extradited, tried and acquitted by the Virginia Court we do not find it easy to see how Article 3 would have been infringed. The principle applied by the Court appears to have been that it is a breach of the Convention to take action in relation to someone within the jurisdiction which carries with it the real risk that it will expose that person to infringement of his Article 3 rights outside the jurisdiction.

30. Such a principle is readily intelligible. What is less easy to see is why it should not be applied to any Convention right. Yet we think that Miss Carss-Frisk was plainly right to submit that the approach of the Court in *Soering* was exceptional. What is the basis of the exception and what are its parameters? In considering the application in *15 Foreign Students v United Kingdom* (1977) 9 DR 185 the Commission declined to extend the approach in *Soering* to a complaint that removal would deprive the applicants of the right to education under Article 2 of the First Protocol. The Commission held that the applicants' complaints could not be compared with complaints under Article 3 which 'concerns alleged violations of human rights of a particularly serious nature' – paragraph 6.

31. Some passages in *Soering* itself lend support to the thesis that the basis of the exception is the severity of the foreseeable consequences of extradition. Apart from the passages which we have already cited, we would draw attention to the manner in which the Court dealt with the application under Article 6:

> "113. The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.
>
> Accordingly, no issue arises under Article 6(3)(c) in this respect."

32. The possibility that expulsion to Iran might infringe Article 6 if this involved a *flagrant* risk of deprivation of a fair trial was recognised by the Commission in *Aspichi Dehwari v Netherlands* (2000) 29 EHRR CD 74 at paragraph 86, citing *Soering*. The 'flagrancy' test in *Soering* was also cited '*mutatis mutandis*' by the Court in *Drodz and Janousek v France and Spain* (1992) 14 EHRR 745 at paragraph 110. It held that Article 5 might be engaged by imprisoning an individual within the jurisdiction pursuant to conviction in a trial outside the jurisdiction 'if it emerges that the conviction is the result of a *flagrant* denial of justice'.

33. These decisions are, as we understand it, the basis of Miss Carss-Frisk's submission that, if Article 9 is engaged, this can only be on the basis that removal will involve a risk of a flagrant breach of Article 9 in the receiving state. Her primary submission is, however, that expulsion can only engage a Convention right where, as in the case of Article 3, the right is absolute.

34. Before leaving *Soering* we should draw attention to two passages in which the Court suggested that the importance of extradition fell to be weighed in the balance when deciding whether the treatment to be anticipated in the receiving state was sufficiently severe to engage Article 3. In paragraph 86 the Court endorsed the submission of the United Kingdom that the beneficial purpose of extradition in preventing fugitive offenders from

evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 in particular.

35. The Court reverted to this theme at paragraph 89:

> "What amounts to 'inhuman or degrading treatment or punishment' depends on all the circumstances of the case. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases."

36. In *Chahal v United Kingdom* (1996) 23 EHRR 413 the Court considered whether deportation of a Sikh separatist leader to India would violate Article 3. The United Kingdom argued that, if he remained in this country he would be a threat to national security, so that the Convention posed no bar to his deportation, even if he would be at risk of torture, inhuman or degrading treatment in India. The threat to national security fell to be balanced against the risk of ill-treatment. The Court rejected this argument, holding that the national interests of the state could not be invoked to override the interests of the individual where substantial grounds had been shown for believing that he would be subjected to ill-treatment if expelled.

37. The Court continued:

> "79. Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.
>
> The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds

> have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.
>
> Paragraph 88 of the Court's above-mentioned *Soering* judgment, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged."

38. We find it hard to reconcile this passage with paragraph 89 of the Court's judgment in *Soering*. It seems to us that the Court was resiling from that paragraph. Clayton and Tomlinson observe at 8.15 of their work on the Law of Human Rights that Article 3 provides protection 'only against the most serious ill-treatment'. If the risk of such treatment is to prevail absolutely over the right of a state to extradite a criminal pursuant to a treaty, or to deport an alien who is a threat to national security, then it seems to us that the ill-treatment in question must necessarily be serious. In *Tyrer v United Kingdom* (1978) 2 EHRR 1 the Court held that three strokes with a birch constituted degrading punishment for a 15 year old boy which violated Article 3, having regard to the particular circumstances in which it was administered. We find it hard to accept that the risk of such treatment could suffice to override the right of a state to deport an alien guilty of a serious crime. It seems to us that the Court had reason in *Soering* for concluding that the interest in an effective system of extradition was a relevant factor when considering the severity of ill-treatment in the receiving state that would preclude the extradition of a suspected criminal.

39. As we read *Soering* and *Chahal*, the underlying rationale for the application of the Convention to the act of expulsion is that it is an affront to fundamental humanitarian principles to remove an individual to a country where there is a real risk of serious ill-treatment, even though such ill-treatment may not satisfy the criteria of persecution under the Refugee Convention. Article 3 provides the test of such treatment. The issue then arises of whether this rationale extends to preventing removal of aliens where there is a real risk that the receiving country will treat them in a way that infringes other Articles, and in particular Article 9.

40. While in *Soering* the Court recognised that expulsion might engage Article 6, we know of no case where the Court has held that it has done so.

41. There is a line of Strasbourg authority that suggests that where an individual is removed, or, having landed, is denied entry, with the specific motive of preventing the enjoyment of a Convention right such as, for instance, a right protected by Article 9 or 10, the right in question will be engaged – see the cases cited in *R (Farrakhan) v Home Secretary* [2002] 3 WLR 481 and the discussion of these at paragraphs 52 to 56. That situation has, however, no relevance in the present context.

42. Article 8 has been quite often invoked in support of a submission that an immigration restriction infringes the Convention. We believe, however, that it has only successfully been invoked where removal or refusal of entry has impacted on the enjoyment of family life of those already established within the jurisdiction. The Strasbourg cases in this field were reviewed by the Master of the Rolls in *R (Mahmoud) v Home Secretary* [2001] 1 WLR 840 at paragraphs 43 to 55.

43. In the leading case of *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471 applicants living within this jurisdiction complained that their Article 8 rights were infringed because their husbands were not permitted entry in order to join them. The United Kingdom argued that neither Article 8, nor any other Article of the Convention applied to immigration control. In rejecting this argument the Court remarked that the applicants were not the husbands but the wives and that they were not complaining of being refused leave to enter or remain in the United Kingdom, but as persons lawfully settled in the country of being deprived or threatened with deprivation of the company of their spouses.

44. In *Abdulaziz,* as in all similar Article 8 cases, the Court has been astute to recognise the right under international law of a state to control immigration into its territory. This right has been weighed against the degree of interference with the enjoyment of family life caused by the immigration restriction often , as we see it, not because this served a legitimate aim under Article 8(2) but because it acted as a free-standing restriction on the Article 8 right.

45. A recent case in which Article 8 was invoked as a bar to expulsion was *Bensaid v United Kingdom* (2001) 33 EHRR 205. The applicant was a schizophrenic, faced, as an illegal immigrant, with removal to Algeria. He claimed that the proposed move would deprive him of essential medical treatment and sever ties that he had developed in England that were essential to his well-being. He claimed that his Article 3 and Article 8 rights would be infringed and his complaint focused, in part, on the treatment that he would receive, or fail to receive, in Algeria. The Court held that his case under Article 3 was not made out. It went on to deal with his Article 8 claim:

> "46. Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity.

> 47. Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender, identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.
>
> 48. Turning to the present case, the Court recalls that it has found above that the risk of damage to the applicant's health from return to his country of origin as based on largely hypothetical factors and that it was not substantiated that he would suffer inhuman and degrading treatment. Nor in the circumstances has it been established that his moral integrity would be substantially affected to a degree falling within the scope of Article 8 of the convention. Even assuming that the dislocation caused to the applicant by removal from the United Kingdom where he has lived for the last eleven years was to be considered by itself as affecting his private life, in the context of the relationships and support framework which he enjoyed there, the Court considers that such interference may be regarded as complying with the requirements of the second paragraph of Article 8, namely as a measure "in accordance with the law", pursuing the aims of the protection of the economic well-being of the country and the prevention of disorder and crime, as well as being "necessary in a democratic society" for those aims."

46. Part of the reasoning of the Court suggests that the treatment that a deportee is at risk of experiencing in the receiving state might so severely interfere with his Article 8 rights as to render his deportation contrary to the Convention. The more significant Article 8 factor was, however, the disruption of private life within this country. There is a difference in principle between the situation where Article 8 rights are engaged in whole or in part because of the effect of removal in disrupting an individual's established enjoyment of those rights within this jurisdiction and the situation where Article 8 rights are alleged to be engaged solely on the ground of the treatment that the individual is likely to be subjected to in the receiving state. In *Bensaid* the Court considered that the right to control immigration constituted a valid ground under Article 8(2) for derogating from the Article 8 rights of the applicant in that case.

47. We shall now set out our conclusions in relation to the Strasbourg jurisprudence that deals with the apprehended treatment of a deportee in the receiving state. The application of Article 3 in expulsion cases is an extension of the scope of the Convention and one that is at odds with the principle of territoriality expressed in Article 1. That extension has occurred

because the Convention is a living instrument. The extension no doubt reflects the fact that it would affront the humanitarian principles that underlie the Convention and the Refugee Convention for a state to remove an individual to a country where he or she is foreseeably at real risk of being seriously ill-treated. To date, with the possible exception of *Bensaid*, the application of this extension has been restricted to Article 3 cases. To apply the principle to other Articles where the apprehended treatment would fall short of that covered by Article 3 would be likely to constitute a further extension. While the Strasbourg Court has contemplated the possibility of such a step, it has not yet taken it. The obligations in sections 3 and 6 of the HRA do not require this court to take that further step. We turn now to consider the approach that has been taken by the English courts.

The domestic jurisprudence

48. The possibility that an immigration decision may engage the Convention is recognised by section 65 and 77(3) of the Immigration and Asylum Act 1999. The latter sub-section provides:

> "In considering-
>
> (a) any ground mentioned in section 69, or
>
> (b) any question relating to the appellant's rights under Article 3 of the Human Rights Convention,
>
> the appellate authority may take into account any evidence which it considers to be relevant to the appeal (including evidence about matters arising after the date on which the decision appealed against was taken)."

This demonstrates that Parliament has accepted that immigration decisions can engage Article 3 of the Convention. It also demonstrates that Parliament has not accepted that immigration decisions can engage other articles of the Convention. We do not consider that it demonstrates that Parliament has accepted that immigration decisions *cannot* engage other articles of the Convention - see the discussion in *S & K* considered in paragraph 57 below.

49. *Secretary of State v Z,* [2002] EWCA 952 was an appeal from a decision of the Immigration Appeal Tribunal which had ruled unlawful the removal of the respondent to Zimbabwe. It was common ground that the decision of the Tribunal in the case of Z could not stand. The appeal in Z was heard with two others that raised similar issues. Each involved an application by a man who claimed to be a homosexual. Apart from claims to asylum under the Refugee Convention, each claimed that removal to Zimbabwe would violate both Article 3 and Article 8 of the Convention. This was because in Zimbabwe 'living the sort of sexual life which he would wish to live has been subjected to various social and statutory inhibitions'. Schiemann LJ with whose judgment the other two members of the court agreed, did not have to do more than consider whether it was arguable that Article 3 or Article 8 was engaged. So far as Article 3 was concerned, he held:

> "Circumstances can undoubtedly exist in which the treatment which awaits a claimant in a destination state is of a severity which would cause a State to be in breach of a claimant's Article 3 rights if it expelled him to that destination state. I would not rule out the possibility that amongst those circumstances might be treatment which was aimed at a particular sexual group. However, I do not consider that the mere existence of a law in the destination State prohibiting particular types of sexual conduct in private amongst adults has the automatic result that an expelling State which wishes to expel a person who wishes to indulge in that type of sexual conduct is breaching his rights under Article 3."

50. So far as Article 8 is concerned, Schiemann LJ concluded that the question was fact specific and should not be decided in the abstract. In the case of both Z and A the matter was remitted to the Tribunal. Schiemann LJ clearly considered that it was possible that Article 8 was engaged by the decision to remove each of them, but we do not consider that his judgment is conclusive of this question.

51. In *R (Holub and another) v Secretary of State for the Home Department* [2001] 1 WLR 1369 the Court of Appeal had to consider a claim that the removal of a schoolgirl to Poland would interfere with her right to education under Article 2 of the First Protocol to the Convention. In giving the judgment of the Court, Tuckey LJ made this observation:

> "We are not bound to follow the decisions of the European Court of Human Rights but simply to take them into account. Nevertheless the jurisprudence of the court does point clearly to the fact that rights which are not absolute, such as the right to education, are not engaged where a state is exercising legitimate immigration control. Accordingly we think Mr Pleming's submissions on this issue are right. A child's right to education whilst it is in the United Kingdom does not carry with it the right to stay here. The Secretary of State has obviously to take account of any educational difficulties which it is alleged the child will suffer if returned to the country of origin as part of the compassionate grounds for granting exceptional leave to remain, but is not obliged to take a view as to whether the child's Article 2 right will be infringed there. However, in the spirit of restraint to which we have referred, we do not think it is necessary to decide this point authoritatively in this case, in view of our decision on the other issues to which we now turn."

He went on to consider whether Article 2 was infringed and held that it was not.

52. In *R (Ahmadi) v Secretary of State for the Home Department* [2002] EWHC 1897 Scott Baker J. had to consider the issue of whether removal to Germany of a family of refugees from Afghanistan was contrary to the Convention. Germany was the country responsible for entertaining their application for asylum under the Dublin Convention. They

claimed, however, that removal to Germany would infringe Articles 3, 8 and 14 of the Convention. The evidence relied upon in the case of Mrs Ahmadi sought to demonstrate that the contrast between the family's living conditions in this country and in Germany would damage her fragile mental health and, thus, infringe her Article 8 rights. Reliance was placed on, among other matters, evidence that, in the words of her consultant psychiatrist:

> "She has been allowed to develop a social network that has helped to support her" … "she has now been in the UK long enough to develop a positive and supportive social network" … "I do believe that if returned she will deteriorate markedly if only because of the loss of her social network."

53. No issue was raised as to whether, in principle, Article 8 could be engaged. The issue was simply as to whether, on the facts, the claim under the Convention was 'manifestly unfounded'. The Judge decided that in the case of Mrs Ahmadi it was not - there was a case to go before the adjudicator.

54. So far as the children were concerned, greater emphasis appears to have been placed on the effect on them of the conditions in Germany, and the Judge expressly held that this was material. He held that, in considering the Article 8 claim, it was necessary to 'look at this family as a whole' and ruled that the children also had an arguable case under Article 8.

55. It remains to consider three starred appeals to the Tribunal. The first, *Secretary of State v Kacaj,* (date notified – 19 July 2001), was reversed by the Court of Appeal on the facts, but without comment on the Tribunal's analysis of the law. The applicant claimed asylum under the Refugee Convention and the right to remain on the ground that return to her native country of Albania would infringe Articles 3, 4 and 8 of the Convention. The Secretary of State contended that only Article 3 was capable of being engaged by an immigration decision, relying in part on the observation of this Court in *Holub* that we have quoted above. In the judgment of the Tribunal, Collins J. analysed the position as follows:

> "25. With great respect to the Court of Appeal, we are not persuaded that the rights are not engaged in immigration cases. That in our view is contrary to *Soering*. The true analysis is that, although the rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate. There may be exceptions, as the reference in *Soering* to flagrant breaches of Article 6 indicate. This is because the court has recognised that a country is entitled, "as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens". (See *Hilal v United Kingdom* E.Ct.HR 6 March 2001 at Paragraph 59). In *Salazar v Sweden* (E.Comm HR 7 March 1996) the Commission observed:
>
> > 'In the field of immigration Contracting States enjoy a wide margin of appreciation in determining the steps to be taken

> to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals'.
>
> Among other cases, it cites *Abdulaziz v United Kingdom* (1985) 7 E.H.R.R. 471, which concerned an alleged breach of Article 8 in the refusal to permit the applicant to join his family in the United Kingdom. The court decided that Article 8 could apply where immigration control was being enforced but that in the circumstances of that case there was no breach.
>
> 26. We therefore see no reason to exclude the possible application of any relevant Article (save, perhaps Article 2 if the reasoning in *Dehwari* is to be followed) in deportation cases, but it will be virtually impossible for an applicant to establish that control on immigration was disproportionate to any breach. In particular, if Article 3 is not established, it is difficult to see how Article 8 could be if, as in this instant case, the alleged breach will occur in the receiving State when the applicant is removed. In the context of this case, the adjudicator was in error in concluding that Article 4 could not be relied on because it did not, as he put it, have extra-territorial effect. That definition is misleading since there is no question of extra-territorial effect in the true sense of that word since the breach, if any, will have occurred within the jurisdiction by the decision to remove which will have the effect of exposing the individual to whatever violation of his human rights is in issue. We have used the word as a convenient label for the argument, but, for the reasons given, we reject the argument."

56. Shortly after this decision, the appeal in *Devaseelan v The Secretary of State for the Home Department* [2002] UKIAT 00702 (date notified – 13 March 2002) was heard by a Tribunal presided over by Mr Ockleton. The appellant, a Tamil, contended that removal to Sri Lanka would infringe his rights under Articles 3, 5, 6 and 8 of the Convention. The Tribunal ruled out any danger of infringement of Article 3 and 8 on the facts. So far as the alleged engagement of Articles 5 and 6 were concerned, the Tribunal said this:

> "It is clear that the Court does not attempt to impose the duties of the convention on States that are not party to it. It is also clear that the fact that a person may be treated in a manner that would, in a signatory State, be a breach of the convention does not of itself render his expulsion to another country unlawful, unless *either* the breach will be of Article 3, *or* the consequences of return will be so extreme a breach of another Article that the returning State, as one of its obligations under the convention, is obliged to have regard to them. Following the jurisprudence on Articles 5 and 6, this consequence will only arise if the situation in the receiving country is that there will be a flagrant denial or gross violation of the rights secured by the convention. For this reason we have not needed to

> consider in this determination the precise implications of Article 5 and 6 within signatory States.
>
> The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case - where the right will be completely denied or nullified in the destination country - that it can be said that removal will breach the treaty obligations of the signatory State however those obligations might be interpreted or whatever might be said by or on behalf of the destination State."

57. In *Secretary of State for the Home Department and S & K* [2002] UKIAT 05613 (Date notified 3 December 2002) the Tribunal presided over by Collins J. considered, among other issues, the effect of the HRA on the proposed removal to Croatia of a number of ethnic Serbs. The Tribunal made the following comments in relation to section 77 of the Immigration and Asylum Act 1999:

> "Section 6 of the Human Rights Act 1998 requires the appellate authority as a public authority (see s.6(3)(a)) to act in a way which is compatible with a Convention right. This obligation does not apply if 'as a result of one or more provisions of primary legislation, the authority could not have acted differently' s.6(2)(a). Section 3 of the 1998 Act requires us to read and give effect to legislation so far as possible in a way which is compatible with the Convention rights. To make a determination which upholds a decision to return in breach of human rights could, subject to the impact of primary legislation, breach section 6. It is important to note the language of and relationship between s.77(3) and (4). In s.77(3) a distinction is drawn between a 'ground mentioned in s.69' and a question relating to rights under Article 3. S.77(4) refers to consideration of 'any other ground' not to consideration of other questions arising. The differences in wording must be taken to have been deliberate. We are well aware that the Home Office view was (and the argument has been raised by Mr. Wilken in his skeleton but not developed because of our decision in *Kacaj*) that only Article 3 could be relied on in removal cases. It is therefore not surprising that Parliament should have wanted to leave the matter open, particularly in the light of indications in *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 that Article 6 certainly might be relied on in such cases. Parliament no doubt recognised the absurdities and contradictions of its 'one-stop' policy which would arise otherwise and it is incidentally to be noted that the matter is put beyond doubt in the 2002 Act which has just been passed.
>
> In our judgment s.77(4) does not in appeals concerned with potential removals from the United Kingdom prevent consideration of any question relating to an appellant's rights under any Article of the Human Rights Convention as at the date of hearing."

58. The two decisions of the Court of Appeal that we have cited are inconclusive on the question of whether an expulsion decision can engage Articles other than Article 3 on the ground of the treatment to be anticipated in the receiving state. In *Ahmadi* no issue was raised as to whether on the facts, which bore similarities to those in *Bensaid*, Article 8 was capable of being engaged. The decisions of the Tribunal accept that other Articles can be engaged in principle, although, in *Devaseelan*, only where a flagrant violation is anticipated. In *Kacaj* Collins J. considered that the right to control immigration would almost inevitably outweigh any interference with a Convention right other than one arising under Article 3. These decisions are not binding on this Court. There is no domestic authority which requires us to hold that where an alien is removed to a country where his right to practice his religion is inhibited, Article 9 will, or can, be engaged.

Article 9

59. Both Mr Blake and Mr Gill urged the importance of Article 9 rights. They submitted that they were 'fundamental' or 'core' rights under the Convention. In support of this submission they referred us to the following statement of principle by the Court in *Kokkinakis v Greece* (1993) 17 EHRR 397:

> "31. As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.
>
> While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions.
>
> According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change [one's] religion or belief', enshrined in Article 9, would be likely to remain a dead letter."

60. Counsel emphasised that Article 9 rights are, to a degree, absolute. It is only the freedom to manifest one's religion or beliefs that can, in pursuance of the prescribed aims, be limited. They referred us to page 109 of Professor Hathaway's work on the Law of Refugee Status. There the author identifies 'basic and inalienable rights' and comments: 'the failure to ensure

these rights in any circumstances is…appropriately considered to be tantamount to persecution'. The rights identified include 'freedom of thought, conscience and religion'.

61. We recognise that ill-treatment of a member of a religious minority is capable of amounting to persecution under the Refugee Convention or to infringement of Article 3 rights – see, for instance, *Iftikhar Ahmed v Secretary of State for the Home Department* [2000] INLR 1. Mr Ullah's contention that his case fell into this category did not succeed and is not the subject of this appeal. We have yet to explain why Miss Do's claim under the Refugee Convention is not made out. What we are currently considering is, in effect, a submission that the HRA and the Convention require this country to grant asylum to anyone who can demonstrate that his freedom to practice his religion is not respected in his home country, though Mr Blake adds the proviso that the interference with that freedom must be 'severe'.

62. Mr Blake accepted that the Strasbourg Court has not gone this far. He submitted, however, that this Court should take the lead in recognising that removal in the interests of immigration control can engage Article 9. In our judgment there are compelling reasons why this Court should not do so. The Refugee Convention and Article 3 of the Convention already cater for the more severe categories of ill-treatment on the ground of religion. The extension of grounds for asylum that Mr Blake and Mr Gill seek to establish would open the door to claims to enter this country by a potentially very large new category of asylum seeker. It is not for the Court to take such a step. It is for the executive, or for Parliament, to decide whether to offer refuge in this country to persons who are not in a position to claim this under the Refugee Convention, or the Human Rights Convention as currently applied by the Strasbourg Court. There may be strong humanitarian grounds for offering refuge in this country to individuals whose human rights are not respected in their own country, and it is open to the Secretary of State to grant exceptional leave to remain where he concludes that the facts justify this course. There are, however, practical and political considerations which weigh against any general extension of the grounds upon which refuge may be sought in this country. It is not for the courts to make that extension.

63. For these reasons we hold that a removal decision to a country that does not respect Article 9 rights will not infringe the HRA where the nature of the interference with the right to practice religion that is anticipated in the receiving state falls short of Article 3 ill-treatment. It may be that this does not differ greatly, in effect, from holding that interference with the right to practice religion in such circumstances will not result in the engagement of the Convention unless the interference is 'flagrant'.

Other Articles

64. This appeal is concerned with Article 9. Our reasoning has, however, wider implications. Where the Convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage Article 3, the English court is not required to recognise that any other Article of the Convention is, or may be, engaged. Where such treatment falls outside Article 3, there may be cases which justify the grant of exceptional

leave to remain on humanitarian grounds. The decision of the Secretary of State in such cases will be subject to the ordinary principles of judicial review but not to the constraints of the Convention.

65. Our conclusion renders it unnecessary to consider further the facts of Mr Ullah's case, for it has already been determined that these do not engage Article 3. We would simply observe that most of the matters urged by Mr Blake in relation to the facts applied to all Ahmadis in Pakistan. Mr Ullah's special position as a preacher added little to his case in the light of the adjudicator's finding that his preaching 'did not result in any serious problems for him'. In Miss Do's case, her claim under the Refugee Convention as well as her claim under Article 3 remain to be considered, in addition to her claim under Article 9. We turn to the facts of her case.

Miss Do's appeal

66. Miss Do's more extreme allegations of harassment and arrest by the police were not accepted. Before the Tribunal it was submitted on her behalf that the adjudicator's finding that Miss Do could only practice her religion 'under reduced circumstances' was enough to make good her case. This was because this constituted an infringement of a 'basic' or 'first category' right from which there could be no derogation. The grounds of appeal to this court focussed largely on the allegation that Miss Do would have to curtail that part of her religious activities which consisted of teaching her faith to children if she returned to Vietnam. It was submitted that this was an inhibition on her core right to practice her religion, which infringed Article 9(1) and could not be justified under Article 9(2). If apprehension of a 'flagrant' violation of her right was the correct test, then that test was satisfied.

67. The evidence does not indicate that there is a total embargo on teaching the Catholic faith in Vietnam. It does establish that, if Miss Do wishes to continue to do this, she may have to move from her home to a different part of the country. Such inhibition as this might place on her right to practice her religion falls far short of persecution under the Refugee Convention or ill-treatment that violates Article 3 of the Convention. There is evidence of other restrictions on the practice of Catholicism as a minority religion in Vietnam, but these are applicable to all of that minority, which has the sizeable total of some 8 million. Mr Gill was wise not to press these points. That part of Miss Do's case was not, and could not be, made out.

68. Miss Do's case based on Article 9 fails in consequence of our finding that Article 9 is not engaged by her proposed removal. We wish, however, to draw attention to a paradox in her case which struck us from the outset. Insofar as she was prevented from teaching Christianity to children in Vietnam, she did nothing to improve her position by coming to this country. Had she been an English missionary and had the Vietnamese authorities deported her to this country, she would have had a stronger case of interference with her right to teach Catholicism than that which she advances. We put this paradox to Mr Gill at the start of the hearing. It was not one which appeared to have occurred to those instructing him. They at once set about enquiring whether there was an answer to it. If it transpired that Miss Do

had a burning desire to proselytize the Catholic faith no matter where she found herself the paradox would be shown to be illusory. This proved not to be the case. Miss Do has been in this country about two years. She attends Mass at a church in Tottenham every Sunday. She asked the assistant priest whether she could help in any way with the parish's teaching of young children. He declined on the basis that her English was not good enough for her to be of any real use to him. She did not persist in attempting to teach, although she provided the assistant priest with some general assistance in the parish. This picture is at odds with the suggestion that Miss Do came to England in order to be able to continue to teach her faith. The paradox remains.

69. We do not see that the 'reduced circumstances' under which Miss Do was practising her faith in Vietnam differ significantly from those encountered by the other 8 million Catholics in that country. This merely underlines the implications that would follow were it correct that the decision to remove her to Vietnam engaged Article 9 of the Convention.

70. As it is, for the reasons that we have given, the appeals of both Mr Ullah and Miss Do must be dismissed.

ANNEX A

"35. In summary therefore I find that although the appellant's family may well have been subjected to general harassment and verbal abuse in recent years, perhaps because it has become known in the community the appellant preaches, there is no credible evidence that he has in fact suffered from serious incidents of violence which the police have been unwilling to investigate. The appellant and his family remained living in Karachi during the whole of this period. The appellant's family are still living in Karachi and do not appear to be experiencing any serious problems, although I accept that his children may continue to be abused at school. His father lives in Karachi as does his wife's family and there is no evidence that they suffer any particular problems. The appellant has never been subjected to any state investigation as a result of his preaching; he has never been arrested nor detained for any reason at all. He claims to have been a successful business man, even to the extent of being able to restart a business in Karachi with no apparent difficulty and yet he produces no evidence about his business activities. He had no problems at all until the age of 42 and has been able to carry on his faith all of his life without serious hinderance. This evidence must be viewed against the background evidence of serious discrimination against some followers of the Ahmadi faith in their work and daily lives and serious interference in their ability to follow and practise their faith. There is no credible evidence that this has been the position in relation to this appellant. Having regard to the evidence in totality, I have come to the conclusion that the appellant has come to the United Kingdom for reasons other than the need to seek international protection."

"36. The appellant has therefore not established that he has in fact been persecuted in the past on account of his faith and neither has he established that he would face a serious risk of persecution, in his particular circumstances, if he returns to Pakistan now. I see no reason why the appellant cannot return to Karachi to his wife and children where on his own account it is open to him to continue his business activities and, importantly, in his case, the evidence strongly supports the finding that he will be able to carry on his faith as before, as his family appear to do so currently. Even accepting that he began to preach in 1998, for the reasons I have already given, I do not find that in his case that did result in any serious problems for him. He is an ordinary member of the Ahmadiyya faith; he has not come to the attention of the authorities on account of his faith; has no credible evidence that he has been targeted by religious extremists for that reason and no evidence on which to properly conclude that he would face such problems in the future.

ANNEX B

"In relation to Articles 9 10 and 11 (Freedom of Thought, Conscience and Religion and Expression and Freedom of Assembly and Association) it is clear from the background evidence that the ability of Ahmadis to exercise their free rights under these Articles are constrained by the law and by societal attitudes towards them and that state action is generally ineffective. In relation to the appellant however, these rights do have to be regarded in the context of the evidence before me, which as I have said, has led to my finding that he has not personally experienced to any serious degree some of the problems which are faced by many Ahmadis in Pakistan. I have referred to the background evidence

included in the appellant's bundle and to two further fairly recent reports in late 2000 from Amnesty International concerning the stepping up of campaigns against minorities in the country. The background evidence also supports the conclusion that the government continues to express its opposition to discrimination against religious minorities although, I accept, that this may just be words as opposed to action. I have concluded that in the context of these Articles, that is that they enshrine an individual's right to express his beliefs in public or private and to manifest his beliefs in worship, teaching practice and observance and to share ideas and information concerning his or her opinions and also to have the freedom of peaceful assembly, that returning the appellant to Pakistan where those rights are curtailed, does engage those articles under the Convention in the appellant's case. These articles are qualified articles and I must therefore consider whether or not the UK government's action in returning the appellant would be in breach of those articles by a reference to a three stage test, that is, whether or not the respondent's action is in accordance with the law; whether it pursues a legitimate aim and whether or not it is proportionate in relation to the prospective breach. It is my finding that the respondent's action is in accordance with the law in that he has made his decisions in accordance with immigration legislation and the decisions he has made comply with statutory requirements. I also find that the respondent is pursuing a legitimate aim, that is immigration control which is a state's right. The appellant will be returned to a society where he is regarded as a religious minority and he is not afforded the same rights as the majority. Nevertheless, for the reasons I have already given in his particular circumstances, that has not prevented him from carrying on his faith nor has it prevented his family. He has been preaching since 1998 and the authorities have taken no action against him. He has been a life long Ahmadi, he was born into an Ahmadi family and neither he nor his family appear to have suffered any direct discrimination from the State. He has been successful in business; his children have been educated and apart from incidents of verbal abuse in the streets and minor violence there is no credible evidence of any serious problems. His family remain in Karachi and there is no evidence that they are experiencing any real difficulties. I have therefore come to the conclusion that the UK government's action in seeking to remove the appellant to Pakistan in pursuance of the need for proper immigration control, and in the light of my findings in this case, will not breach the appellant's right under these articles as that action is proportionate to any difficulties the appellant may face as a result of his faith on return to Pakistan."

ANNEX C

14. The respondent refused the claim saying that he did not believe that the appellant was a Roman Catholic. This was based on the fact that the appellant appeared to have little knowledge of Roman Catholicism and her replies to technical questions were inadequate. That evidence has now been rebutted in three ways. The first way is the fact that a lot of the evidence was simply based on mistranslation. I can say from my own experience at the hearing that this is a problem. Clearly the Vietnamese interpreters available in this country are all Buddhist with little or no knowledge of Christian terminology. They were unable to translate what she was saying either in interview or at the hearing. For this reason I put little weight on some of the answers. Further the appellant has now produced two important pieces of evidence that strongly support her claim. The first is the photographic evidence. And clear evidence that the appellant was given first Holy Communion in the Catholic Church and confirmed into that Church. I find that unassailable evidence of her membership

of the Catholic Church. Finally her evidence is supported by the Vietnamese Priest being the Reverend Simon Thag Duc Nguyen who submitted a witness statement. That witness statement indicates that the appellant is a strong supporter of the Catholic faith and her lack of knowledge of Catholic tenets would be expected from someone brought up in Vietnam under the repressive regime which did not allow good religious instruction. On that basis I accept that the appellant has proved to the necessary standard that she was a member of the Catholic Church and that she practised the Catholic religion in Vietnam.

15. The appellant has also claimed that she found it difficult to practice her religion because of the attitude of the authorities in Vietnam. I have described above the ways in which she said she was disadvantaged. I have considered that evidence in the light of the objective evidence. The objective evidence does show that there are problems with certain religions. Up until recently religions were banned but that has been changed and the constitution now provides for freedom of worship. However the US State Department Report says:

> 'Government regulations control religious hierarchies and organised religious activities in part because the Community Party fears that organised religion may weaken its authority and influence.'

The Report also says:

> 'Many of these restrictive powers lie principally with provincial city peoples committees and local treatment of religious persons varied widely …. In other areas such as the north-west provinces local officials allowed believers a little discretion in practising their faith. In general religious groups face difficulties in obtaining teaching materials, expanding training facilities, publishing religious materials, and expanding the clergy in training in response to the increased demand from the congregation.'

In those circumstances the appellant's evidence of difficulties in following her faith and discrimination are supported by the evidence and I accept the same.

16. The appellant has also belatedly claimed that the police had questioned her and taken her to the station on a number of occasions. Although I have generally accepted the appellant's evidence I do not accept this evidence. This evidence is in direct contradiction to her original interview and statement. Her statement never mentioned any question of a problem with the police. The statement was detailed and such an omission seems to me surprising, to say the least, if it were true. Further in interview she very specifically said that she had never been arrested although she did say that there were difficulties with the police over the religion. However, that reference was only to discriminatory steps being taken. I therefore find it highly suspicious that suddenly just before the hearing, and after the criticism of her claim in the refusal letter relating to lack of arrests, she adds a claim that she has been harassed by the police and taken to the police station. Further I cannot understand the distinction she is trying to make between being arrested and being invited to go to the police station and being taken there. The evidence itself was contradictory as to whether she ever

went to a police station or not. I simply believe that this is an embellishment to the claim and I do not accept the appellant's evidence in that regard at all.

….

18. I have considered the objective evidence in the light of the arguments before me. I do not find that the objective evidence supports the appellant's claim. The CIPU Report, the US State Department Religious Freedom Report and the US State Department Report all indicate that Roman Catholicism is a recognised religion by the government of Vietnam. Although there certainly is some discrimination against religious practices and efforts to minimise their effect, there is absolutely no evidence that persons are actually persecuted. Certainly there is no evidence of widespread arrests. There is evidence of arrests of certain political and religious dissidents but the objective evidence makes it clear that those religious dissidents are not Roman Catholic. There are some Buddhists, Protestants and something called a Hoa Hoa Sect which have been targeted. However, there is no evidence at all that Roman Catholics are at risk of persecution. The sort of behaviour the appellant specified in her statement is discrimination. It has does not affect her basic rights. She can still practice her religion albeit under reduced circumstances and her rights to earning a living, physical safety and her right to shelter is not compromised. In those circumstances such disadvantages as she does suffer because of her faith do not cross the line from discrimination to persecution. For all these reasons therefore I find that the appellant has not proved to the necessary standard that she is likely to be persecuted or arrested if she were returned to Vietnam because of her religion. I therefore dismiss the asylum appeal.