XH (Art 8 - Role of HOPO) Serbia and Montenegro [2004] UKIAT 00058

IMMIGRATION APPEAL TRIBUNAL

Date heard: 10 April and 9 September 2003
Date notified: 29 March 2004

Before:-

DR H H STOREY (CHAIRMAN)
MRS J HARRIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

Respondent

Presenting Officer role in Art 8 appeals – not a "decision-updater"
Evaluation of medical evidence asserting serious deterioration of claimant's psychological condition on return

Representatives:
Miss A Green on the first occasion and Mr M Blundell on the second occasion appeared for the appellant.
Mr E Grieves of Counsel instructed by Tuckers Solicitors for the respondent

DETERMINATION OF APPEAL AND REASONS

1. This case is reported primarily to clarify a point about the role of Presenting Officers in Art 8 appeals where the adjudicator is faced with a Secretary of State decision which has not addressed Art 8 considerations. The appellant, the Secretary of State, has appealed with leave of the Tribunal against a determination of Adjudicator, Mr C M Phillips, allowing the appeal of the respondent, a national of Federal Republic of Yugoslavia, against the decision to give directions for removal having refused asylum. This case was heard on two separate dates, 10 April 2003 and 9 September 2003. To avoid confusion the respondent is hereafter referred to as "the claimant". We apologise for the delay in promulgating this case, largely caused by our desire to await the outcome of an appeal being heard by the President dealing with the issue of proportionality in the light of *Razgar* [2003] EWCA Civ 840, [2003]

INLR 543 and *Djali* [2003] EWCA Civ 1371. However, the approach taken in that case, which is now reported as [2004] UKIAT 00024 *M (Croatia)**, does not significantly differ from our own; and so we did not consider it was necessary to invite the parties to make further submissions addressing points dealt with in that case.

2. We have decided to allow this appeal.

3. The adjudicator dismissed the appeal under the Refugee Convention and under Arts 2 and 3 of the ECHR. However, he allowed it under Art 8. He found that removal would adversely affect the mental health of the claimant and his wife and therefore their moral and physical integrity. He wrote:

> "The appellant and his wife had been subjected to treatment of such severity that the appellant currently suffers from post-traumatic stress disorder and depression and his wife suffers from chronic depression requiring a high level of medication. There is clear medical evidence that the return of the appellant and his wife will adversely affect their mental health. Removal will be clinically regressive. There is no realistic prospect of either receiving appropriate medical treatment in Kosovo. The appellant and his wife fall into the categories identified by the UNHCR as requiring continued international protection on humanitarian grounds".

4. The grounds of appeal to the Tribunal were twofold. Firstly, it was submitted that, having dismissed the appeal on Art 3 grounds, it was not open to the adjudicator to find a breach on Art 8 private life grounds. Reliance was placed on the case of *Berkani* [2002] UKIAT 01704. In the course of elaborating on this ground Mr Blundell contended that this was a case in which, following the Court of Appeal judgment in *Blessings Edore* [2003] EWCA Civ 716, the adjudicator was only entitled to decide whether the decision of the Secretary of State was "within the range of reasonable responses". Whereas, submitted Mr Blundell, the adjudicator's assessment had gone beyond that, in effectively conducting the balancing act under Art 8 for himself. Secondly, the grounds contended that the medical evidence did not justify a finding that return would breach Art 8. Originally the grounds had also alleged that Dr Turner's diagnosis was unsound, but Mr Blundell withdrew that allegation. He still maintained, however, that even if the claimant and his wife did suffer from depression and PTSD, there were adequate medical facilities for the treatment of these conditions in Kosovo. Reliance was placed on the case of *Thaqi* [2002] UKIAT 03520 and on objective country materials.

The issue of whether this was a "mixed case"

5. These grounds were drafted before the judgment of the Court of Appeal in *Razgar* and *Djali*. In light of these judgments we have no hesitation in rejecting the argument that having dismissed the Art 3 claim the adjudicator did not have jurisdiction to find a breach of the right to physical and moral integrity protected by Art 8. He would only have lacked jurisdiction if the case had been one in which the sole or exclusive ground on which the Art 8 claim

was based concerned conditions in the receiving country: see *Razgar* paragraph 17. This, by contrast, was (to use the terminology adopted in *Razgar*) a "mixed case". Before explaining why it is, it is salient to refer in detail to the guidance given by the Court of Appeal on this issue:

> "18. …Where the claim is that an expulsion will interfere with a person's family life in the deporting state, there is no problem. Art 8 is in principle capable of being engaged: see Ullah, para 46. But where the claim is based on an alleged breach of the right to private life in the broader sense referred to, for example, in Bensaid para 47, the position is more difficult. The preservation of mental stability is "an indispensable precondition to effective enjoyment of the right to respect for private life". Let us consider two paradigm cases. In case A, the person is in good health in the UK, but he says that, if he is deported to a "safe" third country, there is a real risk that he will suffer a serious decline in his mental health, because he has a fear (admittedly irrational) that he will be returned to face persecution in his country of origin. In case B, the person is already suffering from mental ill health for which he is receiving treatment in the deporting country. His case is that, if he is deported, his mental condition will become significantly worse because in the receiving state he will not be given the treatment that he has previously enjoyed.
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> 19. It is clear that case A is not capable of engaging article 8: the territoriality principle is decisive. But what about case B? The allegation is that the expulsion will cause a significant deterioration in the claimant's mental health. But will it be as a result of the cessation of treatment in the deporting country, or will it be because the treatment previously enjoyed will not be replicated in the receiving country? On an application of the "but for" test, both will be effective causes. The deterioration in the claimant's mental health will not occur if the deporting state does not disrupt the treatment being given by it. But equally it will not occur if the receiving state continues the treatment previously enjoyed. So how should the territoriality principle be applied in a "mixed case" where the allegation of interference with private life contains two elements, one relating to the deporting country, and the other to the receiving country?
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> …
> 22….We suggest that, in order to determine whether the article 8 claim is capable of being engaged in the light of the territoriality principle, the claim should be considered in the following way. First, the claimant's case in relation to his private life in the deporting state should be examined. In a case where the essence of the claim is that expulsion will interfere with his private life by harming his mental health, this will include a consideration of what he says about his mental health in the deporting country, the treatment he receives and any relevant support that he says that he enjoys there. Secondly, it will be necessary to look at what he says is likely to happen to his mental health in the receiving country, what treatment he can expect to receive there, and what

> support he can expect to enjoy. The third step is to determine whether, on the claimant's case, serious harm to his mental health will be caused or materially contributed to by the difference between the treatment and support that he is enjoying in the deporting country and that which will be available to him in the receiving country. If so, then the territoriality principle is not infringed, and the claim is capable of being engaged…"

6. We find that the appeal before us involves a mixed case for the following reasons. Even if there is room for argument as to the extent of the claimant's mental ill health both have been the subject of periodic and concerned medical assessments, particularly the claimant's wife. That is salient in this case, since, when considering the claimant's right to respect for private and family life under Art 8, we have also to consider the impact on him of his wife's mental ill-health. His claim to alleged interference with significant elements of her right to respect for private life has two elements: one relating to her enjoyment of this right in the UK (arising out of the threat of cessation of UK treatment and support); the other relating to her ability to enjoy this right in Kosovo (arising out of alleged shortcomings in the treatment and support she is likely to receive there). We use the phrase "significant elements" of private to highlight the obvious fact that his claim is not based on the mere fact of having a private life – in certain respects everyone has a private life where they are. His claim was and is that there were/are considerations, which affect in a significant way his and his wife's physical and moral integrity.

The due deference issue

7. We also reject Mr Blundell's related contention that the adjudicator was wrong in this case to conduct the balancing exercise required by Art 8 for himself. This was a case in which the Secretary of State in his Reasons for Refusal letter did not consider any Art 8 issue. Against this background, it is pertinent to cite from the relevant passages in *Razgar*:

> "40. We note that both Moses J and Simon Brown LJ were careful to limit what they said to cases where there is "no issue of fact" (Moses J) and "the essential facts are not in doubt or dispute" (Simon Brown LJ). We recognise that, if the adjudicator finds the facts to be essentially the same as those which formed the basis of the Secretary of State's decision, there will be no difficulty in adopting the approach enunciated by Moses J and Simon Brown LJ. But what if the adjudicator finds the facts to be materially different? In such a case, the adjudicator will have concluded that the Secretary of State carried out the balancing exercise on a materially incorrect and/or incomplete factual basis. There is no power in the adjudicator to remit the case to the Secretary of State for a reconsideration of the balancing exercise on the facts as found by the adjudicator. There will, therefore, be cases where it is not meaningful to ask whether the decision of the Secretary of State was within the range of reasonable responses open to him, because his determination was based on an accurate analysis of the facts. But even if the adjudicator were to conclude that the Secretary of State's analysis was wrong, it would not necessarily follow that the Secretary

> of State would remain open to the adjudicator to decide that the conclusion reached by the Secretary of State was lawful (and did not breach the claimant's human rights) because it was in fact a proportionate response even on the facts as determined by the adjudicator.
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> 41. Where the essential facts found by the adjudicator are so fundamentally different from those determined by the Secretary of State as substantially to undermine the factual basis of the balancing exercise performed by him, it may by impossible for the adjudicator to determine whether the decision is proportionate otherwise than by carrying out the balancing exercise himself…"

8. These passages go on to emphasise the importance of adjudicators, even when conducting the balancing exercise themselves, "pay[ing] very considerable deference to the view of the Secretary of State" as to the importance of maintaining an effective immigration control.

9. In a recent starred determination, [2004] 00024 *M (Croatia)*, a panel of the Tribunal chaired by the President has reaffirmed the need to apply a different approach depending on whether or not the Secretary of State has applied his mind to Art 8 at the decision stage or not. At paragraph 25 they accept that "where a decision on proportionality has not been taken by the Secretary of State as here, the Adjudicator is obliged to reach his own conclusions on whether removal would be proportionate. The first approach has to be followed [i.e. "it is now for the judicial decision-maker to make the decision, giving appropriate weight to the public need identified in relation to immigration control: see para 21].

10. However, the President goes on to identify constraints on what adjudicators can decide when they are obliged by reasons of pragmatism to conduct the balancing exercise for themselves:

> "The starting-point should be that, if in the circumstances the removal could reasonably by regarded as proportionate, whether or not the Secretary of State has actually said so or applied his mind to the issue, it is lawful".

11. Having considered the approach taken by the adjudicator to the balancing exercise in this case, we do not consider that he failed to bear in mind such constraints. Even if we are wrong about that, we agree with the view of the Tribunal in *M (Croatia)* and the Court of Appeal in *Razgar* and *Djali* that in practice it would be rare indeed for one approach or the other to lead to different outcomes. This was certainly not one of such rare cases: given the adjudicator's flawed approach to the medical evidence and the evidence about medical facilities in Kosovo, we have no doubt he would have reached the same (wrong) conclusions whichever of the two approaches he took to proportionality.

12. We have established earlier that the Secretary of State did not consider any Art 8 issue when reaching a decision in this case. We should perhaps stress that we do not think he can be easily blamed for that, since the claimant had failed to raise any Art 8 issues when he claimed asylum. Furthermore, when the claimant was invited to submit a statement of additional grounds, whilst Arts 2, 3 and 5 were mentioned, there was no reference to Art 8. Possibly, since the claimant did however refer to concerns that his wife's mental state would be undermined by any return, the Secretary of State should have recognised he had raised Art 8 in substance if not in form and so should have reviewed his original decision on Art 8 grounds. However, Mr Grieves has not sought to take this point an in our view nothing hangs on it in any event.

13. Mr Blundell raised a further point. So far as we are aware it was, at least at the date of first hearing, entirely novel. It was that, as a Presenting Officer acting for the Secretary of State in this appeal, his submissions on the case amounted to or doubled as the Secretary of State's assessment of the Art 8 claim, and thus the Tribunal was obliged by the principles set out by *Edore* and *Razgar* to defer to them. He highlighted the fact that a Presenting Officer is normally senior in rank to the person who makes the original decision. We are grateful to Mr Blundell for raising this important argument. However, the novelty of his submission is not matched by its logicality. The subject of any combined asylum and human rights appeal is the decision or action of the Secretary of State: see paragraph 21 of Sch 4 of the 1999 Act. In the case of an appeal brought as this was under s. 69 (5), the grounds of appeal are confined to the issue of whether removal in pursuance of the decision to give directions for removal would be contrary to the Refugee Convention. They refer, that is, to a decision already made. (Matters appear to remain the same in this respect under ss. 82-86 of the Nationality, Immigration and Asylum Act 2002).

14. Similarly, the human rights grounds of appeal under s. 65 concern any decision taken under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom…" Following *Kehinde* (01/TH/2668*) and *Kahiharan* [2003] Imm AR 163, "any decision" in this context includes the decision taken to give removal directions. Mr Blundell, in his capacity as the Secretary of State's representative, may have authority to make decisions about whether e.g. to withdraw, concede or maintain an appeal; he cannot, however, recast the decision which is the subject of the appeal. Indeed, if he were to make a fresh decision on behalf of the Secretary of State, that would attract a fresh right of appeal and would require a fresh notice to be served and other steps to be taken. It would not be a decision which we could consider in the context of this appeal, unless it were the concurrent or subsequent grant of limited leave; and, in that case, pursuant to s. 58(9), we would be obliged to treat the current appeal as abandoned.

15. Mr Blundell ventured a further related submission. He argued that in a case such as this, where the Secretary of State had not conducted the balancing exercise previously, the appellate authority should adjourn so that

this could be done and then consider the appeal in the light of that reconsideration. That submission falls for the same reasons as his earlier submission. The statutory framework governing appeals does not provide for post-decision decisions to substitute for the decision under appeal.

16. We appropriate that this can be the cause of some very considerable difficulty for the Secretary of State, particularly since the starred determination of the Tribunal in *SK* [2002] UKIAT 05613 requires adjudicators to assess the evidence as at the date of hearing. (Under ss. 85(4) and 002 (2) of the 2002 Act the ability of the appellate authorities to consider post-decision evidence in asylum and asylum-related appeals is even more clear-cut). We acknowledge too that it could be said, in the context of the 1999 (and 2002) Act, that there is some unfairness to the Secretary of State in sometimes having to respond in the last-minute context of a hearing to further human rights-related evidence submitted late, although the Immigration and Asylum Appeals (Procedure) Rules afford some protection against that. By the same token it could be said that if the Presenting Officer were seen as a decision-updater, there would be unfairness to the claimant's side in having to deal with a revised decision, with no proper opportunity to respond to the revision. Nevertheless, although the Presenting Officer cannot be seen as having the role identified by Mr Blundell, we do accept that it is right that the appellate authorities should always be mindful of the constraints placed on the Presenting Officer by the statutory framework governing post-decision evidence in Art 8 appeals and should always take careful account of submissions made, particularly since such submissions may cast significant light on the question of whether, notwithstanding new evidence, the decision under appeal was and remains unlawful.

17. However, in our view the difficulties for the Presenting Officer identified b Mr Blundell are ones created by Parliament: not only does the one-stop appeal process as established by the 1999 (and 2002) Act accept that human rights grounds of appeal can be raised late by way of a statement of additional grounds. It also clearly contemplates that there will be cases where the decision of the Secretary of State does not address human rights grounds raised late. The One-Stop Notice as set out in the Asylum (One-Stop) Procedure Regulations 2000 informs claimants that in such cases the material they submit by way of additional grounds will be included for the adjudicator to consider. The Act provides for the Secretary of State to review the decision but it does not compel him to issue a fresh decision. (If anything the structure of the 2002 Act as expressed in s.84 (1) (c) and s. 85(4) increases the scope for adjudicator consideration of human rights grounds not previously considered by the Secretary of State.

The Art 8 issue

18. There was no question in this case that if any removal were made in respect of this claimant it would be together with his wife: as such there was no real issue of the decision violating his (or her) right to respect for family life. This case then is primarily concerned, not with the right to respect for family life, but with the right to respect for private life.

19. In the light of *Razgar*, it would be perfectly possible to examine the Article 8 issue initially in terms of whether the decision posed a sufficiently serious threat to the claimant's physical and moral integrity so as to engage Art 8(1). We would not necessarily have to go on to consider under Art 8(2) whether any interference with that right was disproportionate. However, under either approach the essential question, certainly in this case, seems the same, namely whether the decision was a disproportionate one, as to the adjudicator thought, then he was right to allow the appeal and we would have to dismiss the appeal of the Secretary of State before us.

20. The allegation in this case is of a disproportionate threat to the claimant's right to respect for private life based on a mix or combination of elements, some relating to enjoyment of that right in the UK, some relating to enjoyment of that right in Kosovo.

21. It is also a case in which it is necessary to take account of the medical situation of the claimant as well as his wife.

The Adjudicator's assessment of the medical evidence and its implications

22. Specifically in respect of the claimant, the adjudicator found as follows:

> "The lengthy and well-reasoned report by Dr Turner concludes that the appellant is suffering from shame-based Post-Traumatic Stress Disorder and Depression. There is a significant psychiatric disturbance and the appellant is clearly traumatised. His presentation and his reaction to making the disclosure is entirely consistent with the history that he gives".

23. At paragraph 46 the adjudicator summed up his assessment of both as follows:

> "…the appellant and his wife have suffered serious trauma as a result of rape…[and]…to recover the appellant and his wife require appropriate and sustained treatment, available in Britain…"

24. At paragraph 49 (already cited) he amplified this as follows:

> "The appellant and his wife had been subjected to treatment of such severity that the appellant currently suffers from post-traumatic stress disorder and depression and his wife suffers from chronic depression requiring a high level of medication. There is clear medical evidence that the return of the appellant and his wife will adversely affect their mental health. Removal will be clinically regressive. There is no realistic prospect of either receiving appropriate medical treatment in Kosovo. The appellant and his wife fall into the categories identified by the UNHCR as requiring continued international protection on humanitarian grounds".

The medical evidence

25. It is plain that the adjudicator's decision to allow the appeal on Art 8 grounds turned largely on his evaluation of the medical evidence. The central issue in this case is thus whether the medical evidence in respect of the claimant and his wife properly supported the adjudicator's conclusions. Let us first consider the medical evidence in respect of the claimant.

26. As already noted Mr Blundell withdrew at the outset of the hearing the allegation that Dr Turner's clinical findings in respect of the claimant were unsound. He made clear that this concession was based at least in part on the fact that Dr Turner had produced a supplementary medical report dated 1 September 2003. In this report Dr Turner confirmed that the claimant continued to meet the detailed criteria for Major Depressive Disorder and for Post-Traumatic Stress Disorder albeit there had been marginal improvement. Reiterating his view that return would cause a significant deterioration in his mental state, Dr Turner noted:

> "Although I would be mainly concerned here about the depressive illness and a risk of suicide as a consequence, I would have to draw attention to the significance of shame as an important additional risk factor in relation to such an outcome. In other words if Mr Hasani found himself confronted with worsening depression, worthlessness and a marked feeling of shame, then a suicidal response would become very understandable. In my opinion, in such a scenario he would present a serious risk of suicide".

27. However, Mr Blundell maintained his challenge to the other aspects of the adjudicator's findings in respect of Dr Turner's and other medical experts' assessment of the claimant's medical condition. He pointed out that although the claimant was someone who suffered from depression and PTSD, he had not sought medical treatment either prior to the decision of the Secretary of State or by the time of the hearing before the adjudicator. By the time of the hearing before the adjudicator he had been in the UK nearly 3 years. Given the lack of any treatment during this period, he argued, the adjudicator was not entitled to consider that the claimant would necessarily require any specific treatment for himself. Thus it was irrelevant whether there were appropriate medical facilities available to treat him. The adjudicator erred in treating this as a significant factor.

28. We consider that Mr Blundell is right to identify a flaw in the adjudicator's consideration of the medical condition of the claimant. The claimant's lack of treatment should have been seen as a highly relevant consideration. It was an indication that his illness was not seen as severe enough to necessitate immediate treatment. It is true that on the evidence accepted by the adjudicator the claimant had felt too ashamed to make known his experiences of rape until May 2002 and we know from Dr Turner's report that it was not until 8 July 2002 that he felt able to seek medical help concerning it. However, he was not even then immediately regarded as someone urgently needing treatment. Mention was made of initial SSRI drug treatment in order to stabilise the condition, nothing more.

29. It is also true that, having found that the claimant suffered from PTSD and depression, Dr Turner's opinion was that his medical condition was seriously affected and that "…he should be treated". We also note that an assessment appointment with the Psychological Therapies Service has recently been made by the claimant's GP. It is true too that Dr Turner did not think his condition would stabilise until the claimant's asylum case had been determined. However, Dr Turner did not use the language of necessity to describe the treatment the claimant would require. It was simply that"…he should be offered cognitive behavioural therapy to try and help him overcome some of the deeper emotional reaction to this experience. This is likely to involve referral to a specialist centre".

30. For the above reasons we do not think that the adjudicator paid sufficient regard to the fact that the medical evidence relating to the claimant did not disclose that his condition was extremely serious.

31. We now turn to weigh in the balance the mental health difficulties of the claimant's wife.

32. Specifically in respect of the claimant's wife, the adjudicator stated:

> "The appellant's wife's psychiatric history has been documented since at least June 2000. The appellant's wife is currently prescribed the maximum dose of an antidepressant. She is suffering from a depressive illness. In the report of 11 March 2002, this is stated to be chronic as it has persisted for more than three months. In the report of 12 April 2002 Doctor Ananthanarayanan; Consultant Psychiatrist at Chase Farm, Enfield expresses the view that it is quite likely that the appellant's wife would rapidly deteriorate further if returned to Kosovo. This is because it seems this was the precipitant for her depression and there is also the issue of her having been raped in Kosovo."

33. The Tribunal now has further letters from Dr Gillian Century, doctor and counsellor, dated 20 March 2003 and 8 August 2003, which consider that return was likely to lead to a "complete breakdown" of her mental health. Also before us is a report from Dr S Ahmad, staff grade to Dr H Scurlock, Consultant Psychiatrist, which found her suffering from moderate to severe depression with no active suicidal ideation. Although noting some improvement in her symptoms, the report concluded that it was possible that her return would cause a "full relapse" considering her past history of rape and lack of medication and good psychiatric services. We also have further details about the claimant's wife's medication.

34. Once again, although the medical assessment of her wife expressed serious concerns about her likely situation on return to Kosovo, it does not identify the wife as someone whose current mental condition is extremely serious or as someone who requires hospitalisation or a special regime of drug therapy. And, once again, we do not see that the adjudicator sufficiently

recognised that the evidence did not demonstrate that the claimant's wife's condition was extremely serious.

35. Given that neither the claimant's nor his wife's mental condition is considered to be extremely serious, much depends in this case, therefore, on whether return would cause a significant deterioration in their condition, so that it would become extremely serious.

36. In approaching the issue of medical evidence insofar as it relates to risk on return, we take as our starting point the approach set out by the Tribunal in the case of *P (Yugoslavia)* [2003] UKIAT 00017 in which is was said:

> "The approach of the appellate authorities
> The grounds in this case are not unique in complaining that the Adjudicator failed to attach proper weight to (significant parts of) the medical evidence. The appellate authorities are frequently called upon to evaluate medical reports which deal with the risk facing asylum seekers if returned in the light of their medical history. How should they go about this task? Drawing on past cases such as *Ademaj* [2002] 00979 and *Cinar* [2002] UKIAT 06624 and in particular on the starred determination of the Tribunal in *AE* and *FE* [2002] UKIAT 05237, it is possible to identify the following principles.
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> a) It is not the job of an Adjudicator to make clinical judgments. This is the job of medical experts to evaluate conditions in an appellant's country of origin. Except in very rare cases they have no expertise about such matters.
>
> b) Albeit not medical experts, adjudicators are perfectly entitled, when evaluating a medical report, to consider to what extent it is based on established medical methodology and criteria. Adjudicators should obviously be cautious about criticising medical reports unnecessarily, particularly given that they do not have the benefit of a medical report from the respondent so as to enable a comparison to be made. But by virtue of the frequency with which the immigration appellate authorities have to examine and assess medical reports in asylum-related case, a fund of experience and knowledge has been built up, making it possible to identify what is expect from a "good report", and to discern which medical experts among, the many whose reports they see, produce reports based squarely on established medical methodologies and criteria. If confronted, therefore, with a diagnosis (or prognosis) which departs for no good reason from methodology and criteria established within the medical profession, they cannot be expected to overlook that kind of deficiency. And to the extent that a medical report fails to base itself on established medical methodologies and criteria, an Adjudicator may be justified in attaching lesser weight to it as a consequence. A medical report purporting to give an in-depth

diagnosis of PTSD based on one superficial interview is an obvious example. As the Tribunal highlighted in *AE* and *FE*, an Adjudicator is also entitled to assess to what extent a medical report is based on examination which has been conducted as soon as possible after the time of the injury or event which is said to have caused the physical or psychological disorder.

c) Irrespective of the quality of the medical report, the assessment of risk upon return that has to be made by an Adjudicator must be based on the notion of real risk as established by refugee law and human rights law. That will not necessarily be the same concept of real risk applied by medical experts.

d) Since an Adjudicator must be his assessment on a consideration of all the evidence viewed in the round, it is always ultimately a matter for an Adjudicator what weight if any to attach to medical evidence. In order to assess whether there is a real risk, the medical evidence has to be placed alongside all the other evidence. Where a doctor's report has based some of its key findings on the truth of what has patient has told him about past experiences and/or current fears, it may well be that an Adjudicator who having made a global assessment finds the appellant's account not credible, will reject that report's principal findings. Depending on the particular circumstances, the medical evidence stating that a person's injuries or condition is "consistent with" his account of what happened to him in his country of origin may or may not add credence to his claim".

37. Applying these principles to this case, we are satisfied (as now also is Mr Blundell) that the medical reports did not depart from established methodologies.

38. There is no dispute in this case, either, that the account given by the claimant and his wife concerning their past traumatic experiences was true.

39. However, two questions remain. The first is, does the medical evidence establish that the mere fact of no longer being treated by UK medical experts (as opposed to medical experts in another country) would seriously threaten the claimant's or his wife's physical and moral integrity? We think the answer to that question is plainly no. As already noted, neither the claimant nor his wife could be described as undergoing any intensive, special course of psychiatric treatment for their psychological difficulties currently. Nor has any of the medical evidence claimed that there was something uniquely crucial about the continuation of treatment in the UK (such as it was) as opposed to treatment in some other country).

40. The second question is, did the medical evidence in this case demonstrate of itself that return to Kosovo would lead to serious deterioration? It is reasonably clear that at least one important reason the experts in this case consider that return to Kosovo would be adverse is simply

because it was events that had happened to the claimant and his wife there which were the cause and precipitant of their psychological problems.

41, In our view this reason is plainly incomplete. Except in highly unusual circumstances, it must be reasonable to expect that how persons will respond on return to the country of trauma will depend to some considerable degree on the conditions they will actually face once there. The medical findings in respect to the couples' subjective fears and anxieties about return to Kosovo are important. However, equally important is the fact that there have been major changes in Kosovo since the claimant and his wife left. We do not think, therefore, that the mere fact of returning to their country or origin would necessarily have a traumatising effect. Nothing in the medical evidence indicates that the claimant and his wife would be unable to recognise the significantly different political and social realities once they returned to Kosovo. Furthermore, neither would be required to return to the actual places where they experienced rape, so it would not automatically follow that return would re-expose them to the traumas each was caused by their experiences of rape.

42. Given these limitations in the medical evidence, we consider that the question of whether the claimant and his wife will in reality face serious deterioration in their mental health must in this case depend crucially on the extent to which the couple would be able to access available medical treatment in Kosovo.

43. Mr Blundell in this regard has very properly reminded us that, as well as having to assess the extent to which a cessation of medical treatment in the UK of the claimant' wife might adversely affect the claimant, account has also to be taken of the extent to which there would be adequate medical treatment available to her (and possibly her husband) in Kosovo. His contention was, by reference to *Thaqi* and the latest objective country evidence, that there would be adequate treatment available in Kosovo.

44. As Mr Grieves pointed out, the adjudicator did not fail to address this further dimension. At paragraph 27 he concluded: "…medical care in Kosovo is limited". At paragraph 30 he stated that:

> "I also place considerable weight upon the UNMIK Reports, the most up to date being April 2001. Under health care it is recommended that those suffering from severe or chronic mental illness and psycho-social disorders cannot be satisfactorily treated in Kosovo. In paragraph 46 he noted that: "Kosovo does not have adequate psychiatric facilities to deal with the family's problems and drug therapy is unlikely to be available". In paragraph 49 he found that: "There is no realistic prospect of either [the claimant or his wife] receiving appropriate medical treatment in Kosovo. The appellant and his wife fall into the categorised identified by the UNCHR as requiring continued international protection on humanitarian grounds".

45. The question remains, however, did the adjudicator here capture the main relevant considerations that arose in this case?

46. We do not think he did. There were two particular shortcomings. Firstly, despite the firm views expressed by the medical experts in this case about the psychological condition of both the claimant and his wife, the fact remains that: (1) the claimant's condition was not one which had been seen to necessitate ongoing treatment prior to relatively recently and even then all that was specified was cognitive behavioural therapy; so far as drug therapy was concerned nothing specialised had been recommended; (2) the claimant's wife had been undergoing some counselling but she has not been considered as requiring admission as an in-patient. Dr S Ahmad described her as someone suffering from moderate to severe depression with no active suicidal ideation. Although she is currently prescribed the maximum dose of an antidepressant, there is no specialised drug therapy.

47. A second shortcoming was that the adjudicator did not accurately summarise the situation in Kosovo as regards available medical treatment. It may be that Kosovo considered as a whole does not have "adequate" psychiatric facilities. It does not follow, however, that overall inadequacy means that persons on return would not be able to access such facilities. In this regard, as the Tribunal has noted in many other cases, it is important to note that Kosovo does have special centres for treatment of those (like the claimant in this case) who have experienced war trauma. We have seen no evidence to show that the claimant or his wife would be turned away from such centres. It may be that this might require some travel or relocation on their part, but, again, there is no evidence we have seen to show that such difficulties would prevent access in needy cases.

48. In relation to the adjudicator's reliance upon UNHCR's specific and continuing concerns about "victims of sexual violence", we do not think he was entitled to treat that as a decisive factor. Plainly that document does not state that all person in this category are at real risk of serious harm, it makes clear that much will depend on the particular circumstances.

49. Summing up our assessment of this case, we do not consider that the adjudicator was justified in regarding the medical evidence as establishing that the claimant and his wife would face a real risk of serious deterioration in their mental condition upon return. He was wrong to consider that medical facilities in Kosovo would be insufficient to alleviate any serious difficulties the couple would face upon return.

50. We should add for the sake of completeness that we do not consider the adjudicator properly understood that the threshold in cases based on threats to a person's physical and moral integrity as an aspect of the right to respect for private life under Art 8 is a high one: it is necessary to show a threat that is serious, or, put another way, to show a level of resultant harm which would be exceptional and extreme. Since the adjudicator did not have the benefit of the Court of Appeal insights in *Razgar* and other more recent cases, we do not criticise him too greatly for failing to analyse matters as

these cases have done. But the fact remains that (in addition to failing to properly assess the significance of the medical evidence and the evidence relating to available treatment in Kosovo) he set the threshold too low.

51. For the above reasons the appeal of the Secretary of State is allowed.

DR H H STOREY
VICE-PRESIDENT