

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF BENSAID v. THE UNITED KINGDOM

(*Application no. 44599/98*)

JUDGMENT

STRASBOURG

6 February 2001

FINAL

06/05/2001

In the case of Bensaid v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr P. KŪRIS,
Mr W. FUHRMANN,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 6 June 2000 and 16 January 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 44599/98) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Algerian national, Mr Abdel Kader Bensaid ("the applicant"), on 18 November 1998.

2. The applicant was represented by Ms S. Ghelani of the North Islington Law Centre, and Mr M. Henderson and Mr A. Nicol QC, of Doughty Street Chambers, London. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley, of the Foreign and Commonwealth Office.

3. The applicant alleged that his proposed expulsion from the United Kingdom to Algeria placed him at risk of inhuman and degrading treatment, and threatened his physical and moral integrity; he also claimed that he had no effective remedy available to him in respect of these matters. He relied on Articles 3, 8 and 13 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). The President of the Chamber and subsequently the Chamber decided to apply Rule 39, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings that the applicant should not be expelled to Algeria pending the Court's decision.

5. By a decision of 25 January 2000, the Chamber declared the application admissible [*Note by the Registry*. The Court's decision is available from the Registry.].

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the parties were invited to provide further information and observations on the merits. Both parties provided such observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant is a schizophrenic suffering from a psychotic illness. He appears to have experienced the first symptoms in 1994-95. When he first came to the attention of the mental health services, his condition was so severe that consideration was given to detaining him compulsorily in a psychiatric hospital. However, this turned out to be unnecessary as he responded sufficiently to treatment and his illness has been successfully managed. At the end of 1997, he was admitted to hospital for a few days following a minor relapse which his psychiatrist attributed in part to side effects from his previous medication. His antipsychotic medication was changed from sulpiride to olanzapine.

Schizophrenia is an illness or group of illnesses affecting language, planning, emotion, perceptions and movement. "Positive symptoms" often accompany acute psychotic episodes (including delusions, hallucinations, disordered or fragmented thinking and catatonic movements). "Negative symptoms", associated with long-term illness, include feelings of emotional numbness, difficulty in communicating with others, lack of motivation and inability to care about or cope with everyday tasks.

8. The applicant arrived in the United Kingdom as a visitor on 2 May 1989 and was granted six months' leave to remain, which was extended until 11 February 1992 because he was undertaking studies. In June 1992 an out-of-time application for a further extension was rejected and in October 1992 he was requested to leave.

9. On 8 April 1993 the applicant married J., a United Kingdom citizen. On 5 May 1993 he applied for leave to remain on account of his marriage. He was granted leave to remain on that basis until 29 June 1994. On 20 June 1994 he applied for indefinite leave to remain as a foreign spouse. This was refused on 9 January 1995. On 24 March 1995 the applicant made further representations and on 12 May 1995 he was granted indefinite leave to remain as a foreign spouse.

10. On 10 August 1996 the applicant left the United Kingdom to visit Algeria. As a result, his indefinite leave to remain lapsed. He returned to the

United Kingdom on 17 September 1996 and sought leave to enter as a returning resident. The immigration officer, whose suspicions were aroused about the subsistence of the marriage on which leave to remain had been obtained, granted him temporary admission pending further enquiries. On 24 March 1997 the immigration authorities decided to refuse leave to enter on the ground that indefinite leave to remain had been obtained by deception, the marriage being one of convenience. He was given notice of intention to remove him from the United Kingdom. He was only entitled to appeal against the basis of that decision after leaving the United Kingdom. The applicant sought deferral of the removal directions on the basis of his medical condition. The Secretary of State refused to defer the directions.

11. On 7 April 1997 the applicant applied for judicial review of the proposed expulsion on the grounds that it would cause him a full relapse in his mental health problems and would amount to inhuman and degrading treatment, contrary to Article 3 of the Convention. By a letter of 7 May 1997, the Secretary of State gave detailed reasons for his decision.

12. On 8 May 1997 the High Court refused the applicant leave to apply for judicial review. The applicant renewed his application before the Court of Appeal.

13. The applicant made further representations about his medical condition, which were considered by the Secretary of State and rejected in letters dated 16 and 18 July 1997.

14. On 21 July 1997 the Court of Appeal adjourned the application to enable the Government to reconsider their position in the light of further material submitted by the applicant. It suggested that the Government might wish to obtain their own medical examination of the applicant.

15. Six months later the Government indicated that they did not wish to have the applicant medically examined. They submitted that there was a hospital in Algeria which provided treatment "not solely to those who have committed crimes" and which could admit the applicant and administer the medication which the Government understood the applicant to be receiving. The hospital was situated at Blida, 75 to 80 km from the applicant's village of Rouina. In a letter dated 15 July 1998, the immigration authorities stated, *inter alia*, that, as advised by the Foreign and Commonwealth Office, there was at that time no particular danger in travelling between Rouina and Blida. As regards the applicant's state of health, they stated that they would only remove the applicant if he was certified as fit to travel, and he would be accompanied by medical personnel during the journey. As medication and treatment would be available to him in Algeria, it was concluded that his circumstances were not so exceptional or compelling that he should be granted entry.

16. The applicant obtained opinions from his psychiatrist as to the likely effect of his removal to Algeria. In a letter dated 24 March 1998, Dr Johnson stated that there was a high risk that the applicant would suffer a

relapse of psychotic symptoms on being returned to Algeria. The requirement to undertake regularly an arduous journey through a troubled region would make the risk still greater. She pointed out that when individuals with psychotic illnesses relapse, they commonly have great difficulty in being sufficiently organised to seek help for themselves or to travel. For this reason, it was necessary for the management of such illnesses to be local and readily accessible. It was therefore very unlikely in these circumstances that any relapse of the applicant would be effectively treated. In a supplementary report of 7 July 1998, Dr Johnson stated that any suffering which might accompany a relapse would be likely to be substantial. When the applicant's illness had been severe, he had lost all insight into the fact that he was ill and believed the persecutory delusions and abuse which he experienced, including voices telling him to harm other people. He had previously felt sufficiently depressed and hopeless to contemplate suicide.

17. The applicant also obtained opinions from Mr Joffé, Deputy Director of the Royal Institute of International Affairs as to conditions in Algeria. In a letter of 3 March 1998, Mr Joffé stated that the area in which Rouina and Blida were situated had been a focus of terrorist violence and terrorist action since 1994.

18. Following further adjournments requested by the Government, the matter came before the Court of Appeal on 17 July 1998. The court dismissed the applicant's appeal. In giving his judgment, with which the two other judges concurred, Lord Justice Hutchison referred to the evidence from the Government relating to the possibilities of treatment and to their view that there was no particular danger in travelling along the main road between Rouina and Blida by day. He referred also to the evidence from the applicant with respect to the risk of relapse, the inadequacy of the alleged facilities and the state of disorder and violence which was alleged severely to compromise his ability to travel for regular treatment. He concluded, however, that matters of that sort were for the judgment of the Secretary of State:

> "It is not for this Court to take the decision as to whether the applicant should in all the circumstances be removed to Algeria. It is for this Court to review in appropriate cases the decision of the Secretary of State on well-known grounds and the limitations imposed on the Courts are well-established. [Counsel for the applicant], of course, is submitting that the facts as disclosed in the evidence filed on behalf of the applicant show that the decision is unreasonable in a *Wednesbury* sense and/or constitutes a breach of Article 3. However, it has to be said that the letters from the Chief Immigration Officer answer, it seems to me, with particularity each of the points which is made on behalf of the applicant. It is not for us to judge where the truth lies, for example, between the account of Mr Joffé [Deputy Director of the Royal Institute of International Affairs] on the one hand and the account on which the Secretary of State has based his view on the other as to the situation obtaining in the area between Rouina and Blida. What would have to be established if this application were to stand any chance of success would be that the decision of the Secretary of State in the light

> of the information available was so unreasonable that no reasonable Secretary of State could have come to it. For my part, I see no prospect of a Court being persuaded, if leave were granted, that that was the position. Moreover it is clear from the letter of 15 July that quite exceptional steps are intended to be taken by the Secretary of State to endeavour that the applicant is adequately cared for on the journey and on his arrival, and, finally, I observe that it has twice been reiterated that his case will be reviewed in respect of the situation in Algeria and also no doubt in respect of his current state of health before any removal directions are put into effect. ... while this is obviously a case which must have occasioned the Secretary of State considerable thought and which poses difficult decisions, he has taken decisions on the basis of information available to him and given a full and detailed explanation of his reasons. I see no prospect whatever of the Court being persuaded that his decision is in the circumstances so unreasonable that no reasonable Secretary of State could have reached it."

19. Removal directions were set for 20 November 1998.

20. The applicant's home village is Rouina. His parents live there, as do five of his brothers and a sister. His father is retired and lives on his pension. He has a two-bedroom house. None of the family has a car. The nearest hospital with facilities for treating mental illness is the Frantz-Fanon Hospital in Blida, 75 to 80 km away. The Government have provided a letter dated 28 July 1999 from Professor Ridouh, a senior psychiatrist at that hospital, indicating that the hospital contains 160 beds catering for persons committed in the context of criminal acts and 80 beds for persons referred administratively. He stated that the drug olanzapine was available in Algeria and could be prescribed in hospital pharmacies. Medical treatment, including drugs, was provided free to persons treated at the hospital.

21. In a further opinion dated 20 May 1999 sought by the immigration authorities with the applicant's consent, Dr Johnson reported that, when seen in February 1999, the applicant showed some signs of deterioration, with his auditory hallucinations having become more intrusive and with thoughts about harming himself and voices telling him to harm himself ("positive symptoms"). He had been unable to sleep because of this. His olanzapine had been increased and he had responded to this. However, he continued to have considerable difficulty with motivation and social withdrawal ("negative symptoms"). The applicant's mental illness was likely to be a long-term one. She would expect that he would continue to have positive symptoms, which would persist and could worsen, although controlled to a substantial degree by olanzapine. At times, he might require urgent help with these symptoms. There had been a significant deterioration in his level of social functioning probably due to negative symptoms and which was likely to be significantly handicapping in the coming years. With continuing medication and support from the mental health services, however, he would be likely to remain at the same level and not require very long periods of institutionalisation. Nor was he at a very serious risk of suicide. She stated, however, that if the applicant were to be returned to Algeria she would be more uncertain of the prognosis. She thought it was

> "highly likely that stressful life events such as deportation together with the more stressful environment he would be likely to encounter in Algeria would trigger exacerbation of his symptoms as occurred on his last visit to Algeria. ... his fearfulness when unwell and also the motivational difficulties and flatness of affect makes it very difficult for him to seek appropriate help when he does become unwell. ... If he were unable to obtain appropriate help, if he began to relapse I think that there would be a great risk that his deterioration would be very great and he would be at risk of acting in obedience to the hallucinations telling himself to harm himself or others ... Thus I do think that there is a substantial likelihood that forcible repatriation would result in significant and lasting adverse effect."

She further advised that any change in medication from olanzapine to sulpiride would create a risk of deterioration in his negative symptoms and diminish the control of the positive symptoms.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Immigration legislation and rules

22. Subject to exceptions, persons who are not United Kingdom citizens may not enter or remain in the United Kingdom unless given leave to do so. The grant of leave may be for a limited or indefinite period. Leave to enter is granted by immigration officers. Leave to remain is granted by the Secretary of State.

23. The Secretary of State makes rules concerning the practice to be followed in applying the Immigration Act 1971. The rules concerning the admission and residence of spouses provide that indefinite leave to remain as a foreign spouse requires, *inter alia*, that the marriage be still subsisting.

24. Where there has been a refusal of leave to enter, there is a right of appeal under section 13 of the Immigration Act 1971 to an adjudicator. However, this appeal cannot be exercised until the applicant has left the United Kingdom.

25. Persons seeking to enter the United Kingdom for medical treatment must show that they can maintain and accommodate themselves without recourse to public funds. The Secretary of State retains a power to grant leave to enter outside the Immigration Rules, known as "exceptional leave". The policy statement entitled "Exceptional Leave" (July 1998), although it applied to asylum-seekers, reflects the approach taken by the Secretary of State in this case:

> "2.1. Eligibility criteria
>
> ELE/R [exceptional leave to enter or remain] must be granted to asylum applicants if they fall under the following criteria
>
> – where the 1951 UN Convention requirements are not met in the individual case but return to the country of origin would result in the applicant being subjected to

torture or other cruel, inhuman or degrading treatment or where the removal would result in an unjustifiable break up of family life. For example ...

– where there is credible medical evidence that return, due to the medical facilities in the country concerned, would reduce the applicant's life expectancy and subject him to acute physical and mental suffering, in circumstances where the UK can be regarded as having assumed responsibility for his care. In cases of doubt, a second opinion should be sought from a credible source. ...

2.2. Disqualifying criteria

A person should never be disqualified from ELE/R if there are substantial reasons for believing that he or she would be tortured or otherwise subjected to inhuman or degrading treatment if they were to be returned to their country of origin ...”

B. Judicial review

26. Decisions of the Home Secretary to refuse asylum, to make a deportation order or to detain pending deportation are liable to challenge by way of judicial review and may be quashed by reference to the ordinary principles of English public law.

27. These principles do not permit the courts to make findings of fact on matters within the jurisdiction of the Secretary of State or to substitute their discretion for the minister's. The courts may quash his decision only if he has failed to interpret or apply English law correctly, if he failed to take account of issues which he was required by law to address, or if his decision was so irrational or perverse that no reasonable Secretary of State could have made it (*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 King's Bench Reports 223).

28. In the recent case of *R. v. Home Secretary, ex parte Turgut* (28 January 2000) concerning the Secretary of State's refusal of asylum to a young male Turkish Kurd draft evader, Lord Justice Simon Brown, in the Court of Appeal's judgment, stated as follows:

“I therefore conclude that the domestic court's obligation on an irrationality challenge in an Article 3 case is to subject the Secretary of State's decision to rigorous examination and this it does by considering the underlying factual material for itself to see whether it compels a different conclusion to that arrived at by the Secretary of State. Only if it does will the challenge succeed.

All that said, however, this is not an area in which the Court will pay any especial deference to the Secretary of State's conclusion on the facts. In the first place, the human right involved here – the right not to be exposed to a real risk of Article 3 treatment – is both absolute and fundamental: it is not a qualified right requiring a balance to be struck with some competing social need. Secondly, the Court here is hardly less well placed than the Secretary of State himself to evaluate the risk once the relevant material is before it. Thirdly, whilst I would reject the applicant's contention that the Secretary of State has knowingly misrepresented the evidence or shut his eyes to the true position, we must, I think, recognise at least the possibility that he has

(even if unconsciously) tended to depreciate the evidence of risk and, throughout the protracted decision-making process, may have tended also to rationalise the further material adduced so as to maintain his pre-existing stance rather than reassess the position with an open mind. In circumstances such as these, what has been called the 'discretionary area of judgment' – the area of judgment within which the Court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant's removal ... – is decidedly a narrow one."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

29. The applicant complained that his proposed expulsion to Algeria placed him at risk of inhuman and degrading treatment contrary to Article 3 of the Convention, which provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

30. The applicant submitted that his removal to Algeria, where he would not receive the degree of support and access to medical facilities which he currently relies on in the United Kingdom, would place him at real risk of a relapse in his illness, which includes hallucinations and suggestions of self-harm and harm to others. He relied on information indicating that the GIA opposition group was active in the region of his village, which would render travel dangerous and add to the strains on his precarious mental balance. He disputed that he would have any reliable access to olanzapine, the drug necessary for controlling his symptoms, and that it would jeopardise his condition to try any other products. He was not able to claim any social insurance benefits to pay for any drugs and it was doubtful that olanzapine would be available to him as an outpatient at the nearest hospital, which was the Frantz-Fanon Hospital. He pointed out that even if olanzapine was available at the Frantz-Fanon Hospital, it was 75 to 80 km from his village. As his family did not have a car and would urge him to rely on faith rather than medicine, he would have considerable practical and motivational problems in obtaining treatment at the hospital.

31. The Government submitted that the applicant suffered from a mental illness, the effects of which were likely to be long term whether he was in the United Kingdom or Algeria. They disputed that the applicant's village was in an area of Algeria which would place him at particular risk from

terrorists and were satisfied that he could safely travel by day to the hospital at Blida. They relied on the letter by Professor Ridouh of the Frantz-Fanon Hospital that the drug olanzapine taken currently by the applicant was available in the hospital pharmacy. He would be able to receive the drug free, if an inpatient, and would be entitled, as an outpatient, to reimbursement of the cost if he subscribed to the national social insurance fund. In any event, other appropriate drugs would be available if olanzapine was not. In these circumstances, the Government argued that there were no substantial grounds for believing that, if deported, the applicant would face a real risk of being subjected to treatment contrary to Article 3 of the Convention.

B. The Court's assessment

32. The Court recalls at the outset that 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. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question (see, for example, *Ahmed v. Austria*, judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2206, § 38, and *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, p. 1853, §§ 73-74).

33. The Court observes that the above principle is applicable to the applicant's removal under the Immigration Act 1971. It is to be noted that he has been physically present in the United Kingdom since 1989, with only short absences, and that he has been receiving medical care and support in the United Kingdom in relation to his mental illness since 1994-95.

34. While it is true that Article 3 has been more commonly applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities or non-State bodies in the receiving country (see, for example, *Ahmed*, cited above, p. 2207, § 44), the Court has, in the light of the fundamental importance of Article 3, reserved to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not, therefore, prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which

cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to rigorous scrutiny, especially the applicant's personal situation in the expelling State (see *D. v. the United Kingdom*, judgment of 2 May 1997, *Reports* 1997-III, p. 792, § 49).

35. The Court has therefore examined whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3 in view of his present medical condition. In so doing, the Court has assessed the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on the applicant's state of health (see *Ahmed*, cited above, p. 2207, § 43, and *D. v. the United Kingdom*, cited above, pp. 792-93, § 50).

36. In the present case, the applicant is suffering from a long-term mental illness, schizophrenia. He is currently receiving medication, olanzapine, which assists him in managing his symptoms. If he returns to Algeria, this drug will no longer be available to him free as an outpatient. He does not subscribe to any social insurance fund and cannot claim any reimbursement. It is, however, the case that the drug would be available to him if he was admitted as an inpatient and that it would be potentially available on payment as an outpatient. It is also the case that other medication, used in the management of mental illness, is likely to be available. The nearest hospital for providing treatment is at Blida, some 75 to 80 km from the village where his family live.

37. The difficulties in obtaining medication and the stress inherent in returning to that part of Algeria, where there is violence and active terrorism, would, according to the applicant, seriously endanger his health. Deterioration in his already existing mental illness could involve relapse into hallucinations and psychotic delusions involving self-harm and harm to others, as well as restrictions in social functioning (such as withdrawal and lack of motivation). The Court considers that the suffering associated with such a relapse could, in principle, fall within the scope of Article 3.

38. The Court observes, however, that the applicant faces the risk of relapse even if he stays in the United Kingdom as his illness is long term and requires constant management. Removal will arguably increase the risk, as will the differences in available personal support and accessibility of treatment. The applicant has argued, in particular, that other drugs are less likely to be of benefit to his condition, and also that the option of becoming an inpatient should be a last resort. Nonetheless, medical treatment is available to the applicant in Algeria. The fact that the applicant's circumstances in Algeria would be less favourable than those enjoyed by

him in the United Kingdom is not decisive from the point of view of Article 3 of the Convention.

39. The Court finds that the risk that the applicant would suffer a deterioration in his condition if he were returned to Algeria and that, if he did, he would not receive adequate support or care is to a large extent speculative. The arguments concerning the attitude of his family as devout Muslims, the difficulty of travelling to Blida and the effects on his health of these factors are also speculative. The information provided by the parties does not indicate that travel to the hospital is effectively prevented by the situation in the region. The applicant is not himself a likely target of terrorist activity. Even if his family does not have a car, this does not exclude the possibility of other arrangements being made.

40. The Court accepts the seriousness of the applicant's medical condition. Having regard, however, to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. The case does not disclose the exceptional circumstances of *D. v. the United Kingdom* (cited above), where the applicant was in the final stages of a terminal illness, Aids, and had no prospect of medical care or family support on expulsion to St Kitts.

41. The Court finds, therefore, that the implementation of the decision to remove the applicant to Algeria would not violate Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

42. The applicant complained that the expulsion would violate his right to respect for private life guaranteed under Article 8 of the Convention.

43. Article 8 of the Convention provides as relevant:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of ... the economic well-being of the country, for the prevention of disorder or crime ..."

A. The parties' submissions

44. The applicant argued under Article 8 that the removal would have a severely damaging effect on his private life in the sense of his moral and physical integrity. The National Health Service ("the NHS") has been responsible for the applicant's treatment since 1996 and withdrawal of that

treatment would risk a deterioration in his serious mental illness, involving symptoms going beyond horrendous mental suffering – in particular, there would be a real and immediate risk that he would act in obedience to hallucinations telling him to harm himself and others. This would plainly have an impact on his psychological integrity. In addition to the ties deriving from his eleven years in the United Kingdom, the treatment which he currently receives is all that supports his precarious grip on reality, which in turn enables some level of social functioning. Without it, he would be unable to interact in the community and establish or develop relationships with others.

45. The Government disputed that the removal of the applicant from the United Kingdom, where he was illegally, to his country of nationality, where medical treatment was available, would show any lack of respect for his right to private life. Even if there was an interference, it would be justified under the second paragraph of Article 8 on the basis that the State immigration policy was necessary for the economic well-being of the country and the prevention of disorder and crime. They also referred to the fact that the applicant was seeking continued medical treatment at the expense of the British taxpayer, adding to the already considerable burdens of the NHS. It would have seriously destabilising effects if the NHS became liable to provide treatment to a potentially open-ended class of non-European Union citizens.

B. The Court's assessment

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 (see *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, pp. 60-61, § 36).

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 (see, for example, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41; *B. v. France*, judgment of 25 March 1992, Series A no. 232-C, pp. 53-54, § 63; *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24; and *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, *Reports* 1997-I, p. 131, § 36). 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 (see, for example, *Burghartz*, cited above, opinion of the Commission, p. 37, § 47, and *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, p. 20, § 45). 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 was 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.

49. Accordingly, it finds that the implementation of the decision to remove the applicant to Algeria would not violate Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

50. The applicant complained that he had no effective remedy against the proposed expulsion. He relied on Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

51. The applicant submitted that he had no effective remedy available to him by which he could challenge the decision of the Secretary of State to deport him to Algeria. He argued that judicial review was limited in its scope to an examination of rationality and perverseness and could not enter into the merits. He referred to the recent *Smith and Grady v. the United*

Kingdom judgment (nos. 33985/96 and 33986/96, ECHR 1999-VI), where judicial review was not found to give effective redress for the expulsion of homosexuals from the army. He emphasised that the courts refused to determine the essential disputes of fact between him and the Secretary of State. This inability to determine the substance of his Convention complaint deprived the procedure of effectiveness for the purposes of Article 13 of the Convention.

52. The Government submitted that judicial review furnished an effective remedy, and referred to previous findings of the Court to that effect in expulsion cases (see, for example, *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, and *D. v. the United Kingdom*, cited above). The domestic case-law demonstrated that the courts considered carefully the evidence before them in such cases. While they accepted that the Court of Appeal in the applicant's case did not resolve the factual disputes in the evidence before it, it nonetheless scrutinised the Secretary of State's decision closely, noting that the Secretary of State had answered with particularity the points made on the applicant's behalf and the exceptional steps which the Secretary of State had stated would be taken to ensure that the applicant was adequately cared for during the journey and on his arrival in Algeria.

B. The Court's assessment

53. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law. In particular, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95; *Aydın v. Turkey*, judgment of 25 September 1997, pp. 1895-96, § 103; and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, pp. 329-30, § 106).

54. On the basis of the evidence adduced in the present case, the Court finds that the applicant's claim that he risked inhuman and degrading treatment contrary to Article 3 of the Convention if expelled to Algeria is therefore "arguable" for the purposes of Article 13 (see *Boyle and Rice*

v. the United Kingdom, judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and *Kaya*, cited above, p. 330, § 107). The Court has therefore examined whether he had available to him an effective remedy against the threatened expulsion.

55. In *Vilvarajah and Others* (cited above, p. 39, § 123) and *Soering v. the United Kingdom* (judgment of 7 July 1989, Series A no. 161, pp. 47-48, §§ 121-24), the Court considered judicial review proceedings to be an effective remedy in relation to the complaints raised under Article 3 in the contexts of deportation and extradition. It was satisfied that English courts could effectively control the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate. It was also accepted that a court in the exercise of its powers of judicial review would have power to quash a decision to expel or deport an individual to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take. This view was followed more recently in *D. v. the United Kingdom* (cited above, pp. 797-98, §§ 70-71).

56. While the applicant argued that, in judicial review applications, the courts will not reach findings of fact for themselves on disputed issues, the Court is satisfied that the domestic courts give careful and detailed scrutiny to claims that an expulsion would expose an applicant to the risk of inhuman and degrading treatment. The judgment delivered by the Court of Appeal did so in the applicant's case. The Court is not convinced, therefore, that the fact that this scrutiny takes place against the background of the criteria applied in judicial review of administrative decisions, namely, rationality and perverseness, deprives the procedure of its effectiveness. The substance of the applicant's complaint was examined by the Court of Appeal, and it had the power to afford him the relief he sought. The fact that it did not do so is not a material consideration, since the effectiveness of a remedy for the purposes of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see *Vilvarajah and Others*, cited above, p. 39, § 122).

57. *Smith and Grady*, relied on by the applicant, in which there was a breach of Article 13 due to the ineffectiveness of judicial review, does not alter the Court's conclusion. In that case, the domestic courts were concerned with the general policy applied by the Ministry of Defence in excluding homosexuals from the army, in which security context there was a wide area of discretion afforded to the authorities.

58. The Court concludes, therefore, that the applicant had available to him an effective remedy in relation to his complaints under Articles 3 and 8 of the Convention concerning the risk to his mental health of being expelled to Algeria. Accordingly, there has been no breach of Article 13.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that the implementation of the decision to remove the applicant to Algeria would not violate Article 3 of the Convention;

2. *Holds* that the implementation of the decision to remove the applicant to Algeria would not violate Article 8 of the Convention;

3. *Holds* that there has been no violation of Article 13 of the Convention.

Done in English, and notified in writing on 6 February 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Sir Nicolas Bratza joined by Mr Costa and Mrs Greve is annexed to this judgment.

J.-P.C.
S.D.

SEPARATE OPINION OF JUDGE Sir Nicolas BRATZA JOINED BY JUDGES COSTA AND GREVE

It is with considerable hesitation that I have voted in favour of a finding that the return of the applicant to Algeria would not violate Article 3 of the Convention.

As is rightly emphasised in the Court's judgment, it is beyond doubt that the applicant is suffering from a mental illness which is both genuine and serious. His condition, when his psychotic illness was first diagnosed, was so severe that consideration was given to his compulsory detention in a mental hospital. In the event, the applicant responded sufficiently to treatment to make this unnecessary and, subject to a minor relapse in 1997 for which he was admitted to hospital and to signs of deterioration in his condition in February 1999, his illness has been successfully managed with the use of antipsychotic medication – most recently and currently, olanzapine.

Nevertheless, the applicant's mental illness remains serious. In the view of Dr Johnson, not only was his illness likely to be a long-term one, but the applicant was likely to continue to have positive symptoms (delusions, hallucinations and thoughts of self-harm), which would persist and could worsen although controlled to a substantial degree by olanzapine. In addition, there had in her view been a significant deterioration in the applicant's level of social functioning which was likely to be significantly handicapping in the coming years. While, with continuing medication and support from the mental health services, the applicant would, in the view of Dr Johnson, be likely to remain at the same level and not require very long periods of institutionalisation, the prognosis if he were returned to Algeria was more uncertain. It was her uncontradicted view that it was "highly likely" that the stress caused by the deportation to Algeria and the environment there would trigger an exacerbation of the applicant's symptoms; that his fearfulness when unwell and motivational problems would make it difficult for him to seek help; and that if, without such help, he began to relapse "there would be a great risk that his deterioration would be very great and he would be at risk of acting in obedience to his hallucinations telling him to harm himself or others".

The availability of appropriate treatment and medication in Algeria remains imponderable. It is common ground that olanzapine would not be free to the applicant as an outpatient and that the closest hospital with facilities for dealing with mental patients, where he could be treated as an inpatient, is some 75 to 80 km from the village where his family live. It is in dispute whether olanzapine is available to outpatients on payment in hospital pharmacies, but the cost of such drug would be likely in any event to prove prohibitive. It is also in dispute whether the security situation in Algeria would render travel to the Frantz-Fanon Hospital dangerous but,

even if such a journey could be safely made, regular travel to the hospital at such a distance would be likely to pose serious practical problems for the applicant.

In these circumstances, the central question raised is whether the risk of a relapse and the risk that any such relapse would go untreated because of lack of appropriate support or medication have been shown to be sufficiently real and certain that the applicant's removal to Algeria would amount to a violation of Article 3. The standard required is a high one. In *D. v. the United Kingdom* (judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III), the Court required that the circumstances surrounding the case should be subjected to a "rigorous scrutiny" where the source of the risk of proscribed treatment in the receiving country stemmed from factors which could not engage either directly or indirectly the responsibility of the public authorities of that country. The circumstances in *D. v. the United Kingdom* itself were correctly categorised by the Court as "very exceptional". The applicant in that case was in an advanced stage of a terminal and incurable illness; at the date of the Court's hearing there had been a marked decline in his condition and he had to be transferred to a hospital where his condition was giving rise to concern; the abrupt withdrawal of sophisticated treatment and medication which he enjoyed in the United Kingdom would, as the Court found, have entailed dramatic consequences for him, hastening his death and subjecting him to acute mental and physical suffering, since any medical treatment which he might hope to receive in St Kitts could not contend with the infections which he might possibly contract on account of his lack of shelter and proper diet, as well as exposure to the health and sanitation problems which beset the population of that island.

As is pointed out in the Court's judgment, the present case does not disclose exceptional circumstances similar to those of *D. v. the United Kingdom*, the risk that the applicant would, if returned to Algeria, suffer treatment reaching the threshold of Article 3 being less certain and more speculative than in that case. For this reason, I have on balance arrived at a different conclusion from that reached by the Court in *D. v. the United Kingdom*. Nevertheless, on the evidence before the Court, there exist in my view powerful and compelling humanitarian considerations in the present case which would justify and merit reconsideration by the national authorities of the decision to remove the applicant to Algeria.