Neutral Citation Number: [2006] EWCA Civ 1531

Case No: C5/2006/0410

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Immigration Appeal Tribunal
Mr C.M.G. Ockelton (Deputy President)
Mr N.W. Renton (Senior Immigration Judge)
Mr D.R. Humphrey (Immigration Judge)
Case No. AS/04832/2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2006

Before :

LORD JUSTICE CARNWATH
LORD JUSTICE GAGE
and
MR JUSTICE BODEY

- -

Between :

EM (LEBANON)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPT	**Respondent**

- -
- -

Frances Webber (instructed by **Messrs. J.M. Wilson**) for the **Appellant**
Nicola Greaney (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date : 9th October, 2006

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Judgment

Carnwath LJ:

Background

1. The claimant, who is now 34, is a citizen of the Lebanon. She arrived in this country in December 2004 with her son, born in July 1996. Following refusal of her claim for asylum, directions for removal were given in February 2005. She appealed on both asylum and human rights grounds. The appeal was rejected on 13th June 2005 by a single immigration judge (Mr C Deavin), and that decision was confirmed, following an order for reconsideration, on 22nd November 2005 by a panel chaired by Mr Mark Ockelton, Deputy President ("the Panel"). Permission to appeal was granted by Buxton LJ on one ground only (Article 8). Applications to renew on two other grounds (Article 14 and Refugee Convention) are also before us.

The AIT decision

2. The AIT Panel were willing to take her personal evidence "at its highest". They summarised her "central assertions":

> "She says that her husband married her only because of her father's money and that he did not want children. Their son was born in 1996, and her husband sought to abduct him to Saudi Arabia immediately after the birth. He failed in that endeavour and subsequently subjected her to violence of the most extreme kind. She obtained a divorce from the Islamic court and was awarded custody of her son until his seventh birthday. She says (and this is supported by the report on Islamic law in Lebanon) that after that date she would lose custody: her husband or his relatives will have a right to it. Because she did not want to be bound by that rule of law, she arranged to leave Lebanon on false documents, taking her son with her. She says that she is, as a result, sought for the offence of kidnapping and that she is accordingly at risk of ill-treatment in prison and, she suggests, death. She further claims that she would be the subject of discrimination in legal proceedings for custody. She further claims that her separation of her son from her, albeit in accordance with Islamic law as applied in Lebanon, is contrary to her human rights." (para 3)

They noted that the son had made no separate claim, it being accepted that his claim was dependent on that of his mother, and that the Secretary of State would not remove one of them to Lebanon without the other.

3. The contention that, if returned to the Lebanon, she would automatically lose custody of her child, was not in dispute. The only relevant evidence was in the form of a written report by Kristine Uhlman, an expert in Islamic law and customs relating to marriage, divorce and child custody. She confirmed that, in accordance with the principle of Islamic law that "the male is seen as the leader of the family unit", legal custody of a child lies with the father. In recognition of "the infant's need for female care" physical custody is given to the mother until the age of custodial transfer, generally set at the age of seven, but thereafter reverts automatically to the father.

4. It was clear from her evidence that in the Lebanese courts there would be no room for the exercise of judicial discretion in respect of custody:

> "The Lebanese judiciary is generally impartial and independent except in the application of Shari'a law as it relates to the custody of the child after the age of custodial transfer – it is predetermined that in the absence of the approval of the child's father to allow the mother to retain custody, custody is transferred to the father or the father's extended family at the age of custodial transfer.
>
> A mother generally has a right to physical, not legal, custody of her child until the child reaches the age of custodial transfer, at which time the child is returned to the physical custody of the child's father or the father's family. The father always retains legal custody and the right to determine where the child will live and whether the mother may travel with the child. Under Shari'a, a father is the natural guardian (*al waley*) of his children's persons and property, and some jurisdictions may also give the child's paternal grandfather joint guardianship. In all instances, a child's paternal grandfather is his or her natural guardian after the father. Under the law of Lebanon, guardianship passes to the next relative on the father's side if the father and paternal grandfather are unable to act as guardian.…
>
> … even if the courts were to find the father unfit as a parent due to past finding of his unacceptable moral standards, the child would be passed to the paternal grandfather or male member of the extended paternal family…"

5. Of the claimant's prospects of maintaining contact with her child if returned to the Lebanon her evidence was less clearcut:

> "If (the claimant) were to return to Lebanon, the child's father, paternal grandfather, or other male member of the extended paternal family would retain legal custody of the child and (the claimant) may, or may not, be allowed visitation. While the parent with physical custody cannot be compelled to send the child to the other parent's residence for visits, he must bring the child to a place where the other parent can see the child if ordered by the court… If a custody hearing were to be held in Lebanon it would not address custody but would most likely be to determine the appropriateness of allowing (the claimant) access to the child during supervised visits, under no circumstances would custody remain with the mother…."

6. The single judge felt able to infer that "there is every likelihood that she will be allowed visitation rights". The basis for this is not clear to me, but it is unnecessary to explore the point. The Panel simply observed:

> "We cannot see that it would be right to say on the basis of the information before us that the Appellant would not see her child again."

For the purposes of the present appeal, as I understand it, Miss Webber accepts that the claimant has not established to the necessary standard that she would not obtain visitation rights. Accordingly, her case stands or falls on the apparently certain prospect of loss of custody of her child.

7. The Panel dealt shortly with the claim under the Refugee Convention, which they summarised as being:

> "… to the effect that any ill-treatment of the Appellant on her return to Lebanon would be for the Convention reason of membership of a particular social group, that is to say women in Lebanon. This argument is based on selected sentences from a very large bundle, which are said to establish that "*there is clearly no regard for a woman's rights in Lebanon*". "

In the Panel's view the country evidence came "nowhere near establishing that proposition", and was "a world away" from the facts in *Shah* and *Islam* [1999] 2 AC 629 (in which the House of Lords upheld the asylum claims of two women, on the grounds of lack of effective legal protection against marital violence in Pakistan):

> "Muslims in Lebanon are governed, in family matters, by Muslim law. The fact that the rules of Muslim law operate in a way which some Western societies might regard as discriminatory does not show that all women are deprived of standing before the law. On the contrary: the Appellant's own claimed history demonstrates that she has been able to obtain relief from the courts."

8. As to the Human Rights claim, they noted that this rested on Article 8 alone. They observed:

> "… it is not easy to see that this Tribunal should take it upon itself to pass judgment on the general law of another country save in exceptional circumstances."

Having noted that the complaint was not of any action or inaction by the UK Government, but of the possible actions of the Lebanese authorities if she were returned, they continued:

> "11. The law in these circumstances is well established. It is to be found in the decisions of the House of Lords in *Razgar*, [2004] UKHL 27, and *Ullah* [2004] UKHL 26, [2004] Imm AR 419. The Appellant can only succeed if she can show that the country to which she returns has a flagrant disregard for the rights protected by Article 8.

> 12. On the material before us, that is clearly not so. There is a judicial system, to which the Appellant has access. The system of family law to which she, by her religion, is subject, is one which in this respect she does not like: but that does not permit her to choose the law of another country, nor does it permit us to say that it is a system to which nobody should be subject. As a result, we cannot say that the removal of the Appellant and her son to Lebanon would itself constitute a breach of the rights they have under Article 8 while they remain in the jurisdiction of this country. After their removal, they simply have no such rights: they are subject to the law of their own country, which is not a party to the European Convention on Human Rights."

9. No specific case having been made under Article 2 or 3, they dealt shortly with the suggested risks of maltreatment by the husband and of prosecution for kidnapping:

> "There is no reason to suppose that the Appellant is not entitled to the protection of the law in respect of any attacks by her husband, whom she had indeed not seen for some years before her departure for the United Kingdom. There is therefore no real risk from him. If the Appellant is subject to criminal proceedings for kidnapping, she may possibly serve a prison sentence. We were not asked to find, and we would not have found, that that risk of itself could cause the United Kingdom to be in breach of her rights under Article 3 by returning her. We should, however, observe that our conclusions on Article 2 and Article 3 to an extent support the conclusion we reached on the refugee claim: even if any ill-treatment that she may receive on return had been for a Convention reason, there does not seem to be any real risk that she would be subject to such treatment as might amount to persecution. " (para 17)

The issues in the appeal

10. Miss Webber's overall case was put succinctly and powerfully in her skeleton argument:

> "Removing a child from the mother's custody for the sole reason of her sex, without regard to the interests, wishes or welfare of either mother or child, constitutes a flagrant denial of rights to equal treatment in the enjoyment of the 'elementary' right to care for one's own child and corresponding right of the child to be cared for by his mother.
>
> Such a flagrant denial of fundamental rights…
>
> > (i) engages the United Kingdom's obligations under the Human Rights Convention and renders the forcible return of mother and child to Lebanon disproportionate to the legitimate aims entailed in immigration control;

> (ii) constitutes persecution, alone or together with the likelihood of imprisonment of a mother who acts in breach of such a measure."

11. In that formulation (as so often) the human rights and asylum issues overlap. Although permission to appeal was limited to Article 8, it is convenient to consider the human rights issues together, before dealing with questions of permission to appeal, and any separate issues under the Refugee Convention.

The law

12. Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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 national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

13. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

14. We have been referred to a number of English and Strasbourg authorities. However, for the purpose of the issues in the case I think it is sufficient to refer to four.

15. It is common ground that the relevant test for a "foreign case" is that set out by Lord Bingham in *Ullah* (a case under Article 9). He explained the distinction between "domestic" and "foreign" cases:

> "9. Domestic cases as I have defined them are to be distinguished from cases in which it is not claimed that the state complained of has violated or will violate the applicant's Convention rights within its own territory but in which it is claimed that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory will lead to a violation of the person's Convention rights in that other territory. I call these "foreign cases", acknowledging that the description is imperfect, since even a foreign case assumes an exercise of power by the state affecting a person physically present within its territory…"

16. Having reviewed the Strasbourg case-law, he summarised the approach adopted under the earlier articles:

> "24. While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment: *Soering*, paragraph 91; *Cruz Varas*, paragraph 69; *Vilvarajah*, paragraph 103. In *Dehwari*, paragraph 61 (see paragraph 13 above) the Commission doubted whether a real risk was enough to resist removal under article 2, suggesting that the loss of life must be shown to be a "near-certainty". Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: *Soering*, paragraph 113 (see paragraph 10 above); *Drodz*, paragraph 110; *Einhorn*, paragraph 32; *Razaghi v Sweden*; *Tomic v United Kingdom*. Successful reliance on article 5 would have to meet no less exacting a test."

17. Against that background he explained the correct approach to articles 8 and 9:

> "The lack of success of applicants relying on articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance is placed on articles such as 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown. This is not a balance which the Strasbourg court ought ordinarily to strike in the first instance, nor is it a balance which that court is well placed to assess in the absence of representations by the receiving state whose laws, institutions or practices are the subject of criticism. On the other hand, the removing state will always have what will usually be strong grounds for justifying its own conduct: the great importance of operating firm and orderly immigration control in an expulsion case; the great desirability of honouring extradition treaties made with other states. The correct approach in cases involving qualified rights such as those under articles 8 and 9 is in my opinion that indicated by the Immigration Appeal Tribunal (Mr C M G Ockelton, deputy president, Mr Allen and Mr Moulden) in *Devaseelan v Secretary of State for the Home Department* [2002] IAT 702, [2003] Imm AR 1, paragraph 111: "
>
> > '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".”

Both parties before us rely on the test as there formulated by the AIT (presided over as in the present case by Mr Ockelton). For ease of reference I shall call this “the Devaseelan formula”.

18. Lord Steyn spoke of the “high threshold” which would need to be satisfied in all cases:

> “It will be necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other articles could become engaged.” (para 50)

It is apparent from the preceding paragraphs that he regarded this test as applicable not only under article 8, but also under what he called the “cluster of qualified guarantees” comprising articles 9-11 and 14.

19. Further guidance on the word “flagrant” is to be found in the speech of Lord Carswell (which also had majority support):

> “69. The adjective "flagrant" has been repeated in many statements where the Court has kept open the possibility of engagement of articles of the Convention other than article 3, a number of which are enumerated in paragraph 24 of the opinion of Lord Bingham of Cornhill in the present appeal. The concept of a flagrant breach or violation may not always be easy for domestic courts to apply - one is put in mind of the difficulties which they have had in applying that of gross negligence - but it seems to me that it was well expressed by the Immigration Appeal Tribunal in *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1 at p 34, para 111, when it applied the criterion that the right in question would be completely denied or nullified in the destination country. This would harmonise with the concept of a fundamental breach, with which courts in this jurisdiction are familiar.”

On the facts of the case, assuming article 9 to be engaged, he did not consider that the appellants came within “the possible parameters of a flagrant, gross or fundamental breach of that article”.

20. The facts of *Ullah* were very different from those of the present case. So were those of *Razgar* [2004] UKHL 368, the Article 8 case decided at the same time as *Ullah*. However, it is helpful to note Baroness Hale’s formulation of the distinction between domestic and foreign cases:

> “Another way of putting this distinction is that in domestic cases the contracting state is directly responsible, because of its own act or omission, for the breach of Convention rights. In foreign cases, the contracting state is not directly responsible:

> its responsibility is engaged because of the real risk that its conduct in expelling the person will lead to a gross invasion of his most fundamental human rights." (p 41)

She also referred to the acceptance in the Strasbourg jurisprudence of "the state's obligation to take positive steps to enable family life to develop between parent and child" (recognised since the "ground-breaking decision of *Marckx v Belgium* (1979) 2 EHRR 330), and of "the elementary human right, the right to care for your children" (para 53).

21. Closer on the facts to the present case, although under a different statutory jurisdiction, was *Re J (a Child)* [2005] UKHL 40. That concerned a family judge's decision to refuse an application by the father, as Saudi national, to order the return of a child to Saudi Arabia, because of the possible consequences under Sharia law of allegations made by him against the mother. Baroness Hale gave the leading speech. The issue of principle was the proper approach to applications for the summary return of children to countries which are not parties to the Hague Convention on the Civil Aspects of International Child Abduction. As she explained:

> "The Convention is widely regarded as a great success, particularly in combating the paradigm case which its authors had in mind: the child who was living with one parent but snatched or spirited away by the other…. Obviously, the cultures and legal systems of the Contracting States will differ widely from one another. All are prepared to accept these differences for the sake of the reciprocal benefits which membership can bring. But one group of States is conspicuous by its absence. These are States which adopt some form of Shariah law." (para 21)

22. The issue, in summary, was whether the court should, in accordance with its traditional role, have regard to the "the welfare of the child as its paramount consideration", or whether that approach should be modified in some way, by analogy with the Convention, and in the interests of international collaboration. The House affirmed the traditional approach. In the course of her speech (approved by the whole House), Baroness Hale drew comparison with the human rights issues considered in *Ullah*.

23. In order to see her comments in context, I will set out the whole passage, highlighting the parts most directly relevant to the present discussion:

> "*Human rights*
>
> 42. The fact remains that the unchallenged evidence before the trial judge was that the law in Saudi Arabia treats fathers and mothers differently and in significant respects the mother is in a less favourable position than the father. Under articles 8 and 14 of the European Convention on Human Rights, the right to respect for family life is to be enjoyed without discrimination on grounds of sex. The Court of Appeal held, at para 34, that the fact that the mother might experience in Saudi Arabia what

would be regarded here as breaches of her Convention rights did not render the English court in breach of those rights if it returned F to Saudi Arabia. In reaching that conclusion the Court relied principally on the decision of the Court of Appeal in *R (Ullah) v Special Adjudicator*…: our obligations were only engaged if the likely treatment in another state would engage the prohibition against torture and inhuman or degrading treatment or punishment in article 3 of the Convention. *This House has since held that our obligations may be engaged where there is a real risk of particularly flagrant breaches of other articles in the foreign country… This is not a case of such a risk*. In relation to article 8, however, a distinction has also been drawn between 'domestic' cases, where a family life established here may be disrupted by a forced return to another country, and 'foreign' cases, where the only breach would take place abroad: see Lord Bingham of Cornhill, at paras 7 - 9. In practice, this adds nothing to the welfare inquiry, once it is accepted that the strength of the child's connection with this country, and the effect upon his parent here, are relevant to whether a summary return will be in his best interests.

43. However, there is another way in which the human rights considerations might have been relevant. Article 20 of the Hague Convention provides that:

> "The return of the child under the provisions of article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

44. This was not included in the provisions incorporated into our law by the 1985 Act because at that time it would have been difficult to say what our fundamental principles relating to the protection of human rights and fundamental freedoms were. Now that we have incorporated the European Convention on Human Rights, that is no longer a problem. Mr Setright acknowledged that had the Human Rights Act 1998 preceded rather than followed the 1985 Act there would have been no reason not to incorporate article 20.

45. The importance of article 20 is that it asks whether what might happen in the foreign country would be permitted under those fundamental principles were it to happen here. *(It thus goes further than the principle under consideration in Ullah, which asks whether it is a breach of this country's obligations to send a person away to a country where his human rights may be violated.) In this country, it would not be acceptable to distinguish automatically between father and mother in their relationship with their children. Non-discrimination between the sexes is a fundamental principle of our law*. Were article 20 of the Hague Convention to be incorporated, we would be

> entitled, though not obliged, to decline to return a child on that ground alone. If we were, therefore, to be applying the spirit of the Hague Convention in a non-Convention case, there would be no reason not to apply the whole of the Hague Convention, including article 20. Any discrimination in the foreign country which was contrary to article 14 of the Convention on Human Rights would allow, but not require, the court to refuse to return the child. This consideration serves to reinforce the view that the legal system in the foreign country cannot be irrelevant to the issue of summary return."

24. Miss Webber relies on the unequivocal statement in the last paragraph that non-discrimination between the sexes, in respect of their relationships with their children, is "a fundamental principle of our law". That is an important step in her argument. But it was said in respect of a legal requirement which "goes further than the principle under consideration iu *Ullah*". At paragraph 43, Baroness Hale had emphasised the requirement under *Ullah* for there to he a real risk of a "particularly flagrant" breach, stating that this was "not a case of such a risk". Thus, apparently, sending a child back to a legal system which did not accept that "fundamental principle" was not thought enough in itself to satisfy the "flagrancy" test. Of course, that was not an issue before the House, and there appears to have been no argument on it.

25. Turning to Strasbourg, Miss Webber relies on the "ground-breaking" case of *Marckx v Belgium* (1979) 2 EHRR 330. That concerned the Belgian illegitimacy laws which laid down special requirements for recognition of mothers of illegitimate children, and limited their capacity to bequeath property. The Court held that these requirements breached Article 8, both on its own, and in conjunction with Article 14. Having confirmed that Article 8 "applies to the 'family life' of the 'illegitimate' family as it does to that of the 'legitimate' family", and having found that there was a "real family life" between the claimant and her daughter, the court considered the meaning of the word "respect":

> "It remains to be ascertained what the "respect" for this family life required of the Belgian legislature in each of the areas covered by the application.
>
> By proclaiming in paragraph 1 the right to respect for family life, Article 8 (art. 8-1) signifies firstly that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2 (art. 8-2). As the Court stated in the "*Belgian Linguistic*" case, the object of the Article is "essentially" that of protecting the individual against arbitrary interference by the public authorities (judgment of 23 July 1968, Series A no. 6, p. 33, para. 7). Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life.
>
> This means, amongst other things, that when the State determines in its domestic legal system the regime applicable to

> certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8 (art. 8), respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 (art. 8-1) *without there being any call to examine it under paragraph 2 (art. 8-2).*
>
> Article 8 (art. 8) being therefore relevant to the present case, the Court has to review in detail each of the applicants' complaints in the light of this provision." (emphasis added)

26. Miss Webber relies on the emphasised words as showing that the requirement expounded in that paragraph was treated as a fundamental principle of the Convention, from which there could be no derogation under Article 8(2). She also points to the fact that, in subsequent paragraphs (36-7), the Court did in fact uphold the claims of both mother and daughter under Article 8, without any consideration of Article 8(2). I note, however, that there is no reference to any objective justification being put forward by the Belgian Government under Article 8(2) (by contrast with its arguments under Article 14 – see below).

27. The Court also considered the alleged violation of Article 14 "taken in conjunction with Article 8": It explained the interaction between the two articles:

> "32. … The Court's case-law shows that, although Article 14 (art. 14) has no independent existence, it may play an important autonomous role by complementing the other normative provisions of the Convention and the Protocols: Article 14 (art. 14) safeguards individuals, placed in similar situations, from any discrimination in the enjoyment of the rights and freedoms set forth in those other provisions. A measure which, although in itself in conformity with the requirements of the Article of the Convention or the Protocols enshrining a given right or freedom, is of a discriminatory nature incompatible with Article 14 (art. 14) therefore violates those two Articles taken in conjunction. *It is as though Article 14 (art. 14) formed an integral part of each of the provisions laying down rights and freedoms…*
>
> Accordingly, and since Article 8 (art. 8) is relevant to the present case (see paragraph 31 above), it is necessary also to take into account Article 14 in conjunction with Article 8 (art. 14+8).
>
> 33. According to the Court's established case-law, a distinction is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality

> between the means employed and the aim sought to be realised"…"
>
> 34. In acting in a manner calculated to allow the family life of an unmarried mother and her child to develop normally (see paragraph 31 above), the State must avoid any discrimination grounded on birth: this is dictated by Article 14 taken in conjunction with Article 8." (emphasis added)

28. The Court rejected the Belgian Government's suggested justification based on the "difference between the situations of the unmarried and married mother" (para 39). In reaching that conclusion it took account of developments in social attitudes since the 1950 when the Convention was drafted:

> "It is true that, at the time when the Convention of 4 November 1950 was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the "illegitimate" and the "legitimate" family. However, the Court recalls that this Convention must be interpreted in the light of present-day conditions (*Tyrer* judgment of 25 April 1978, Series A no. 26, p. 15, para. 31). In the instant case, the Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim "*mater semper certa est*". (para 41)

29. The comments on article 14 must be read in the light of subsequent Strasbourg cases on the role of that article, recently reviewed in detail by the House of Lords in *M v Secretary of State* [2006] 2 WLR 637; [2006] UKHL 11 (see paras 56ff, per Lord Walker). However, I do not think there is anything in the later cases to detract from the principle (taken from the "*Belgian Linguistic*" case, Series A no. 6, pp. 33-34, para. 9) that non-discrimination, in the sense defined by Article 14, is to be regarded as "an integral part of each of the provisions laying down rights and freedoms."

Issues in the appeal

30. Miss Webber's case under Article 8 is simple. The right of a mother to participate in the upbringing of her child is a fundamental right, recognised by domestic, European and international law; a legal system which denies her that right, after the child has reached seven years, solely on the grounds of her sex, is a "flagrant denial or gross violation" of that right.

31. She reinforces those propositions by reference to international conventions. They include the International Covenant on Civil and Political Rights (Articles 2, 17, 24, and 26), the Convention of the Elimination of all Forms of Discrimination against Women (CEDAW) (Articles 1 and 16). 1966). It is to be noted that, although the Lebanon is a party to both conventions, it has entered a reservation to certain parts of CEDAW, including for example Article 16.1(d), which requires the States Parties –

> "… to ensure, on a basis of equality of men and women:
>
> (d) the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount."

Such reservations have been categorised by the CEDAW Committee as "impermissible". Article 16 is described as a "core provision" of the Convention, and accordingly:

> "… reservations to article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn."

32. Unsurprisingly, Miss Greaney, for the Secretary of State, does not dispute the first part of Miss Webber's proposition, viewed from an English or European perspective. Indeed, the "fundamental" nature of the right was affirmed by Baroness Hale in *Re J (a Child)*. Nor, I think, does she dispute that, in a country to which the European Convention applies, the automatic denial of custody to a mother, solely on the grounds of her sex, would be a clear breach of both Article 8 and Article 14, for which there could be no objective justification under either article. But she takes issue on Miss Webber's application of the "flagrancy" test.

33. Before coming to my conclusions on this central issue, I should deal with two criticisms made by Miss Webber of the Panel's reasoning. First, she criticises their summary of the *Ullah* test as requiring her to show that the Lebanon "has a flagrant disregard for the rights protected by Article 8". This she says implies, wrongly, that the answer is in some way dependent on the subjective attitude of the Lebanese authorities. I think, however, that she may be reading too much into the words of the decision, which were intended as no more than a shorthand summary. The Devaseelan formula (of which this particular Panel can be assumed to have been well aware) makes clear that it is not a subjective test; the issue is whether, viewed objectively by the standards of the Convention, "the right will be completely denied or nullified".

34. She also criticises the Panel's statement that it should not be part of the AIT's task, other than in exceptional circumstances, to "pass judgment on the general law of another country". She sees the same line of thinking reflected in their later reference to her dislike of this aspect of "the system of family law to which she, by her religion, … subject", and the comment that this –

> "… does not permit her to choose the law of another country, nor does it permit us to say that it is a system to which nobody should be subject."

Here I think her criticism has more justification. The Tribunal is not asked to any kind of value judgment on the laws of Lebanon, still less to express a political opinion as to whether the citizens of that country should be subject to such laws. The issue is one purely of domestic law, incorporating the Convention. That was made clear in the leading case of *Soering v UK* (1989) 11 EHRR 439, discussed at length in *Ullah*. The claimant argued that extradition to the United States, because of his prospect of

detention on death row if convicted, would infringe his rights under article 3. Although the claim was rejected on the facts, the court accepted in principle that such a claim might give rise to an issue under the Convention and hence "engage the responsibility" of a signatory state:

> "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." (para 91, emphasis added)

There is no suggestion in *Ullah* that a different approach should apply to article 8.

35. However, I do not think that issue goes to the heart of the dispute before us. In the end the difference between the parties comes down to a narrow but crucial point. Applying the Devaseelan formula, Miss Webber says that her right to be considered on an equal basis in decisions on custody would be "completely denied or nullified" by the Lebanese court. Miss Greaney says that is too narrow a formulation of the "right". Article 8 protects the right to family life. Although she would lose custody of son, the evidence did not establish that she would lose all contact with her son. The Lebanese courts had power to give her visitation rights, and on the evidence they would exercise that power impartially. Thus her enjoyment of family life with her child, though severely restricted, would not be "completely denied or nullified".

36. With considerable misgivings, I am forced to the conclusion that Miss Greaney is correct. My misgivings are due principally to the natural reluctance of an English judge to send a child back to a legal system where a crucial custody issue will be decided without necessary reference to his welfare. That would be an overriding consideration in other jurisdictions, but it is not suggested that it can be determinative in the context of asylum law.

37. In addition I have not found it easy to give effect to the different expressions which have been used to define the test. If "complete denial" or "nullification" is the test, I agree with Miss Greaney's analysis. The right in question is the right protected by article 8, of which custody is but one important aspect. On the evidence her article 8 right would not be completely denied.

38. However, one finds many other formulations in the passages of high authority cited above: "flagrant denial", "gross violation", "flagrant violation of the very essence of the right", "flagrant, gross or fundamental breach", "gross invasion of (her) most fundamental human rights", "particularly flagrant breaches". To my mind there is a difference in ordinary language between "complete denial" of the rights guaranteed by Article 8, and "flagrant breach" or "gross invasion" of those rights. In short, the former is quantitative; the latter qualitative.

39. If one or more of the latter expressions provided the test, I would find it difficult to think they are not satisfied in this case. This is not a case where the answer could realistically be affected by representations from the receiving state (a factor mentioned by Lord Bingham in *Ullah* para 24). The parent/child relationship is a fundamental aspect of the rights guaranteed by article 8, perhaps the most fundamental; in Lord Steyn's words, it goes to "the very essence" of the right to family life. The ability to participate in that relationship on an equal basis to the father is similarly fundamental to the rights guaranteed by article 14. Those rights are also recognised as fundamental by the wider international community. The facts disclose the almost certain prospect of an open "breach" or "violation" of those rights. A breach which is open, unmitigated, and in Convention terms indefensible can fairly be described as "flagrant" in the ordinary use of that word.

40. However, I am persuaded that that is not the right approach. The word "flagrant" was first used in *Soering* not, I think, as a definitive test, but to illustrate the extreme circumstances which would be needed to bring the Convention into play in a "foreign" case. As Lord Bingham pointed out in *Ullah*, the Strasbourg case-law reveals no examples of cases which have been held to meet that test. The different expressions used in the domestic cases have been used for a similar purpose. Linguistic analysis and comparison is unlikely to be helpful. Lord Bingham's adoption of the Devaseelan formula, with the agreement of the whole House, was clearly intended to provide a single authoritative approach. Applying that test, I conclude that the appeal on this central issue must fail.

Permission to appeal – article 14

41. Up to this point I have dealt with article 8 and article 14 as two aspects of the same issue.

42. The point has been taken that article 14 was not in terms relied on before the single judge or the Panel. At one stage it looked as if we would be faced with arguments about the admissibility of new points on appeal under the new statutory regime, having regard to the principles in *Miftari* [2005] EWCA Civ 982 and *Robinson* [1998] QB 929. Indeed it was by reference to those cases that permission was refused by Buxton LJ. However, in the way the arguments were developed before us, I do not think any such issues arise.

43. The Panel is not to be criticised for failing to treat the article 14 aspect as "obvious" under the *Robinson* approach, it not having been relied on in terms before them. However, on the facts of this case, I think we are entitled to follow the Strasbourg court (in *Marckx*) in treating article 14 (as it has been developed by Miss Webber) as an "integral part" of article 8 for these purposes. Indeed it is artificial to separate the issues. In case the appeal goes further I would grant permission to appeal.

44. I should make clear that this permission applies solely to discrimination in relation to issues of custody and contact. At one point, Miss Webber floated a separate issue relating to the prospect of the claimant being prosecuted for abduction of her child. The suggestion was that, since the abduction was provoked by her fear of discriminatory treatment by the Lebanese court, it should be treated as itself breaching Convention principles (by analogy with *Thlimmenos v Greece* (application 34369/97;

6.4.00). That seems to me a good example of a wholly new point which is neither integral nor obvious, and should be excluded under *Miiftari* principles.

Permission to appeal – the Refugee Convention

45. Buxton LJ refused permission to appeal under the Refugee Convention. While acknowledging that the account of her experiences makes "grim reading" the evidence did not establish that in Lebanon women were "a relevantly persecuted group" as explained in the cases. Shortly before the hearing before us, Miss Webber applied out of time to renew her application for permission on this ground. This main reason as I understand it was to preserve her position pending the decision of the House of Lords, following argument heard in July, on appeal from this court in *Fornah v SSHD* [2005] EWCA Civ 680. The decision of the House of Lords became available in October ([2006] UKHL 46). Accordingly, we invited written submissions on how if at all it affected the issues in this case. Having considered those submissions I am satisfied that there is nothing to assist the appellant. There was no issue in *Fornah* that the feared treatment (genital mutilation) was sufficiently serious to amount to persecution; the only question was whether the women so threatened were members of "a particular social group" for the purposes of the convention. The issue in this case is quite different. There is nothing in *Fornah*, either to assist the appellant's case under the human rights convention, or, if it fails the test of severity under those rules, to suggest that a lesser test applies under the refugee convention.

Conclusion

46. For these reasons I would grant permission to appeal on the Article 14 ground, but dismiss the appeal under both article 8 and article 14. I would refuse the out of time application for permission to appeal under the Refugee Convention.

Lord Justice Gage:

47. The issue in this appeal narrowed considerably during the course of oral argument. It can now be summarised as whether removal of the appellant back to Lebanon would result in a flagrant breach of her rights under article 8 and article 14. So far as article 14 is concerned the appellant requires the permission of this court to advance this ground. For the reasons given by Carnwath LJ I also would grant permission.

48. The jurisprudence of the European Court of Human Rights as summarised by Lord Bingham in *Ullah* makes it clear that in foreign cases, as opposed to domestic cases, a very high threshold or strong case of breach of articles of the Human Rights Convention is required to be demonstrated to resist removal: "strong grounds" (article 3), loss of life a "near certainty" (article 2), risk of a "flagrant denial of a fair trial" (article 6). Lord Bingham continued (see para 24):

> "The lack of success of applicants relying on articles 2, 5 and 6 before the Strasbourg Court highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance

> is placed on articles such as 8 or 9 which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where interference is shown."

49. Lord Bingham then commended as the correct approach in cases involving qualified rights such as those under articles 8 and 9 the one adopted by Mr C.M.G. Ockelton, deputy president, Mr D.K. Allen and Mr Moulden in *Devaseelan v Secretary of State for the Home Department*, to which Carnwath LJ has referred. It is a matter of note that Mr Ockelton presided in the constitution of the AIT which dealt with the appeal in this case from the Immigration Judge. Carnwath LJ has also quoted the statements of principle by Lord Steyn and Lord Carswell.

50. Miss Webber, focusing on the above parts of the speeches in *Ullah* and on the decision of European Court in *Marckx v Belgium* (1979) 2 EHRR 330 submits in this appeal that this court ought to treat the test as whether the appellant's right to care for her son would be completely nullified and denied in Lebanon. Miss Greaney accepts this formulation of the test.

51. There is no dispute that the appellant's right to custody/residence of her son would be removed by the Shari'a Court. Since the son is now 7 years old his father, or, his paternal grandfather or other male relatives, would be entitled to custody as of right. The appellant's rights in respect of her son would be confined to rights of visitation. There was no evidence before the AIT or the Immigration Judge as to the precise form which visitation rights might take.

52. It is submitted on the appellant's behalf that the denial of a mother's fundamental right to care for her child establishes a flagrant breach of a mother's article 8 rights. Miss Webber further submitted that discrimination against a mother in a Shari'a Court on the ground of gender would breach her article 14 rights as well as her article 8 rights. In that way it is submitted that the court should find that breaches of article 8 and/or article 14 whether individually or cumulatively amount to flagrant breaches of the mother's Convention rights.

53. For the respondent it is submitted that on the undisputed facts of this case the breaches of article 8 and/or article 14 which are identified are not such as to pass the high threshold required by the Strasbourg jurisprudence. Miss Greaney relies on the fact that the appellant is likely to be granted visitation/contact rights in respect of her son. It is submitted that for this reason it cannot properly be said that the appellant's rights have been completely nullified or denied.

54. It follows that what is in issue is whether the facts give rise to such a flagrant breach or violation of this appellant's rights. Before setting out my conclusions I should add that it was common ground between counsel that the concept of the child's welfare being of paramount importance under our law is an irrelevant consideration in this case.

55. For my part I have not found this an easy case. On the one hand to deny a mother the right to care for her child seems totally wrong. Judge Martens in a different context described the right to care for "your own children" as "a fundamental element of an elementary right" (see *Gul v Switzerland* (1996) 2 EHHR 330). To deny this right offends against all principles of fairness to a party involved in litigation over the custody of her child or children. It will undoubtedly place a substantial obstacle in the way of this appellant maintaining and fostering her relationship with her son. It is an entirely arbitrary rule without any apparent justification.

56. On the other hand I see the force of the submission made on behalf of the respondent that not all the appellant's rights as a mother will be denied. She will have rights of visitation and will not lose contact with her son. In that sense her rights cannot be said to be completely nullified.

57. In my judgment this is a case, as envisaged by Lord Carswell in *Ullah*, where the concept of flagrant breach or violation is not easy to apply. Not without some hesitation, I have concluded that the risk of such breaches of her human rights as may occur in respect of the appellant's right to care for her son are not sufficient to be categorised as flagrant. In reaching this conclusion, in my view, the appellant's rights of visitation/contact must be taken into account and set against the denial of the right to custody/residence of her child. It is important to note that we are considering her rights and not those of her son. There is no reason to suppose that the Shari'a Court will prevent the appellant from seeing her son. The form and nature of visitation rights remain undefined but in my judgment it must be supposed that the appellant will continue to be permitted to see her son. In that way her ability to maintain her relationship with him will still exist albeit on a less intense level than before. In the circumstances I would hold, as the AIT held, that the risk of breaches of her article 8 and 14 rights in all the circumstances are not such as can be said to be flagrant. For the avoidance of doubt I would also hold that the discrimination against her on grounds of gender in the Shari'a Court whether considered as a breach of her article 8 rights or separately as a breach of article 14 rights, is not sufficient to tip the balance so as to cross the high threshold required.

58. For these reasons and the reasons given by Carnwath LJ, with which I agree, I would dismiss this appeal, and dispose of the applications as he proposes. This is not an outcome for which I have any enthusiasm.

Mr Justice Bodey:

59. I need not recite the facts nor the expert evidence on Shari'a law applicable to family matters in the Lebanon, as these are set out in the Judgment of Carnwath LJ.

60. The short point is that, on return to the Lebanon, the Appellant mother would lose her son to the father on a predetermined basis because of her gender. That is the effect of the expert evidence. This is in the context of a boy now aged 10 who has been brought up exclusively by the Appellant and has no relationship at all with his father.

61. This is a "foreign case" as distinct from a "domestic case", as per the definition given by Lord Bingham of Cornhill in Ullah 2004 2 AC 323. The appellant submits that her removal from this country back to the Lebanon would lead to a violation of her Convention rights there, specifically under Article 8 read in conjunction with Article 14; so she should not be sent back.

62. Such foreign cases are described by Baroness Hale of Richmond in Razgar 2004 to AC 368 at paragraph 42 as being "… an exception to the general rule that a state is only responsible for what goes on within its own territory or control." As a reflection of the exceptional character of this dynamic, the test approved by the House of Lords in Ullah creates a very high threshold. Lord Bingham of Cornhill at paragraph 24 in that case approved the formula used by the AIT in earlier case in the following words:

> "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" (the test which Carnwath LJ has called " the Devaseelean formula").

63. In the same case, Lord Carswell said at paragraph 69:

> "… it seems to me that it [the concept of a flagrant breach or violation] was well expressed by the Immigration Appeal Tribunal in Devaseelean, *when it applied the criterion that the right in question would be completely denied or nullified in the destination country*… it does not seem to me that either appellant comes within the possible parameters of a flagrant, gross or fundamental breach of [Article 9] *such as to amount to a denial or nullification of the rights conferred by it*". [Emphasis added, for a reason which will appear].

64. The AIT held here that the appellant had not succeeded in satisfying this high threshold of a flagrant or complete denial. It said

> "… the fact that the rules of Muslim law operate in a way which some Western societies might regard as discriminatory does not show that all women are deprived of standing before the law. On the contrary, the appellant's own claimed history [her ability to obtain a divorce against the husband in the Lebanon] demonstrates that she has been able to obtain relief from the courts".

65. And further on:

> "… there is a judicial system [in the Lebanon] to which the appellant has access. The system of family law to which she, by her religion, is subject is one which in this respect she does not like: but that does not permit her to choose the law of another country, nor does it permit us to say that it is a system to which nobody should be subject."

66. The right to care for one's own child is described by Baroness Hale in Razgar at paragraph 53 on page 398 as "a fundamental element of an elementary human right". No family lawyer in this jurisdiction could countenance that right being interfered with, *except* on the basis of tried and tested principles, whether they be couched in terms of the proper balancing of the competing Article 8 rights, or (more traditionally) on the basis that, in taking any decision relating to the upbringing of a child, the welfare of the child is paramount (S.1 of the Children Act 1989). So any purported justification for a change of a child's residence (custody) taken on a pre-determined basis, particularly on the basis of gender, is profoundly and fundamentally different from the approach applicable in this jurisdiction and would not be found here to be acceptable.

67. But that is of course not the issue. It is rather a question of evaluating on the available evidence the extent to which, viewed objectively, the mother's human rights under Articles 8 and 14 are or are not likely to be infringed in the country of her nationality.

68. The difficulty in making that necessary evaluation here is that family life is an elastic concept. It may be comprised of the daily care of one's child; or it may comprise contact, sometimes even only by letter (that is, in cases where face-to-face contact would create insuperable problems of one sort or another). That very wide spectrum of the right to 'the society of one's child' is embraced by the concept of family life; and there are of course many other aspects of family life as well.

69. So the dilemma presented by this appeal is that whilst one aspect of family life (the daily care of the child) will on the evidence be infringed in an arbitrary and discriminatory way, another aspect of family life (contact) remains potentially in place.

70. If upon the removal of the child from the appellant mother in the Lebanon, she would never be able to see him again, I would have no difficulty in finding that such an outcome of her expulsion from this country would amount to a "complete denial or nullification" of her Article 8 right to respect for her family life. It would be a "flagrant denial" or "gross violation" of that right.

71. However, the evidence does not go that far. Quite where it does go on the question of contact is less clear than would ideally be the case. The court in the Lebanon has power to order contact (access) although it seems by implication that such visits might have to be supervised. The most one can say, repeating the expert's report, is that "… [the appellant] may or may not be allowed visitation".

72. If the appellant's contact to her child would be likely to be allowed by the Lebanese Court (say) only by letter, or only once a year for half an hour and supervised, then again that might well be construed as being effectively a complete denial or nullification of her right to respect for her family life, particularly if such a decision were gender-based. To the extent, on the other hand, that contact were defined on a more "conventional" basis, then the establishment of the necessary complete denial of respect for and flagrant breach of the appellant's Article 8 rights would become progressively more difficult.

73. There is no justification for making a speculative assumption that the Lebanese court would drastically restrict the appellant's contact, given that the law there recognises a child's need for the care of his or her mother during his or her early years. It requires evidence to establish another jurisdiction's differing approach to family law issues (or any other issues) and I find the evidence lacking from which this court could properly conclude that the mother's Article 8 rights by way of contact would be completely nullified, albeit that such rights would be considerably infringed in a manner and for a reason which would not be found acceptable here nor objectively justifiable. That infringement is a product of the fundamentally different principles and approaches regarding child-care decisions which are applied by the laws of the two respective jurisdictions in question.

74. I respectfully agree with the observations of Carnwath LJ towards the end his Judgment concerning the potential difference between terminology such as "flagrant" or "gross", which expressions are qualitative, and terminology such as "complete denial" or "complete nullification", which are quantitative. Given that family life covers the wide spectrum mentioned above and that it is possible for some aspects of family life to be infringed flagrantly (and in a discriminating way) whilst leaving other aspects of family life intact, it becomes necessary to determine whether it is the qualitative or the quantitative test which is properly to be applied. The result may not be the same. I would read the formula approved by Lord Bingham at paragraph 24 of Ullah as further defining the somewhat subjective adjectives "flagrant" and "gross" by way of the more objective terminology of 'complete denial or nullification'. That seems to me, to be borne out by the extracts from paragraphs 69 and 70 of the speech of Lord Carswell in Ullah cited above, supporting the view that, in a case such as this, it is the completeness of the denial which sets the threshold, rather than the nature of it.

75. Applying the threshold test in the manner just mentioned, it is insufficient for the appellant here to be able to demonstrate (as I consider she succeeds in doing) that the anticipated interference with her right to respect for her family life objectively viewed would be flagrant, both by virtue of Article 8 read alone and especially when read with Article 14. This is because those anticipated breaches do not enable it nevertheless to be said that "… the right will be completely denied or nullified in the destination country"; which seems to me to be the acid test.

76. Rightly or wrongly, I have considered the welfare of the child, he being an obviously very close member of the appellant's family. It seems unclear as to

the extent to which this can or should properly be taken directly into account (see the apparently differing Tribunal decisions referred to at paragraph 8.104 of the 6th Edition of Macdonald's Immigration Law and Practice). No application has been made on behalf of the child asserting that *his* Article 8 right to respect for his family life with his mother as his lifetime carer would be "flagrantly infringed" by a predetermined decision as to his custody; and when the possible relevance of his Article 8 rights was floated during argument, it appeared to be accepted that they cannot be directly taken into account on this, his mother's appeal. On any view it is clear (for reasons which are obvious) that the welfare of the child would not be paramount. It is comforting that any claim by such a child would as I conceive meet the same difficulty as that of the appellant mother, namely that the continuing potential for ongoing mother/son contact would render the anticipated infringement of his Article 8 right less then a complete denial or nullification of it. To that extent the child's position (if admissible as a consideration) would stand or fall along with that of the appellant.

77. Miss Webber, Counsel for the appellant, prays in aid Re J (a child) (custody rights: jurisdiction) 2006 1 AC 80, where the House of Lords reversed a decision of the Court of Appeal that the child concerned should be returned to Saudi Arabia from where the mother had wrongfully brought him to this country. It was there held to be a relevant factor that the courts of the 'non-Hague Convention' country to which the child's return was under consideration "… had no choice but to do as the father wished, so that the mother could not ask them to decide, with an open mind, in which country the child would be better off living" (see the Headnote, summarising paragraph 39 of the speech of Baroness Hale).

78. However, that was said in the context of a private law family dispute between the respective parents, with (as that very case definitively determined) the welfare of the child as the court's paramount consideration. There was lacking, therefore, the fundamentally different dynamic of the need to apply a threshold test (see above) in order to dovetail human rights in with the legitimate need to maintain an effective national immigration policy. In short that case is of no assistance here.

79. Baroness Hale concluded her speech in Razgar (Paragraph 65) by saying

> "… I appreciate that this may seem a harsh conclusion to draw. But this is a field in which harsh decisions sometimes have to be made. People have to be returned to situations which we would find appalling."

Coming at it from my particular perspective, I do find this to be a hard decision for the particular appellant mother and for the child, given the context of the expert evidence. However, it must be recognised that the high threshold test is imposed in such cases for the legitimate reason of preserving the efficacy of necessary immigration controls, in all but extreme cases. Any lower test would potentially give rise to an influx of such cases since, on the expert evidence, the anticipated Article 8 and Article 14 infringements (as we

would say they objectively appear to be) are a 'given' in every "foreign" case which is or would be on an expulsion governed by Shari'a Law.

80. It is inevitable that the imposition of any 'threshold' type test will require value judgments to be made involving matters of fact and degree, with some cases falling into a grey area. In my judgment, this case falls within such a grey area, situated just below the threshold: but, given the competing considerations which have to be taken into account, I have not been persuaded that it attains that threshold.

81. Accordingly, and not without reservations, I too would dismiss this appeal and dispose of the applications as proposed by Carnwath LJ.