MALTA

CONSTITUTIONAL COURT

THE HON. CHIEF JUSTICE
VINCENT DE GAETANO

HON. MR. JUSTICE
JOSEPH D. CAMILLERI

HON. MR. JUSTICE
JOSEPH A. FILLETTI

Sitting of the 19 th February, 2007

Civil Appeal Number. 26/2003/1

Luiza Merujian Zakarian and Simony Merujian Zakarian

v.

The Minister of Home Affairs and the Principal Immigration Officer

The Court:

Preliminary

1. This is an appeal, filed by Luiza Merujian Zakarian and her brother Simony Merujian Zakarian on the 23

November 2006, from a decision of the First Hall of the Civil Court (in its Constitutional Jurisdiction) of the 13 November 2006 which had dismissed their application aimed at preventing their repatriation to Armenia. In the said application, filed before the first court on the 21 August 2003, Luiza and Simony – Simony was then only 16 – had alleged that if they were sent back to Armenia, as the Principal Immigration Officer was planning to do after that their request for refugee status had been dismissed by the Refugee Commissioner[1] as well as by the Refugee Appeals Tribunal[2], their fundamental human rights as protected by Sections 33(1)[3], 36(1)[4], 43[5] of the Constitution, read together with Section 46[6] of the same said Constitution, would be violated. In their application of August 2003, applicants did not specify the redress sought – contrary to what is required by Rule 3(2) of the Court Practice and Procedure Rules – but it is evident from the general tenor of the application that what was being (and what is still being requested) is that the Maltese Authorities be prohibited from repatriating them, perhaps even implicitly, as the first Court suggested in its judgment, by having the decision of the Refugee Appeals Board revoked.

2. It would be appropriate at this stage to reproduce the judgment of the first Court in its entirety:

"The Court:

"Examined the applicants' application presented on the 21st August, 2003 whereby they submitted with respect:

"That the applicants are citizens of the Republic of Armenia and are respectively aged 18 and 16;

[1] See full report at fol. 156 to 158; and abbreviated "Confidential Memo" at fol. 129.
[2] See decision of the 24 April 2003 at fol. 154.
[3] Right to life.
[4] Protection from inhuman or degrading punishment or treatment.
[5] Prohibition of deportation.
[6] In the sense that it is sufficient if a provision of the Constitution "…is <u>likely</u> to be contravened in relation…" to applicants.

"That after the applicants entered the Maltese jurisdiction they undertook the necessary procedures with the competent authorities with a view to procuring the issue of a refugee status in their regard;

"That such proceedings were couched in the sense that had applicants to be deported to their country of origin, namely the Republic of Armenia, they would be subjected inter alia to political persecution and oppression by the Armenian State to the extent that their personal security will likely be jeopardised and that as such political persecution would be perpetrated by the Armenian police, the Armenian State would be unable to protect applicants;

"That in fact it transpires that applicants' family were deeply involved in political activity in Armenia. During the course of such involvement in Armenian politics, applicants' aunt, Armalia Zakarian was forced to flee from Armenia together with her minor daughter after her life was threatened by the Armenian police. In fact Amalia Zakarian had been seriously injured by the Armenian police prior to her flight from that country (Dok. E). This occurred after Amalia Zakarian's husband and his mother, who were citizens of Azerbajan had been murdered during inter-communal fighting ivolving the Armenians and Azeri communities. Amalia Zakarian eventually managed to enter the jurisdiction of the United Kingdom and applied for the grant of a refugee status in that country. To date Amalia Zakarian has been resident in the UK for the last five years pending the processing of her claim to be granted a refugee status in that jurisdiction together with her minor daughter;

"That in the meantime, applicants' father Merujian Simony Zakarian, who was Amalia Zakarian's brother, remained in Armenia and continued with his involvement in Armenian politics notwithstanding that the political party of which both Amalia and Simony Zakarian were activists had lost the elections which were held in March 1998. He was also subjected to political persecution by the Armenian Police and was eventually assassinated by them in 2000 at a time when the political party against which the Zakarians

had struggled, had assumed executive power in Armenia following the results of the 1998 elections, as stated supra (Dok. A and Dok. D.);

“In consequence of further political persecution subsequent to the murder of their father by the Armenian police, the personal security of the applicants was compromised to the extent that arrangements were undertaken for applicants to be in a position to flee from Armenia. On their arrival in Malta, applicants immediately applied for the grant of a refugee status (Dok. B and Dok. C.)

“That applicants’ request for the grant of a refugee status was rejected by the Refugee Commissioner and by the Refugee Appeals Board on the grounds that they did not satisfy the statutory criteria required for the grant of a refugee status although it ought to be emphasised that the said entities were not in a position to have sight of Dok. B and Dok. C as same were not available at that juncture;

“That it has already transpired that the applicants’ father was murdered by the Armenian police, whilst applicants’ aunt felt the dire necessity to flee from her country of origin in order to protect her personal security and her minor daughter’s security which were objectively threatened by the Armenian police. The same course of action was taken by the applicants in as much as they also felt that their personal security was threatened, like their father’s who had already been beaten to death by the Armenian police earlier as stated supra. It is in this context respectfully submitted that no person flees his/her country of origin, with all the attendant consequences resulting from the up-rooting of his/her existence, unless cogent reasons justify such an extreme course of action. In fact applicants, at the apex of their youth, have even forfeited their personal freedom in their quest to obtain a refugee status in this jurisdiction and to date have been detained in various detention centres for the last seven months;

"That there is no doubt that the Police are an essential pillar of the executive power of any state and that the assassination of applicants' father at the hands of the Armenian police consequent to his involvement in political activity would evidently be tantamount to statal persecution on political grounds. Consequently, if the Armenian state was unable to afford protection to the personal security of applicants' father and aunt, it is unlikely that the Armenian state will be willing and able to protect applicants' personal security in the event of their deportation to Armenia, regard being had to the inexperience of the applicants, one of whom is still a minor;

"That had applicants to be deported to Armenia such a state of affairs would undoubtedly undermine their personal security and indeed, in the last analysis place their life in manifest jeopardy;

"That Section 33(1) of the Constitution provides that every person is entitled to the protection of his/her life and that no person shall be intentionally deprived of his/her life. So that in the eventuality of the deportation of applicants to Armenia, applicants lives would be placed in manifest danger notwithstanding that the said provision is entitled "Protection of Right to life". To deport applicants to Armenia would amount to exposing their lives to evident peril and indeed their father has already been murdered by the Armenian police whilst their aunt's would have been in dire peril has she remained in the Armenian jurisdiction rather than fleeing from that country;

"That the said disposition of the Constitution should be interpreted in the sense that no person should be intentionally deprived of his life and that furthermore no person's life should knowingly be exposed to the peril of its forfeiture, even if such an eventuality is merely likely to materialise, regard being had to the provisions of Section 46 of the Constitution;

"That Section 36(1) of the Constitution provides furthermore that no person shall be subjected to inhuman

treatment. Undoubtedly, were applicants to be deported to Armenia such a state of affairs would be tantamount to the subjection of same to inhuman treatment in that no person's well-being and welfare and indeed his/her life should be treated recklessly especially when a strong probability subsists that such person's welfare, well-being and life will be exposed to dire peril;

"That it transpires that in the light of the rejection by the Refugee Commissioner and the Refugee Appeals Board of the claims set up by applicants, the Principal Immigration Officer is undertaking all the necessary preparations in connection with the deportation of applicants to Armenia;

"That the deportation of the applicants to Armenia will inevitably give rise to the breach of their fundamental rights as protected by the said provisions of the Constitution as such deportation would not only expose their lives to manifest danger but would amount to inhuman treatment, in accordance with the said constitutional provisions;

"That no state is entitled to expose the life of any person situate in its jurisdiction by deporting any such person to another jurisdiction were same would be likely to be politically persecuted even to the extent of endangering his/her life. Such statal behaviour woul violate the constitutional provisions embodied in Section 43 of the Constitution relative to the prohibition of deportation;

"Consequently applicants humbly pray this Honourable Court:-

"1. To order the issuance of all the required orders and to provide the remedies which might appear appropriate in the circumstances, in order that their fundamental rights, as protected by the Constitution might be rendered effectual and enforcable.

"With costs as against respondents.

"Examined respondents' reply presented on the 16th September, 2003 whereby they submitted with respect:

"That the application is unfounded in fact and in law for the following reasons:

"1. That the application has not been filed in the Maltese language as the language of the Court and it does not result that the filing of proceedings in the English language has been authorised by the Court as required by Article 21 of the Code of Organisation and Civil Procedure (Cap 12) and by the Judicial Proceedings (Use of English Language) Act (Cap 189);

"2. Without prejudice to the above, the respondents submit that the applicants' claim is unfounded on its merits and has been filed merely to delay the applicants' deportation from Malta. In this regard the respondents point out that claims such as that put forward by the applicant (i.e. that their lives 'are likely to be in manifest peril in the event of their deportation of Armenia') are investigated in terms of the Refugees Act by the Commissioner for Refugees who interviews persons who apply for refugee status and examines their claims scrupulously and at length. The decisions of the Commissioner for Refugees are moreover subject to appeal to the Refugees Appeals Board composed of two lawyers and a Chairman with vast experience in matters concerning refugees;

"That the claims of the applicants have already been dismissed as being unfounded both by the Commissioner for Refugees and by the Refugees Appeals Board who are the competent authorities in these matters and there is no evidence to substantiate the claims of the applicants as being 'prima facie' well founded before the present Court. On the contrary the fact of the dismissal of the claims as unfounded by the competent authorities in the field of refugee law militate against the acceptance of the demand for the issue of a warrant of prohibitory injunction which would effectively stultify the decision of the competent authorities without the applicants having in any

way shown that the decisions of the competent authorities were defective;

“Moreover, given the procedures available under the Refugees Act it is clear that there are more than sufficient reasons for the present Court to decline the exercise of its powers under Article 46 of the Constitution and under Article 4 of the European Convention Act in view of the availability of alternative remedies for the complaint under the Refugees Act;

“For the above reasons the respondents submit that this Court should deny the demand for the issue of a warrant of prohibitory injunction;

“Examined respondents’ reply by the Minister for home Affairs and the Principal Immigration Officer on the 9th October, 2003 whereby it is respectfully submitted:

“That Simony Merujian Zakarian, being a minor cannot persue this action personally since she lacks legal capacity. That the applications for refugee status by the present applicants have already been examined by the Commissioner for Refugees and by the Refugees Appeals Board who after having examined the same applications in terms of the Refugees Act and have found them to be unfounded;

“That therefore adequate means of redress for the contravention of rights alleged by the applicants have been available to them under Maltese law and that it is consequently ‘desireable’ in terms of the provision to subarticle (2) of Artlicle 46 of the Constitution and to Article 4 of the European Convention Act for this Court to decline to exercise its powers under the said articles;

“That the applicants have brought no proof that their aunt Amalia Zakarian is staying in the United Kingdom on the basis of refugee status;

“That the applicants have neither brought forward any proof that there are credible grounds to believe that they

personally would be subjected to breaches of fundamental human rights which would result from political persecution and oppression if they were to be returned to their country of origin;

"That the defendants have indeed failed to indicate the articles of the Constitution and of the European Convention on Human Rights under which they allege to be victims;

"That the Republic of Armenia, albeit being a 'new democracy', is a State with a democratic Constitution which is a member of the Council of Europe and which has ratified the European Convention on Human Rights and therefore also assumed international obligations to respect the fundamental rights and freedoms guaranteed by that Convention. That the fulfillment of those obligations are subject to monitoring by the Council of Europe;

"That the applicants' claims are unfounded and should be rejected;

"Took cognisance of the whole case file including the *verbal* of the 30th March, 2006 whereby the case was put off for judgment;

"Considered;

"That applicants are asking the Court to provide the remedies in order that their fundamental human rights are not infringed. In reality they are asking the Court to declare that the decision of the Refugee Appeals Board be revoked and thus they would not be deported back to their country. They are not contesting the Board's decision on the usual criteria – i.e. that the decision was flawed by non-observance of the rules of natural justice but because they are arguing that their deportation would constitute an infringement of the human rights and freedoms;

"In the text **European Human Rights Law – Text and Materials** one can find some useful comments in this regard (page 151 et sequitur);

""*An increasingly important and difficult question for the European Human Rights system concerns attempts by a contracting state to deport an applicant to a non contracting state where, the applicant claims, he or she will be subject to torture or inhuman or degrading treatment. The Court first considered this issue in Soering vs United Kingdom (7th July, 1989) in which the UK sought to extradite Soering to Virginia in the US to stand trial for murder. The Virginia authorities planned to seek the death penalty. Soering claimed that the circumstances surrounding the administration of death sentences in Virginia particularly the typical delay of six to eight years between imposition and execution constituted inhuman treatment or punishment;*

""The Court held that the extraditing state id have some responsibility under the convention for the potential subsequent maltreatment of extradited individuals. 'For a state to knowingly surrender a fugitive to another state where there were substantial ground for believing that there would be a danger of being subjected to torture or inhuman or degrading treatment however heinous the crime would plainly be contrary to the spirit and intendment of Article 3.';

""As movement about the world becomes easier and crime takes on a larger international dimension it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely the establishment of safe havens for fugitives would not only result in danger for the state obliged to harbour the protected person but also tend to undermine the foundations of extradition. It is not normal for Convention institutions to pronounce on the existence or otherwise of potential violations of the convention. However where an applicant claims that a decision to extradite him would, if implemented be contrary to Article 3 by reason of its foreseeable consequences in the

requesting country, a departure from this principle is necessary in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by the Article.;

"In sum the decision by a contracting state to extradite a fugitive may give rise to an issue under Article 3 and hence engage the responsibility if that State under the convention where substantial grounds have been shown for believing that the person concerned if extradited faces a real risk of being subjected to torture or to inhuman and degrading treatment in the requesting country. The establishment of such responsibility inevitably involves an assessment of the conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless there is no question of adjudication 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 stte by reason of its having taken action which has a direct consequence the exposure of an individual to proscribed ill-treatment.";

"The Court adopted a similar approach in Cruz Varas vs Sweden (20th March, 1991) where the applicant and his family challenged Sweden's deportation of them to Chile claiming that in Chile they faced the possibility of political persecution. The Court held that the standards set out in Soeirng applied to expulsion as well as to extradition but concluded that substantial grounds for believing the existence of real risk of treatment contrary to Article 3 had not been shown. It also was influenced by the fact that a considerably more liberal political atmosphere had begun to develop in Chile;

"The facts of Cruz Varas also presented questions under the 1951 Geneva Convention and 1967 protocol relating to the Status of Refugees. That convention defines refugees as those who have left their country because of a well founded fear of persecution. A reasonable threat of execution or imprisonment on prohibited grounds triggers

a right of asylum under the Geneva Convention and Protocol;

"The Court is satisfied that the political and human rights situation in Armenia has improved considerably since the events mentioned by applicants. Armenia is now a member of the Council of Europe and this is sufficient guarantee that human rights are observed in that country. The facts of this case are similar to the Cruz Varas case above mentioned in that the situation now in that country is very much different to the one prevailing when the facts in question occurred. The Court is also satisfied that the evaluation of the Refugees Appeals Board was correct since applicants failed to prove otherwise;

"For these reasons the Court accepts respondents' pleas and rejects applicants' claims;

"Each party is to bear its own costs because of the particular facts of the case."

The appeal

3. Appellants Luiza and Simony Mrujian Zakarian in their appeal application are basically contending that the First Hall of the Civil Court made a wrong assessment and appreciation of the evidence produced before it. The gist of their grievance is summed up in the following two paragraph of their application:

"In conclusion applicants reiterate their claim that whilst they proved their case beyond reasonable doubt in virtue of the various sources of evidence, including documentary evidence and oral evidence, the respondents did not produce a shred of evidence which undermined the documentary evidence which was filed before the court of first instance or the oral evidence adduced before the said court.

"Applicants humbly submit in conclusion that if they are deported to Armenia they would be condemned to return to a country which is rife with human rights

abuses, referred to graphically in the latest reports which appear on the US Department of State's website – abuses which have given rise to the murder of their father because [of] his political beliefs, the disappearance of other close family members, and would have placed their aunt's life and her daughter in manifest jeopardy had they not fled to the UK where they have succeeded in obtaining asylum. Such asylum would not have been accorded to Amalia Zakarian and her daughter had their claims been vexatious and unfounded; the grant of asylum to applicants' aunt and their cousin is further proof, if any was needed, of the veracity of applicants' claims. There is no doubt that the deportation of applicants to Armenia would expose them to the inhuman and degrading treatment accorded to their aunt and even place their lives in manifest jeopardy which their father faced and which eventually led to his murder by the Armenian police."

The Court's assessment

4. It would appropriate at this stage to make some preliminary observations. First of all, Section 43 of the Constitution, invoked by applicants before the first court, is not applicable in this case. Applicants are not being "extradited" to Armenia – there is no request from the Republic of Armenia for appellants' return to that country to undergo criminal proceedings, and therefore subsections (1) and (2) of the said Section 43 are inapplicable *ratione materiae*. The same can be said, in effect, of subsection (3) since this provision prohibits only the deportation of citizens of Malta (and there is no suggestion that appellants are Maltese citizens) except as a result of extradition proceedings or under such law as is referred to in Section 44(3)(b) of the Constitution. Consequently, Section 43 of the Constitution need be considered no further.

5. Appellants, as applicants before the first Court, did not invoke any violation of any of the provisions of the European Convention on Human Rights – for reasons

known only to them they invoked only some of the human rights provisions of the Constitution, although it must also be said that respondents, in their replies, did in fact refer to the Convention. Nevertheless this Court, like the first Court, is of the view that the case-law of the European Court of Human Rights relative to Articles 2(1) and 3 of the Convention is applicable, *mutatis mutandis*, to the proper interpretation and application of Sections 33(1) and 36(1) of the Constitution.

6. The case-law of the European Court of Human Rights has, over the years, defined the parameters of the inquiry and assessment that a court must make when faced with a claim that deportation would result in a breach of Article 3 of the Convention[7]. First of all it should be made clear that the right to political asylum is not contained in either the Convention or its protocols. In the words of Karen Reid – **A Practitioner's Guide to the European Convention on Human Rights** [8] -- *"While there is no right to asylum as such guaranteed under the Convention, where an applicant faces a real risk of torture or ill-treatment, including extra-judicial or arbitrary execution on expulsion to a particular country, issues arise under Article 3 of the Convention…Under Article 3, the obligation of the State extends in respect of everyone within their jurisdiction to a duty not to expose them to an irremediable situation of objective danger even outside their jurisdiction…The type of ill-treatment to be established is, in line with Article 3 case law, severe. Generally, a significant risk to health, physical or psychological, from deliberate ill-treatment or conditions has to be alleged. However even alleged risk to life is generally still considered in the context of Article 3. The Commission stated that Article 2 would only be in issue where the loss of life was a 'near certainty' as a consequence of the expulsion…The Court holds that, given the absolute character of the provision and the fact*

[7] Although most of the case-law is concerned with Article 3 of the Convention – the absolute prohibition of torture or inhuman and degrading treatment or punishment – there is no doubt that the same criteria are applicable when the right to life is at risk due to arbitrary execution.

[8] 2nd ed. Sweet & Maxwell (London) 2004.

it enshrines one of the fundamental values of the democratic societies making up the Council of Europe, its examination of the existence of a risk of ill-treatment in breach of Article 3 must be rigorous. It will, if necessary, assess the risk in light of material obtained proprio motu. *This said, the mere possibility of ill-treatment in not enough. Thus it may not be sufficient for an applicant to point to the general unsettled situation in a country or his membership in a group which occasionally faces problems. It seems that the applicant has to establish that he faces a specific, personal risk of treatment contrary to Article 3. In* Vilvarajah v United Kingdom [9] *concerning the expulsion of five Tamil applicants to Sri Lanka, the Court did not consider that it was enough that the situation was unsettled or that some Tamils might possibly be detained or ill-treated. This threat was apparently not specific enough to these five applicants, even in light of the fact that during the Convention proceedings three of the applicants were subjected to ill-treatment in Sri Lanka. The Court found that there was no special distinguishing feature which would have enabled the Secretary of State to foresee that they would be treated in this way."* [10] (Court's emphasis). In other words, it must be shown not merely that in the country to which a person is going to be sent the political situation is unsettled, or that there is violence or even political violence to which that person, like other persons, might be subjected; what must be shown, even if at least on a balance of probabilities, is that the applicant faces a specific, personal and significant risk of such ill-treatment which would, in its severity or extent (or because of the personal circumstances of the same said applicant) amount to torture or to inhuman or degrading treatment or punishment.

7. More specifically and with reference to particular judgments, in its judgment of the 30 October 1991 in the case ***Vilvarajah and others v. United Kingdom*** (already referred to, above), the European Court of Human Rights laid down the following rules:

[9] 30/10/1991
[10] Paras. IIB-232/233, IIB-237.

“107. In its Cruz Varas judgment of 20 March 1991 the Court noted the following principles relevant to its assessment of the risk of ill-treatment (Series A no. 201, pp. 29-31, paras. 75-76 and 83):

“(1) In determining whether substantial grounds have been shown for believing the existence of a real risk of treatment contrary to Article 3 (art. 3) the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained proprio motu;

“(2) Further, since the nature of the Contracting States’ responsibility under Article 3 (art. 3) in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant’s fears;

“(3) Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum, is, in the nature of things, relative; it depends on all the circumstances of the case.

“108. The Court’s examination of the existence of a risk of ill-treatment in breach of Article 3 (art. 3) at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe (see the Soering judgment of 7 July 1989, Series A no. 161, p. 34, para. 88). It follows from the above principles that the examination of this issue in the present case must focus on the foreseeable

consequences of the removal of the applicants to Sri Lanka in the light of the general situation there in February 1988 as well as on their personal circumstances."

8. In ***Cahal v. United Kingdom***, decided on the 15 November 1996, the same Court observed:

"73. As the Court has observed in the past, 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. Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols (see the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, para. 102).

"74. However, it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country. In these circumstances, Article 3 (art. 3) implies the obligation not to expel the person in question to that country (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 35, paras. 90-91, the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69-70, and the above-mentioned Vilvarajah and Others judgment, p. 34, para. 103)."

9. And in ***H.L.R. v. France*** (29/4/1997) the Court had this to say:

"40. Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply

where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.

"41. Like the Commission, the Court can but note the general situation of violence existing in the country of destination. It considers, however, that this circumstance would not in itself entail, in the event of deportation, a violation of Article 3 (art. 3).

"42. The documents from various sources produced in support of the applicant's memorial provide insight into the tense atmosphere in Colombia, but do not contain any indication of the existence of a situation comparable to his own. Although drug traffickers sometimes take revenge on informers, there is no relevant evidence to show in H.L.R.'s case that the alleged risk is real. His aunt's letters cannot by themselves suffice to show that the threat is real. Moreover, there are no documents to support the claim that the applicant's personal situation would be worse than that of other Colombians, were he to be deported. Amnesty International's reports for 1995 and 1996 do not provide any information on the type of situation in which the applicant finds himself. They describe acts of the security forces and guerrilla movements. Only in the 1995 report is there any reference, in a context which is not relevant to the present case, to criminal acts attributable to drug trafficking organisations.

"43. The Court is aware, too, of the difficulties the Colombian authorities face in containing the violence. The applicant has not shown that they are incapable of affording him appropriate protection.

"44. In the light of these considerations, the Court finds that no substantial grounds have been established for believing that the applicant, if deported, would be exposed to a real risk of being

subjected to inhuman or degrading treatment within the meaning of Article 3 (art. 3). It follows that there would be no violation of Article 3 (art. 3) if the order for the applicant's deportation were to be executed."

10. Finally, in the more recent case of ***Hilal v. United Kingdom***, decided on the 6 March 2001, the ECHR expressed itself in the following terms:

"1. 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. The expulsion of an alien may give rise to an issue under this provision where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see, for example, *Ahmed v. Austria*, judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2206, §§ 38-39, and *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, p. 1853, §§ 73-74).

"2. In determining whether it has been shown that the applicant runs a real risk, if deported to Tanzania, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu* (see the following judgments: *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, Series A no. 215, p. 36, § 107, and *H.L.R. v. France*, 29 April 1997, *Reports* 1997-III, p. 758, § 37). Ill-treatment must also attain a minimum level of severity if it is to fall within the scope of Article 3, which

assessment is relative, depending on all the circumstances of the case."

"3. The Court recalls that the applicant arrived in the United Kingdom from Tanzania on 9 February 1995, where he claimed asylum. In the domestic procedures concerning his asylum application, his claim was based on his membership of the CUF, an opposition party in Tanzania, and the fact that he had been detained and tortured in Zanzibar prior to his departure. He also claimed that his brother had been detained and had died due to ill-treatment and that the authorities were accusing him of tarnishing Tanzania's good name, increasing the risk that he would be detained and ill-treated on his return.

"4. The Government have urged the Court to be cautious in taking a different view of the applicant's claims than the special adjudicator who heard him give evidence and found him lacking in credibility. The Court notes however that the special adjudicator's decision relied, *inter alia*, on a lack of substantiating evidence. Since that decision, the applicant has produced further documentation. Furthermore, while this material was looked at by the Secretary of State and by the courts in the judicial review proceedings, they did not reach any findings of fact in that regard but arrived at their decisions on a different basis – namely, that even if the allegations were true, the applicant could live safely in mainland Tanzania (the "internal flight" solution).

….

"5. The Court accepts that the applicant was arrested and detained because he was a member of the CUF opposition party and had provided them with financial support. It also finds that he was ill-treated during that detention by, *inter alia*, being suspended upside down, which caused him severe haemorrhaging through the nose. In the light of the medical record of the hospital which treated him, the apparent failure of

the applicant to mention torture at his first immigration interview becomes less significant and his explanation to the special adjudicator – that he did not think he had to give all the details until the full interview a month later – becomes far less incredible. While it is correct that the medical notes and death certificate of his brother do not indicate that torture or ill-treatment was a contributory factor in his death, they did give further corroboration to the applicant's account which the special adjudicator had found so lacking in substantiation. They showed that his brother, who was also a CUF supporter, had been detained in prison and that he had been taken from the prison to hospital, where he died. This is not inconsistent with the applicant's allegation that his brother had been ill-treated in prison."

11. In the light of the abovementioned principles, this Court has examined in minute detail all the evidence adduced before the court of first instance, as well as the additional evidence adduced before it, that is on appeal, and has made an assessment of the said evidence independently of that made by the Refugee Commissioner and the Refugee Appeals Tribunal; and after careful deliberation has come to the conclusion that there is not sufficiently strong evidence to confirm that, if applicants – who are now both of age – were to be returned to the Republic of Armenia they would face a specific, personal and significant risk of ill-treatment amounting to torture or to inhuman or degrading treatment or punishment. Much less is there any real and significant risk of their lives being placed "in manifest jeopardy". There is no doubt that applicants have had a very difficult childhood and youth, mainly due to the fact that they were suffering the consequences of their father's political involvement. They grew up in Armenia at a time of transition when this republic of the former Soviet Union was trying to get to grips with democracy and to adjust many of its institutions to achieve at least the minimum requirements to become a member of the Council of Europe. It became a member

of the said Council in January 2001[11]. The late nineties and early years of this century were years of political, social and economic upheaval, and the country by all accounts still faces a number of problems which in other countries of the Council of Europe and especially in countries which are members of the European Union have by and large been relegated to history (even if only modern history). Even if the authenticity (not their correct translation, which is another thing) of certain documents – notably the documents at fol. 5, 14, 15, 125, 126 and 127 – has not been proved, this Court is prepared to accept that applicants' father (deceased) and aunt, Amalia, (who now resides in the UK) were politically active in Armenia in the late nineties and that as a result they were harassed and threatened by people entertaining different political ideas, probably with the connivance of certain State authorities. Amalia Zakarian's affidavit at fol. 92 is evidence of the turbulent political situation in Armenia in the mid and late nineties, which for the Zakarian family appear to have been compounded by the fact that Amalia's husband was of Azeri origin (from Baku, in Azerbaijan), by the hostility between the Armenian and Azeri communities, the loss in mysterious circumstances of Amalia's husband in the mid eighties and the loss of many more relatives in the devastating earthquake of 1988 in the Spitak region of Armenia. Because of constant police harassment and threats, in 1998 Amalia decided to leave Armenia with her eleven year old daughter (appellants' cousin) and sought political asylum in the UK after entering the country clandestinely. Up to the time of the judgment of the first court – 13 November 2006 – no evidence had been produced indicating that the said Amalia had been granted refugee status in the UK or that she had been granted political asylum. However evidence was produced – see, *inter alia*, documents at fols. 31, 33 and 34 to 40 – indicating that she stood a good chance to benefit from a Home Office "amnesty" applicable to "…families that arrived in the UK prior to 2nd October 2000, have a child who is currently below the age of 18, have not claimed asylum in more than one country and

[11] Armenia ratified the the European Convention on Human Rights on the 26 April 2002.

have not made multiple claims with the UK"[12], and which would therefore enable her to remain in the UK indefinitely.

12. The circumstances surrounding the death of Amalia's brother, Merujian – applicants' father – however are not all that clear. The unauthenticated document at fol. 5, purporting to be a photocopy in Armenian of his death certificate, with an English translation printed on top, states that the cause of death was "…that he was beaten by the police and was suddenly killed". This, as the Refugee Commissioner pointed out in his report, does not tally with what appellant Luiza stated in her interview by the said Commissioner as to the circumstances surrounding her father's death (see fol. 114 and 115). There she said that her father was beaten four times because of his political beliefs. In October or November 1999 he was beaten by four or five men when he was taking her brother to school. On that occasion her brother was also stabbed with a knife in his lung. Her father remained in hospital for fifteen days and thereafter became an invalid and could not work any longer. He also left his party. Her father's health deteriorated and he was in hospital for a month before he died in May 2000, suggesting death because of some form of haematological complications. The disappearance of appellants' mother and two sisters some ten months after their father's death does not appear to be directly linked to political violence at the time (2000/2001)[13] – it could have been just a case of abandonment. Likewise, appellants' decision to leave Armenia does not appear to have been really precipitated by any imminent or clear risk of ill-treatment, but rather by the fact that they were living alone with an elderly grandmother when they had an aunt living in the UK in relatively better circumstances. The mysterious Russian friend who engineered appellant's

[12] See the letter from Howe & Co, Solicitors dated 28/11/2003 at fol. 31.

[13] See the interview with the Refugee Commissioner especially pages 117 and 118. The document, produced on the 7 February 2007 purporting to show that appellants' sister, Lina, has recently been granted political asylum in the United States of America, does not shed much light on the personal situation of appellants to-day. At most it goes to show that the said Lina was, after leaving home in 2001/2002, in danger because of political persecution.

passage to Malta on their way to the UK does not add much of substance to the story.

13. It should finally be pointed out that appellants were never personally involved in political activities because they were very young, and the only type of harassment that Luiza complained of was of "being oppressed for religious reasons" (fol. 119) because of the fact that she was sometimes considered by friends as being a Muslim, when in fact she claims to be a Christian. Likewise, the fact that in 1999 when appellants' father was attacked and beaten, Simony was also stabbed with a knife in his lungs does not *per se* substantiate the allegation of a specific, personal and significant risk of degrading or inhuman treatment in 2003 or in 2007. It need hardly be added that the question of whether or not appellants ought to be granted leave to stay in Malta on humanitarian grounds or whether they ought to be allowed to join their aunt, on humanitarian or other grounds, in the United Kingdom, or, alternatively, given the possibilities of travelling elsewhere at their own expense, to another destination of their own choice, is an entirely different matter which falls outside the parameters of the present issue and contestation between the parties before this Court.

14. For these reasons, appellants' appeal is dismissed. Each party to bear its own costs.

< Final Judgement >

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