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Article 8 of the European Convention on Human Rights and Immigration Law

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**Dissertation Submitted as fulfilment for the degree
of Master of Jurisprudence**

Department of Law

University of Durham

2013

Declaration

This thesis is based on my own research and personal experience. No part of this thesis was submitted for a degree in another University.

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Extracts

This research focused on Article 8 of the European Convention on Human Rights and its use in the context of immigration in the UK. Drawn from the decisions of the English Courts and the Researcher's own personal experience as an immigration, asylum and human rights lawyer, the research provides an in-depth analysis of the law in action. Instead of going for an academic discussion, the researcher's main thrust was a better understanding of how the jurisprudence of English Courts has developed in this field, often comparing it with the decision of European Convention on Human Rights. The researcher relied on case laws and on unreported cases where he was personally involved as the legal representative and as such has first-hand knowledge, as the primary source of his research.

The research found that contrary to the view of many commentators that the Human Rights Act has failed to protect personal freedoms, at least in the field of immigration, especially where reliance is placed on Article 8, English Courts have shown remarkable willingness to protect individual rights over state interests. The Judges have taken their role under the Act seriously, and if they find that a particular case is unlawful using established legal principles or other factors, they are not taking deference to Administrative action. Courts are treating factors like delay, mistake, problems of getting entry clearance etc as favourable to the applicants. Lower Level of the Judiciary seems to be keener in finding a violation of Article 8 than Higher Court Judges. This development appears to be unwelcoming to the executive and they try to restrict the judges' powers by bringing in sweeping changes. However, the courts undaunted by these obstacles, try to find a way out to uphold the individual's private and family life, even to the utter disappointment of the executive.

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Chapter One

Article 8 of the European Convention on Human Rights and Immigration Law – Aims and Objectives of the Study

1.1 Introduction

The study aims at critically evaluating the scope and limits of using human rights arguments based on Article 8 of the European Convention on Human Rights (ECHR) in Immigration context in the UK, and how they are being interpreted by the courts and the Asylum and Immigration Tribunals¹. The focus therefore is on a better understanding of how Art.8 works at a practical level. In immigration context, such arguments can be raised against the Home Office both to challenge refusal of entry of people to the United Kingdom as well as to challenge removal of people from the UK. Art.8 Human rights arguments in the immigration context mean allegations that removal of a person from the UK or denial of entry to the UK will infringe their human rights so far respect to their family and private life is concerned. In other words, the decision by the Home Office will interfere with the applicant's private or family life.

1.2 Background

Traditionally, in the UK fundamental freedoms were viewed as residuary rights. Individual members of the state are free to do anything; so long they do not contravene the numerous laws that restrict those matters. This is in line with Dicey's views on constitutional government². In Dicey's scheme, for example, the guarantee afforded to the freedom of expression is not a positive one; it is rather expressed in a negative form. It is not a matter that can be asserted in opposition to law. It is the residue of the conduct permitted in the sense that no statute or common law rule prohibits it. In his words, "*Any man may ... say or*

¹ In this thesis, if not otherwise indicated, courts will include Immigration Tribunals.

² Dicey, A. V. (1965) *An Introduction to the Study of the Law of the Constitution* (London: Macmillan & Co Ltd) 10th edn.

*write whatever he likes, subject to the risk of, it may be, severe punishment if he publishes any statement, which he is not legally entitled to make."*³

The Human Rights Act 1998 (HRA98) has for the first time, created positive fundamental rights in the UK. S.6 of the Act makes it unlawful for a public authority to act in a way, which is incompatible with Convention rights. When read together with S.7 this creates a new cause of action based on breach of human rights by public authorities and can be used to challenge decisions made in public or private law. S. 3 provides that all legislation, Acts of Parliament and delegated legislation, passed before and after the HRA98 should be interpreted to take accounts of Convention rights, *"so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."*

The HRA98, which came into force on 2 October 2000, has the effect of making the ECHR directly enforceable in the UK. Previously, it was necessary for an applicant to exhaust all the domestic avenues first before being allowed to move to the European Court of Human Rights (ECtHR) for recognition of a claim based on ECHR. Under the HRA98 it is now possible for a person to argue Convention rights before a court in the UK.

Earlier public authorities were under no duty to exercise administrative discretion in a way compatible with ECHR. They were not even under any obligation to have regard to Convention rights as relevant considerations in reaching a decision⁴. They were only obliged to take the Convention rights into consideration when they had expressly stated that they would⁵.

1.3 Administrative Decisions, fundamental rights and English Courts

A decision by the Home Office to refuse entry to or to remove someone from the UK is an administrative decision. An important aspect of this study is the examination of judicial attitude to Art.8 based human rights arguments in immigration cases where an administrative decision has been made to deny entry to the UK or to force someone out of the UK.

³ Dicey *ibid.* p.240.

⁴ See *R v. SSHD, ex parte Brind* [1991] 1 AC 696.

⁵ See *Britton v. Secretary of State for the Environment* [1997] JPL 617.

English courts in general place trust in the motives of the executive. There is a presumption that the executive acts honestly and reasonably and does not abuse the trust bestowed on it. This is often expressed in judicial pronouncements. For example, Lord Reading declared in *R v. Governor of Wormwood Scrubs Prison*⁶, “*It is of course always to be assumed that the executive will act honestly and that its powers will be reasonably exercised.*” This is what Simpson calls, ‘the Reading presumption of Executive Innocence’⁷.

English courts are generally very keen in upholding fundamental rights of the individuals when the state is not a serious party to the conflict. As Street argues, “*our judges may be relied on to defend strenuously some kinds of freedom. Their emotions will be aroused where personal freedom is menaced by some politically unimportant area of the executive.*”⁸ The picture however is completely different when the case involves important political issues such as immigration control or state security.

The Courts accept that their willingness to intervene depends upon the subject matter of a particular case. Lord Woolf MR wrote, “*... the scope of judicial review is not limited but the degree of scrutiny exercised and therefore the depth of the review varies according to the subject matter. In addition, issues can be non-justiciable.*”⁹

Judicial deference to executive decision is neither novel nor exceptional but in tune with the peculiar constitutional culture of the UK. Lord Irvine calls this the constitutional imperative of ‘judicial self-restraint’ in compliance with the sovereignty of Parliament.¹⁰

This constitutional culture of the UK can be explained by the so-called mandate theory. The executive branch of the government being the elected body has received the mandate from the electorate. They do what they think is best for the people. They are better placed to judge what should be the proper course in dealing with administrative matters. As they are answerable to the electorate, if the people are not happy with their act, they can always vote

⁶ [1920] 2 KB 305.

⁷ Simpson, A (1992) *In the Higher Degree Odius* (Oxford: Oxford University Press) p. 29.

⁸ Street, Harry (1982) *Freedom, the Individual and the Law* (Harmondsworth: Penguin) 5th edn. p. 318.

⁹ Woolf, Harry (1998) “Judicial Review - The Tension Between The Executive And The Judiciary” in *The Law Quarterly Review* (1998) 114 L.Q.R. pp. 579-93 at 590

¹⁰ Irvine, Lord of Lairg QC (as he was then) (1996) “Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review”, in 1996 *Public Law*, p.59 at 60-61.

the government out of power. On the other hand, the judiciary is the un-elected body; they receive no mandate from the people. The judiciary is always aware of their position as well as their limitations and as such is often reluctant to interfere with the executive action. The courts do not say that they are subordinate to executive or parliament, but that the executive and the parliament, because of their special knowledge and experience, are the best judges of certain matters.

The English system of the government is based on a strict separation of powers between the executive and the judiciary, not in the sense in which Charles Montesquieu would have liked it to be but in the sense that the Parliament, the executive and the courts, each have their own distinct and largely exclusive domain¹¹. As a partner to this tripartite relationship, the judiciary is very much aware of its own boundary and rarely ventures to traverse outside. As Lord Hoffman observed, "*The whole art of judicial review requires a political sensitivity to the proper boundaries between the powers of the legislative, executive and judicial branches of government.*"¹²

This appreciation of the Courts' own constitutional limits explains their reluctance to interfere in administrative decisions when taken by the government in terms of political policy considerations. It is fair to say here that Immigration has always been a reflection of policy considerations by the government of the day.

1.4 Jurisdiction and the extent of interference in HRA Cases

Traditionally the English courts would examine the decision of an administrative body by way of judicial review under one of the accepted grounds, illegality, irrationality and procedural impropriety¹³. However, under the principles of judicial review court was more concerned with the decision making process than with the actual decision¹⁴. It was even open

¹¹ Per Lord Mustill, *R v. Home Secretary, ex parte Fire Brigades' Union* [1995] 2 AC 513 at 567.

¹² Hoffmann, Lord (1999) "The Influence of the European Principle of Proportionality upon UK Law" in Ellis, Evelyn (ed) *The Principle of Proportionality in the Laws of Europe*, (Oxford & Portland: Hart Publishing) p.107 at p.110.

¹³ See Lord Diplock's judgment in (GCHQ case) *Council of Civil Unions v. Minister for Civil Service* [1985] AC 374.

¹⁴ "The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected, and that it is no part of that purpose to substitute the

to an administrative body whose decision had been judicially reviewed on grounds of error in the process, to rectify the error and to come to the same conclusion again¹⁵. The ‘mandate theory’ played an important role in regulating the relationship between the executive and the judiciary as the latter habitually took deference to executive decisions. The HRA98, by conferring jurisdiction on the Courts to hear human rights arguments against administrative decisions has given a new role to the judiciary, where they are now not only asked to consider the decision making process, but also to scrutinise the actual decision to find out whether or not it conforms with the HRA98.

Who can rely on the protection of ECHR? Although the HRA98 has not incorporated Art.1¹⁶ of the ECHR, non-nationals who are within the UK jurisdiction can rely on Convention rights. So the applicants who even have no right to be in the UK can still rely on the HRA98. The ECtHR has already recognised the Convention rights of non-nationals, most notably in *Conka v. Belgium*¹⁷. This principle of extending the protection of fundamental rights to non-nationals also corresponds with domestic authority. In *Khawaja v. SSHD*¹⁸ the court found, “*Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection.*” This means that even an illegal immigrant can take advantage of the HRA98.

1.5 ECHR and Immigration

The use of human rights arguments to resist the removal of a person from a state is relatively of recent origin. Doubts have been expressed by academics whether the framer of ECHR did originally intend that the Convention rights could be extended to cover removal cases.

opinion of the judiciary or of individual Judges for that of the authority by law to decide the matters in question.” *Chief Constable of North Wales Police v Evans* (1982) 1.W.L.R. 1155, p. 1160, (1982) 3 ALL. E.R., 141, p.143 per. Lord Hailsham L.C.

¹⁵ See *Ridge v. Baldwin* [1964] AC 40.

¹⁶ “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.”

¹⁷ (2002) 34 EHRR 1298.

¹⁸ [1984] 1 AC 74. SSHD stands for Secretary of State for Home Department

The ECtHR only recognised the use of Article 3 (freedom from torture, inhuman and degrading treatment - an absolute right) in removal cases in 1989 in *Soering v. UK*¹⁹. The court stated, "... the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country" (Paragraph 91). Similar decision was taken by the Court in *Chahal v. UK*²⁰.

The ECtHR later started recognising the use of Art.8 both to challenge refusal of entry and removal from the country. In *Sen v. Netherlands*²¹, the court found that the Netherlands had failed to strike a fair balance between the applicants' interest and their own interest in controlling immigration which resulted in them refusing entry thus triggering a breach of Art.8. Similarly in *Amrollahi v. Denmark*²², the ECtHR found that the removal of the applicant to his country of origin would cause a permanent breach of his family life established in Denmark and consequently would amount to an unjustified interference with his rights under Art.8

The ECtHR has also accepted that treatment that may not reach the minimum level of severity required to engage Art.3, may amount to a breach of Art.8. In this respect, the threshold appears to be lower than that of Art.3.

In *Raninen v. Finland*²³ the ECtHR declared, "... the notion of "private life" is a broad one and is not susceptible to exhaustive definition; it may, depending on the circumstances, cover the moral and physical integrity of the person. ... Moreover, it does not exclude the possibility that there might be circumstances in which Article 8 could be regarded as affording a protection which do not attain the level of severity required by Article 3." (Para.63).

¹⁹ (1989) 11 EHRR 439.

²⁰ (App.22414/93); (1997) 23 EHRR 413.

²¹ (2003) 36 EHRR 81.

²² (App. No. 56811/00)..

²³ (1997) 26 EHRR 563.

Similar view has been expressed in *Bensaid v. UK*²⁴. The Court held, “*Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court’s case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity*” (Para.46).

1.6 Human Rights Jurisdiction of the UK Courts in immigration cases

Initially it was S. 65 of the Immigration and Asylum Act 1999 that conferred the right on an applicant to challenge his removal from the UK on human rights grounds.

Human rights have been given further effect by the Nationality, Immigration and Asylum Act 2002, which repealed the earlier provisions. S. 84 provides two separate human rights grounds; one relates to an immigration decision taken in breach of S. 6 HRA and another relates to removal in breach of the same section. An applicant can appeal under s.82 on either or both grounds to the tribunal.

1.7 What happens if the human rights arguments are successful?

If the human rights argument is successful then the applicant cannot be removed from the UK and he will be given permission to stay here for a fixed period. This may in time give rise to permanent settlement. Currently, there are two types of leave²⁵: Humanitarian Protection (HP) and Discretionary Leave (DL). HP is normally given when the claim is based on Art.3. However, from 9 July 2012, discretionary leave is no longer available.

HP is granted to someone who is unable to succeed on asylum grounds, but who would face a serious risk to life or person arising from: 1) the death penalty; 2) unlawful killing; and 3) torture, inhuman or degrading treatment or punishment.

DL could be granted to an applicant who: 1) has an Article 8 claim; 2) has an Article 3 claim only on medical grounds or severe humanitarian cases; 3) is an unaccompanied asylum

²⁴ (App. No. 44599/98).

²⁵ For details see Asylum Policy Unit guidelines, APU Notice 1/2003.

seeking child; 4) would qualify for asylum or HP but has been excluded (e.g. war criminals, terrorists, people who committed serious criminals and those who are a threat to national security; and 5) is able to demonstrate particularly compelling reasons why removal would not be appropriate.

Since the withdrawal of discretionary leave from 9 July 2012, applicants who are successful on Art.8 grounds will be given limited leave to remain. Where someone has established family life in the UK and the Home Office accepts that, under the new human rights regime, they will be given leave for 30 months, and this can be extended for three more times, each consisting of 30 months provided the existing conditions of the applicants (for example, continuous family life) merit further grant. After spending 10 years under this leave applicants will qualify for indefinite leave to remain (ILR).

1.8 Art 8 and Immigration

Unlike Art.3, which is absolute, Art.8 is not absolute and an interference with rights contained in Art.8 is possible in wider circumstances under sub-article 2. In the immigration context, the economic well-being, national security, public safety and prevention of disorder and crime are the most commonly cited reasons for interference. Maintenance of effective immigration control, which is one of the functions of the government, is related to the 'economic well-being' of the country.

Like Art.3, Art.8 has become one of the most relied ECHR articles by English lawyers in immigration cases. In fact, the English law that has developed since the HRA98 in respect of Art.8 appears to be more persuasive and far reaching than that of ECtHR.

In order to make a case under Art.8 in immigration context in the UK one has to go through a multi-stage process. This step-by-step process was first initiated by the Tribunal in *Nhundu and Chiwera v. SSHD*²⁶. This was approved by the House of Lords in *R v. SSHD ex parte Razgar*²⁷. The process is as follows:

- a) Is there an existent private or family life?

²⁶ (2001) (01/TH/00613).

²⁷ [2004] UKHL 27.

- b) Is there an interference with that right?
- c) Does the interference pursue a legitimate aim?
- d) Is the interference in accordance with the law?
- e) Is the interference necessary in a democratic society, in other words, proportionate?

In immigration context, legitimate aim ((c) above), will normally mean maintenance of an effective system of immigration control. However, protection of public or the interest of public good are also legitimate aims and often relied on by the Home Office. The steps taken by the Home Office to maintain an effective system of immigration control or to remove someone in the interest of security or public good will be regarded as lawful ((d) above). Further, the Court of Appeal held in *VW (Uganda) v. SSHD*²⁸ that the issue before the court is not whether the proposed interference of an appellant's Art.8 rights is proportionate to the legitimate aims of the Home Secretary, but whether the removal of the appellant was proportionate to the legitimate aims of immigration control.

Proportionality is a key concept in Strasbourg jurisprudence and one that Lord Diplock in *Council of Civil Services Union v. Minister of Civil Service*²⁹ had prophesied one day to become a ground of judicial review in England. Earlier in *R v. Goldsmith*³⁰, Lord Diplock explained that proportionality "prohibits the use of a steam hammer to crack a nut if 'nutcracker' would do" as that will be disproportionate.

Any interference with a protected but qualified right must be proportionate to the aim intended in the sense that:

- (a) the interference should cause the minimum 'damage' to the right in question;
- (b) the interfering measure should be carefully designed to meet the objectives in question;
- (c) the reasons for the interference must not be arbitrary, unfair or irrational.

Assessment of proportionality is a balancing exercise. In immigration context it means that on one side of the scale there is a heavy weight in the form of the need to maintain

²⁸ [2009] EWCA Civ 5.

²⁹ [1984] 3 All ER 935 at 950.

³⁰ [1983] 1 WLR 151 at 155.

immigration control, public good or the security of the UK. On the other side whatever small weights applicants can advance in their favour. None of these small weights is alone sufficient to outweigh the need to maintain immigration control etc. However, collectively the weights may tip the balance in favour of the applicant. A number of factors, such as strong and loving family relationship, presence of children, long residence, employment, social network, contribution to society, treatment for illness, Home Office delay or error, have been relied on by applicants. Some of these factors and how they may influence the outcome of a human rights claim have been explored in details in this study.

In dealing with Art.8 cases, a balance must be struck between two competing interests: the private or family life of an individual and the wider interest of the community or the state. As the title of Art.8 suggests – right to respect etc. it also imposes a positive duty on the state to ensure that the private or the family life of individuals is respected (*Hatton and Others v. UK*³¹).

English Courts have repeatedly asserted that immigration control is a legitimate purpose, which will render removal a proportionate response. In *SSHD v. Kujtim Lama*³² the Tribunal decided that in assessing proportionality under Art.8(2) the sheer size of the immigration problem is a legitimate matter of public concern, and the maintenance of an effective immigration control is a legitimate purpose. The Tribunal held that even if it is conceded that returning an illegal immigrant home would amount to a breach of Art. 8, it would nevertheless be a proportionate means of maintaining an effective immigration control.

1.9 Importance of the study

Since the coming into force of HRA98, thousands of human rights claims have been made to the Home Office to prevent the removal or to challenge the refusal of entry and consequently thousands of appeals have gone to the courts and a healthy body of jurisprudence has developed in this sphere.

As mentioned earlier, the decision to remove someone from the UK or to refuse entry is an administrative one and is often backed by policy considerations. The courts are not always

³¹ (Application No. 36022/97).

³² [2002] UKIAT 07554, 1 April 2003.

comfortable in reviewing administrative decisions, especially when they are taken pursuant to political policies. The courts in such situations endeavour to find a compromise between the executive government's decision and the demand that such decision should not breach individual's human rights. It is important to examine how the courts are discharging their twin and conflicting functions in immigration matters.

In *R v. SSHD ex parte Mahmood*³³, Laws LJ stated, "*Much of the challenge presented by the enactment of the 1998 Act consists in the search for a principled measure of scrutiny which will be loyal to the Convention rights, but loyal also to the legitimate claims of democratic power... The Human Rights Act 1998 does not authorise the judges to stand in the shoes of Parliament's delegates, who are decision-makers given their responsibilities by the democratic arm of the state. The arrogation of such a power to the judges would usurp those functions of government which are controlled and distributed by powers whose authority is derived from the ballot-box.*" (Para. 33).

In an earlier research this researcher found that both the Home Office and the Courts are treating an asylum claim and human rights claim based on Art.3 in the same way applying the same considerations, such as internal flight alternative and sufficiency of protection. As a result if an asylum claim fails a human rights claim will almost inevitably fail and rarely will an Art.3 claim succeed on its own.³⁴

In *R (ex parte Bagdanavicius et al) v. SSHD*³⁵, the House of Lords held that the threshold of risk is the same in both asylum and human rights cases based on Art.3. Lord Brown considered that the same approach should apply to the two conventions (Refugee Convention and ECHR). "*Certainly your Lordships should state for the guidance of practitioners and tribunals generally that in the great majority of cases an article 3 claim to avoid expulsion will add little if anything to an asylum claim.*" (Para. 30).

Treating both the asylum claim and human rights claim based on Art.3 in the same way simply frustrates the whole purpose of the humanitarian protection. It was thought by many

³³ Neutral Citation No: C2000-0385, 08 December 2000.

³⁴ Reza, A. (2006) *Use of Human Rights Arguments in Expulsion Cases*, Unpublished LL.M dissertation, University of Northumbria. There are few cases where Art.3 can succeed without a corresponding Asylum claim, such as blood-feud and honour killing.

³⁵ [2005] UKHL 38 (HL).

academics and immigration lawyers that the ECHR should have offered a better protection than that one available under the Refugee Convention. The Refugee Convention was drafted after the World War II to deal with displaced people. However, the ECHR was meant to be for everyone within the territory of a contracting state. Whereas under the Refugee Convention the applicant must face persecution for one of the five reasons, no such condition is required under the ECHR. The protection offered under the Refugee Convention is one of surrogacy; however, ECHR protection is based on humanitarian considerations. Unlike the Refugee Convention, the ECHR does not have any exclusion clauses and no one is actually excluded from its protection. The ECHR considerations are subject to the rulings of a supranational court, that is, ECtHR, no such judicial body exists to guide the states about Refugee Convention. In fact, different countries have adopted different meaning to their obligations under the Refugee Convention. However, attempts have been made to harmonise the EU law relating to asylum seekers³⁶.

Whereas Art.3 has failed to achieve what many academics and immigration lawyers in the UK had hoped, it is the Art.8 which has probably made the most significant impact of the incorporation of the ECHR so far the immigration cases are concerned. This study shows that the UK courts are more willing to accept a violation than their Strasbourg counterparts in these types of cases.

The House of Lords in three landmark decisions gave new dimensions to Art.8 cases, which have significantly altered the concept of effective immigration control argument. In *Beoku-Betts v. SSHD*³⁷ the court held that the right to respect for family life of the appellant's family members must be taken into consideration when determining whether the appellant's proposed removal will breach Art 8.

In *Chikwamba v. SSHD*³⁸ the court questioned the Home Office policy of requiring an applicant to return to the home country in order to seek entry clearance. The Home Office now have to show that the case is exceptional if return to apply for entry clearance is to be enforced. The entry clearance option should only be for those exceptional cases which have 'appalling' immigration histories or where the period of separation of the family triggered by

³⁶ See Council Directive 2004/83/EC of 29 April 2004.

³⁷ [2008] UKHL 39 (HL).

³⁸ [2008] UKHL 40 (HL).

the immigration decision is small. Taking it further, the Court of Appeal has held in *VW (Uganda) v. SSHD*³⁹, that the likelihood that an appellant could return to the UK through entry clearance should not be ordinarily treated as a factor rendering removal proportionate; the effect could rather be the reverse – disproportionate.

Finally in *E B (Kosovo) v. SSHD*⁴⁰ Lord Bingham set out three grounds upon which delay by the Home Office to decide an applicant's case or to enforce removal may be relevant in affording the applicant a case under Art.8 and thus rendering his removal disproportionate.

Most laws in this field have been developed by the lower level of judiciary – Immigration Tribunals. There has been a significant development of jurisprudence over the last 14 years. Often the higher courts simply recognised a position **already** taken and practised by the Tribunals, such as taking into consideration the rights of the UK based family members or delay in taking decisions. Most laws relating to immigration are contained in Immigration Rules, Home Office Policies, **Concessions** and Guidance and Instructions to their own case workers. **However some laws are also contained in Statutes such as the British Nationality Act 1981. Statutes also often provide procedures in Immigration matters, Immigration Act 1971, Nationality, Immigration and Asylum Act 2002 are the cases in point. Despite these, bulk of the immigration decisions are taken on the basis of whether an applicant can satisfy the requirements of immigration rules and most of the policies and guidance refer to how immigration rules are applied in practice.** The Court of Appeal in *Pankina v. SSHD*⁴¹ and Supreme Court in *Munir v. SSHD*⁴² and *Alvi v. SSHD*⁴³ refused to accept these policies and guidance and instructions as having the force of law since they are not normally brought before the Parliament. However in July and September 2012 Home Office drafted huge statement of changes and brought all these policies and guidance within the frame of law by laying them before Parliament.

Immigration Rules themselves have peculiar legal status. It is very easy to change immigration rules. Changes are regularly brought by way of statement of changes. Immigration Act 1971 gave Secretary of State power to lay down immigration rules and to

³⁹ *Supra* Note 28.

⁴⁰ [2008] UKHL 41 (HL).

⁴¹ [2010] EWCA Civ 719.

⁴² [2012] UKSC 32.

⁴³ [2012] UKSC 33.

bring necessary changes to them. Lord Hoffman in *Olelola v. SSHD*⁴⁴ observed: “*The status of the immigration rules is rather unusual. They are not subordinate legislation but detailed statements by a minister of the Crown as how the Crown proposes to exercise its executive power to control immigration. But they create legal rights:*” Since the rules are statements of the Minister how she will exercise her power in relation to immigration control, an immigration decision which is not in accordance with immigration rules is appealable under s.84(1) of the Nationality, Immigration and Asylum Act 2002. The Secretary of State is required to lay immigration rules before the Parliament but it is a mere formality.

Although the HRA98 made it obligatory for the Public Authorities including the Home Office to take into account human rights issues in taking decisions, until recently human rights considerations fell outside the Immigration Rules. However, on 9 July 2012, the Government brought in important changes in this area intending to restrict the use of human rights, which would like to give rise to many criticisms and challenges in courts in future.

Unfortunately, very little research has been carried out on the relationship of human rights and immigration. Most books on fundamental rights deal with human rights in general and the effect of incorporation of ECHR into HRA98. For example, both Fenwick⁴⁵ and Feldman⁴⁶ presented a critical analysis of the legal protection of civil rights especially in light of the HRA98. Wadham and Mountfield⁴⁷ provided concise guidelines about the application of HRA98 and the scope of Convention rights. Clayton and Tomlinson⁴⁸ provided a systematic and thorough analysis of Human Rights Law and practice in the UK and the impact of the HRA98 on civil and criminal law. Gearty⁴⁹ tried to locate the concept of human rights both in its historical and political process and analysed the effects of HRA98 drawing from academic and practical examples.

⁴⁴ [2009] UKHL 25.

⁴⁵ Fenwick, Helen. (2002) *Civil Liberties in Britain*, 3rd edn. (London: Cavendish Publishing Ltd).

⁴⁶ Feldman, David. (2002) *Civil Liberties and Human Rights in England and Wales*, 2nd edn. (Oxford: Oxford University Press).

⁴⁷ Wadham, John. and Mountfield, Helen. (1999) *Blackstone's Guide to The Human Rights Act 1998*, (London: Blackstone Pres Ltd.).

⁴⁸ Clayton, Richard. and Tomlinson, Hugh. (2009) *The Law of Human Rights*, 2nd edn. (Oxford: Oxford University Press).

⁴⁹ Gearty, Conor. (2004) *Principles of Human Rights Adjudication*, (Oxford: Oxford University Press).

None of these work considered the impact of the HRA on immigration law. Writing before the HRA98 coming into force, Blake and Fransman⁵⁰ argued positively what they foresaw would be the situation of immigration cases under the HRA. However, subsequent judicial decisions have proved how premature was their optimism.

Henderson's⁵¹ work is mainly aimed at practitioners and it sets out in details what is required to conduct each stage of an asylum/human rights appeal. It also offers some valuable strategic and tactical tips for practitioners.

Although around 4000 immigration detainees are kept in various detention centres and prisons used as detention centres, very little research has been carried out on their conditions in detention. This researcher's research in Cambridge on Oakington Detention Centre revealed serious violations of rights and mistreatment of detainees.⁵²

Thomas⁵³ carried an extensive and investigative study of the quality and effectiveness of tribunal adjudications in asylum decision making. It provided a detailed case study of asylum adjudications. However, the present research is not concerned with the effectiveness or quality of Tribunals or Courts decision making, but with the judicial activism in the field of human rights in immigration context.

This study therefore is aimed at examining the Art.8 based human rights arguments in immigration cases and how they are received and interpreted by the UK courts drawing exclusively from the decisions by the courts and Tribunals.

1.10 Methodology

The method of this research is qualitative – the research is concerned with the perspectives of the judges – how they view Art.8 issues in immigration context and the matters they consider as relevant. Bulk of the source came from the judgments delivered by Tribunals, since the

⁵⁰ Blake, Nicholas. and Fransman, Laurie. (1999) *Immigration, Nationality and Asylum; Under the Human Rights Act 1999*, (London, Edinburgh, Dublin: Butterworths).

⁵¹ Henderson, Mark. (2003) *Best Practice Guide to Asylum and Human Rights Appeals* (London: ILPA).

⁵² Reza, A (2009) *Treatment of Immigration Detainees and Complaints Procedure*, unpublished MSt thesis, University of Cambridge.

⁵³ Thomas, Robert (2011) *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudications*, (Oxford: Hart Publishing).

jurisprudence in this field has been mainly developed by the judges of this lower level of judiciary. Further, references have been made to some cases where the researcher was personally involved. These cases provide rich source since the researcher was himself aware of what precise human rights arguments were raised and what discussions took place during the proceedings. Anonymity as to the identity of the applicants has been preserved.

Chapter Two

Experience from the European Court of Human Rights

2.1. Introduction

This chapter deals with the background history of the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) referred to as the Court in this chapter; how the ECHR regime operates and what are the general principles and practices

followed by the Court. Although the framers of the Convention deliberately left the issue of immigration out of the ambit of the Convention, this chapter shows how subsequently immigration issues made their way into the system. It has now reached a stage where ECHR regime has almost recognised a right of an alien not to be removed in certain circumstances by imposing a negative duty on member states, and a similar right of an alien to be admitted to a member state and thus imposing a positive obligation on the host country to allow entry. The result of these developments is the gradual acceptance of a new kind of right – the right of an illegal immigrant to legalise his entry or stay if they can show that there is a family or private life in existence, which cannot justifiably be interfered with.

2.2 General Background of ECHR and ECtHR

The ECHR and the ECtHR originated partly as a reaction to the wanton disregard and violations of basic human rights during the Second World War and partly due to the historical development of political thoughts in the Western World since the age of enlightenment which emphasised on securing individual autonomy and equality for all. Ideas were also borrowed from the American Declaration of Independence and the French Declaration of Rights of Man⁵⁴.

However, the triggering event was the devastation produced by World War II, which in its aftermath brought unprecedented co-operation among the Western European nations. Some Statesmen, notably Churchill even called for creating a United States of Europe to avoid the tragedy of the War.⁵⁵ In one speech Churchill declared, “*The safety of the world ... requires a new unity in Europe, from which no nation should be permanently outcast.*”⁵⁶

The Statesmen of Europe were anxious to prevent the repetition of the catastrophe of the conflict. Many of these politicians actually took part in the resistance against the axis forces and some even became prisoners of war. They realised how despotism resulting in aggressive policies could produce the horror of war and thought that it was through ensuring fundamental rights for the people that state dictatorship could be prevented, which in turn

⁵⁴ Overy, Clare and White, C.A (2006) *Jacobs & White: The European Convention on Human Right*, 4th edn. Oxford: Oxford University Press, 1.

⁵⁵ See Winston Churchill’s Speech at the Zurich University, 17 September 1946.

⁵⁶ Winston Churchill’s Speech delivered at the Westminster College in Fulton, Missouri, 5 March 1946.

would prevent war⁵⁷. This anxiety was heightened with the real possibility of socialist revolution in various Western European countries⁵⁸ thus threatening democracy and free market economy which lied at the heart of the Western Europe. Further the effect of the Cold War which divided the World into two rival blocks reflecting the Soviet and American rivalry together with it the ideological conflicts – communism vs. capitalism. There grew a real fear among Europeans that many countries could fall to communism..

The European politicians realised that the root cause of any revolution is normally the feelings of deprivation and discontent with the socio-political landscape. They appreciated that one of the most effective ways to keep revolutionary and radical ideas at bay was to promote wholesale democracy and fundamental rights. If people are able to enjoy their basic rights and have the means to change their government, they would not succumb to the pressure of social change by inviting communism. Further they realised that an individual's rights needed protection above all against his own State, rather than against the hostile acts of another⁵⁹. With these visions in mind, they came up with the idea of ECHR – a charter guaranteeing fundamental rights of the people of the member states together with a single or comparable standard of rights and the ECtHR to ensure that the member states adhere to the standard in their practice.

The fact that the European Statesmen were anxious to promote democracy and democratic values is apparent from the Convention itself. ECHR repeatedly refers to the phrase 'democratic society', and that the Convention rights and restrictions imposed on some of them are both necessary in a 'democratic society'. However, nowhere in the Convention itself, democracy and democratic values are precisely defined⁶⁰ and the matter seems to have been left to the Court to determine on a case by case basis. The framers of the Convention were largely influenced by the UN's Universal Declaration of Human Rights, which preceded it by four years; and which produced a 'cautious document' providing for basic protection of human rights only, when compared to other international instruments⁶¹.

⁵⁷ Merrills, J.G. and Robertson, A.H. (2001). *Human Rights in Europe: A Study of the European Convention on Human Rights*, 4th edn. Manchester: Manchester University Press.

⁵⁸ Overy and White, *ibid.* 2.

⁵⁹ Douglas, Gillian (1988) 'The Family and the State Under the European Convention on Human Rights', *International Journal of Law and of the Family*, 2 Oxford: Oxford University Press, 76-105 at 76.

⁶⁰ Overy and White. *Ibid.* 2

⁶¹ Fenwick, Helen (2002). *Civil Liberties and Human Rights*, 3rd edn. London and Sydney: Cavendish Publishing Ltd.

The Convention is regarded as the first international human rights instrument which provides both the means for its interpretation and its enforcement.⁶² The ECHR regime provided a list of fundamental rights – absolute and qualified, which should be enjoyed by everyone within the jurisdiction of the member states. Rights are absolute if no derogation is allowed under Article 15⁶³. On the other hand, qualified rights are those where the Convention declares that there is a right, however, it allows the member states to interfere with that right under certain circumstances where the rights of an individual can be overridden in order to protect the wider interest of the society or the state⁶⁴.

The Convention guarantee that everyone within the territory of a member state should enjoy the Convention rights in effect imposes an obligation on member states to ensure that these rights are actually enjoyed by everyone. A mechanism to ensure that the member states are securing the rights of individuals is also designed in the form of ECtHR. Individuals who feel that their rights are violated by the action of a state have the right to redress their grievances by approaching the ECtHR and praying for remedies. For the first time an individual was empowered to take a State to the Court to challenge an interference with his rights. Earlier this was the privilege of a sovereign state and whenever there was a dispute with a state only a state could take another state to an international tribunal. This recognition of an individual's legal standing under international law was later followed in other international human rights instruments⁶⁵. The ECHR is not however, concerned with disputes between individuals.

2.3 Convention as a living instrument

When the Convention was initially drafted, the framers of the Convention could not have foreseen all the human rights issues that might arise in future. For that reason the Convention is being treated as a dynamic and living instrument so that it can cater for the need of the

⁶² Feldman, David (2002). *Civil Liberties and Human Rights in England and Wales*, 2nd edn. Oxford: Oxford University Press.

⁶³ Absolute rights are contained in Articles 2, 3, 4 and 7 and Protocols 6, 7 and 13.

⁶⁴ Qualified rights can be found in Articles 8, 9, 10, 11 and Protocol 1.

⁶⁵ Feldman, *ibid*.

changing society and social perceptions⁶⁶. The Convention should be interpreted ‘in the light of current society’ in order to meet the needs and expectation of the modern day society. The Court has adopted a teleological or purpose-based interpretation to deal with human rights issues which were not contemplated by the founders.⁶⁷

For example, in *Marckx v. Belgium* upholding a claim for violation of Article 8, where the Belgium law discriminated illegitimate children compared with legitimates ones in matters of inheritance, the Court accepted that there has been remarkable change in societal attitude to illegitimate children since the drafting of the Convention.

Further in *Selmouni v. France*⁶⁸ the Court applying the doctrine of living instrument, declared that treatment which in the past was regarded as ‘inhuman and degrading treatment’ can be regarded as ‘punishment’ in future.

In *Tyrer v. UK*⁶⁹, the Court reiterated that the Convention is a living instrument, which must be interpreted in the light of present day conditions. The Court declared that judicial corporal punishment amounted to ‘degrading punishment’ within the meaning of Art.3 despite the fact that the punishment had legislative sanction. The Court was influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.

Similarly in *Saadi v. UK*⁷⁰, a case which involved the question of proportionality and legitimacy of detaining asylum seekers at the Oakington Reception Centre while their claims are being processed, the Court returned to the issue of living instrument. “[*The Convention*] ... had to be interpreted in a manner which ensured that rights were given a broad construction and that limitations were narrowly construed, in a manner which gave practical and effective protection to human rights, and as a living instrument, in light of present day conditions and in accordance with developments in international law so as to reflect the

⁶⁶ The Leicester Study found that the phrase ‘the Convention is a living instrument’ has been used in 28 cases, and the phrase ‘a living instrument’ has appeared in 47 cases. See White, Robin C. A and Boussiakou, Iris (2009) ‘Separate Opinions in the European Court of Human Rights’, *Human Rights Law Review* 9(1), 37-60.

⁶⁷ Fenwick, *ibid*.

⁶⁸ (2000) 29 EHRR 403.

⁶⁹ A 26 (1978) 2 EHRR 1.

⁷⁰ 47 EHRR 17.

increasingly high standard being required in the area of the protection of human rights.” (Para.55).

Does the doctrine of living instrument come into conflict with the doctrine of precedent? The Court made it clear in *Chapman v. UK*⁷¹ and *Christine Goodwin v. UK*⁷² that although it is not bound by its previous judgments, in the interests of legal certainty and foreseeability it should not depart without good reasons from its precedents. When there are good reasons, the Court can depart from established case law by using the doctrine of living instrument. In *Mamatkulov and Askarov v. Turkey*⁷³ the Court accepted the crucial importance of interpreting and applying the Convention in a manner which renders its rights practical and effective not theoretical and illusory and in order to achieve this aim the Court relies on this doctrine of living instrument.

The doctrine thus empowers the Court for evolving legal principles by resorting to creative interpretation of Convention provisions. This reflects the recognition of judicial activism; and it is expected that the changes brought about as a result of the activism will enhance the contents of human rights⁷⁴. However, this may place the Court in a difficult dilemma. On one hand the Court has to ensure that it does not exceed its judicial role of interpreting the Convention by overruling policy decisions taken by democratically elected representatives of Member States who are responsible for the wellbeing of their electorate, and on the other hand not abdicating its own responsibility of fairly reviewing State action.⁷⁵ The doctrine of living instrument is closely related to the doctrine of margin of appreciation, as any creative interpretation must give due regard to the peculiar situation of the Member State.

2.4 Admissibility – who can apply to the Court?

Under Article 34 any person, non-governmental organisations or group of individuals can apply to the court. Earlier, only a State or the Commission could refer a case from the

⁷¹ (Application No. 27238/95) .

⁷² (Application No. 28957/95) .

⁷³ (Applications Nos. 46827/99 and 46951/99) Judgment 4 February 2005.

⁷⁴ See Mahoney, Paul (1990). ‘Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin’, *Human Rights Law Journal*, 11, 57.

⁷⁵ See a detailed analysis in Mahoney, Paul and Prebensen, Soren. (1993). “The European Court of Human Rights” in R. St. J. Macdonald, F. Matscher, H. Petzold (ed) *The European System for the Protection of Human Rights*, Leiden: Martinus Nijhoff, 638-40.

Commission to the Court. An individual could bring a case before the Commission if the respondent State had made a declaration under Art.25. The Ninth Protocol (replaced by Eleventh Protocol) changed this by allowing individuals the right to take a case directly to the Court⁷⁶.

The Court in *Mamatkulov* states that the right of individuals to make an application is one of the fundamental guarantees of the effectiveness of the Convention system of human rights protection. The Convention creates a network of mutual, bilateral undertakings, objective obligations which benefit from a 'collective enforcement'.

However, the applicant must claim to be a victim of a violation of any of the rights enshrined in the Convention. Citizens, non-citizens and even illegal entrants can seek protection under the Convention.

Children can also apply to the Court – on their own rights, or in conjunction with adult victims of Convention rights violations as it happened in *Marcks v. Belgium*⁷⁷. With the influx of thousands of asylum seekers from Asia and Africa to Western Europe, many minors or people with disputed age are arriving and many of whom also petition the Court to prevent their removal⁷⁸.

Under the Convention an indirect victim of an action by a State can also petition to the Court. So an applicant, who himself has not suffered directly by the State action can rely on the Convention. In *Abdulaziz, Cabales and Balkandali v. UK*⁷⁹, the petitioners were the wives of foreigners who were refused permission to remain or to enter the UK to join their UK settled wives.

There are also cases where the Court accepted petitions from secondary victims who suffered as a result of the sufferings by the primary victims. In *Kurt v. Turkey*⁸⁰, the ECtHR found that the applicant had been subject to inhuman and degrading treatment caused by the arrest and

⁷⁶ Merrills, J.G. and Robertson, A. H. (2001). *Human Rights in Europe: A Study of the European Convention on Human Rights*, 4th edn. Manchester: Manchester University Press, 19.

⁷⁷ (1979-80) 2 EHRR 330.

⁷⁸ In the last couple of years hundreds of unaccompanied minor asylum seekers arrived in the UK. This researcher dealt with many ECtHR applications preferred by these minor/disputed age applicants.

⁷⁹ (1985) 7 EHRR 471.

⁸⁰ (15/1997/799/1002,), (1998) 27 EHRR 373.

unexplained disappearance of her son. “*She had witnessed his detention in the village with her own eyes and his non-appearance since that last sighting made her fear for his safety.*” (Para.133). Similarly, in *Chahal* the applicant who was a Sikh separatist and facing deportation to India brought an application under Art.3. His wife and children also applied arguing that his deportation will interfere with their right to respect for their family and private life.

It will be seen later that in Article 8 cases, there is an increasing number of instances where recognition of the rights of the applicant’s family members who are themselves not liable to be removed and who have not applied to the Court are taken into consideration.

Under Article 35(1), it is a precondition that the applicant must exhaust domestic avenues before approaching the Court. So if remedies are available for applicants in a member state, their applications will be found inadmissible. However, absence of legal aid which may make it impossible for an applicant to access the domestic remedy especially where it is not possible for him to seek that remedy without the assistance of a lawyer may tip the balance in his favour and application may be admissible⁸¹. The time limit for making an application to the Court is 6-month from the final decision of the domestic proceeding.

Under Article 36 third party intervention in a case is allowed. The Court can permit any person or organisation to submit written comments and even to take part in hearing if it is necessary in the interest of the proper administration of justice. Many Human Rights Organisations seek permission to intervene and thus make valuable contribution to the outcome of cases. In *Chahal*, Amnesty International, JUSTICE, the AIRE Centre, the Joint Council for the Welfare of Immigrants (JCWI) – all these Human Rights NGOs intervened and each focused on different aspects of the case.

When an applicant alleges that his Conventions rights are violated, the burden of proof falls on him and he must establish on a balance of probabilities that his rights have indeed been violated. However, if he can show that his qualified rights are interfered with, then the burden will shift to the State and it must then show on a balance of probabilities that such

⁸¹ This researcher lodged several applications to the ECtHR on behalf of foreign nationals who were facing removal to Greece under the Dublin II Convention (that is, there is a third safe country where removal can be effected) despite the availability of domestic remedy in the form of judicial review since legal aid was virtually impossible to obtain in these type of cases for High Court Applications.

interference is justified. This justification can be established, if it can be shown that (a) the alleged interference was in accordance with law; (b) the aim of such interference was to protect a recognised interest – normally the interest of the society or the state; and (c) such interference was necessary in a democratic society.

2.5 Concept of ‘Manifestly ill-founded’ cases

Article 35(3) of the Convention provides a ‘filtering mechanism’ to ‘root out weakest cases’⁸². The Court can declare inadmissible any case, if upon a preliminary investigation it finds that the application does not disclose a violation of Convention rights. Given the enormous number of applications that the Court receives every year, this helps it to concentrate on the meritorious ones.

In *Advic v. UK*⁸³ the applicant, a Yugoslovak national, lived in the UK for 18 years. He married in the UK and had two children and had ILR. He left the UK and wanted to return as a returning resident after 18 years mainly to avail the social security benefits. However the UK refused to allow him in, since under the immigration rules a returning resident must return within 2 years. His children and brothers lived in the UK. Upholding the refusal the adjudicator recommended that the Home Secretary should exercise his discretion outside the Immigration Rules and allow the applicant to enter the UK and resume his family life in light of Art.8⁸⁴. However, the Secretary of State refused to act on the recommendation and the applicant petitioned the ECtHR under Art.8. The Commission decided that since there was no financial dependency on the relatives in the UK the applicant failed to show that there existed sufficient links between him and his relatives in the UK so as to give rise to a breach of Art.8. The application was declared as ‘manifestly ill-founded’.

2.6. Margin of Appreciation

⁸² Leach, Philip (2001) *Taking a Case to the European Court of Human Rights* London: Blackstone Press Limited, p.91.

⁸³ (Application No. 25525/94), Judgment 6 September 1995.

⁸⁴ This case was decided before the Human Rights Act 1998, when the Adjudicator was not obliged to take into consideration ECHR cases.

The doctrine of ‘margin of appreciation’, which was developed by the ECtHR in *Handyside v. UK*⁸⁵, is a doctrine of judicial discretion or judicial self-restraint. It preserves the diverse cultural and traditional values and practices of different member states by allowing domestic courts a form of discretion in dealing with restrictions on rights which are challenged before them.

There are matters which because of their very nature, national authorities and domestic courts are better placed to deal with in line with the prevailing local conditions and practices. A fine line is drawn between matters which are not significant and which can be decided at local level, where variation in each state is possible and matters which are so fundamental that uniformity in all states should be ensured. It is in relation to the localised matter that the doctrine plays its part by allowing local conditions to prevail with the ECtHR not interfering to upset the balance. In *Handyside*, the Court declared, “*By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements ...*” (Para 48).

In *Branningan and McBride v. UK*⁸⁶, the issue was the detention of suspected terrorists under the terrorist legislation. The UK sought derogation under Article 15 which had the effect of excluding the application of Article 5(3). The ECtHR had to consider the validity of this derogation. Allowing a wide ‘margin of appreciation’ to the UK, the Court held that the UK national authorities, ‘by reason of their direct and continuous contact with the pressing needs’ were in a better position than the Judges of the ECtHR to appreciate the presence of threat to the life of the nation and the nature and scope of the derogation necessary to counter the threat.

The doctrine is a clear example of the fact that in case of doubts, the matter should be resolved in favour of the respondent state and not the individual⁸⁷. However, it should not be taken to mean that the employment of the doctrine implies lowering down the standard of the Convention. As Sweeney observes, “*The doctrine’s use has been presented as a valuable tool*

⁸⁵ (1979-80) 1 EHRR 737; Judgment 7 December 1976, Series A, No.24.

⁸⁶ (1994) 17 EHRR 539, Series A, No. 258-B.

⁸⁷ Overy, Clare. and White, Robin. C.A. (2006) *Jacob’s & White The European Convention on Human Rights*, 4th edn. Oxford: Oxford University Press, at 53.

for recognising and accommodating limited local variations within a nevertheless universal model of human rights.”⁸⁸

2.7 Extraterritoriality

Art.1 of ECHR provides that the States shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. However, no definition of jurisdiction is provided in the ECHR. Can States be liable for incidents happening outside their territory? Budzianowska believes that the lack of codification and clear rules about jurisdiction results in disagreement between writers as to the scope and role of ECHR in terms of extraterritorial application of ECHR⁸⁹.

In *Bankovic and Others v. Belgium and Others*⁹⁰, the Court declared that the ECHR was not designed to be applied throughout the world. The Court made an exception to the territorial principle in a situation where the inhabitants of a territory are effectively under the control of an ECHR contracting State. Later in *Al-Skeini and Others v. United Kingdom*⁹¹, the Court maintained that the ECHR applies extraterritorially in exceptional circumstances. That case related to the murder and torture of Iraqis by British troops in Basra, Iraq. The Court held that through its soldiers the UK exercised ‘governmental authority’ and ‘public powers’ which normally belong to a sovereign government in Basra and as such in the specific and exceptional circumstances the applicants were within the jurisdiction. Ryngaert argues that even after the favourable decision of *Skeini*, the exact parameters of the extraterritorial nature of ECHR remains unclear since the Court reintroduced the principles of *Bankovic* through ‘back door’⁹².

Despite the cautious approach in *Bankovic* and *Skeini*, a survey of the cases of the Court show that on many occasions, the Court did endorse extra-territorial jurisdiction of ECHR member states and in some cases did find violations.⁹³ Miller⁹⁴ states that in four types of

⁸⁸ Sweeney, James A. (2005) ‘Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post Cold War Era’, *International and Comparative Law Quarterly*, 54, 459-474 at 474,

⁸⁹ Budzianowska, Dobrosława C. (2012) “Some Reflections on the Extraterritorial Application of the European Convention on Human Rights”, in *Wroclaw Review of Law, Administration & Economics*, Vol 2.1, pp.51-61.

⁹⁰ (Application No: 52207/99, Judgment 12 December 2001).

⁹¹ (Application No. 55721/07, Judgment 7 July 2011)

⁹² Ryngaert, Cedric (2012) “Clarifying the Extraterritorial Application of the European Convention on Human Rights”, in *Merkourios Utrecht Journal of International and European Law*, Vol. 28, Issue 74, pp.57-60.

⁹³ See ‘Factsheet – Extra-territorial Jurisdiction’, Press Unit, European Court of Human Rights.

cases, the Court invokes extra-territorial jurisdiction. (a) In extradition or expulsion cases involving the removal of an individual from a member state's territory. (b) In extraterritorial effect cases, where the acts of a state authority produced effects or performed outside their own territory. (c) In effective control cases, where as a consequence of military action a member state exercises effective control of an area outside its territory. (d) Consular or diplomatic cases and flag jurisdiction cases involving the activities of a member state's agents abroad and on board in flight or vessel carrying its flag.

2.8. Interim Measures

Unlike domestic courts, which have powers to grant injunction to prevent any act from happening, the ECHR regime does not have any injunctive process. However, in case of emergency, the Court can adopt interim measures under Rule 39, which has in effect, similar results like injunctions, if the life or personal welfare of an applicant is at risk.

Haeck et al. suggest that three cumulative conditions have to be met before interim measures can be issued⁹⁵. They are (a) the situation is imminent and exceptional and no domestic remedy that can suspend the disputed act is available; (b) a high degree of probability that the disputed act will violate the Convention and (c) there is a risk of irreparable damage if the interim measure is not issued.

In immigration context, this is a very effective remedy when an applicant is facing a threat of removal from a member state since it can stop the removal and allow the applicant to petition the Court. Interim measure can be renewed to cover the whole period that takes to dispose of the substantive application. In *Soerin, D v. UK*⁹⁶ and *Jabari v. Turkey*⁹⁷, interim measures preventing the immediate removal of the applicants were granted.

⁹⁴ Miller, Sarah (2009) "Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention", in *The European Journal of International Law*, Vol. 20 No. 4, pp.1223-1246.

⁹⁵ Haeck, Yves. Herrera, Clara Burbano. and Zwaak, Leo. (2008) 'Non-Compliance With a Provisional Measure Automatically Leads To a Violation of the Right of Individual Application ... or Doesn't It?', *European Constitutional Law Review*, 4, 41-63.

⁹⁶ (1997) 24 EHRR 423.

⁹⁷ (Application No. 40035/98).

Similarly in *H.L.R v. France*⁹⁸ where the threat was from non-state agents the Commission issued renewed measures asking the French authorities “in the interest of the parties and the proper conduct of the proceedings, to refrain from deporting the applicant.”⁹⁹

Interim measures are rarely granted. However, it appears that the Court is more willing to grant interim measures, when the applicant is a minor and faces removal to another state¹⁰⁰.

What happens if a State does not comply with an interim measure? In *Mamatkulov* the Court declared that a failure by a Contracting State to comply with interim measure is to be regarded as preventing the Court from effectively examining an applicant’s complaint thus hindering the effective exercise of their right. This accordingly amounts to a violation of Art.34. In *Olaechea Cahuas v. Spain*¹⁰¹, the applicant was returned to Peru despite an interim measure issued by the Court. The Court ruled that the non-compliance with interim measures by a State may amount to a violation of Art.34 and it is immaterial whether or not subsequently a violation of material provisions of the ECHR is established.

2.9 Effectiveness of the ECtHR

Although the ECHR confers rights on individuals to take a State to the Court for infringing their rights, States are actually responsible due to their international obligations for such breaches. The violation of any human rights under the ECHR, therefore, amounts to a breach of treaty obligations of the member States and consequently a breach of international law¹⁰². For this reason the Court and the Commission treat the interpretation and application of the Convention as a matter of international law¹⁰³. For example in *Ireland v. UK*¹⁰⁴, in interpreting whether the interrogation techniques of the UK agents amounted to a violation of Art.3, the Commission made reference to what prevailed in connection with responsibility

⁹⁸ (Application No. 11/1996/630/813). This case recognised that Art.3 can be invoked in immigration context when the threat of torture and inhuman and degrading treatment emanates not from the State but from non-state agents.

⁹⁹ *Ibid*, para. 26.

¹⁰⁰ This researcher sought and obtained interim measures in several cases where minor asylum seekers were facing removal to another member state under Dublin II Convention.

¹⁰¹ (Application No. 24668/03).

¹⁰² Loucaides, Loukis, G. (1995). ‘Responsibility under the European Convention of Human Rights: Objective or Subjective Test’, in *Essays on the Developing Law of Human Rights*, Dordrecht/Boston/London: Martinus Nijhoff Publishers.

¹⁰³ *Ibid*. Also see the *Golder’s Case*, (ECHR Series A, Vol. 28).

¹⁰⁴ 1976 Yearbook Eur.Com.Hum.Rts. 512.

under international law generally. In *De Becker's case*¹⁰⁵, regarding the obligations of the member States, the Commission declared that in accordance with the general principles of international law, borne out by the spirit of the ECHR, the contracting States have undertaken to ensure that their domestic law is comparable with the ECHR.

Although the judges of the Court come from different member states there is a common legal culture peculiar to the Court and the diverse human rights history of the Western and Eastern Europe rarely reflect in the judicial deliberation. Arold's study¹⁰⁶ found a high level of unanimity among the judges in delivering judgements. For example, in case of judgements in Article 8 cases, 64 per cent decisions were unanimous. The figure goes to as high as 87 per cent for cases based on Article 9. The Leicester Study, which explored the separate opinions of judges in the ECtHR between 1999-2004, found that in 85 per cent cases the outcome was unanimous although the reasoning of the judges is not always the same¹⁰⁷.

Judges are appointed through a political process. However, there are cases, when a judge from a particular state actually gave a decision against that state. For example, in *Baghli v. France*¹⁰⁸, a case concerning Article 8, where the majority decision found no violation, the French judge dissented and found against France. The Leicester Study also found only few instances of dissents by national judges and concluded that the judges do not usually tend to defend the interests of their country of origin.¹⁰⁹

It seems that in comparison with the European Court of Justice (ECJ), the ECtHR has little mechanisms to implement its decisions. Unlike the ECtHR, most rulings of ECJ become directly enforceable laws in the member states and it can also impose financial penalties for non-compliance with ECJ rulings. From that perspective, the ECHR has no 'biting tooth'¹¹⁰. Respondent member states are left to choose the means in which they can discharge their obligations under Article 46(1) to abide by the final judgment of the Court and in theory the

¹⁰⁵ (Application No. 214/56) 2 Yearbook 234.

¹⁰⁶ Arold, Nina-Louisa (2007) *The Legal Culture of the European Court of Human Rights* Leiden/Boston: Martinus Nijhoff Publishers.

¹⁰⁷ A summary of the findings of the Leicester Study can be found in White, Robin C. A and Boussiakou, Iris (2009) 'Separate Opinions in the European Court of Human Rights', *Human Rights Law Review* 9(1), 37-60.

¹⁰⁸ (1999) 30 November 1999.

¹⁰⁹ White, Robin C. A and Boussiakou, Iris (2009) 'Separate Opinions in the European Court of Human Rights', *Human Rights Law Review* 9(1), 37-60. See especially foot note 65.

¹¹⁰ Arold, Nina-Louisa (2007) *The Legal Culture of the European Court of Human Rights* Leiden/Boston: Martinus Nijhoff Publishers, p. 30.

Court cannot impose any penalty to coerce an offending respondent state to obey the decision of the court. The Court itself has endorsed this freedom of member states in *Scozzari and Giunta v. Italy*¹¹¹. It declared that the respondent states are free to choose the means in which they want to discharge their obligations so long the means chosen are compatible with the conclusions reached in the Court judgment.

The duty to supervise execution of judgements falls on the political wing of the Council of Europe – the Committee of Ministers. However, the Council of Europe can do very little when a state is persistently violating the Conventions, except suspending its voting rights or expelling it from the Council – both these measures are extreme and unlikely to be taken.¹¹² Despite these criticisms about the effectiveness of the Court, it remains highly influential and in practice, respondent states usually accept and implement decisions from the Court. The Court has actually been instrumental to many changes to domestic legal structures and procedures.

The ECtHR system also provides for a friendly system should the respondent government and the applicant want to resolve their dispute and once an agreement is reached between the parties the case is stuck off. It is not unusual for a respondent state to try to ‘pay off’ an applicant and thus preventing the issues violating the convention be raised at the international forum, which in effect can undermine the effectiveness of the ECHR regime. Statistics show that between 1984 and 2004 on average there were 55 friendly settlements every year¹¹³.

In some cases, some States have avoided being found in violation of Art.3 in immigration context by reaching a friendly settlement with applicants. In *Tatete v. Switzerland*¹¹⁴ the applicant was from the DRC. She was found to have AIDS, pneumonia and tuberculosis. When the case was declared admissible the Swiss authorities arrived at a friendly settlement and allowed the applicant temporary admission and 6,000 Swiss francs by way of compensation.

2.10. Individual Interest vs. Interest of the society/state

¹¹¹ Judgment 13 July 2000.

¹¹² For a detailed analysis of the state compliance with Convention see Greer, Steven (2006) *The European Convention on Human Rights: Achievements, Problems and Prospects* Cambridge: Cambridge University Press.

¹¹³ Greer, Steven (2006) *The European Convention on Human Rights: Achievements, Problems and Prospects* Cambridge: Cambridge University Press, p.151.

¹¹⁴ (App. No. 41874/98, 6 July 2000).

Central to the jurisprudence of the ECtHR is an attempt at reconciling individual interests and the interests of the State. Most rights of the Convention are not absolute. Individual's rights may be relegated to a second place if they come into conflict with much higher interests of the State. However, there may also be instances when individual rights will triumph over the interests of the State. The matter therefore requires a careful balancing exercise in which attempts are made to arrive at reconciliation between two apparently contradictory interests. The Court made this point clear in a number of judgements and most notably in *Soering* when it declared: "... *inherent in the whole convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental human rights.*" This was echoed by the former President of the Court Rolv Ryssdal, "*The theme that runs through the Convention and its case law is the need to strike a balance between the general interest of the community and the protection of the individual fundamental rights.*"¹¹⁵ This balancing exercise is explained in terms of the principles of proportionality.

2.11.1 Interference with Rights

States can interfere with qualified rights under certain circumstances. Rights contained in Arts 8,9,10 and 11 fall within this category and all these articles have virtually identical provisions contained in sub-article (2) providing the basis of interference.

2.11.2 *Whether there was an interference with the applicant's rights.*

The first thing to decide is whether an applicant has the right in question. For example it is not every type of relationship that will give rise to family life; the applicant must have an established family life. Next it is to consider whether that right has been interfered with by the action of the member state.

2.11.3 *Whether the interference was "in accordance with the law"*

¹¹⁵ Ryssdal, Rolv (1996) 'Opinion: The Coming Age of the European Convention of Human Rights', *European Human Rights Law Review*, 18, at 26.

Once it is established that an applicant's rights are violated, the next step is to see whether the act designed to interfere with rights is in accordance with or prescribed by law – there has to be some basis for this in the law of the member country.

This means three things:

- (a) there must be a specific legal rule or regime which authorises the interference;
- (b) the citizen must have adequate access to the law in question¹¹⁶
- (c) the law must be formulated with sufficient precision so that citizens can foresee the circumstances in which it might be applied.

In *Malone v. UK*¹¹⁷, case involved interception of telephone conversation under a warrant. It was held that the interference was not in accordance with law since the domestic law relating to interception was obscure and open to different interpretations.

2.11.4 *Whether the interference pursued a legitimate aim*

The interference must be for achieving a legitimate aim. In subparagraph 2 of Arts 8-11, there is a list of aims – such as prevention of crime, state security, economic wellbeing, etc.

2.11.5 *Whether the interference was 'necessary in a democratic society'*

Even if a measure has been taken in pursuit of one of the legitimate interests listed in the second paragraph of Articles 8, 9 10 or 11, the measure must be tested for “necessity.” The Court has held that the notion of necessity implies two things:

- (1) The interference corresponds to a pressing social need;
- (2) that it is proportionate to the legitimate aim pursued.

2.11.6 Proportionality – whether the interference is proportionate?

¹¹⁶ *The Sunday Times v United Kingdom* (1979) 2 EHRR 245.

¹¹⁷ (1984) 7 EHRR 14

In order for a measure to be “necessary in a democratic society”, it must respond to a “pressing social need”¹¹⁸. This involves the test of proportionality. If a measure has been adopted which infringes an individual’s Convention right in some way, if that measure is prescribed by law and is designed to achieve a legitimate aim/interest, and if that interference is proportionate to that legitimate aim, then it is justified. It will also not be considered disproportionate if it is restricted in its application and effect, and there are safeguards in national law which makes the individual not subject to arbitrary treatment. In *MS v Sweden*¹¹⁹ the applicant suffered from a back injury and applied for compensation from the Social Insurance Office. This was followed by communication of the applicant’s personal and confidential medical data by one public authority to another. Held, that such disclosure could involve Art.8. However, the interference had a legal basis and it was foreseeable. Further, there was a legitimate aim - protection of the economic well-being of the country since communication of data was potentially decisive for allocation of public funds to deserving claimants. The communication was necessary in the context of an assessment whether the applicant was eligible for the benefit which she claimed, by comparing the information with the ones received from the Clinic, and as such it was proportionate and justified.

‘Proportionality’ is a key concept of the ECHR regime and requires a fair balancing exercise of competing rights. It can also be argued that the ECHR itself represents a balance between the state and individual interests.

States can only interfere with the substantive rights of individuals if such interference is ‘necessary in a democratic society’, and the interference itself was pursuant to achieving ‘particular legitimate aims’. This can only happen if ‘there is a pressing social need’ for such interference. Above all, interference must be proportionate and not excessive, in relation to the legitimate aim pursued. So if alternative measures for preserving the wider state interest are available, interference will not be proportionate. States must show justification for their action. In order to assess whether interference is proportionate, the member state is allowed a ‘margin of appreciation’.

2.12. Use of ECHR in immigration Context

¹¹⁸ *Sunday Times*, ibid.

¹¹⁹ (1997) 3 BHRC 248.

As mentioned above, the framers of the ECHR deliberately left question of immigration outside the ambit of the Convention. However, in accordance with the ‘living instrument’ concept, immigration issues duly made their way well into the Convention. Human rights arguments in the context of expulsion or immigration cases mean allegations that removal of a person from a member state will infringe his human rights. The first time such an argument was accepted by the Court in *Soering v. UK*, a case based on Art.3. Art.3 speaks for freedom from torture and inhuman and degrading treatment. This is an absolute right. The subsequent development in this area led Lambert to comment that the fundamental importance of Art.3 read with Art.1, the obligation to secure the rights and freedoms for everyone, allowed the Court to develop an obligation for states akin to the principle of non-refoulement contained in the Refugee Convention.¹²⁰

Infringements of human rights may be direct or indirect. Direct breach means when the removal of a person interferes with his existing rights, that is, the rights that he is enjoying at the time of removal in a member state. In removal cases, based on Article 3, mostly indirect breaches of human rights are argued. This means, that the breach will occur outside the member state which is expelling the applicant. However, the expelling state is responsible because, by removing the claimant from the country it is triggering the violation of his rights, which is in effect taking place in another country, even if the country to which the applicant is expelled, is a foreign country – non-member state.

The standard of proof in human rights cases in immigration context, is that there are substantial grounds to believe that there is a ‘real risk’ of a breach of the applicant’s human rights if removed from a member state. The burden of proof is on the applicant, In *Vilvarajah v. UK*¹²¹ the ECtHR held that a ‘real risk’ need not amount to a probability but equally a mere possibility of the violation occurring was not sufficient. In *Nsona v. Netherlands*¹²² the court held that in demonstrating the necessary risk of suffering mistreatment in an Article 3 expulsion case, the level of likelihood or the standard of proof is the same as for a refugee’s fear of persecution.

¹²⁰ Lambert, Helen (2005) ‘The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities’, in *Refugee Survey Quarterly*, Vol:24, Issue 2, UNHCR, pp.39-55.

¹²¹ (1992) 14 EHRR 248 at para. 111.

¹²² (2001) 32 EHRR 170 at para. 92©.

In *Soering*, the applicant was a German national who was wanted in the USA in connection with a murder and the UK authorities tried to extradite him there to stand trial. Although the court was of the opinion that the death sentence might not violate the Convention it was the ‘death row phenomenon’, which would trigger a breach of Art.3. The court also for the first time accepted that Art.3 has extraterritorial effect.

In *Chahal*, the applicant, a Sikh from India had ILR to remain in the UK. The authorities wanted to deport him to India as they considered him to be a risk to state security due to his alleged involvement with Sikh terrorists. The applicant claimed that if he were returned to India he would be subjected to torture by Indian/Punjab Police. Country information about India showed wide scale human rights violations committed by Police. The Court concluded that returning him to India would breach his Art.3 rights. Although the Court appreciated the danger faced by Modern States from terrorism, owing to the absolute nature of Art.3 even if someone poses a threat to State Security, he should not be expelled if there is a ‘real risk’ that he would face treatment contrary to Art.3 and there will be an obligation on the States not to return him.

The use of Art.3 to prevent an indirect breach is not confined to cases where the applicant is likely to face ill-treatment from the state authorities in the receiving country. In an extension of the earlier principle, the ECtHR in *HLR v. France*¹²³ recognised the applicability of ECHR to expulsion cases where the fear emanates not from the state authorities of the applicant but from non-state agents. *“Owing to the absolute character of the right guaranteed, the court does not rule out the possibility that article 3 of the Convention 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.”* The applicant was a Colombian national who was caught with drugs in France. During interrogation by the police he revealed the names and details of drug cartels which led to the arrest of one key drug dealer. Faced with a deportation order, the applicant was anxious that if he is returned to Colombia the drug cartels would take revenge.

¹²³ (1997) 26 EHRR 29.

The application of indirect breach of Convention rights in immigration context may invariably take the effect of the Convention beyond the territories of member states. In cases like *Soering* and *Chahal* extra territorial effect of the ECHR was recognised.

A punishment which although legitimate but disproportionate may give rise to an issue under Art.3, even in an immigration context. Whether or not a punishment is disproportionate is decided using Western standard. In *Jabari v. Turkey*¹²⁴, the applicant was likely to face death or cruel punishment for adultery in Iran, and the Turkish authorities refused to hear her case on the ground that she did not claim asylum within five days of arrival as required by the domestic law. The ECtHR held that removal of her to Iran would violate Art.3 as she would be at serious risk of punishment by stoning to death.

Art.3 is not confined to acts perpetrated by state agents or non-state agents when the state is not able to offer protection. The ECtHR has extended the meaning of Art.3 to cover risk, which emanates from factors for which the authorities in the receiving country are not responsible in any way. One of these is when the applicant is suffering from medical conditions, which may not be treatable in the receiving country.

In *D v. UK*¹²⁵, the applicant was from St Kitts. He was convicted in UK for a drug related offence and was facing deportation on the ground that his exclusion was conducive to the public good. However while serving his sentence the applicant was diagnosed as HIV positive. He argued that his removal to St Kitts would amount to a violation of Art.3 as this “would condemn him to spend his remaining days in pain and suffering in conditions of isolation, squalor and destitution”.

When the matter came before the ECtHR, the applicant was at an advanced stage of his disease and his life was drawing to a close. Evidence showed that St Kitts did not have the medical facilities that were required by the applicant. He also had no family there.

The Court held that the limited quality of life that the applicant was then enjoying was due to the availability of sophisticated treatment and medication in the UK and the care and

¹²⁴ (App. 40035/98), [2001] INLR 136. Judgment of this case is very brief, and it appears that the Judges were clearly moved by the fact that at the time of petitioning the ECtHR the applicant had already been recognised as a refugee by the UNHCR.

¹²⁵ (146/1996/767/964 App. No. 30240/96, 2 May 1997), Reports 1997-III p.777, (1997) 24 EHRR 423.

kindness administered by a UK Charity. The abrupt withdrawal of these facilities would entail the most dramatic consequences for him. There was a serious danger that the conditions of adversity which awaited him in St Kitts would further reduce his already limited life expectancy and subject him to acute mental and physical suffering. The Court came to the conclusion that in view of these ‘exceptional circumstances’ and the fact that the applicant had reached the critical stage of his fatal illness, the implementation of the decision to remove the applicant would amount to inhuman treatment by the UK.

The Court recalled that Contracting States have the right as a matter of well-established international law and subject to their treaty obligations including the ECHR, to control the entry, residence and expulsion of aliens. However, the court reminded that in exercising their right to expel such aliens Contracting States must have regard to Art.3 and its absolute nature, which represents one of the fundamental values of democratic values.

The Court then went on to explain the reasons for the expansion of Art.3. Although until then the Court had only applied Art.3 in situations where threat emanated from state authorities or from non-state bodies where the State was unable to offer protection, given the absolute nature of Art.8 the Court thought it had the flexibility to use Art.8 in situations where the threats come from sources for which the States are not normally responsible. However, in those circumstances, the Court will apply rigorous scrutiny to the facts and the applicant’s personal situation in the expelling State. Medical illness was one of the circumstances.

There are some suggestions that the responsibility of a State is engaged where the applicant arrives in the State without the knowledge of his illness and that it develops during the period of lawful residence or during the process of an asylum claim or lawful detention. Furthermore where treatment has been provided and there is a lack of treatment in the country of origin the treatment should not be withdrawn without an effective alternative otherwise responsibility under Art.3 will be engaged.

In *SCC v. Sweden*¹²⁶, a Zambian national was diagnosed as being HIV positive. She unsuccessfully sought to stay in Sweden. On appeal she raised the issue of her illness. The

¹²⁶ (App. No. 46553/99).

Court found her case inadmissible since there was some treatment available in Zambia and that she had family and friends there to care for her.

In a similar case in *BB v. France*¹²⁷ the applicant was from DRC. He was suffering from AIDS and was facing the prospects of removal to DRC following the serving of a prison sentence. When the Commission found that there would be a violation of Arts. 2 and 3, the French authorities avoided the findings by undertaking not to remove the applicant. The Commission noted that it was highly probable that if he were deported he would not have access to treatment designed to inhibit the spread of the virus and that the numerous epidemics raging in his country would increase the risk of infection. To expect him on these facts to confront his illness alone, without any support from his family, was likely to make it impossible for him to maintain human dignity as the disease ran its course. It should be noted that BB was not terminally ill and the Commission did not say that the circumstances of his case were ‘exceptional’ within the meaning of *D.*.

In *Bensaid v. UK*¹²⁸ the applicant, an Algerian obtained ILR as a foreign spouse on account of his marriage with a UK citizen. Later the immigration authorities revoked his leave as it had been obtained by deception, the marriage being one of convenience. He faced removal. The applicant, however, was a schizophrenic suffering from a psychotic illness. He responded sufficiently to treatment in the UK and his illness was successfully managed. The applicant argued that his expulsion to Algeria would cause him a full relapse in his mental health problems, which was supported by his psychiatric reports and consequently would amount to inhuman and degrading treatment, contrary to Art.3.

The ECtHR in identical terms of its decision in *D* accepted that as a matter of well-established international law, contracting States have a right to control the entry, residence and expulsion of aliens. However, in exercising their rights, they must have regard to Art.3. The court stated that Art.3 was not confined to actions of violence or other forms of treatment deliberately inflicted on the applicant by others but could apply to situation where no one was actually targeting the applicant for ill-treatment. It then reiterated the absolute nature of Art.3 and its flexible use to different situations; the issue of scrutiny and the particular situation of the applicant.

¹²⁷ (28 September 1998) RJD 1998-VI p.2596.

¹²⁸ (App. 44599/98).

The Court accepted that there is a high threshold of Art.3 where the case does not concern the direct responsibility of the Contracting State for the infliction of harm. This case does not come within ‘the exceptional circumstances’ of *D*. Medical treatment was available to the applicant in Algeria. The fact that the applicant’s circumstances in Algeria would be less favourable than those enjoyed by him in the UK, such as the nearest hospital was about 80 km away and the family did not have a car, was not decisive from the point of view of Art.3.

The current position in this area is governed by the restrictive approach of *N v. UK*¹²⁹ which shows the Court’s reluctance to extend the principles beyond the high threshold set up in *D*. In *N* the applicant was from Uganda. After her arrival to the UK, she became seriously ill and was admitted to hospital where she was diagnosed as HIV positive. Her CD4 count went down to 10 whereas a healthy person has over 500. Following treatment with antiretroviral drugs and frequent monitoring her condition began to stabilise and her CD4 count rose to 414. Experts suggested that with the same level of treatment in the UK, the applicant could live for decades. However, if returned to Uganda her life expectancy would be severely reduced and she would die within a year. Although the medication that she required was available in Uganda, it was considerably expensive and short in supply. Further in Uganda there was no provision for publicly funded blood monitoring, basic nursing care, social security, food or housing. There was no disagreement in the domestic Courts that the quality of the treatment in Uganda was not at par with that available in the UK.

Before the Court, the UK argued that the practical effect of extending Art.3 to cover the applicant’s case would be to grant her and numerous other AIDS patients and people with fatal diseases a right to remain and to receive the benefit of treatment in a Contracting State. It was inconceivable that the Contracting States would have agreed to such a provision. They argued that the ECHR was primarily intended to protect civil and political rights and not economic and social rights.

Majority of the Judges showed sympathy with the UK’s submission. Although the Court accepted the seriousness of the applicant’s medical conditions, it did not come within the ‘exceptional circumstances’ of *D*. The Court put it bluntly that aliens who are subject to

¹²⁹ (Application No. 26565/05).

expulsion from a Contracting State cannot in principle claim any entitlement to remain there for the purpose of continuing to receive benefit from medical, social or other forms of assistance and services provided by that State. The fact that the removal of the applicant from that State will significantly reduce his life expectancy is not sufficient itself to give rise to a breach of Art.3. The Court also agreed with the UK's submission that although many of the Convention rights have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights.

The most striking feature of this judgment is that the majority judges approached Art.3 as if it were a qualified right and subjected it to the balancing exercise, a fact which drew strong criticisms from the dissenting judges. Majority here balanced the right of the applicant (although non-derogable in theory) against the wider interest of the society – if the State has to look after aliens like the applicant, its resources will be overstretched and consequently a huge floodgate will open. Dissenting judges criticised the majority for taking the decision on policy considerations as well as for claiming that the Convention essentially is directed at the protection of civil and political rights thus ignoring the social dimension of the integrated approach adopted by the Court in many other cases.

2.13. Article 8 – scope and extent - examples

Velu¹³⁰ argues that Art. 8 of ECHR was inspired by Art.12 of the UN's Universal Declaration of Human Rights, which reads: "*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.*" However, the protection offered under the UDHR seems to be less precise as it only prohibits 'arbitrary interference' without explaining what it entails, whereas under the ECHR regime, Art.8(2) spells out the circumstances when an interference can be justified. It is interesting to note that it was at the suggestion of the British Representatives that the clause relating to the 'economic well-being of the country' was inserted¹³¹. In immigration context, maintenance of immigration control is directly related to the preservation of the economic well-being.

¹³⁰ Velu, Jacques (1973) "The European Convention on Human Rights and the Rights to Respect for Private Life, The Home and Communications", in A.H. Robertson (ed) *Privacy and Human Rights*, Manchester University Press pp.12- at p.14.

¹³¹ Ibid. Pp.17-18.

The scope of Art.8 is quite wide – anything which is likely to disrupt the enjoyment of family and private life can come within the purview of this article. In *Hatton*, noise pollution which interferes with people's sleep and rest was declared to be capable of amounting to a breach of Art.8. In addition to protecting family and private life, the article also categorically speaks of protecting home and correspondences of individuals. However, a detailed analysis of other aspects of Art.8 is outside the scope of this research since the focus is on immigration only.

2.14 What is family life?

Douglas informs that although Art.8 went through various drafting changes, there was very little discussion among the drafters as to the precise meaning of 'family life'¹³². However, there was probably a common understanding among the delegates that the family is a unit comprising of parents and children rather than some other distant kinder.

As it is developed by case law the concept of family life now appears to be far wider than the 'nuclear family' living under one roof. In *Marckx* the ECtHR found, "... *"family life"*, within the meaning of Article 8, includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life. *"Respect" for a family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally.*" However, as Liddy¹³³ argues, the concept of family life may appear to be uncertain in the light of changing ethical and social standards. *Marckx* itself is a case in point where breaking with the past an illegitimate child was accorded the same status as that of a legitimate one.

It appears that the Court has a preference for relationships based on the norm of traditional marriage¹³⁴. For example, in *Karner v. Austria*¹³⁵, where the issue was the succession of a tenancy by a homosexual 'life companion' the Court accepted that in principle, the protection of the family in the traditional sense is a weighty and legitimate reason, which might justify a difference in treatment on the ground of sexual orientation. ECHR regime allows differential

¹³² Douglas, Gillian (1988) 'The Family and the State Under the European Convention on Human Rights', *International Journal of Law and of the Family*, 2 Oxford: Oxford University Press, 76-105 at 78.

¹³³ Liddy, Jane (1998) 'The Concept of Family Life under ECHR', *European Human Rights Law Review*, I, 15-25.

¹³⁴ McGlynn, Clare (2006). *Families and the European Union: Law, Politics and Pluralism*, Cambridge: Cambridge University Press, 15.

¹³⁵ (Application No: 40016/98) (2004) 38 EHRR 24.

treatment of married and unmarried heterosexual couples. In *Lindsay v. UK*¹³⁶, the Commission declared that marriage is characterised by a corpus of rights and obligations, which differentiate it markedly from the situation of a cohabiting man and woman. *Berrehab v. Netherlands*¹³⁷, shows that relationship based on marriage even after divorce, always constitute ‘family life’ within the meaning of Art.8.

Further in *Abdulaziz*, the Court decided that the existence of a legal marriage without cohabitation could give rise to Art.8 rights.

In *Berrehab v. Netherlands*¹³⁸ the Strasbourg Court held that the relationship created between the spouses of a lawful and genuine marriage should be regarded as ‘family life’. A child born of such union is ‘*ipso jure*’ part of that relationship. “*From the moment of the child’s birth and by the very fact of it, there exists between him and his parents a bond amounting to ‘family life’, even if the parents are not living together.*” (Para.21). This principle was extended in *Kroon* which shows that even when the parents are not living together, “*a child born of such a relationship is ipso jure part of that “family unit” from the moment of its birth and by the very fact of it.*” (Para 30). However, subsequent events may break that tie (*Berrehab*).

Where there is no marriage, the Court will assess the relationship with reference to its similarities to the functions which a marriage normally fulfils. Interestingly while a marriage does not have to fulfil the ideals of a marriage in order to create a ‘family life’, in the case of a non-marriage relationship it must show that at least it has some features of an ideal marriage to gain recognition as creating a family life¹³⁹. Further, while the ECHR regime recognises the right of unmarried fathers in relation to their children, in *McMichael v. UK*¹⁴⁰ - a case regarding the custody of a child, the Commission held that the legal differences between the right of married and unmarried fathers do not breach the right to respect for family life.

¹³⁶ (Application No. 11089/84) (1987) 9 EHRR 555.

¹³⁷ (Application No. 10730/84) (1989) 11 EHRR 322.

¹³⁸ (1988) 11 EHRR 322.

¹³⁹ McGlynn, *ibid.* 17.

¹⁴⁰ (Application No. 16424/90) (1995) 20 EHRR 205.

In *Keegan v. Ireland*¹⁴¹, the Court held that the notion of ‘the family’ is not confined solely to marriage based relationship, but can include other *de facto* ‘families’ where the parties living together outside of marriage. So if a child is born outside of marriage, there may still be a family unit.

However, where there is no marriage, the Court considers a number of factors to determine whether the relationship amounts to a ‘family life’. In *X, Y and Z v. UK*¹⁴², it was decided that the relevant factors in this regard include, ‘whether the couple live together’, ‘the length of their relationship’, ‘whether the couple have demonstrated their commitment to each other by having children together or by other means’.

It is worth noting that cohabitation although a strong evidence of family life is not an essential feature. In *Kroon v. Netherlands*¹⁴³ the ECtHR held that co-habitation is not a prerequisite to the existence of a family life. The Court declared, “... *notion of “family life” in Article 8 is not confined solely to marriage-based relationships and may encompass other de facto “family ties” where parties are living together outside marriage ... Although as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficiently constancy to create de fact “family ties”* (Para 30). The case itself came within the exception as spelt out by the Court – the couple had a long-standing relationship, which produced four children, however, they neither did live together nor did they want to get married, but still the Court found sufficient evidence of an existing family life.

In *Sen v. Netherlands*¹⁴⁴, the ECtHR made it clear that a biological parent-child relationship would almost always give rise to family life. The Court accepted that despite the fact that a daughter who had spent her whole life in Turkey and had strong links with the linguistic and cultural environment of her country in which she still had relatives, there was a family life between her and her parents who are settled in Netherlands. The bond was strengthened only by three visits by the parents in seven years. There were also major obstacles to the rest of the family’s return to Turkey. The parents had been legally resident in Netherlands for many years, and two of their three children had always lived in the Netherlands and went to school

¹⁴¹ (Application No. 16969/90) (1994) 18 EHRR 342.

¹⁴² (Application No. 21830/93) (1997) 24 EHRR 143.

¹⁴³ (1995) 19 EHRR 263.

¹⁴⁴ (2003) 36 7 EHRR 471.

there. Concluding that the Netherlands had failed to strike a fair balance between the applicants' interest and their own interest in controlling immigration, the Court held, unanimously, that there had been a violation of Article 8.

In *Advic v. UK*¹⁴⁵ it was held that the family life would depend on the circumstances of each particular case. There is no automatic link between adult siblings who are living apart for a long period of time and who are independent of one another. Further, the relationship between a parent and an adult child will not necessarily acquire the protection of Art.8 without evidence of further elements of dependency, involving more than normal emotional ties.

2.15 What is private life?

The notion of private life is very broad. It encompasses all aspects of modern private life within an 'inner circle' in which individuals may live their personal lives as they choose without interference from the state. It concerns a sphere within which everyone can freely pursue the development and fulfilment of his personality. The ECtHR never attempted to define the ambit of private life. In *Niemietz v. Germany*¹⁴⁶ the Court declared, "*The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.*" (Para.29). The Court observed that the notion of 'private life' should not be taken to exclude activities of a professional or business nature since, it is in the course of their working lives that the majority of the people have a significant opportunity of developing relationships with the outside World.

Referring to right to respect for private life, the Court in *Pretty v. UK*¹⁴⁷ declared, "*Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside World*" (Para.61). Clearly in the view

¹⁴⁵ (App. No. 00025525/94).

¹⁴⁶ (1992) 16 EHRR 97.

¹⁴⁷ (2002) 35 EHRR 1.

of the Court mental stability is an indispensable precondition to effective enjoyment of the right to respect for private life and the phrase ‘right to respect for private life’ covers the physical and psychological integrity of a person.

Feldman¹⁴⁸ argues that the way ‘moral integrity’ is interpreted in relation to Art.8 private life that it requires that people should be treated holistically as morally worthy of respect, organising the State and society in ways which respect people’s moral worth by taking account of their need and choices. A further extension of this concept can oblige the State to provide practical assistance to those who lack the physical, financial or other capacity to give effect to their moral choices. This in turn would make Art.8 generating social or economic rights imposing positive obligations on States.

2.16. Family vs. Private life

Liddy¹⁴⁹ notes, where the question of family life does not arise, there may still be questions relating to the right to respect for private life.

2.17. Positive vs. Negative duties of the State

In *Botta v. Italy*¹⁵⁰, the Court held that while the essential object of Art.8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference, but in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These positive obligations may involve the adoption of measures designed to secure respect for private life in the sphere of the relations of individuals between themselves.

Earlier in *Kroon and Others v. The Netherlands*¹⁵¹ the Court emphasised both on the negative and positive obligations of the State in respect of an individual’s rights under Art.8. However, the Court admitted that the boundaries between the State’s positive and negative obligations in this respect are not capable of precise definition but similar principles apply to them. In

¹⁴⁸ Feldman, David (1997). “The developing scope of Article 8 of the European Convention on Human Rights”, *European Human Rights Law Review*, 3, 265-274.

¹⁴⁹ Liddy, Jane (1998). “The Concept of Family Life under the ECHR”, *European Human Rights Law Review*, I, 15-25.

¹⁵⁰ (Application No. 153/1996/772/973).

¹⁵¹ (Application No. 18535/91).

both contexts, the State must strike a fair balance between the competing interests of the individual and the community as a whole, and in both contexts, the State enjoys certain margin of appreciation. Further where the existence of a family tie with a child is established, as a part of its positive obligations, the State must act in a manner calculated to enable that tie to be developed. Legal safeguards should be established to make it possible for the integration of the child to the family from the moment of its birth or as soon as practicable thereafter.

As regards the positive obligations under Art.8, the Court in *Johnston and Others v. Ireland*¹⁵² held that the notion of ‘respect’ as mentioned in Art.8 is not a ‘clear-cut’ concept. Subject to the diversity and practices in different member states, the requirements of this notion will vary considerably and for that reason states have been given a wide margin of appreciation in determining the steps that they want to take to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.

2.18 Extension of Article 8 – Immigration Context

It was only in 1985 that the Court despite steep opposition from the UK recognised in *Abdulaziz*, that measures taken in the field of immigration can interfere with the right to respect for family life, where the exclusion of a family member may prevent him from joining his lawfully resident spouse. The Government argued that none of the articles of the Convention applied to immigration control. At the admissibility stage, the Commission rejected this argument and declared that although the right of a foreigner to enter or remain in a country was not as such guaranteed by the Convention, immigration controls had to be exercised consistently with Convention obligations. Consequently the exclusion of an applicant from a State where members of his family are living may raise an issue under Art.8. The Court in their turn agreed with the analysis of the Commission.

A passage from this landmark judgment *Abdulaziz* has been routinely relied on by member States to display their authority to control immigration. “... *as a matter of well-established international law and subject to its treaty obligations, a State has the right to control entry of non-nationals into its territory.*” (Para.67).

¹⁵² (Application No. 9697/82),

In respect of Art.8 the European Court of Human Rights mostly dealt with applicants who are either second generation migrants or long term residents. We shall see in this study that most applicants who secured benefit under Art.8 are actually first generation migrants including failed asylum seekers or those who arrived relatively recently.

The ECHR regime fully appreciates the political nature of immigration issues and how difficult it is for state authorities to tackle them and at the same time acknowledges the individual's right to be with their family. Since Art.8 confers a margin of appreciation to the State, it may be often up to the State concerned to determine what steps it should take to comply with its obligations under the article, which may vary according to the nature of the case.

One common consideration for the Court is the possibility for the couple to settle in another State and whether or not there are any obstacles for the resident member in following the expelling member. Since the Court recognises that immigration control is a matter of domestic policy and allows a wide margin of appreciation to the state concerned, case law in this area has become unpredictable which makes it difficult to clearly identify the principles which would normally engage Art.8 in immigration context.¹⁵³

In *Boultif v. Switzerland*¹⁵⁴, the Court reiterated that the Convention does not guarantee an alien right to enter or reside in a particular country. However, the Court thought that removal of an applicant from a country where close members of his family are living may amount to an infringement of his right to respect for his family life. Again length of residence in the expelling country and especially whether the applicant was born there or was raised up has always been relevant considerations. In *Moustaquim v. Belgium*¹⁵⁵ the applicant was born in Morocco. At the age of 2 he along with his mother moved to Belgium to join his father who had already emigrated to Belgium. Three of his seven brothers and sisters were also born there. The applicant had a criminal disposition and was charged with 147 counts of offences and faced deportation. Despite this, the Court found a violation of Art.8.

¹⁵³ Rogers, Nicola (2003) 'Immigration and the European Convention on Human Rights: Are New Principles Emerging?', *European Human Rights Law Review*, I, 53-64 at 53.

¹⁵⁴ (Application No. 54273/00).

¹⁵⁵ (Application No. 12313/86).

In *Kaya v. Germany*¹⁵⁶, the Court restated that the ECHR does not guarantee the right of an alien to enter or to reside in a particular country and that a State is entitled subject to its treaty obligations to control the entry of aliens into its territory and their residence. The Court also endorsed the view taken in *Uner v. Netherlands* that Article 8 does not confer on persons who were born in a member State an absolute right not to be expelled from the territory of that State.

It is very important for an applicant who wants to rely on Art.8 to frustrate his removal or to have permission to entry to show that there exists a family or private life which will be interfered with by the decision of the expelling State. The burden of proof is on the applicant. In *Alam and Singh v. UK*¹⁵⁷, both the applicants were resident in the UK. Alam wanted to bring his minor son in and Singh wanted to bring his father. Both the applications were refused by the UK authorities. While the Commission found Alam's application admissible, as regards the application of Singh, the Commission held that despite the blood relationship, since both the father and son were adults and had living apart for a considerable period, there was no family life.

In *Application No. 7229/75*, the Commission emphasised on the existence of certain links between persons before their relationship could be regarded as forming a family life. In the Commission's view, this is satisfied where they lived together, or where there are financial dependency. In the instant case, a childless Sikh couple adopted their nephew in India and the UK authorities refused to give the boy entry clearance. The Commission held that Art.8 only guarantees the right to respect for existing family life and not the right to establish a new family life. However, the position is different in relation to the natural parents when a child is born, as it has been mentioned above that from the moment of the birth there exists a family life.

Once it is established that an applicant who is facing removal from a country or whose application for entry is rejected, has an established family or private life, focus shifts on the State, which must show the justification for interfering with the family or private life. The ECtHR has repeatedly asserted that such interference can only be justified if it is 'in

¹⁵⁶ (Application No. 31753/02).

¹⁵⁷ 24 Coll 116.

accordance with law', motivated by one or more 'of the legitimate aims' as set out in Art.8(2) and that such interference is 'necessary in a democratic society'.

ECtHR has recognised that Art.8 can be relied on not only by applicants who are facing removal from a member state, but also by those who are denied entry to continue or to resume a family life in there. *Sen* above is a case in point.

2.19. Extraterritoriality of Article 8

Art.8 has extraterritorial effects. So if a person's removal from a member state or his prevention of entry there amounts to an interference with his family and /or private life, Art.8 is invoked.

2.20. Direct vs. Indirect Breaches

A breach of Art.8 in immigration context can be both direct and indirect. A direct breach is occasioned when the removal of an applicant interferes with his established family or private life in the expelling state. Similar result can occur, when an applicant is not allowed to a state to continue or to re-establish his family ties, such as it happens when entry clearance is refused. *Sen* is a case in point. Indirect breach takes place when as a result of removal from the respondent state an applicant's right to respect for his private life, more especially the moral and physical integrity aspect of an applicant is disturbed. In this case, the effect of the breach is felt in another state. For example, had *Bensaid* been upheld on Art.8 grounds that would have provided an excellent instance of an indirect breach – the failure of Bensaid to receive adequate treatment in his country of origin resulting in frustration, anger and mental agony, which in turn would have interfered with his enjoyment of his life.

It is important to note the significant differences between the approaches of Art.3 cases and Art.8 cases in expulsion/immigration context. While in cases based on Art.3, an applicant has to show that if removed from the respondent state, there is a likelihood that he would suffer torture and inhuman and degrading treatment, in cases based on Art.8, once it is accepted that there exists a family and/or private life, the decision of removal will certainly breach the applicant's rights under Art.8 – it is not the case that the removal is likely to breach his right

to respect to his private and family life. Question then arises whether such breach can be regarded as justified.

2.21 Proportionality and Article 8

In dealing with Art.8 cases, a balance must be struck between two competing interests: the private or family life of an individual and the wider interest of the community or the state. In *Hatton and Others v. UK*¹⁵⁸ the ECtHR stressed that, whether the allegation is of ‘interference’ with private or family life, or of shirking the ‘positive duty’ on the State to take reasonable and appropriate measures to secure the rights enshrined in Art.8(1) same considerations apply. In both cases, a fair balance has to be drawn between the competing interests of the individual and of the community as a whole and in both context the State enjoys margin of appreciation.

2.22 Immigration, criminal law and Article 8

It is often the case that an immigrant who had lived in a member state for a number of years and had established a family and private life, but then commits a crime. If a State then wants to remove an immigrant can Art.8 be used?

One may question the morality of such an approach, as it in effect allows the award of double punishment. First, the applicant receives a sentence, which is normally a custodial sentence, and then gets deported from the country. Strasbourg authorities legitimise this double jeopardy. In *Boultiff v. Switzerland*¹⁵⁹, the Court views that it is for the States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to the treaty obligations, to control the entry and residence of aliens. In this regards the States have the power to deport aliens convicted of criminal offences. In *Kaya* the Court restated that the Contracting States have the power to expel an alien convicted of offences and such expulsion does not constitute double punishment. However, such power is still subject to the rights under Art.8, in particular, it is important to show that the removal of the convicted applicant was necessary in a democratic society which means it is justified by a pressing social need and proportionate to the legitimate aim pursued.

¹⁵⁸ (Application No. 36022/97).

¹⁵⁹ (Application No. 54273/00).

The Court is not concerned about the severity of punishment, but the nature of the offence committed by an applicant. For example, drug related offences although may not carry a severe penalty but their devastating effects on society normally tips the balance in favour of the State seeking exclusion. Further the length of stay in the expelling State is also a relevant consideration. In *Dalia v. France*¹⁶⁰, the applicant was born and brought up in Algeria. She came to France when she was 17/18 to settle down with her family. She was convicted of a drug related offence and was given 12 months imprisonment followed by deportation. Despite the fact that the applicant had a French child the Court decided that the interference in her right to respect for family life was justified. Considering the devastating effects that drugs may have on people's lives, the Court accepted that France was justified in showing the firmness. Besides, the fact that the applicant spent 17/18 years of her life in Algeria, had her schooling there and could speak the local language reflected her social and emotional link with that country. Unlike *Dalia* in *Mehemi v. France*¹⁶¹, the applicant was convicted for importation of drugs and sentenced to six years imprisonment. He was then removed to Algeria. In this case, despite accepting the devastating effects that drugs might have on the society and the consequent justification sought by the State to remove the applicant in order to prevent crime, the Court held that removal would disproportionately interfere with his family rights. The fact that he was born in France and lived there for 30 years, had three French children and he was married to the mother of them, had his parents and four siblings there all meant that his family life was there – any connection that he had with Algeria was nominal although he visited there few times.

It is worth considering here two recommendations of the Committee of Ministers regarding the expulsion of long term immigrants from a member state. The first one¹⁶² protects long term immigrants. It urged the states to consider the personal behaviour of the immigrant, duration of stay, consequence of removal to him and to his family and his link to his country of origin. It also provided a tariff of length of residence and sentences received with twenty years residence providing an absolute bar from removal.

¹⁶⁰ (App No. 26102/95).

¹⁶¹ App No. 25017/94.

¹⁶² Committee of Ministers Recommendation (2000)15.

In the second recommendation¹⁶³ the Committee of Minister spoke about the legal status of persons admitted for family reunion, which states that where the withdrawal of or the refusal to renew a residence permit, or the expulsion of a family member is being considered: “... member States should have proper regard to criteria such as the person’s place of birth, his age of entry on the territory, the length of residence, his family relationships, the existence of family ties in the country of origin and the solidity of social and cultural ties with the country of origin. Special consideration should be paid to the best interest and wellbeing of children.”

In order to decide whether or not an expulsion is necessary in a democratic society and proportionate to the legitimate aim pursued, the Court in a number of cases starting from *Boultif* stated the following criteria:

- (a) the nature and seriousness of the offence;
- (b) the length of the applicant’s stay in the host country;
- (c) the time elapsed since the offence was committed and the applicant’s conduct during that period;
- (d) the nationalities of the various persons concerned;
- (e) the applicant’s family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple’s family life;
- (f) whether the spouse knew about the offence at the time when they formed the relationship;
- (g) whether there are children of the marriage, and if so, their age; and
- (h) the seriousness of the difficulties which the spouse is likely to encounter in the country where he is to be expelled.

In *Onur v. UK*¹⁶⁴, the Court added the following two criteria to the above list.

- (i) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- (j) the solidity of social, cultural and family ties with the host country and with the country of destination.

¹⁶³ Committee of Ministers Recommendation Rec (2002)4.

¹⁶⁴ (Application No. 27319/07).

In *Boultiff*, the applicant arrived in Switzerland in 1992 as a tourist and married a Swiss national and obtained a residence permit. Following a criminal conviction the Swiss Government refused to renew his permit. The government argued that the non-renewal was called for in the interests of public order and security. Although they accepted that this might well separate the applicant from his wife, they argued that the couple could live together in another country or could visit each other. Applying the above criteria the Court held that there has been a violation of Art.8.

In *Onur* the outcome was different. The applicant arrived in the UK at the age of 11 with his family. They were granted exceptional leave to remain. Eventually rest of his family became British citizens. He however, led a life of juvenile delinquency and continued the life style well into his adulthood. He had a series of sentences including custodial ones. In 2001, the Home Secretary informed him that he was considering deportation. However, no enforcement action was taken. In the meantime the applicant formed a relationship with a British citizen and had two children by her. Following the publication of a news item that 1023 foreign national prisoners who should have been deported after serving their sentences, but were released into the community, the Home Secretary sought to deport him. In rejecting Onur's claim that his removal will breach his Art.8 rights, the Court accepted that the applicant enjoyed a family life in the UK. However, he lived for a relatively short period with his partner and their first child. He never lived with their youngest child as he was removed to Turkey. His British partner was aware of his criminal record and immigration history when they started a relationship.. She was aware that in 2001 the Home Secretary was considering deporting Onur. Although the Court accepted that there was a long and inexplicable delay in the commencement of deportation action, in the circumstances of the case, the delay did not entitle the applicant and his partner to assume that no further action will be taken. The deportation was therefore proportionate.

In *Amrollahi v. Denmark*¹⁶⁵ an Iranian Army deserter went to Denmark where he met a Danish woman, cohabitated with her and later married her. He had two children by that woman, and another child by another woman, who lived with this couple. All three children grew up as one family. He was convicted of a drug related offence and was given three years

¹⁶⁵ (Application No.56811/00).

imprisonment. The Danish authority wanted to remove him. The Court observed that despite the fact that drugs had a devastating effect on people's lives and that it was right for the authorities to show firmness in dealing with these types of offences, under the circumstances, there was a violation of Art.8. In the balancing exercise, the Court found the following factors in the applicant's favour. He had very little contact with Iran rather he had a strong tie with Denmark. His wife had never been to Iran; she did not understand Farsi and was a non-Muslim. Apart from being married to an Iranian man she had no tie with that country. Applicant's daughter from previous relationship refused to go to Iran. The Court was of the opinion that if it were not impossible for the applicant's wife and children to live in Iran, it would nevertheless cause them obvious difficulties. They had no permission to live in another country. Consequently, if the applicant is excluded, the family will be separated as it will be effectively impossible for the family to continue their life outside Denmark.

2.23 Physical and moral integrity

The discussion above mainly related to the use of Art.8 in domestic cases, that is where the breach is direct as it takes place in the expelling state. However, Art.8 is also recognised as having extraterritorial effect. The ECtHR has extended the concept of private life to include the moral and physical integrity of applicants. For example, in *Botta*, the Court declared that the private life includes a person's physical and psychological integrity and that the guarantee afforded by Art.8 is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. It is in this respect indirect breach of Art.8 is recognised. The court has also accepted that treatment that may not reach the minimum level of severity required to engage Art.3, may amount to a breach of Art.8. In this respect, the threshold appears to be lower than that of Art.3.

In both *Raninen v. Finland*¹⁶⁶ and *Bensaid* the Courts accepted that there may be situations which although may not give rise to a breach of Art.3 it may still amount to a breach of Art.8 in its physical and moral aspects. In *Bensaid* the Court held that mental health must be regarded as a crucial part of private life associated with the aspect of moral integrity. "*Article 8 protects a right to identify and personal development, and the right to establish and develop*

¹⁶⁶ (1997) 26 EHRR 563.

relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.” (Para.47).

In *Raninen*, the Court was concerned with the arrest, detention and handcuffing of a military conscript who objected to military and substitute service. The Court found unanimously a violation of Art.5, but no violation of Art. 3. However, by a majority of 7 to 2, the Court found no violation of Art.8 since it had not been shown that the handcuffing had affected the applicant physically or mentally or had been aimed at humiliating him. As a result the treatment complained of by the applicant did not have such adverse effects on his physical or moral integrity as to constitute an interference with his right to respect for his private life. However, in a powerful dissent, Judge Foighel and Judge Morenilla thought that although the handcuffing of *Raninen* did not amount to a breach of Art.3 it entailed a breach of Art.8 since the effect of handcuffing must have been one of humiliation and lowering of the applicant’s self-esteem especially when the respondent state conceded that the handcuffing was not made necessary by his own conduct – it was rather imposed in the context of an unlawful arrest and detention. As a result, the treatment did affect the applicant’s integrity to such a degree as to amount to an interference with his right to respect for private life.

Although in *Kurt v. Turkey*, reliance was only placed on Art.3 in a similar case there is no reason why a breach of Article 8 as regards the infringements of physical and moral integrity of the mother who suffered so much distress as a result of the treatment meted out to her son and his disappearance cannot be raised.

Similarly, one may question why in *N*, if there is no violation of Art.3, no violation of Art.8 was considered? This drew criticisms from the dissenting judges. In this case, the majority took an unprecedented move. Normally when a violation of one of the articles is found, under the Court’s case law, the Court does not proceed to consider the violation of another article on the same facts. However, in this case, as mentioned above, the majority thought that the case does not come within the exceptional circumstances to amount to a violation of Art.3, but then decided, without giving reasons, that it was not necessary to consider the violation of Art.8.

2.24. EU Law and Art.8

It should be noted that the Court of Justice of the European Union can also deal with Art.8 cases. The Court of Justice gives ECHR ‘special significance’ as ‘guiding principles’ in its case law¹⁶⁷. The Court of Justice may use ECHR principles in its reasoning while deciding a case. In the *Baumbast*¹⁶⁸ case, the Court held that when a child has a right of residence in a Member State by virtue of the EU law (the child was in education), this would imply that their parents should also have a right of residence due to the right to respect for family life under Art.8 of the ECHR.

EU law relating to freedom of movement actually offers a better protection to non-EU nationals family members than what they can have under Art.8. The family members of an EU national who is exercising their treaty rights (qualified persons) can accompany them or join them without the requirements of maintenance or accommodation or language requirements. However a detailed analysis of EU law is outside the scope of this research.

2.25 Conclusion

As the title of Art.8 suggests – right to respect etc. it imposes a positive duty on the state to ensure that the private or the family life of individuals is respected. The ECtHR has recognised the right of an alien under Art.8 to prevent their removal or entry. The burden is on a member state if it wants to justify an interference with that right and show that such interference comes within one of the exceptions in Art.8(2). At the end the Court determines whether the requirements are met by applying a proportionality test. Law in this immigration context has been developed through the robust approach of the ECtHR and that it has made a significant contribution in safeguarding and preserving family unit and private life where none was existent before.

¹⁶⁷ Arnall, Anthony (2006) *The European Union and Its Court of Justice*, Oxford EC Law Library, pp.339-40.

¹⁶⁸ *Baumbast and R v. Secretary of State for Home Department* [2002] ECR I-7091.

Chapter Three

Article 8, Immigration and English Courts

3.1 Introduction

This chapter deals with the jurisdiction of the English Courts and the factors the judges consider in dealing with Art.8 cases in immigration context. References have been made to other Articles of the ECHR and their use in immigration cases. It also provides the background under which the ECHR was incorporated within the UK domestic law and what approaches the English Courts follow in human rights cases in general.

3.2 Background to Human Rights Act

The European Convention on Human Rights was incorporated into English domestic law by virtue of the Human Rights Act 1998 (HRA 98). The Act came as a result of an election pledge by the Labour Party, which produced a consultation paper on the incorporation of ECHR in December 1996.

After being elected to power the Labour Government in October 1997 published a White Paper *Rights Brought Home* which proposed to incorporate the ‘main provisions’ of the ECHR..

Prime Minister Blair in his preface to the White Paper stated: *“It will give people in the United Kingdom opportunities to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the European Human Rights Commission and Court in Strasbourg. It will enhance the awareness of human rights in our society..”*¹⁶⁹

The call for a bill of rights came after a series of policies and decisions by successive governments which seriously undermined individual liberties. Many Commentators including Senior Judges made a compelling case for the incorporation of ECHR. It was thought that the Bill would particularly empower the less powerful groups of the society.¹⁷⁰

During the second reading of the Bill the then Lord Chancellor, Lord Irvine was very confident about the impact of the Act.¹⁷¹ He believed this Bill which occupied a central position in the government’s programme for constitutional change and that, *“It will allow British judges for the first time to make their own distinctive contribution to the development of human rights in Europe.”* (c.1227).

Questions were asked how the Act would fit within the peculiar culture of the British Constitutional system where the three organs of the government function independently. Would it not upset the balance of power by allowing the Judges a power to police the action of the executive and legislature?

The Act was specifically structured to allow the Courts to uphold human rights while also retaining parliamentary authority¹⁷². Lord Irvine assured the House that the Bill would not undermine the existing constitutional arrangement. His use of the phrase ‘our traditional understanding of the separation of powers’ refers to the peculiar arrangement of the application of the doctrine of separation powers where there is a great deal of judicial deference to administrative action.

¹⁶⁹ White Paper *Rights Brought Home: The Human Rights Bill*, 24 October 1997, see Preface.

¹⁷⁰ Ewing, K.D. (2004) “The Futility of the Human Rights Act” in Public Law 829- 852 at 830-32.

¹⁷¹ Official Report, House of Lords, 3 November 1997, vol.582, col. 1227-34.

¹⁷² Klug, F. (2003) “Judicial Deference under the Human Rights Act 1998” in EHRLR 125-33.

The fact that the HRA 98 preserved the sovereignty of the parliament has received judicial recognition. In the words of Lord Steyn in *Ex Parte Kebeline*¹⁷³, “*It is crystal clear that the carefully drafted Human Rights Act 1998 preserves the principle of Parliamentary sovereignty. In a case of incompatibility, which cannot be avoided by interpretation under section 3(1), the courts may not disapply the legislation. The court may merely issue a declaration of incompatibility which then gives rise to a power to take remedial action.*”

In *Regina v. Saunders and three others*¹⁷⁴, the Court of Appeal (Criminal Division) held that where a defendant’s conviction had resulted from procedures which the Human Rights Court categorised as unfair, the CA could not properly declare them unlawful since the stigmatised procedures were expressly permitted by the Parliament. When the matter went to the House of Lords as *Regina v. Lyons and Others*¹⁷⁵, Lord Holfman eloquently explained the constitutional position of the UK Courts in the context of international instruments. He said that the ECHR is an international treaty and the ECtHR is an international court with jurisdiction under international law to interpret and apply the Convention. International treaties do not form part of English law and that the English Courts do not have jurisdiction to interpret or apply them. However, the Parliament may pass a law mirroring the terms of a treaty and thus incorporate it into English law. In that case, it is the statute, and not the treaty which forms part of English law. He maintained that the English Courts were not bound, unless the statute expressly so provides to give effect to interpretations of the treaty given by an international court, even though the UK is bound by international law to do so. He accepted however, there is a strong presumption in favour of interpreting English law in a way which does not place the UK in breach of its international obligations. He reiterated that the sovereign legislator in the UK is the Parliament. If the Parliament passes a law, it is the duty of the Courts to apply it, no matter whether that will involve the Crown in breach of an international treaty or not. It is only when no such law is laid down by the Parliament that the Courts are free to interpret the law in accordance with the obligations of the Crown under an international treaty.

Question may arise whether the Act brings the Courts in conflict with Parliament. As regards the balancing of the power of the court and the supremacy of the parliament, Lord Irvine

¹⁷³ *R v. Director of Public Prosecutions, ex parte Kebeline and others*, [1999] UKHL 43.

¹⁷⁴ *The Times* 1 February 2002.

¹⁷⁵ [2002] UKHL 44.

argued, *“The design of the Bill is to give the courts as much as possible to protect human rights, short of a power to set aside or ignore Acts of Parliament. In the very rare cases where the higher courts will find it impossible to read and give effect to any statute in a way, which is compatible with Convention rights, they [c.1229] will be able to make a declaration of incompatibility. Then it is for Parliament to decide whether there should be remedial legislation. Parliament may, not must, and generally will, legislate.”* He then concluded, *“It maximises the protection of human rights without trespassing on parliamentary sovereignty.”*

3.3 How the Act works?

S.6 of the HRA98 makes it unlawful for a public authority to act in a way, which is incompatible with Convention rights, unless it is required to do so to give effect to primary legislation. However, under subsection 6 ‘act’ includes a failure to act but does not include a failure to legislate or to make remedial orders.

The courts have the power to strike down subordinate legislation if it is found not to be compatible with the Act, so long as primary legislation does not prevent this. However, the courts have no power to strike down primary legislation. In such a case, the court may make a declaration of incompatibility.

The HRA98 does not make the decisions of the European Court and Commission of Human Rights binding in domestic law. However, under s.2(1) domestic courts or tribunals ‘must take into account’ judgments, decisions, declarations and advisory opinions of ECHR regime. Consequently, the domestic judicial bodies are under obligations only to consider the relevant Strasbourg authorities in interpreting the convention rights.

Can the domestic courts depart from the existing Strasbourg decisions? The position is not very clear. However, at the committee stage Lord Irvine thought: *““The Bill would of course permit United Kingdom courts to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so”*.¹⁷⁶ At the report stage, he added, *“There may*

¹⁷⁶ HL Debs (committee stage) col 514, 18 November 1997.

also be occasions when it would be right for the United Kingdom courts to depart from Strasbourg decisions.¹⁷⁷ This may happen, when ECtHR's decision is old and circumstances have changes since then.

However, in following the Strasbourg case law, the English courts should assess the weight of the decisions by considering the age of the decision¹⁷⁸. Since the Convention is to be treated as a living instrument, the older a decision is, the less reliable a guide it is to be a contemporary construction of Convention rights.

As it will be seen in this research the HRA has created a domestic version of margin of appreciation. Domestic version of the 'margin of appreciation' means judicial deference to executive decision. Courts on many occasions are using mandate theory and leaving the matters with the executive, since the latter had the best knowledge and mandate from the people to deal with issues.

Lord Hope in *Kebeine* accepted 'this discretionary area of judgment'. He recognised the doctrine of 'margin of appreciation' as an integral part of the supervisory jurisdiction, exercised by the international court. By conceding this doctrine to each member state, the international court has recognised that the Convention is a living instrument, which does not need to be applied uniformly by all states, but may vary according to local conditions and needs. However, when the domestic courts are dealing with Convention matter, the question is how to balance between competing interests and to deal with proportionality. There may be a situation when the court will leave the matter to the executive, as they may be, under the circumstances better placed to take the decision. *"In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention."*

3.4 English Courts and Human Rights in General

¹⁷⁷ HL Debs col 1270, 19 January 1998.

¹⁷⁸ N Bratza and P Duffy, *The European Convention on Human Rights in Practitioners' Handbook of EC Law* 1998, pp. 632-33.

In Chapter 1(1.4) I discussed the position of English Courts in respect of Human Rights, in particular the fact that even illegal immigrants can rely on HRA98. The HRA98 has conferred a new role to the Courts. As Simon Brown LJ observed in *International Transport Roth GmbH v. SSHD*¹⁷⁹, “... the court’s role under the 1998 Act is as the guardian of human rights. It cannot abdicate this responsibility.” (para. 27). This is in line with Laws J’s earlier argument that the High Court was becoming the custodian of human rights¹⁸⁰. Brown LJ also observed that these days the courts had no other alternative but to apply the HRA98.

Even if a non-national who is not within the UK can rely on the Convention. In *R (on the application of Farrkhan) v. SSHD*¹⁸¹, and *Singh v. Entry Clearance Office Delhi*¹⁸², court confirmed this. Both these cases involved entry clearance applications. In *Farrkhan*, entry clearance was denied as it was argued that Louis Farrkhan’s speech might offend sections of public in the UK, and the arguments were raised that his freedom of expression under Art.10 would be breached. In the case of *Singh*, the applicant was refused entry clearance to join his adoptive parents in the UK, and Art.8 was pleaded. This aspect of the applicability of the Convention is important for the current study, as we will see later, how Art.8 can be relied on entry clearance cases.

In line with ECHR authorities, the English Courts have recognised that the relatives of a victim can also in some cases be treated as victims. In *Re Mckerr*¹⁸³, the House of Lords decided that a son, who questioned why his father was killed by state agents in Northern Ireland, is actually a victim. We will see later in Chapter 4, how these concepts of primary and secondary victims are important in Art.8 cases, where the family lives of the applicant’s family members are also taken into consideration.

Although the HRA98 declares that if a public authority action is incompatible with the ECHR, a cause of action may ensue, the Act itself has not defined what a public authority is. However, for the purpose of this study, it is important to note that the Home Office, its agencies and the Courts are all regarded as public authorities.

¹⁷⁹ [2003] QB 728.

¹⁸⁰ See Laws, Sir J (1993) “Is the High Court the Guardian of Fundamental Constitutional Rights?” in *Public Law* pp. 59-79.

¹⁸¹ [2001] EWHC (Admin) 781; [2002] 3 WLR 481.

¹⁸² [2004] EWCA Civ 1975; [2005] QB 605.

¹⁸³ [2004] UKHL 12.

HRA98 has no retrospective effects, so events which occurred before the Act came into force will not give rise to a cause of action under it. In two leading decisions, *R v. Lambert*¹⁸⁴ and *R v. Kansal (No. 2)*¹⁸⁵, the House of Lords made this position clear. This was further endorsed by the House in *R v. Lyons and Others*¹⁸⁶.

In order to determine compatibility with the HRA, the courts are displaying a liberal approach when interpreting statutes. The House of Lords in *Kebeleline*¹⁸⁷ decided that words contained in a statute would be construed differently from their literal meaning as far as reasonably possible in order to achieve compliance with the Convention. Lord Cooke observed, “... *the new canon of interpretation will be that, so far it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. This is a strong adjuration.*”

The courts, however, display a reluctance to consider Convention arguments unless Strasbourg case law can be advanced which is directly on point. So in *R (ota P and Q) v. SSHD*¹⁸⁸, absence of decided cases was the reasons for the LCJ’s judgment.

Again the English Courts are reluctant to accept that Strasbourg authorities are wrongly decided. This is evident from *R (ota Anderson) v. SSHD*¹⁸⁹.

Traditionally, in interpreting statutes, the courts look at the intention of the Parliament. Will that change if the Court is considering human rights issues? Lord Lester¹⁹⁰ argued that there are two stages of this interpretation. In the first stage the question for the courts is whether the legislation interferes with a Convention right. At this stage, the purpose behind the legislation or the intention of the Parliament plays a secondary role since rarely the Parliament would want to pass an Act in breach of the Convention. If the Government seeks to justify the interference with a Convention right under one of the exceptions, then at the second stage, the

¹⁸⁴ [2001] 3 WLR 206.

¹⁸⁵ [2002] 2 AC 69.

¹⁸⁶ [2002] UKHL 44.

¹⁸⁷ [1999] 3 WLR 972.

¹⁸⁸ [2001] EWHC Admin 363.

¹⁸⁹ [2001] EWHC Admin 181.

¹⁹⁰ Lord Lester of Herne Hill QC (1998) “The Act of the Possible: Interpreting Statutes under the Human Rights Act”, [1998] *EHRLR* 665.

purpose or the intention of the Parliament becomes relevant and the test of proportionality will be applied.

However, in determining the compatibility the courts are, understandably not willing to rewrite the provisions of the Statutes. In *Donoghue v. Poplar Housing Association*¹⁹¹ the Court of Appeal stated that section 3 of HRA98 did not enable Court to legislate. Its task is still one of interpretation, but such interpretation has to be in accordance with the directions of s.3.

In *R v. A*¹⁹² Lord Steyn and Lord Hope disagreed about whether it was possible to ‘read in’ to a statutory provision to make it compatible with the Convention. Lord Hope held that it was possible to ‘read down’ a provision but not ‘read in’. Lord Steyn held that there could be the ‘implication of provisions’. The case was not on Art.8. Lord Steyn stated that in accordance with the will of Parliament as reflected in S.3 of HRA98, it will sometimes be necessary to adopt an interpretation which may linguistically appear to be strained. The techniques that will be employed will involve not only the reading down of express language of a statute, but also the implication of provisions. A declaration of incompatibility should be regarded as a last resort and must be avoided unless it is impossible. Lord Hope added that the rule of construction which S.3 HRA98 has laid down is very different from any previous rule of statutory interpretation. Compatibility with the Convention is the sole guiding principle of this new rule of interpretation. However, he made it clear, that this rule of interpretation does not entitle the judges to act as legislators.

What would be the extent of the review of human rights issues? In *Smith and Grady v. UK*¹⁹³ the ECtHR held that the traditional *Wednesbury*¹⁹⁴ approach to judicial review was inadequate in human rights matters.

The courts have acknowledged that the HRA has lowered the threshold of irrationality in cases involving issues of proportionality. In *Turgut v. SSHD*¹⁹⁵, Simon Brown LJ noted that if the domestic court was prepared to regard a policy as justifiable no matter whether it

¹⁹¹ [2001] EWCA Civ 595.

¹⁹² [2001] UKHL 25.

¹⁹³ (1999) 29 EHRR 493.

¹⁹⁴ *Associated Provincial Picture House Ltd v. Wednesbury Corporation* [1948] 1 KB 223 CA.

¹⁹⁵ [2000] UKHRR 403.

answered a pressing social need or was proportionate to the aims pursued, the traditional approach would accord insufficient weight to interference with human rights. He declared, “*It is plain that by October 2000, the threshold of irrationality will have to be lowered in cases of that sort.*” The Court endorsed the view that although the Courts have a constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power, their role even in a case involving human rights remains essentially supervisory. They are not thrust into the position of primary decision-makers.

In *R (Daly) v. SSHD*¹⁹⁶ the House of Lords recognised that “*domestic courts must themselves form a judgment whether a Convention right has been breached*” and that “*the intensity of review is somewhat greater under the proportionality approach.*” Lord Steyn thought that the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. The intensity of review, according to him, is guaranteed by the twin requirements, which are the limitation of the right was necessary in a democratic society in the sense that it meets a pressing social need and the question whether the interference was really proportionate to the legitimate aim being pursued. He rejected the ‘Super *Wednesbury*’ test, as developed in *R v. Ministry of Defence ex parte Smith*¹⁹⁷ as it was “*not necessarily appropriate to the protection of human rights*”.

The Courts now have powers not only to declare a decision taken by the Home Secretary as incompatible with the Convention, but can even in appropriate situation make an incompatibility declaration in respect of a Statute. In *A (FC) and others (FC) v. SSHD*¹⁹⁸ a primary legislation was declared incompatible. The House of Lords declared s.23 of the Anti-Terrorism, Crime and Security Act 2001 dealing with detention of suspected international terrorist, although lawful but incompatible with the right to liberty under Art.5(1) of ECHR. The Act provided for indefinite detention without trial and deportation. The court also spelt out the role of judiciary when asked to consider a legislative or executive action in the context of human rights. The Court will only interfere when insufficient weight was given to human rights issues. Lord Nicholls accepted that courts are conscious that the government is

¹⁹⁶ [2001] UKHL 26, [2001] 2 AC 532, esp. paras 23 and 27.

¹⁹⁷ [1996] QB 517 at 554.

¹⁹⁸ [2004] UKHL 56.

alone capable of deciding what Counter-terrorism measures are needed and the Courts are not equipped to take such decision. However now the Parliament has given the Courts a particular responsibility of checking that due weight is given to fundamental freedoms. In his words: “*The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected. In enacting legislation and reaching decisions Parliament and ministers must give due weight to fundamental rights and freedoms. For their part, when carrying out their assigned task the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right. The courts will intervene only when it is apparent that, in balancing the various considerations involved, the primary decision-maker must have given insufficient weight to the human rights factor.*” (Para.80).

3.5 Human rights and jurisdiction of courts in expulsion cases

Long before the ECtHR’s decision in *Abdulaziz* the English Court asserted the right of the UK to control the entry of foreigners. In *Attorney General for the Dominion of Canada v. Cain*¹⁹⁹, Lord Atkinson in the Privy Council held that one of the rights possessed by the supreme power in every state was the right to refuse permission to an alien from entering the State or to attach whatever conditions it pleased to the entry permission. This power included the power to expel or deport from the State at pleasure even a friendly alien, especially if it considered their presence was opposed to its peace, order, good government, or to its social or material interests. After the incorporation of ECHR within the HRA98, the House of Lords in *Regina Ex Parte Saadi (FC) and Others (FC) v. SSHD*²⁰⁰ reiterated the position by declaring that the UK has the right to control the entry and continued presence of aliens in its territory. Further in *R (European Roma Rights Centre v. Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees Intervening))*²⁰¹, the court stated that the power to admit, exclude and expel aliens was among the earliest and most widely recognised power of the sovereign state. However, the court held that no developed state has ever enforced or sought to enforce a blanket rule to exclude the entry of all foreign nationals.

¹⁹⁹ [1906] AC 542.

²⁰⁰ [2002] UKHL 41.

²⁰¹ [2004] UKHL 55; [2005] 2 AC 1. This case dealt with the situation where British Immigration Officers were posted at Prague Airport to monitor and stop Roma asylum seekers from coming to the UK.

Some exceptions were always made, especially in light of international instruments, such as the Refugee Convention.

The greatest innovation of the regime that developed from the HRA98 is that not only the new human rights regime confers the benefit of the Convention rights on non-nationals, whether legally in the UK or not, but also a right to challenge the decision expelling them from the UK. Submission by way of representations can be made to the Home Office on human rights grounds. If application on human rights grounds is refused by the Home Office, in most cases, there will be an appeal before an immigration judge²⁰². However, the decision in such a case must amount to an immigration decision within the meaning of S.82 of the Nationality, Immigration and Asylum Act 2002.

If an applicant appeals both under the Refugee Convention and ECHR, there are not two appeals; the courts treat the two as one appeal with the two Conventions forming two separate grounds. So, if the applicant wishes to withdraw the asylum appeal, the effect will be that the whole appeal will be treated as withdrawn. The safe course will be to ask for a variation of grounds and to omit the asylum ground.

Even when the appeal is only on asylum grounds, the courts will consider whether or not any human rights considerations are applicable.

So in *Suleyman Altunatmaz v. SSHD*²⁰³, a case involving a Turkish draft evader, the Tribunal held that when dismissing an asylum appeal, the adjudicator must explain why he is also dismissing the human rights appeal, and indicate which articles of ECHR he has considered.

²⁰² Since the incorporation of the ECHR into the HRA98, the immigration court has undergone structural and name changes three times. In 2000 the court was known as IAT (Immigration and Asylum Tribunal). In the first place an appeal could be lodged with an Adjudicator. If it was refused, a further appeal could be lodged with a Tribunal Judge. However, the 1999 Act conferred on the Secretary of State power to certify an asylum or human rights claim as 'manifestly unfounded', thus limiting the application only to the first appeal before the Adjudicator. However, if the Adjudicator refused the appeal, but disagreed with the certificate, a second appeal could then be lodged with the Tribunal. The Court was renamed as AIT (Asylum and Immigration Tribunal) in 2005, and appellants were only restricted to one appeal. The Adjudicators positions were given the titles of Immigration Judges. Although there was no provision for a second appeal, a newly inserted section 103A to the 2002 Act provided for a reconsideration mechanism on the grounds that an error of law was made by an Immigration Judge. The matter was then decided by a Senior Immigration Judge. In 2010, the Court system has undergone another round of changes. It now consists of two tiers, known as First-tier Tribunal and Upper Tribunal respectively. An appeal in the first place lies with the First-tier Tribunal. After that, leave can be sought from the First-tier Tribunal and if refused, then from the Upper Tribunal on the ground that a material error has been committed by an immigration judge for an appeal before the Upper Tribunal.

²⁰³ [2002] UKIAT 03002.

In *Hakeem Olanrewaju Kehinde v. Secretary of State for the Home Department*²⁰⁴, the IAT briefly described the nature of human rights appeal in exclusion or removal cases as essentially an appeal on the grounds that such removal or exclusion was or would be for human rights reasons, unlawful. It follows therefore that if a person's removal or exclusion is unlawful, then he has a right to remain or enter. An appeal on human rights grounds against expulsion or removal is therefore, an appeal against the decision of an applicant's entitlement to enter or remain in the UK.

It is not entirely clear whether the courts can hear human rights arguments when there is no imminent threat of removal. In *P (Yugoslavia)*²⁰⁵ the IAT decided that there had to be a threat of removal before it could be said that there was a real risk of breach of human rights. This leads to the argument that in an expulsion case, the real breach of an applicant's human rights occurs not when a decision not to allow him to stay in the UK is taken, but when a decision to remove him is made.

However, in *Maksimovic*²⁰⁶ Collins J, held that apart from certain Article 8 cases where it would be impossible to envisage what the position might be at the time of the proposed removal, it would otherwise be a 'waste of time and unnecessary delay' if a human rights claim could only be considered if removal were decided upon. However, the current practice of the Home Office is often not to issue any immigration decision when refusing Art.8 human rights arguments relating to family and private life in the UK when not accompanied by any asylum grounds, thus in effect depriving applicants from going to the Court. On many occasions, applicants had to seek judicial review to compel the Home Office to issue immigration decision so that they can appeal to an Immigration Judge.

3.6 Extra-territoriality – direct and indirect breach

As mentioned in Chapter 2, breach of human rights in immigration context can be direct or indirect. In the case of indirect breach, the violation takes place outside the UK. To give an example, if an applicant is returned to his country of origin, where he is tortured and

²⁰⁴ *(01TH02668) 2001.

²⁰⁵ [2003] UKIAT 00017.

²⁰⁶ [2004] EWHC 1026 (Admin).

subjected to inhuman and degrading treatment by the members of security forces, the breach is indirect. He is facing treatment contrary to Art.3. Although the UK authorities are not directly responsible for the treatment of the applicant in his country of origin, they can be held liable indirectly, because it is their decision to remove the client which results him being tortured etc. On the other hand, if the applicant has established a family and private life in the UK, and then removed to his country of origin, then the breach can be regarded as direct. In the case of direct breach, the decision to remove automatically results in the interference of the right of the applicant, there is no need for another party to get involved. In our example, it is the decision to remove, which splits the family life and disrupts the private life. However, in the case of indirect breach, it is the act of the third party which causes the interference. It can conveniently be said that while the direct breach is real, the indirect breach is speculative or expected and the risk depends very much on the likelihood of its occurring. In that sense, the human rights arguments advanced in cases of indirect breach are pre-emptive in nature. The argument runs like this, if the applicant is sent back to another country, he is likely to face torture etc. On the other hand, in the case of direct breach, there is no question of the violation being likely - it is actual.

Indirect breach, therefore takes place outside the UK. For this reason, in *Ullah and Do*²⁰⁷, the court referred to cases involving indirect breach as ‘foreign cases’.

During the early days of HRA98, the Home Office used to argue that the UK’s obligations to protect human rights only extends while people are in the UK and that it was not responsible for any breach that might occur after the removal of applicants to another country.

The Tribunal in *Kacaj*²⁰⁸ rejected this Home Office argument. They held, “*In deportation cases the decision maker and, on appeal, the adjudicator and tribunal must be concerned to decide whether there is a real risk that Article 3 (or indeed any other Article) will be violated.*” (Para. 7).

²⁰⁷ [2004] UKHL 26.

²⁰⁸ *Klodiana Kacaj v. SSHD* (2001) (01TH00634).

However, this argument found some favour with the Court of Appeal in *Ullah and Do v. SSHD*²⁰⁹. The implication of this decision was that unless there was a violation of Art.3 no other articles could stand on its own.

Fortunately the House of Lords in *Ullah and Do* overruled the decision²¹⁰. Their Lordships decided that apart from Art.3 other articles of the ECHR could operate to prevent the removal of an applicant. However, not every minor breach of these articles will render removal unlawful. Following the formulation of IAT in *Devaseelan*²¹¹, the court held that the future breach has to be a ‘flagrant denial’ of the rights of the applicant. The implications of these decisions are that, if for example, an applicant complains that if he is returned to another country his freedom of expression as enshrined in Art.10 is likely to be interfered with, he must show that such interference amounts to a flagrant violation of his Art.10 right in such a way that it almost brings itself to a situation closer to the violation of Art.3.

In *Devaseelan* the IAT recognises the indirect breach of the ECHR in expulsion cases. *“Depending on the circumstances of the case, a government act may be prohibited by the Convention not because it directly breaches the individual’s human rights but because it puts in a situation where others breach his human rights.”* (para.58). The Tribunal also accepted that such breaches might take place within the UK *“by the decision the effect of which is to expose the individual to treatment that is prohibited.”* In other words, the IAT accepted the preventive or pre-emptive nature of human rights arguments in expulsion cases.

The courts however, made an exception to cases involving future breach of Article 8. Where the future ill-treatment will not be so serious as to breach Art.3 but will nevertheless seriously damage or impinge on the claimant’s physical and moral integrity, there could well be a breach of Art.8.

3.7 Judicial Attitude towards human rights arguments in immigration cases

The overall attitude of the judiciary in dealing with human rights arguments in expulsion cases in general is mixed. The courts on many occasions do go against the decision of the

²⁰⁹ *R (Ahsan Ullah) v Special Adjudicator; Thi Lien Do v. SSHD* [2002] EWCA Civ 1856.

²¹⁰ [2004] UKHL 26.

²¹¹ *[2002] UKIAT 00702.

secretary of the state, on Art.8 grounds, to remove someone from the UK, On other occasions there seems to be a tendency to tilt the scale towards the executive with effective immigration control is the catchword that seems to win the day for the home office. One of the arguments of this research is the lower level of judiciary, that is, the Immigration Tribunals are in general more likely to accept Art.8 based arguments than the higher courts. This is evident from the number of reported cases and also from the personal experience of this researcher. Even within the Tribunal System it appears that on many occasions the First Tier Tribunal allows appeal on human rights grounds and then the Home Office do not appeal to the Upper Tribunal. Had the Home Office routinely appealed all the decisions against them, the outcome could have been different. The cases referred to in the real life case studies in this thesis are all from First Tier Tribunal. I will return to this issue in Chapter Six, where I will show that compared to the Tribunals the Higher Judiciary, especially Court of Appeal and Supreme Court are more cautious and restrictive in their approach in expending the scope of Art.8.

Earlier it was thought that foreigners, who seek international protection, will have a better remedy under the HRA98 regime. Prior to HRA98 the only ground on which they could seek protection was to rely on the 1951 UN Convention for the Status of Refugees. They had to show that they have a well-founded fear of persecution for one of the five convention Reasons. as set out in the Convention. However, under the human rights regime to claim protection on human rights grounds there was no need to show any convention reason – only a reasonable likelihood of harm on return to the country of origin would suffice. As a result, it was thought that in addition to an asylum claim, a claimant would also make a claim under Art.2 (right to life) or more routinely, under Art.3 (freedom from torture, inhuman and degrading treatment and punishment) and that applicants would generally fare better under Art.3, than under the Refugee Convention. However, in reality, the human rights system produced a completely different result.

As mentioned in Chapter 1 both the Home Office and the courts are treating asylum and Art.3 human rights claims in the same way. So if an asylum claim fails it is likely that the underlying Art.3 human rights claim will also fail. Home Office and the courts are using the concept of internal flight option, sufficiency of protection equally to both claims. On many occasions if the acts complained of do not amount to persecution, they may not reach the

minimum level of severity required for a breach of article 3. In fact, the Nationality, Immigration and Asylum Act 2002 treats a claim based on article 3 as an asylum claim²¹².

If an applicant can establish that his human rights will be infringed by his removal he will not be automatically entitled to prevent his removal unless he can also show that he will not be able to relocate to another part of his country and be safe, and also if he fears non-state entities then, that his country of origin will not be able to offer him protection against those entities in the same way as an asylum seeker is required to establish the same.

The fact that the two claims should be treated in the same way, has also received judicial recognition. In *Bagdanavicius*²¹³ the Court of Appeal held that the threshold of risk is the same in both asylum and human rights claim. The main reason for originally introducing S. 65 of the 1999 Act (now the jurisdiction is replaced by the 2002 Act) was not to provide an alternative, lower threshold of risk and/or a higher level of protection against such risk through the medium of human rights claims, but to widen the reach of protection regardless of the motive giving rise to the persecution. The House of Lords have expressed similar view when they heard the case later²¹⁴.

In dealing with human rights claims when the main claim is asylum, the Home Office rarely considers the human rights arguments separately and relies on reasons given for the refusal of asylum claims for refusing human rights claims. The fact that the Art.3 has rarely advanced the case of an immigrant has made the use of Art.8 all the more important.

3.8 Article 8 and the Jurisdiction

²¹² S.18(3) provides, “A claim for asylum is a claim by a person that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom’s obligations under – (a) the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and its Protocol, or (b) Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4th November 1950.”

²¹³ *R (on the app. of Bagdanavicius and Bagdanaviciene) v. SSHD* [2003] EWCA Civ 1605.

²¹⁴ *R (ex parte Bagdanavicius et al) v. SSHD ex parte Bagdanavicius (FC) and another* [2005] UKHL 38.

In immigration context, when a breach of Art.8 is alleged, it is mostly direct. The applicant has established a family and/or private life in the UK and the removal will interfere with that life. However, as it will be seen in Chapter 5, that the effect of a breach of Art.8 can also have extra-territorial effect, and the breach thus becoming indirect. The ECtHR in cases like *Bensaid* also recognised it.

In order to make a case under Art.8 in immigration context in the UK one has to go through a multi-stage process as explained in Chapter 1(1.8). In dealing with Art.8 cases, a balance must be struck between two competing interests: the narrower interest of the private or family life of an individual and the wider interest of the community or the state.

In the UK shortly before the coming into force of the HRA98 in *B v. SSHD*²¹⁵, the Court of Appeal had the opportunity to consider the test of proportionality in an expulsion case. B who was born in Sicily came to the UK when he was 7 with his parents and lived here for 36 years continuously having visited Sicily only twice and remained an Italian citizen. Following his conviction for prolonged and systematic child abuse, the Home Secretary wanted to deport him and he relied on Art.8. For the Court, proportionality essentially meant that a measure which interfered with Community and human rights must not only be authorised by law but must correspondent to a pressing social need and go no further than strictly necessary in a pluralistic society to achieve its permitted purpose. The court held that the decision to deport the applicant was so severe as to be disproportionate to the applicant's particular offending, because the deportation would result in removing him from the country where he had grown up, lived his whole adult life and had such social relationships as he possessed. The deportation would negate both his freedom of movement and respect for private life in the one place – the UK – where these had real meaning for him.

The English Courts have repeatedly asserted that immigration control is a legitimate purpose, which will render removal of an alien a proportionate response. In *SSHD v. Kujtim Lama*²¹⁶ the Tribunal decided that in assessing proportionality under Art.8(2) the sheer size of the immigration problem is a legitimate matter of public concern, and the maintenance of an effective immigration control is a legitimate purpose. The Tribunal held that even if it is

²¹⁵ Court of Appeal, 18 May 2000.

²¹⁶ [2002] UKIAT 07554.

conceded that returning an illegal immigrant home would amount to a breach of Art. 8, it would nevertheless be a proportionate means of maintaining an effective immigration control.

But how to determine ‘proportionality’ and what will be the courts’ precise role in this regard? In *Blessing Edore v. SSHD*²¹⁷, the applicant was an illegal entrant and failed asylum seeker. She formed a relationship with a married man and bore him two children. The man continued to live with his wife and other 3 children, but was devoted to the applicant’s two children by visiting and supporting them financially. The Court of Appeal held that there would plainly be an interference with the Art.8 rights of the applicant and her children, who would be adversely affected by removal to Nigeria. The children were emotionally dependent on their father, who was a stable influence in their lives. The Court recognised the flagrancy of the applicant’s breach of immigration control and the need for an effective immigration control. However, due to the unusual nature of the instant case, the balance between the competing interests could be stuck in the applicant’s favour. The Court held that the adjudicator’s task on a human rights appeal based on Art.8 is to determine whether the decision under appeal was properly within the decision-maker’s discretion, that is, one that could reasonably be regarded as proportionate and as striking a fair balance between the competing interests in play. There will be occasions when it can properly be said that the decision reached by the Secretary of State was outside the range of permissible responses open to him, that is, the balance struck by him was simply wrong. The Court also approved that the issue of proportionality is a matter of judgment and balance, but not itself a matter of discretion.

However, proportionality exercise is not a straightforward task. In *Pamela Elaine Baah v. SSHD*²¹⁸ the Tribunal declared that in assessing whether an immigration decision is proportionate in terms of Art.8, the Immigration Appellate Authority could not substitute its own discretion for that of the decision-maker. The applicant needs to show that removal is outside the range of permissible responses available to the Home Secretary.

The above view was echoed in *HR (Proportionality) Serbia and Montenegro*²¹⁹. The Tribunal decided that in assessing the proportionality of the decision under appeal, the adjudicator is

²¹⁷ [2003] EWCA Civ 716.

²¹⁸ [2002] UKIAT 05998.

²¹⁹ [2004] UKIAT 00088 para. 12.

not exercising discretion. Whatever may be his own inclinations, he cannot substitute his own view of proportionality for that of the Secretary of State, and can only hold that the decision under appeal is ‘not in accordance with the law’ if it is one which nobody could reasonably call proportionate.

A further restriction was imposed on the role of adjudicator/immigration judge as regards proportionality assessment by the Court of Appeal in *Huang, Abu-Qulbain and Kashmiri v. SSHD*²²⁰. The Court of Appeal stated that *M* (Croatia)*²²¹ was wrong to restrict the adjudicator’s assessment of proportionality in an Art.8 case to reviewing whether the decision under appeal lay out with the range of responses reasonably open to the Secretary of State. The Immigration Rules having themselves struck the balance between the public interest and private rights, the adjudicator would only allow an appeal against removal on Art.8 grounds if he concluded that the case was so exceptional on its particular facts that the imperative of proportionality demanded an outcome in the applicant’s favour notwithstanding that he could not succeed under the Rules. However, when *Huang and Kashmir*²²² went to the House of Lords, their Lordships decided that the Immigration Appellate Authority does not need to determine whether the case meets a test of ‘exceptionality’. They held that the first task of the Appellate Immigration Authority is to establish the relevant facts, investigate the facts, test the evidence, assess the sincerity of the appellant’s evidence, genuineness of the appellant’s concerns and evaluate the nature and strength of the family bond. Facts should be explored and summarised in the decision with care, since they will always be important and often decisive. The Court then gave the following formula to be followed by the Appellate Court in Art.8 cases, “*In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the appellant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide.*” (para.20).

²²⁰ [2005] EWCA Civ 105.

²²¹ [2004] UKIAT 24.

²²² [2007] UKHL 11.

How the competing interests should be balanced in case of indirect breaches? In *Alena Hadiova v. SSHD*²²³, the Court of Appeal employed a strange logic. It held that where interference with Art.8 rights is said to arise not in the UK, but in the country of destination, the English Courts are in no position to decide how the balance should be struck in a foreign state between an individual right and a legitimate aim of public policy. The Strasbourg jurisprudence recognised that, in determining whether the means adopted to achieve a legitimate aim were ‘necessary in a democratic society’ and were proportionate, the state in question was to be allowed a margin of appreciation. That being so, how could a Judge of the English courts claim to be in an appropriate position to arrive at such a judgment about the balance to be struck in a foreign state between the competing interests of the individual and the wider society? He would not know on what basis the foreign state might seek to justify the interference, and he would not have before him the evidence on that issue. Moreover, it might well be thought contrary to the principle of international comity for one state to be purporting to strike such a balance between competing private and public interests for another state. The Court thought that this is an extra reason why *Ullah* (CA) was rightly decided. This reasoning sounds odd since foreign countries are not subject to ECHR and there is no question of allowing them margin of appreciation. One has to judge whether or not there will be a breach of ECHR in expulsion context, by applying Western Standards.

3.9 Restrictions on using human rights arguments before courts

One of the great innovations of the HRA98 regime is to provide foreign migrants a right to appeal to an immigration judge on human rights grounds if they are facing expulsion or exclusion. However, the Home Office often use some statutory provisions to deny applicants from raising human rights arguments by way of appeal.

Section 94 of the Nationality, Immigration and Asylum Act 2002 confers power on the Secretary of the State (SOS) to certify any human rights/asylum claims from persons who have a right to reside in certain countries as ‘clearly unfounded’. The effect of such certification is that applicants will lose their in-country right of appeal. These countries are known as Non-suspensive Appeal countries and are regarded as ‘generally safe’.

²²³ [2003] EWCA Civ 701.

The list of these NSA countries is commonly referred to as 'white list' and the 2002 Act has drawn an implied statutory presumption that these countries are safe and the problems faced by people there do not merit a case with in the Refugee Convention or the ECHR. S. 94 also contain broad power, which entitles the SOS to certify any case as 'clearly unfounded' regardless of the country of origin of the applicant.

It was originally thought that the certification will only be used in cases based on Art.3, since it was meant to cover the so called 'safe countries'. However, since the SOS has wider power to certify any claims irrespective of the origin of the claimant, Home Office have started to certify Art.8 based claims where the applicant has established family and/or private life in the UK. Unlike in asylum cases, where claimants are interviewed by Home Office, often, such certificate is issued in Art.8 cases, without interviewing the applicant. This researcher was involved with a Chinese applicant who came to the UK in 1997 and claimed asylum, which was refused and he lost his appeal in 2000. However, he stayed. After he was detained in 2010 and the Home Office sought to remove him. This researcher pointed out since the applicant's application and appeal were disposed of before the HRA98 coming into force in October 2000, arguably he still had a human rights claim pending. Since he had spent 13 years in the UK he must have established a family/private life in the UK. The Home Office responded with the issue of a certificate without even asking the applicant to elaborate or to give evidence of his life in the UK.

In *R (on the application of Zakir Husan) v. SSHD*²²⁴, the Administrative Court has found that listing Bangladesh as a safe country and treating it as NSA was unlawful since no rational decision maker could have been satisfied that there was in general in Bangladesh no serious risk of persecution. The case is significant in the sense that the court here declared a secondary legislation as incompatible with the Convention.

Following the decision of *Husan*, the government removed Bangladesh from the NSA-list. However, in dealing with human rights cases from Bangladeshi applicants, the SOS then relied on his additional power under the 2002 Act to certify their claims. In effect, the removal of Bangladesh from the list has not changed the situation that much. In the same

²²⁴ [2005] EWHC 189 (Admin).

way, although Sri Lanka was included in the safe list, it was later withdrawn, and still applicants from Sri Lanka can receive certificate.

The Court of Appeal had the opportunity to provide an interpretation to the term 'clearly unfounded' in *ZL & VL v. SSHD and LCD*²²⁵, a case involving Oakington detainees. The court held that the test of whether a claim was 'clearly unfounded' was an objective one. The decision maker would (i) consider the factual substance and detail of the claim; (ii) consider how it stood with the known background data; (iii) consider whether in the round it was capable of belief; (iv) if not, consider whether some part of it was capable of belief; (v) consider whether, if eventually believed in whole or in part, it was capable of coming within the Convention. Only if the answers were such that the claim could not on any legitimate view succeed, would it be clearly unfounded.

The courts have further upheld these principles of certification in cases of *Koci v. The Secretary of State for the Home Department*²²⁶ and *R (on the application of Nezir Koceku) v. The Secretary of State for the Home Department*²²⁷. Both these cases dealt with blood-feuds in Albania.

If a case is certified then the only remedy is to ask for a judicial review and have the certificate lifted. In *R v SSHD ex parte Thangarasa and ex parte Yogathas*²²⁸, the House of Lords held that in the case for issuing a certificate of unfoundedness, the Home Secretary must carefully consider the allegation of the breach of human rights, the grounds on which it is made and any material consideration on which reliance was placed. However, his consideration does not involve a 'full-blown' merits review. It is like a screening process to determine whether the applicant should be sent to another country or whether there appear to be human rights arguments which merit full consideration in the UK before his removal.

In *ZT (Kosovo) v. SSHD*²²⁹, the House of Lords held that the Administrative Court while reviewing a 'clearly unfounded' certificate must (a) ask the question which an immigration

²²⁵ [2003] EWCA Civ 25; ILD (Vol 9 No 2) 6.

²²⁶ [2003] EWCA Civ 1507.

²²⁷ [2003] EWHC 2063 (Admin).

²²⁸ [2002] UKHL 36.

²²⁹ [2009] UKHL 6.

judge would ask about the claim and (b) ask itself whether on any legitimate view of the law and the facts any of those questions might be answered in the claimants favour.

S.120 requires an applicant who has made an application to enter or remain in the UK or against whom an immigration decision is made to furnish any additional grounds on which he wishes to rely to prevent his removal from the UK. This is known as the 'one stop notice'. So if he has human rights issues, he should raise them at that time. A failure to do so may be fatal, as he may not be allowed to raise the issues later.

S.96 gives the Secretary of State or an immigration officer the power to certify that a ground relied on by the applicant is one, which he should have included in a statement, which he was required to make under S. 120. The implication of such certification is that the applicant may not bring or continue with an appeal. So for example, if an applicant is facing deportation to his country of origin, and in his deportation appeal does not mention that he has a partner and children in the UK, thus showing a family life, if wants to rely on these later by way of representations, he risks certification under S.96.

If the Secretary of state wants to certify an applicant's asylum claim he should also certify his human rights claim or vice versa. Otherwise, he may have a right of appeal in respect of his uncertified claim. This is clear from an earlier decision in *R (on the app. of Aleksejs Zenovics) v. SSHD*²³⁰. The Court of Appeal held that an asylum and human rights appeal is one appeal on two grounds (asylum and human rights) against one administrative decision (exclusion/removal). If the asylum claim is certified, the applicant can still proceed with his human rights claim to the Tribunal.

If a case has been certified, the courts have no jurisdiction to deal with appeal until the applicant is physically removed from the UK. In *Ryszard Pawlak v. SSHD*²³¹ the appellant, a former detainee at Oakington was removed to his country Poland, a country in the white list, since his case was 'clearly unfounded'. Following the lodging of his appeal by his legal representatives, the appellant returned to the UK to attend his appeal. It was held that he lost his right of appeal as he had returned to the UK.

²³⁰ [2002] EWCA Civ 273.

²³¹ (2003) IAS Update Vol.6, No.12, 12.

The changes brought about by the 2002 Act in the form of NSA cases have serious consequences for both the applicants and the practitioners. First of all, it deprives applicants of their right of appeal while remaining in the UK. They can of course appeal from outside the country. Secondly, since they have no right of an in-country appeal, they will be removed as soon as possible from the UK. The Home Office has recently decided that if they certify a case as ‘clearly unfounded’ and then issue an applicant with removal directions, nothing short of an injunction from the High Court can stop the removal. In these cases, simply lodging a judicial review petition will not change the outcome. Experience shows that very few applicants actually appeal from abroad.

3.10 Conclusion

Treating both the asylum claim and Art.3 human rights claim in the same way simply frustrates the whole purpose of the humanitarian protection. Before the incorporation of ECHR into the HRA98, it was thought that the ECHR should have offered a better protection than that of the Refugee Convention. The Refugee Convention was drafted after the World War II to deal with people displaced by war. However, the ECHR was meant to apply to everyone within the territory of a contracting state. Whereas under the Refugee Convention the applicant must face persecution for one of the five reasons, no such condition is required under the ECHR. The protection offered under the Refugee Convention is one of surrogacy; however, ECHR protection is based on humanitarian considerations and is real. Unlike the Refugee Convention, the ECHR does not have any exclusion clauses and no one is actually excluded from its protection. The ECHR considerations are subject to the rulings of a supranational court, the ECtHR. No such judicial body exists to guide the states about Refugee Convention. In fact, different countries have adopted different meaning to their obligations under the Refugee Convention. For example, unlike the UK, Germany and France did not recognise the concept of persecution by non-state agents and hence did not believe that *their* obligations under the Refugee Convention are engaged in these cases.²³² Since Art.3 has failed to offer the expected extra protection to the aliens, Art.8 has now assumed more of a significant role in expulsion cases.

²³² See the House of Lords decisions in *R v. SSHD ex parte Adan* and *R v. SSHD ex parte Aitsegeur* ILD (vol7 No 1) 3.

Chapter Four

Family Life and Immigration under UK Law

4.1 Introduction

Right to respect for family life under Art.8 is normally involved where there is a threat that a family will be split. This is a situation where a part of the family can stay in the UK, but other members are required to leave. It is often argued that if the entire family is liable to be removed then there is no breach of family life since the family is not split rather the whole family is moved to another country while keeping the family unit intact. However, we will also see that often there are reasons when although the entire family is liable to be removed but they are allowed in because of the interest of one or some members of the family or because the private life of the family as a whole makes their return disproportionate.

4.2 Family Life

The English Courts have more or less accepted the definition of ‘family life’ as developed by the ECtHR. In *Singh v. ECO New Delhi*²³³, the Court of Appeal accepted the wide and diverse nature of family life and stated that the ECtHR had never sought to identify the minimum requirements for the existence of family life since there were none. Law accepts a tolerant indulgence to cultural and religious diversity and adopts an essentially agnostic view of religious beliefs. “... *such is the diversity of forms that the family takes in contemporary society that it is impossible to define, or even to describe at anything less than almost encyclopaedic length, what is meant by “family life” for the purposes of Article 8.*” The Court observed that the existence or non-existence of ‘family life’ was essentially a question

²³³ [2004] EWCA Civ 1075.

of fact depending upon the real practical existence of close personal ties. This view is consistent with the Strasbourg authorities.

Berrehab received endorsement from the Tribunal in *Abdelhak Maiji v. SSHD*²³⁴ where it decided that in the absence of exceptional circumstances the natural parent/child relationship *ipso jure* gives rise to family life.

In *Navaratnam Kugathas v. SSHD*²³⁵, the Court of Appeal decided that while there was no geographical limitation, which required the members of a family to live in the same country, there had to be an irreducible minimum of ‘real’ or ‘committed’ and ‘effective support’ to constitute family life for the purposes of Art.8. There is no need to have economic dependency. Arden LJ accepted that family life was not established between an adult child and his surviving parent or other siblings unless something more existed than normal emotional ties. However, it is not essential that the members of the family should be in the same country, although if they were not, that would probably be exceptional.

In *Nadarajah Senthuran v. SSHD*²³⁶ the Court of Appeal decided that in determining whether family life exists for the purposes of Art.8 between adult siblings, each case would turn on its own facts.

Immigration Rules do make provisions for a British citizen or someone settled in the UK to sponsor their spouse and under age children to join them. There are also provisions for bringing in elderly parents and other relatives who are living alone in exceptional compassionate circumstances.

4.3 Family Life and proportionality – indirect breach

Although in majority of the cases, applicants would allege a direct breach of their Art.8 rights, it is also possible that in a minority of cases, indirect breach can be successfully asserted. The House of Lords decision in *EM (Lebanon) v. SSHD*²³⁷ showed that in appropriate cases, breaches which may take place abroad can also be pleaded before English

²³⁴ (2001) (01/TH/1352.).

²³⁵ [2003] EWCA Civ 31.,.

²³⁶ [2004] EWCA Civ 950,

²³⁷ {2008} UKHL 64.

Courts. However, following the rationale of *Ullah*, the Court stipulated that in such cases, the breach of Art.8 has to be flagrant. Here a Lebanese national came to the UK with her minor son. She had to go through a violent marriage and later obtained a divorce. Under Lebanese Sharia law, the legal guardianship of the child remained with the father. The Court in Lebanon allowed her custody for seven years and after that the son was supposed to return to the father's family. The House of Lords held that although she might have a right of visitation, there will be a flagrant denial of her Art.8 family rights with her son.

4.4 Family Life and proportionality – direct breach

Often it is the case that an appellant enters the UK illegally or after entering legally becomes an overstayer, he then gets involved with someone settled in the UK. The relationship may even produce children. Art.8 is often pleaded when the applicant in these circumstances face removal on the ground that removal will interfere with his family life. However, the typical Home Office response is since the applicant can qualify under the immigration rules to seek entry, as a spouse/partner there is no interference. The applicant is expected to leave the UK and apply for entry clearance through normal channel and will not be allowed to circumvent the immigration rules. Will interference in these cases be proportionate?

In *R v. SSHD ex parte Mahmood*²³⁸ the Court of Appeal demonstrated the judicial approach in weighing the rights of the applicant under Art.8(1) against the public interest elements of Art.8(2). The applicant was a Pakistani national who entered the UK clandestinely and claimed asylum, which was refused. He got married to a British citizen and sought leave to remain as her spouse. This was refused and he was required to leave the UK. His wife in the meantime gave birth to two children and the applicant claimed that his expulsion would breach his family life under Art.8.

Lord Phillips MR gave the following formulation of Art.8. This is mainly in the context of maintaining effective immigration control.

- (1) A State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.

²³⁸ [2001] 1 WLR 840, esp. para.55.

- (2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.
- (3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Art.8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.
- (4) Art.8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.
- (5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Art.8.
- (6) Whether interference with family rights is justified in the interests of controlling immigration will depend on
 - (i) the facts of the particular case and
 - (ii) the circumstances prevailing in the State whose action is impugned.

Commenting on the *Mahmood* guidelines, the Tribunal in *SSHD v. Bakir*²³⁹ pointed out that although the guidelines were helpful, other members of the court (Laws and May LJ) did not adopt these conclusions. The test to be applied is whether in all the circumstances it is ‘reasonable’ to require the family members of the applicant to leave the country; in other words, whether the interference is proportional.

The straightforward application of *Mahmood* principles can be found in *R (on the app. of Surinder Singh) v. SSHD*²⁴⁰. The applicant, an Indian national came to the UK and claimed asylum which was refused. He later married a Malaysian citizen who had been living in the UK since the age of 14. She had three children born in the UK from a previous marriage. She had never been to India. At the time of her marriage she was aware of his immigration status. The court held that since the family could move to India there were no insurmountable obstacles; it would have been different if the family members were not allowed to enter there. The applicant could go back and apply for entry clearance. The fact that there were practical

²³⁹ [2002] UKIAT 01176.

²⁴⁰ [2003] EWHC 248 Admin..

difficulties in securing entry clearance since the wife could not satisfy the maintenance requirements did not amount to insurmountable obstacle. Any interference with Art.8 arose from the couple's own choice to marry despite the precarious immigration status of the applicant and it did not result from any direct interference by the state. Once again a strange logic was employed by the court. It is the decision to remove the applicant, which interfered with Art.8 not their decision to get married.

Similar decision was reached in *Desmond Osariemen Omoruyi v. SSHD*.²⁴¹ The applicant resided in the UK for 6 years, bought his own house, studied for a law degree and formed relationship with a British citizen. The Tribunal held that the applicant's girlfriend must have known about the applicant's precarious immigration status when she embarked upon that relationship. There were no insurmountable obstacles to her joining the applicant in Nigeria, or he could apply for entry clearance.

The same principles apply where the family life does not involve spousal relationship. In *NS*²⁴², the applicant's two daughters had preceded her to the UK and one was granted asylum and the other ELR (exceptional leave to remain). When the applicant arrived her asylum claim was refused. The Tribunal refused to accept that removal would interfere disproportionately with the family life that the applicant enjoyed with her daughters in the UK. The focus had to be on the effect of removal on the appellant rather than on her daughters. The relationship was not one of unusual dependency. Since the circumstances have changed in Sri Lanka, the daughters could move back there with their mother, or at least keep in contact with her there.

Further in *Morena Zeqaj v. SSHD*²⁴³ the Tribunal held that where an applicant had established family life with close relatives in the UK, the crucial question was whether there were 'insurmountable obstacles' to those relatives returning to their country of origin with the applicant.

It should be noted that insurmountable obstacles for the family to accompany the expelled applicant to his country of origin includes whether or not they would face persecution or

²⁴¹ [2002] UKIAT 05296.

²⁴² [2005] UKIAT 00081.

²⁴³ [2002] UKIAT 07566..

breach of Art.3 rights, whether they will be allowed in by the receiving country. In *R(ota R) v. SSHD*²⁴⁴ it was held that the removal of a failed asylum seeker was disproportionate where his family seeking asylum remained in the UK.

However, later cases moved from the ‘concept of insurmountable obstacles’ to whether it is ‘reasonable’ to expect the British members of the family to relocate with the removed family member. In the House of Lords decision in *Huang and Kashmiri v. SSHD*²⁴⁵ where their Lordships thought:

“20. In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8.”

Following this judgment many successful cases were made on the grounds that where the British partner is born or brought up in the UK and has little knowledge of the country of the applicant, especially when he/she does not even speak the local language, is it reasonable to expect the British partner to follow the expelled applicant to the latter’s country?

Mahmood principles are not confined to spouse cases. In *R (on the app. of Khadija Doka) v. IAT, SSHD as interested party*²⁴⁶, a Sudanese applicant, aged 65 had been living in the UK with her daughter who had refugee status and five grandchildren. She was in regular contact with her son and two stepchildren who were also refugees from Sudan. The court found that her Art.8 claim was much stronger since she was enjoying family life with her children and grandchildren in the UK, who could not be expected to return to the Sudan with her, having been granted asylum due to a well-founded fear in Sudan. This presented an ‘insurmountable obstacle’, in *Mahmood* terms, to the family living together in the country of origin. There was also evidence that the applicant would not be able to open a bank account in Sudan so as to enable her relatives here to prevent her from becoming destitute by sending remittances.

²⁴⁴ Unreported Gage J, 24 October 2000.

²⁴⁵ [2007] UKHL 11.

²⁴⁶ [2004] EWHC 3072 Admin.

In the proportionality exercise, the Courts consider a number of factors, such as the character of the applicant, criminal acts, abuse of the asylum system, strengths of the family ties etc as factors that may be weighed. In *Maiji* the Tribunal decided that one relevant factor to be weighed was the extent of the excluded parent's responsibility for failure to take steps to gain access to or contact the child. The applicant separated from his wife when she was pregnant and only saw the child twice in 7 years. The Tribunal accepted that regardless of how little contact he had with his wife and child, there was a natural parent/child relationship between him and his son, and therefore a family life within the meaning of *Berrehab*. However, the decision to remove him was not disproportionate since his relationship with his son was one with little or no substance. If his tie with his son was so important, he could have taken some steps to gain access or contact.

In *R (on the app. of Renford Johnson) v. SSHD*²⁴⁷, the Administrative Court decided that while family life ties between siblings would often count for much less than those between spouses or between parents and children, each case must be considered on its own facts. In assessing proportionality, the age of the person facing removal is an important factor. The need to uphold immigration law will be greater in a case where the person has intentionally and dishonestly flouted it, than where he has acted honestly and attempted to comply with the law.

4.5 Family life and criminal offence

When an applicant is facing removal because he has committed an offence, proportionality exercise will include, the seriousness of the offence, the likelihood of re-offending and the need to use removal as a deterrent. In *Antonio Cioffo v. SSHD*²⁴⁸, the applicant, an Italian had British wife and two children. He was convicted of blackmailing and sentenced to 13 years imprisonment. He faced deportation. The Tribunal held that the balancing exercise was to be conducted by weighing the requirements for the prevention of crime and disorder against the interference with the right to family life. The applicant had two boys aged 13 and 8 both born and brought up in the UK and unable to speak Italian. The applicant's wife had stuck by him throughout his conviction and prison sentence and had described him as a good hardworking

²⁴⁷ [2004] EWHC 1550 Admin.,

²⁴⁸ IAT 22 March 2001 (2001) *ILD* (Vol.7, No.4) 22.

husband who had supported the family. Although blackmail was a serious crime, there had been no suggestions that, like drugs there was an epidemic of blackmail, which needed to be discouraged. The Tribunal found that by a significant margin the balance came down in favour of the applicant's right to respect for his private and family life. Accordingly deportation would not be appropriate to the legitimate aim pursued.

In *R (Samaroo) v. SSHD*²⁴⁹, the applicant was convicted of a drug offence and was facing deportation. He pleaded Art.8. Dyson LJ held that in deciding what the proportionality test required the issue should be approached in two separate stages. At the first stage, the question is: could the objective of the measure be achieved by means which were less interfering of an individual's rights? At the second stage the question is: did the measure have an excessive or disproportionate effect on the interests of affected persons? Where the legitimate aim could not be achieved by alternative means less interfering with a Convention right, the task of a decision maker was to strike a fair balance between the legitimate aim on the one hand and the affected person's Convention rights on the other. The Secretary of State has to show that he has struck a fair balance between the individual's Art8 rights and the prevention of crime and disorder. How much weight he gives to each factor will be the subject of careful scrutiny by the court. The Court would interfere if, despite an allowance for the appropriate margin of discretion, it concluded that the weight accorded was unfair and unreasonable. Here the Home Secretary was entitled to regard class A-drug trafficking offence as very serious and as such the interference was justified.

4.6 Third Party Interest

In assessing an applicant's right under Art.8 are the courts required to consider the rights of others? For example, the rights of close family members? What is the effect of an applicant's expulsion on others? However, law in this regard is not quite settled.

In *Kehinde v. SSHD*²⁵⁰ the applicant argued that the court was bound to consider not only the rights of the applicant, who was the subject of an immigration decision but his British spouse as well. The Tribunal decided that an appeal on human rights grounds against any decision which would cause the subject to be removed from the UK is an appeal against a decision

²⁴⁹ Court of Appeal 17 July 2001, (2001) *ILD* (Vol.7 No.4) 18.

²⁵⁰ (2001) (01/TH/02668).

relating to the applicant's entitlement to enter or remain in the UK and as such only his human rights can be pleaded. There is no obligation for the courts to take into account the human rights of individuals other than the applicant who are not themselves subject of a decision which is under appeal.

However, in *Met Sula v. SSHD*²⁵¹ the Tribunal stated that where the only appeal before the adjudicator is that of the appellant, that does not mean that the human rights of his dependants are irrelevant to his human rights appeal. The duty imposed by s.6(1) of the HRA98 on a public authority not to act in a way which is incompatible with a Convention right is not confined to the Convention rights of an appellant. It is essential that the relevant decision-maker including immigration authority, adjudicator or Tribunal, "*take account of the human rights not only of the appellant but also of any other persons who stand to be directly affected by the decision made against the appellant.*" (Para.71). In that case, the applicant and his dependants were from Yugoslavia. The adjudicator upheld the removal decision against the husband whilst accepting that it would be contrary to the wife's human rights under Art.3 to remove her as she was brutally raped by Serbs and was now a traumatised individual. The Tribunal concluded that having found that the return of the applicant's wife would violate her Art.3 rights, the adjudicator should have considered both Arts.3&8 so as to determine whether the perceived serious harm would lead to the applicant's treatment contrary to Art.3 or a disproportionate interference with his right to respect for family life.

In *SSHD v Beqiri*²⁵² the Tribunal clarified that *Kehinde* does not mean that the human rights of others affected by the decision were irrelevant if it impinged on the human rights of the appellant himself. Also *Kehinde* did not exclude the need for a global assessment of a person's circumstances insofar as they concerned his private and family life relationships.

However, in *AC*²⁵³, the Tribunal decided that in a human rights appeal, only the rights of the applicant would be considered. The effects of the appellant's removal upon another member of her family who is not a party to the appeal are to be taken into account, but only insofar as they impact upon the appellant herself.

²⁵¹ [2002] UKIAT 00295.

²⁵² [2002] UKIAT 00725.

²⁵³ [2004] UKIAT 00122.

Then in *Baah* the Tribunal decided that while it is not possible to take into account the human rights of individuals other than the applicant, it may also not be possible to exclude the lives of close family members from the consideration of the applicant's private and family life under Art.8.

So in *SSHD v. Alban Krasniqi*²⁵⁴, the applicant, a Kosovan, met a girl in the UK and started living together after she gave birth to their child. The Tribunal applying *Mahmood* found that the applicant's return to Kosovo would breach Art.8. The Tribunal focussed on the possible detrimental effect of the removal of the new born child. The Tribunal identified the inadequacy of shelters available in Kosovo in conditions, which were not always suitable for a normal family life. The Tribunal held that, if in any particular case it would be unreasonable to expect a small child to go to live in a situation which might be, though unpleasant, possible for adults, that could establish a breach of Art.8. The Tribunal here treated the child's situation as determinative.

In *Astrit Hasani v. SSHD*²⁵⁵ the Tribunal decided that in considering the human rights of the appellant the appellate authority must also consider the human rights of any dependents.

However, a restrictive attitude was taken in *SO*²⁵⁶. The Tribunal decided that in considering the rights under Art.8, the focus should be on the appellant's own private life, rather than on speculation about the impact of his removal on third parties. In that case, surprisingly, the Tribunal was willing to leave the 'balancing exercise' with the Secretary of State. The appellant, who was from Nigeria built up his own successful business in the UK from scratch. The business employed 16 people and it was argued that his removal would result in the loss of 16 jobs. However, the Tribunal held that this argument attracted little weight in an Art.8 claim, if any at all. It was outside the adjudicator's jurisdiction to consider the overall economic welfare of the country and the need to maintain employment which lay squarely within the discretion of the Secretary of State, acting on behalf of the community as a whole. It was for the Home Secretary to weigh the economic benefit, which his activities might bring to the UK.

²⁵⁴ [2002] UKIAT 00231..

²⁵⁵ [2002] UKIAT 03469.

²⁵⁶ [2005] UKAIT 135.

Finally the House of Lords in *Beoku-Betts v. SSHD*²⁵⁷ made it clear how important it is for the Home Office and the Appellant authority to take into account the rights of the other family members. The applicant was from Sierra Leone. His family was politically influential there and had to suffer due to the change of the government. Most members of his family were settled in the UK. He came originally as a student and later claimed asylum. The Court said that there is only one family life in the case and the Art.8 rights of the other family members has to be considered, otherwise an aggrieved family member can bring a separate human rights proceeding under s.7 of the HRA98. This is contrary to the Home Office's policy of 'one stop' appeal.

4.7 Proportionality and Problems with Entry Clearance

As mentioned earlier that the English Courts take the position that since the immigration rules are designed to strike a balance between individual and the community interests, removal of an applicant who can qualify under the rules to seek entry through entry clearance, is proportionate.

It is also clear from *Surinder Singh* that the fact that applicant cannot meet part of the requirements of the rules (in that case, the requirements of not relying on public funds) is no bar against removal. However, what will happen if the applicant, despite meeting all the requirements of immigration rules, for reasons beyond his control cannot apply through the normal channel, will removal in these circumstances be proportional?

In *Yohannes Kidane v. SSHD*²⁵⁸, the applicant was from Eritrea. After his asylum claim was refused he married an Ethiopian lady settled in the UK. Applying *Mahmood*, the couple would have been aware that the applicant's immigration status was precarious, and although there might have been an insurmountable obstacle to his wife, as an Ethiopian, joining him in Eritrea due to the Eritrean-Ethiopian conflict, the applicant could nevertheless apply for entry clearance as a spouse to return to the UK. However, there was no entry clearance facility in Eritrea. He could travel to Sudan and apply at the British Embassy there. Further, the applicant would be expected to complete his military service in Eritrea upon return. As a

²⁵⁷ [2008] UKHL 39.

²⁵⁸ [2002] UKIAT 04814..

result of the military service, he might not be able to travel to Sudan and apply for entry clearance for a very long time. Although the Tribunal accepted that the applicant did not face persecution or human rights abuses on return, it held that the long separation from his wife would be a disproportionate interference with his family life.

In *KJ*²⁵⁹, the applicant was a failed Kurdish asylum seeker who was enjoying family life in the UK with his British wife and stepdaughters. He argued that it would disproportionately interfere with his family life if he were required to return to Iraq and travel from there to the British Embassy in Jordan to seek entry clearance as a spouse. The Tribunal found that the travel route from Iraq to Jordan was dangerous due to insurgency and accepted that it would be disproportionate to expect him to travel to Amman in order to apply for entry clearance.

Similarly in *EH*²⁶⁰ a Palestinian Iraqi who had a relationship with a British woman, had his application refused by the Home Office. Although the applicant had good chance of making a successful application for entry clearance to come to the UK as a spouse, the Tribunal found that the Home Secretary could not show that the public interest in maintaining an effective system of immigration control could be served by requiring him to make that application. There were no visa facilities in Iraq and it would have been difficult for him to travel to Jordan and apply for visa. It was not the case here that the applicant would be allowed to jump the queue rather, there was no queue for him to jump. The assessment of proportionality under Art.8 might differ if removal would prevent an application being made. If it was the Secretary of State's contention that the interests of immigration control required the applicant to make an application for entry clearance in his country of habitual residence, it was implicit that the Foreign and Commonwealth Office would provide the facility to do that. The force of the interest of immigration control in an orderly system of entry clearance was weakened where no application could practicably be made.

In *PG*²⁶¹, the Tribunal decided that Art.8 should not be used to circumvent provisions of Immigration Rules, which were designed to strike a fair balance for example, between the right of a father to exercise rights of access to his child and the wider interest of maintaining immigration control, which included protecting the state and the taxpayer from being

²⁵⁹ [2005] UKIAT 00066,

²⁶⁰ [2005] UKIAT 00062,

²⁶¹ [2004] UKIAT 00255,.

overburdened by applicants who could not maintain and accommodate themselves. The applicant was an Albanian Kosovar who formed a relationship with a British citizen and a daughter was born. However, the couple later separated acrimoniously and the applicant had to obtain a contact order from the court to secure regular contact with his daughter. There was a danger that he would lose contact with his daughter if returned to Kosovo. His ex-girlfriend would not bring the child to see him there. Although in theory he could apply under paragraph 246 of HC 395 for entry clearance in order to exercise rights of access, in practical terms he would lack the wherewithal to come back to the UK, and to maintain and accommodate himself here. Relying on *Mahmood*, which held that an application for entry clearance might fail was no reason to excuse someone who was in the UK without leave from making it, the Tribunal decided that the decision to remove the applicant was a fair one. The Tribunal emphasised on the fact that where there was a viable option of applying under the Immigration Rules, it was likely to be extremely rare for an applicant to succeed under the ECHR, although likely to fail under the Rules.

4.8 Family Life and Entry Clearance

In Chapter 2 and 3 we have seen that ECHR can be applicable even outside the UK. ECtHR in a number of cases starting from *Abdelaziz, Sen* recognised that Art.8 can be relied upon in entry clearance cases.

English Courts have also accepted that in appropriate cases, human rights arguments can be advanced in entry clearance applications. For example in *R (on the application of Farrakhan) v. SSHDI*²⁶² the controversial preacher of Nation of Islam of USA was denied a visa to come to the UK to preach. The Court found that Art.10 – freedom of expression was engaged.

English Courts have also recognised the use of Art.8 in entry clearance applications, however their approach in this case appears to be limited then *Sen*. Under Ss 82 and 84 of the Nationality, Immigration and Asylum Act 2002 refusal of entry clearance may be challenged by way of appeal on human rights grounds. However in *Rev Sun Myung Moon v. ECO Seoul*²⁶³ the Tribunal suggested that it was a mistake by the Parliament. A number of Tribunal

²⁶² [2001] EWHC (Admin) 781.

²⁶³ [2005] UKIAT 00112 para.56.

decisions suggested that human rights do not apply to entry clearance cases. However, there are also cases, which suggest that it does apply.

In both *Singh v. ECO New Delhi*²⁶⁴ and *Shamim Box v. ECO Dhaka*²⁶⁵ it was held that Art.8 human rights arguments are applicable in entry clearance cases. In *Singh*, the appellant was a boy of 6 who was adopted in India by a British family. However, that adoption was not recognised under English Law. The Court held that there were substantial links between the appellant and his adoptive parents which would give rise to family life. Further the adoption although not recognised under English law, was a further factor which militated in favour of family life. In *Shamim Box*, the Tribunal decided that in entry clearance applications human rights issues should be approached in terms of the UK's positive obligations to facilitate family reunion. Article 8 questions should not be treated as one whether there has been an unjustified interference with the right to respect for private and family life. They should rather be treated as one of whether there has been an unjustified lack of respect for private and family life. The focus therefore should be whether in light of the positive obligation on UK to facilitate family reunion, there has been a failure to act in the particular circumstances of the case.

In *SS* (ECO –Article 8) Malaysia*²⁶⁶ the Tribunal decided that the protection of UK human rights law did not extend to those outside the territory of the UK and that Art.8 can only be used in entry cases by way of special extension and relying on the existence of family members in the UK. This case endorsed the earlier decision of *H (Somalia)*²⁶⁷. These two cases stand for the proposition that if close family members are already settled in the UK, and the overseas applicant wants to join them, there could be Art.8 issues.

Rule 2 of the Immigration Rules HC 395 now obliges the entry clearance officers, like the Home Office staff to take an entry clearance decision in compliance with the HRA98.

Even if requirements for entry clearance or leave to remain are contained in Immigration Rules, they can still be regarded as incompatible with Art.8. The Supreme Court in *Quila and*

²⁶⁴ [2004] EWCA Civ 1075

²⁶⁵ [2003] UKIAT 02212

²⁶⁶ [2004] UKIAT 00091

²⁶⁷ [2004] UKAIT 00027

*Bibi v. SSHDI*²⁶⁸ declared that immigration rule requiring both the spouses to be over 21 for marriage application was a violation of Art.8. The purpose behind the introduction of this rule was to tackle forced marriages – a purpose accepted by the Court to be legitimate. However, the means that was adopted, namely a blanket ban on all couples under the age of 21 was disproportionate and unnecessary since it would affect many genuine couples.

4.9 Home Office Delay or Error

When considering the proportionality of a decision to expel an applicant from the UK, serious delay or an error by the Home Office will count in the applicant's favour. Two arguments may follow from this. Firstly, it was because of Home Office's failure that the applicant has accrued his Art.8 relationships and rights. Secondly, if the enforcement of immigration control were so important as a matter of public policy, the Home Office would take it more seriously and not permit delays and errors to occur.

The first argument featured in *SSHD v. Sukhjit Gill*²⁶⁹. In that case the applicant entered the UK as a visitor and stayed for 12 years. The Tribunal concluded, “... *the delay which has accompanied the decision making process in this case is a relevant factor, playing its part in the length of time the respondent has been in this country and the building up of close relationships here.*”

Both the arguments appeared in *Oghenekaro v. SSHD*²⁷⁰. The Tribunal observed, “*Although the appellant may well have hoped, as others might on the basis of her case, to gain permanent residence by lying low for as long as possible, she could not have done so without the Home Office enforcement system being seriously ineffective. If they had been properly concerned with maintaining an effective system, they could have taken enforcement action against her at latest when they refused her fraudulent asylum application, instead of waiting till she made the one for indefinite leave to remain, which was at least based on a genuine relationship with her children.*” The Tribunal concluded that if the Home Office are seriously interested in deterring overstaying, it is in the first place up to them to take enforcement action as soon as possible.

²⁶⁸ [2011] UKSC 45.

²⁶⁹ (2001) (01/TH/02884).

²⁷⁰ (2000) (00/TH/00682).

In *Arben Shala v. SSHD*²⁷¹ the Court of Appeal held that 4-years' of Home Office delay, which led almost inevitably, to the forming of a strong family and private life in the UK in that time, rendered it disproportionate to require the applicant to return to Kosovo and apply for entry clearance, particularly as the applicant would have been entitled to status in the UK had his claim been assessed in a timely manner.

The promise that was shown in *Shala* was restricted by subsequent decisions. This is partly due to the fact that *Shala* became very popular with the practitioners and was widely cited. In *R (on the application of Ekinici) v. SSHD*²⁷² the Court of Appeal declared that the circumstances of *Shala* were somewhat exceptional.

Further in *J (Serbia and Montenegro) v. SSHD*²⁷³ the Tribunal placed a strong bar on *Shala* by declaring that *Shala* should be limited to cases with almost identical facts. The Tribunal stated that the *Shala* point could be extended to apply to close family relationships other than marriage. It considered that *Shala* covered delay underpinned by special or exceptional circumstances, as in that case:

- a) the applicant had a legitimate claim to enter at the time when, on any reasonable basis, his claim should have been determined;
- b) had his asylum application been dealt with reasonably efficiently, he would have been likely to have obtained at least ELR;
- c) his private or family life had only become significantly established as a result of the time spent by him in the UK where he formed a relationship. Accordingly possession of ELR, if it had been granted when it should have been would thereby have given him the ability to apply from within the UK for a variation of leave on the grounds of his relationship.

The appellant in *J* arrived with his wife and children and applied for asylum, which was refused after two years. The Tribunal decided that unreasonable period of delay in deciding an application was a relevant factor, if not a decisive or even a major one, in conducting the balancing exercise. It was not a factor to be weighed in favour of the individual whose Art.8

²⁷¹ [2003] EWCA Civ 233.

²⁷² [2003] EWCA Civ 765.

²⁷³ [2004] UKIAT 00016.

rights were asserted, but rather a factor varying the weight to be placed on the interests of the state in maintaining effective immigration control. Where delay was attributable to the Secretary of State rather than to the applicant, the interest of the state in maintaining effective immigration control would be assessed as less strong than where it had sought enforcement speedily. But such delay would have to be quite excessive to make a difference. Because of the high volume of asylum applications which the Home Office had had to deal with in the past decade or so, even a delay of several years might not be excessive, unless accompanied by other special circumstances disclosing particular prejudice to the applicant.

However, in *Jananin and Musanovic v. SSHD*²⁷⁴ the Court of Appeal followed a similar but less restrictive approach. Wall LJ held that in *Shala* the delay of the Home Office, had deprived the applicant from making an application from the UK. This was an unjust and disproportionate interference of the applicant's Art.8 rights. He accepted that there is room for argument in favour of the applicant where delay in dealing with applications and the consequential length of time that an applicant stays in the UK (a) goes to establish family and/or private life within the UK and (b) renders the decision to remove a disproportionate interference with it.

Again in *Senthuran* the Court of Appeal held that if the Secretary of State takes an unreasonable time, which in the case was four years, to decide an asylum application that is a factor to be taken into account in the Art.8 balancing exercise.

In an extraordinary decision in *R (on the app. of Islam Shahid) v. SSHD*²⁷⁵ it was held that a Pakistani applicant who had been in the UK for more than 10 years partly due to the inaction of the Home Office had established family life although he had neither spouse nor children.

Shala again appeared in *R (on the app. of Mthokozisi) v. SSHD*²⁷⁶. The applicant came to the UK as a 13-year unaccompanied asylum-seeking child. It took Home Office 4 years to reject his claim on credibility grounds. As a result of the unexplained and apparently inexplicable delay he was not granted ELR while he was a minor. The Asylum Policy Instructions expect an unaccompanied child's application to be dealt with within 6 months and that if the asylum

²⁷⁴ [2004] EWCA Civ 448.

²⁷⁵ [2004] EWHC 2550 (Admin).

²⁷⁶ [2004] EWHC 2964 Admin..

is refused and no satisfactory reception arrangements can be made there is a presumption that ELR to be granted. As a consequence of not being granted ELR in line with this policy, the applicant lost the opportunity of applying for ILR, which would probably have been granted. The court compared this case with *Shala*. and held that the latter case had some distinguishable features. In *Shala*, the applicant had a legitimate claim to enter the UK as a refugee at the time when his application should have been determined, whereas in this case the applicant had not been found credible, at no time he had a legitimate claim to enter the UK. Also in *Shala*, the applicant had established family life in the UK within the terms of Art.8, which was not the case here. The court accepted that in general interference with private life would not weigh as heavily in the balance as interference with family life. However, in the instant case, there was obvious unfairness to the applicant in losing both ELR and the likelihood of obtaining ILR as a result of the Secretary of State's failure to determine his application for over four years. Owen J defined the ambit of *Shala* as follows: "*Shala is authority for the wider proposition that when striking the balance between an applicant's rights under Article 8 and the legitimate objective of the proper maintenance of immigration control, the decision-maker must have regard to delay in determining an application for asylum and its consequences.*"

In *N (Kenya)*²⁷⁷ the applicant came to the UK with her minor child and claimed asylum, which was refused. By the time of the appeal she had already been in the UK for seven and a half years. The Tribunal noted that it was frequently invited by legal representatives to extend the scope of *Shala* and, by implication, punish the respondent Secretary of State for his delay by adding this delay to the factors weighing in favour of the applicant in the balancing exercise. The Tribunal would be very cautious about extending the principles in *Shala*. However, in the instant case, the factor of more than 7-years delay should have been taken into account by the adjudicator when performing the balancing exercise, since the Secretary of State's own policy was not to remove an applicant in such circumstances. In light of the Secretary of State's own policy in respect of long residence²⁷⁸, his other policy of maintaining fair and effective immigration control would be weakened in view of the substantial private and family life which the applicants had built up over eight years. It would be disproportionate to remove them now.

²⁷⁷ [2004] UKIAT 00008,.

²⁷⁸ There was a 7-year concession policy of the Home Office whereby if a person lived in the UK for 7-years with a minor child he might be eligible for ILR.

Later the Court of Appeal restricted the application of *Shala* principle further in *Strbac v. SSHD*²⁷⁹. The court held that delay by the Home Office in deciding an application may be a relevant factor in the assessment of proportionality, but it will not be determinative. *Shala* is not authority for a proposition that delay, which allows the establishment of private or family life in the UK, is enough on its own to render removal disproportionate.

Two weeks later the Court of Appeal in *SSHD v. Elizabeth Titilayo Akaeke*²⁸⁰ decided that unreasonable delay by the Home Office in taking a decision is a relevant factor in the assessment of proportionality, which may reduce the importance given in the balancing exercise to the public interest in maintaining an effective immigration policy. The court was of the opinion that delay was only relevant if it caused substantial prejudice to the claimant such as happened in *Shala*.

In *MB*²⁸¹, the Tribunal decided that delay in deciding an applicant's claim (in this case four years) may strengthen family and private life ties in the UK, but it is the effect of delay, rather than the delay itself, which might make a difference to the Art.8 assessment. The Tribunal held that delay in decision-making might cause an individual to lose specific advantages or opportunities which timely decision-making would have conferred. The effect of delay might also be to create circumstances, e.g. marriage or parenthood, which strengthens an individual's claim to a family life or to a private life through work, friendships, community ties, the need for medical treatment and a host of other considerations.

In *GS (Article 8 – public interest not a fixity)*²⁸², the Tribunal decided that the weight to be given to the public interest in maintaining an effective immigration control was not a fixity, but might be reduced in the special circumstances of a particular case. It was reasonably open to the adjudicator on the evidence, including lengthy delays in decision-making by the Home Office, to conclude that it was disproportionate for the appellant not to be granted further leave to remain. The appellant came as a 15-year old orphan and claimed asylum, which was refused after two years. He was however given ELR until his 18th birthday. Before that leave

²⁷⁹ [2005] EWCA Civ 848,

²⁸⁰ [2005] EWCA Civ 947.

²⁸¹ [2005] UKIAT 00092,

²⁸² [2005] UKIAT 121..

expired, he applied for further leave, which was not decided for another two and a half years. In the meantime, the appellant formed close ties with his foster parents and other friends. Eloquent tributes were paid to his personal and academic achievements by his tutors, employers and guardians. The tribunal accepted that the public side of the balance was not immutable. At a particularly vulnerable and formative period of his life, the effect of delay was to encourage him to integrate with the wider community.

Often delay in combination with other factors can give an applicant a right under Art.8. In *KL (Article 8 – Lekstaka – delay – near- misses) Serbia & Montenegro*²⁸³ the three year delay in deciding an asylum claim when the applicant established a family and private life was one of the deciding factors.

Delay by Home Office has not always tilted the balance in favour of the applicant. In *AA*²⁸⁴, the applicant was a Palestinian from Gaza. He claimed asylum and then converted to Christianity. The applicant feared persecution and ill-treatment on return as an apostate in addition to his fear of both the Palestinian and Israeli authorities, and of militant Islamic groups whose members he had betrayed. It took the Home Office six years to refuse his claim. As regard his Art.8 rights he had no family life to be interfered with. He only gained employment in the UK – his private life. The Tribunal held that while there had been real and untoward delay in processing his claim, the delay had not occasioned him any significant disadvantage, beyond uncertainty.

Inappropriate behaviour of the applicant may also be taken into consideration in the balancing process thus rendering delay an insignificant factor. In *MA*²⁸⁵, the applicant, a Pakistani national, had been coming on multiple-entry visas as a business visitor since 1989. He did not tell the immigration authorities that he had started a company here in which his wife was employed, that he had bought a house here, that his children were going to school here, and that to all intents and purposes his family were residing in the UK rather than in Pakistan. Held, although there was a three year delay, the interests of immigration control, which the applicant had attempted to thwart by deceiving the immigration authorities and not

²⁸³ [2007] UKAIT 00044.

²⁸⁴ [2005] UKIAT 00104.

²⁸⁵ [2005] UKIAT 00090.

abiding by his conditions as a visitor, outweighed his private and family life in the UK and *Shala* did not apply.

Abuse of the system may also be relevant, which may reduce the effect of delay. In *K (Russia)*²⁸⁶ the Tribunal decided that while delay by the Home Secretary in deciding an asylum claim may have allowed an applicant's long residence to be 'clocked up', where that asylum claim has been found to be false and the Art.8 claim would not have been possible at all without the false asylum claim, the position of the applicant will be considerably weakened. In carrying out the balancing exercise, adjudicators must consider the interest of the state in deterring abuse of the asylum system. In this case, there was a total delay of six years, in the meantime the asylum seeker married a fellow asylum seeker and had a child. Her asylum claim was found to be a complete fabrication and only merits she had were in her Art.8 claim. The Tribunal, however, missed the fundamental point – it was the delay by the Home Office, which allowed the family life to grow. Should there be a decision in time it would have been apparent that the asylum claim was a fabrication. However, the Tribunal instead wanted to use the decision to have deterrent effect on people who flawed the asylum system.

A similar decision was taken in *D (Croatia)*²⁸⁷ the applicant came to the UK as an *au pair* and later made an unsuccessful claim for asylum. After her appeal being dismissed the Home Office wrote to her twice that she must leave the UK immediately otherwise she would be committing a criminal offence. The applicant formed a relationship with a Croatian asylum seeker who later became British, married him and had a child. The applicant made representations on the basis of her cohabitation and marriage. The Home Secretary did not expect the applicant's husband to return to Croatia with her, but nevertheless considered that it would not constitute a disproportionate interference with her family life for the applicant to return to Croatia and seek entry clearance. The Tribunal agreed with him. The Tribunal held that in assessing the proportionality it would attach little weight to the appellant's long residence in the UK. Her resolve to stay on, in defiance of immigration laws, should not benefit her, nor should the failure by the Home Office to enforce removal, which was due to lack of resources.

²⁸⁶ [2004] UKIAT 00082.

²⁸⁷ [2004] UKIAT 00051.

In *HJ*²⁸⁸, the applicant arrived in the UK as a visitor in 1992, overstayed, and eventually was given ILR as the husband of a British citizen. He was sentenced to 5-years imprisonment for selling crack cocaine and also committed further offences of assault and criminal damage. The Home Secretary decided to deport him on ‘conducive’ grounds in 1998. His wife divorced him. However, 5-years elapsed before the Home Office got round to preparing an Explanatory Statement, without which, his appeal could not proceed. During this period, he had not got into any further trouble, but had established family life with another woman, who had borne his child. The applicant argued that by failing to take action for over 5-years, the Secretary of State had acquiesced in the applicant’s making a life for himself in the UK. The original purpose of deportation had vanished since it could no longer be regarded as conducive to the public good due to his good behaviour in the previous 5 year. The delay by the Home Office had been due to the file being misplaced because of ‘restructuring’ at Croydon. The Tribunal held that the maladministration did not amount to ‘acquiescence’ by the Secretary of State who had done nothing, either expressly or by implication, to indicate that the applicant’s immigration status had ceased to be anything but precarious, as the applicant had known since being notified that the Secretary of State was minded to make a deportation order. There was no estoppel that operated to prevent the Secretary of State from now relying on the factors on which he was able properly to rely in July 1998, nor was there any principle, at law or in equity, establishing that the applicant should benefit from an error or delay on the part of the Home Office. The applicant had not been prejudiced by the delay rather he had gained the advantage of a longer sojourn in the UK than would otherwise have been the case. Once again the Tribunal missed the fundamental point it is the delay itself which should be the issue and not what caused it.

Similarly in *SSHD v. Marian Vandi*²⁸⁹, the applicant’s long residence in the UK did not make her removal to Sierra Leone disproportionate under Art.8. It was held that the 5-year long delay in deciding the applicant’s application was due to the moratorium on deciding cases from Sierra Leone during the civil war and as such it was not open to an adjudicator to treat the interests of the state and wider community in the maintenance of effective immigration control as easily overridden.

²⁸⁸ [2004] UKIAT 00162,

²⁸⁹ [2002] UKIAT 05755..

The issue of delay came for discussion before the House of Lords in *EB Kosovo (FC) v. SSHD*²⁹⁰. The applicant was from Kosovo, During the Kosovo crisis he arrived on 2 September 1999 at the age of 13. He came with his cousin who was one year older. He claimed asylum 4 days after arrival. It was refused on 27 April 2004 there being a delay of over four and a half years. Had his case been decided before 10 December 2003 when he became 18 and ceased to be a minor, in accordance with policies in place then he could have secured exceptional leave to remain with the possibility that his leave could then be converted into indefinite leave after four years. The applicant when was around 18 embarked on a relationship with a Somalian girl, who had ELR which was later converted to ILR. When he met this girl, she was five weeks pregnant by another man who had abandoned her. A daughter was born and the appellant treated her as his own daughter. Later his partner became pregnant with his child but miscarried. The couple intended to remain together and to get married. One of the main issues in the case was delay and whether it has any bearing on the consideration of Art.8 rights.

Lord Bingham decided that delay may be relevant in one of three ways. First, an applicant may during the delay develop closer personal and social ties and establish deeper roots in the Community than he could have had his case been decided earlier. The longer the period of delay, the likelier this is to be true. It will thus strengthen an applicant's claim under Art.8. Secondly, an immigrant without visa is in a precarious situation since he is liable to be removed at any time. If he enters into a relationship with that status with someone settled in the UK such relationship is imbued with a sense of impermanence, especially when the UK spouse is aware of the immigration status of the applicant. However, if months and even years pass without a decision being made, then this sense of impermanence will fade away and expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. Thirdly, delay may reduce the weight of an otherwise firm and fair immigration control, if the delay is shown to be the result of a "dysfunctional system which yields unpredictable, inconsistent and unfair outcomes."

²⁹⁰ [2008] UKHL 41.

4.10 Jumping the Queue

One of the strongest arguments against allowing an Art.8 family life based on stay in the UK is that the applicant is exploiting his physical presence in the UK to evade the requirements of immigration control and to 'jump the queue' for entry clearance. This point was made clear by Keene LJ in *Shala* that persons without leave to enter or remain should not be allowed to exploit the procedures so as to be able to prolong their stay in the UK by making in-country application for such leave.

This can also be explained as a strong policy matter for the Home Office – illegal entrants should be deterred from taking advantage of their illegal stay in preference to prospective lawful entrants.

This point of 'jumping the queue' was also raised in *Mahmood* by Laws LJ. The point was that it would be unfair to allow an applicant to profit from his illegal stay whereas people from abroad will have to go through the normal procedure of entry clearance. This inconsistency will undermine the whole immigration system. As he said, "*Firm immigration control requires consistency of treatment between one aspiring immigrant and another.*"

Laws LJ's view was echoed by Simon Brown in *R (Ekinici) v. SSHD*²⁹¹. The Appellant was a Turkish citizen and was facing removal to Germany under the Dublin Convention.²⁹² He married a British citizen and had a child. He pleaded Art.8. The Court of Appeal held that since the entry clearance processing in Germany was taking about one month, requiring the Appellant to return to Germany for this relatively short period was not even 'arguably disproportionate.' The fact that if he were returned to Germany he would be unable to apply as he would fail to show that he could live without recourse to public fund was no reason to allow him to stay. "*It would be a bizarre and unsatisfactory result if, the less able the applicant is to satisfy the full requirements for entry clearance, the more readily he should be excused the need to apply.*" (Para.17).

²⁹¹ [2003] EWCA Civ 765, [2004] Imm AR 15.

²⁹² Under Dublin Convention an asylum seeker is required to claim asylum in the first available country. If there is evidence that he was in another country prior to his arrival in the UK under the Dublin Convention he can be returned to that country.

Earlier in *ex parte Ahmed*²⁹³, Lord Woolf MR stated that the Home Secretary must not be seen to be giving encouragement to the breach of the Immigration Rules. He should have regard for the need to be fair to those who comply with the rules and wait for their turn to come to the UK lawfully.

So if applicants are allowed to stay in the UK without the need to make entry clearance application, there would be no effective system of immigration control. If the applicant otherwise meets the requirements of entry clearance then the breach of family life will be temporary, and that it will not engage Art.8.

In *Sheikh Saeed Hussain v. SSHD*²⁹⁴, the Court of Appeal held that it was not disproportionate to expect the applicant, who had been living illegally in the UK for four years till his marriage to a British citizen, to return to Pakistan and then seek entry clearance as a husband. His wife had 4 children from a previous marriage and the applicant became a father figure to the children. The Court took into account the impact of his removal on his wife and step-children as required by AC, and found that such interference with their human rights would be temporary. The time of 6-months required for obtaining entry clearance in Pakistan, would not cause an unnecessary delay.

However, if the applicant is physically unable to apply for entry clearance once abroad, even though he would meet the requirements of the immigration rules, the removal would become disproportionate and the breach of family life permanent. In *A H R Soloot v. SSHD*²⁹⁵, the likely impossibility of an Iranian applicant in leaving Iran and travelling to the nearest entry clearance post and apply to rejoin his spouse and children convinced the Tribunal to find that his removal would be disproportionate. Soloot's asylum claim was rejected and he got married to an Iranian refugee. As his wife had been accepted as a refugee, by definition any return to Iran on her part would expose her to a real risk of ill-treatment. If the couple were to continue to conduct a family life, then it could not be Iran. There is no evidence that any other country would grant the couple residence. Taking all the relevant factors into account the Tribunal concluded that the factors in favour of allowing the applicant to remain in the UK outweighed the factors adverse to his claim.

²⁹³ [1999] IAR 22.

²⁹⁴ [2004] EWCA Civ 1190.

²⁹⁵ (2001) (01/TH/01366).

In *SSHD v. Amisa Siana*²⁹⁶, the Tribunal decided that it would only be in ‘exceptional circumstances’ that a failed asylum seeker should not be expected to apply for entry clearance from abroad to rejoin a partner in the UK. In this case, the applicant’s common-law wife was from the same country, and having been granted refugee status she could not be expected to return there. However, there was nothing to stop the applicant from seeking entry clearance from his country. *Soloot* was distinguished on the ground that it was virtually impossible for the applicant there to seek entry clearance through the normal channel.

In *SSHD v. Songul Cetin*²⁹⁷, the Tribunal decided that it was not disproportionate to expect a woman who got married here after making a spurious claim for asylum to apply for entry clearance as a spouse even though her husband was a refugee and was unemployed. The asylum system should not be used to circumvent the Immigration Rules. Any delay in sorting out the visa would not be disproportionate to the legitimate aim of maintaining immigration control.

The House of Lords in *Chikwamba v. SSHD*²⁹⁸, questioned this ‘jumping the queue’ policy and doubted the very philosophy that lies behind it. The Appellant was an asylum seeker from Zimbabwe. Her asylum claim was refused. However, due to the Home Office policy of suspending the removal of failed asylum seekers to Zimbabwe, her removal was halted. She married a fellow Zimbabwean refugee. The couple had a child. The question arose whether the appellant, presumably with her little child should be required to return to Zimbabwe in order to apply for permission to enter and thus to resume her family life with her husband. The Home Office, Immigration Appeal Tribunal and the Court of Appeal all held that this was what they should have done. However, the House of Lords disagreed. If someone is likely to qualify for entry clearance then there remains very little point in sending him back to apply. If this is a policy aimed at the maintenance and enforcement of immigration control then their Lordships questions: “*What in reality is achieved by this policy?*” In the words of Lord Scott, “*So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that government policy requires that she return and make her application from Zimbabwe. This is*

²⁹⁶ [2002] UKIAT 06049..

²⁹⁷ [2002] UKIAT 06272..

²⁹⁸ [2008] UKHL 40.

elevating policy to dogma. Kafka would have enjoyed it.” (Para.6). The Court was of the opinion that unless an applicant has really appalling immigration history or there are other reasons, only rarely in family cases involving children should an Art.8 appeal be dismissed on the ground that it would be proportionate and more appropriate for an applicant to apply for leave from abroad.

In *VW (Uganda) and AB (Somalia) v. SSHD*²⁹⁹, the Court of Appeal took the principles of *Chikwamba* further. The Court held that the likelihood of return of an applicant via entry clearance should not be ordinarily treated as a factor rendering removal proportionate; if anything, the reverse is the case. In other words, the possibility that the applicant can secure entry clearance is far from diminishing the claim to remain, capable of strengthening it.

‘*Chikwamba*’ became quite popular with the lawyers and judges. Even when the sponsoring spouse did not have settled status in the UK, ‘*Chikwamba*’ was successfully relied on. In *Khizar Hayat v. SSHD*³⁰⁰, the Tribunal decided that the ‘*Chikwamba*’ principle is not confined to cases where children are involved or where the person with whom the appellant is seeking to remain has settled status in the UK. In the instant case, the Appellant came to the UK as a student and changed that to a PSW status. After that he wanted to remain as the dependant of his Pakistani wife who was in the UK as a student. Under Immigration Rules such switching is not permitted – applicants are required to leave the country and apply from abroad for entry clearance. Evidence was tendered on behalf of the appellant to show that his wife was dependent on him for moral support – he was picking her up from College, doing the shopping etc. Holding that there will be a breach of Art.8 the Tribunal applied *Chikwamba* and found that the factors of the case outweighed the single factor relied by the Secretary of State – the rule requiring the applicant to apply from abroad.

However, the success of *Hayat* was short lived. On appeal from the Secretary of State³⁰¹, the Court of Appeal decided that there were cogent factors justifying the conclusion that Art.8 was not infringed by requiring the applicant to return to Pakistan. Ignoring the fundamental ‘*Chikwamba*’ principle, that is, if an applicant can qualify for entry clearance then what is the point in requiring him to leave the country and apply from abroad, the Court held that

²⁹⁹ [2009] EWCA Civ 5.

³⁰⁰ *Hayat (nature of Chikwamba principle) Pakistan* [2011] UKUT 00444 (IAC).

³⁰¹ *SSHD v. Kizhar Hayat* [2012] EWCA Civ 1054

following Strasbourg authority such as *Y v. Russia*³⁰² only in exceptional circumstances will a couple who have formed a union in full knowledge of the precarious immigration status of either of them be entitled to remain pursuant to Art.8 rights. Two observations can be made of this judgment. Firstly, the Court ignored the fact that unlike most human rights cases the applicant here was only seeking leave to remain for a temporary period – till the completion of his wife’s study. Secondly, despite strong jurisprudence from the ECtHR, the Tribunals as well as Home Office regularly allow human rights claims even when the UK settled spouse is well aware of the illegal immigration status of the applicant.

Recently, the High Court in *R (on the app of Shuai Zhang) v. SSHD and Ming Tak Ng*³⁰³ returned to *Chikwamba* principles. A Chinese PBS migrant had to return to China to apply to come to the UK as the dependant of another PBS migrant as it was required by the Immigration Rules. The Court held that the requirement to leave the country in order to apply for entry clearance is disproportionate and that it infringed the claimant’s Art.8 rights.

4.11 Family life with Children

Applicants who have a family or private life with children tend to receive favourable treatment from the Courts. Earlier the Home Office operated a ‘seven year child concession’ policy known as DP5/96, which was withdrawn in November 2008. Under the policy if a family had a child who has spent 7 years in the UK, then the family, unless they have convictions or possess bad character would have received permission to stay.

In the absence of such a policy, practitioners often argue before the Home Office and the Courts that the European Convention on Human Rights should be the yardstick in human rights applications involving children. Despite the withdrawal of the concession where a child has spent significant part of their life in the UK, this would continue to be a relevant factor when consideration is made whether or not enforcement action to be pursued. In other words, although the ‘seven year policy’ has now gone the spirit of the concession lasts and will be relevant in applications involving children. On the 9th of December 2008 withdrawing the policy the then Immigration Minister Phil Woolas stated that the fact a child has spent a significant period of their life in the UK would continue to be an important relevant factor

³⁰² [2010] 51 EHRR 21.

³⁰³ [2013] EWHC 891 (Admin).

when evaluating whether the removal of their parents is appropriate. He emphasised that the decision to remove a family would continue to be subject to Art.8 of the ECHR.

The ‘best interests’ of the child of an applicant is a relevant consideration. In *LD (Article 8 – best interests of child) Zimbabwe*³⁰⁴, the Court declared that “weighty reasons would be required to justify separating a parent from a lawfully settled minor child...” The Court further stated: “The interests of minor children and their welfare are a primary consideration. A failure to treat them as such will violate Article 8(2)”.

Further the Upper Tribunal in *EM and Others Zimbabwe CG*³⁰⁵ held: “In the absence of countervailing factors, residence of over 7 years with children well-integrated into the education system in the UK is an indication that the welfare of the child favours regularisation of the status of mother and children.”

The view taken in *EM* has been reinforced by Mr Justice Blake, the President of the Upper Tribunal in a recent case known as *SC (Article 8 – in accordance with the law) Zimbabwe*³⁰⁶ where it was stated: “In the absence of strong countervailing factors residence of 8 years in the United Kingdom with a child is likely to make removal at the end of that period not proportionate to the legitimate aims in this case.”

In *R (ZH Tanzania) v. Secretary of State for the Home Department*³⁰⁷ the Supreme Court reiterated the need to safeguard and promote the welfare of the children who are in the UK as a primary consideration when the immigration authorities are making a decision to remove a parent from the UK. Once the best interests of the children are identified then the authorities are required to assess whether these interests are outweighed by any other considerations such as the need to maintain a proper and efficient system of immigration control. The Court also reiterated that when the children have British citizenships, that fact is of particular importance in assessing the best interests of the children involved.

Section 55 of the Borders, Citizenship and Immigration Act 2009 imposes a duty on the Secretary of State to safeguard and promote the welfare of the children who are in the UK. In

³⁰⁴ [2010] UKUT 278 (IAC)

³⁰⁵ [2011] UKUT 98.

³⁰⁶ [2012] UKUT 00056 (IAC).

³⁰⁷ [2011] UKSC 11.

*Tinizaray v. SSHDI*³⁰⁸, it was held that this duty may even require her to ascertain the wishes of the children involved or to secure the views of social services or local NGOs in order to decide the best interest.

This obligation of the Secretary of State mirrors her responsibility under the UN Convention on the Rights of the Children 1989. Article 3(1) of the Convention provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

4.12 Zambrano Concession and EU Law

The decision of the Court of Justice of the European Union in *Zambrano v. ONEm*,³⁰⁹ has provided a new concession for families living in the UK illegally a right to stay. In that case a Colombian couple went to Belgium and claimed asylum. Their claims were refused. However, they stayed there illegally. While there, the couple had two children, who were Belgium nationals due to their birth in the Country. The court stated that member states are precluded from refusing a third country national upon whom his minor children, who are European Union Citizens are dependent. The parents of such children must be granted the right of residence in that state in order to protect the right of the child to live in Europe. If the parents are required to leave the country, then the children will have no other option but to go with them as they will not be able to live in Belgium on their own and as such they will not be able to enjoy their citizenship rights.

Following the decision of *Zambrano*, the Home Office on 21 September 2011 declared a policy to give status to non-British applicants' immigration status who becomes carer of dependent British citizens. The Home Office statement accepts that the decision in *Zambrano* creates a right to reside and work for the sole carer of a dependent British citizen when that carer has no other right of residence in the UK and when removing the carer from the UK would mean the British citizen would have to leave the European Union. The Home Office asked applicants to show (a) evidence that the dependent national is a British citizen; (b)

³⁰⁸ [2011] EWHC 1850 (Adm),

³⁰⁹ Case C-34/10.

evidence of the relationship between the applicant and the British citizen; and (c) adequate evidence of dependency between the applicant and the British citizen. In a letter to ILPA on 31 May 2012 the Home Office has confirmed the existence of the policy and stated that it can also apply where the dependent British national is also adult. However, in that case there has to be severe mental or physical disability.

Although in the actual *Zambrano* case, the carers were the parents of the children, it is clear from the Home Office statement that the matter is not confined to only parents of British citizens and in appropriate case, can involve other relatives. The researcher has applied for two daughters who have been looking after their sick and mentally affected British mother and awaiting a decision.

Zambrano concession can be regarded as an extension of Art.8 since the dependent British citizen cannot enjoy their rights without the presence of their overseas carers.

However, a further step was taken by the Court of Justice of the European Union in *Dereci and Others*³¹⁰. The court spoke of constructive removal of a Union citizen. This will happen in a case where the non-EU member is removed from the EU, and the dependency of the EU citizen on that non-EU family member is such that the EU citizen will have no other option but to follow the expelled member and thus go out of the EU.

This concept therefore involves a risk analysis – whether the decision by a member state places a risk that the EU member will have to follow their non-EU member to outside EU? There should not be any economic reasons or a desire to keep the family unit together – but a genuine dependency of the EU national on the non-EU family member.

Zambrano and *Dereci* received approval from the Tribunal in *Sanade and Others (British children – Zambrano – Dereci)*³¹¹. On 8 November 2012, the Home Office gave effect to *Zambrano* by amending the Immigration (European Economic Area) Regulations 2006 and making provisions for people who would be covered by this concession. It has been argued that the right to reside under this provision should be treated as a ‘derivative’ right and not

³¹⁰ C-256/11

³¹¹ [2012] UKUT 00048 (IAC).

like the rights that other family members of an EEA national enjoys in the UK, if the main EEA national is a ‘qualified person’.³¹²

It should be noted that the *Zambrano* case is not directly related to Art.8. However, as a decision of the Court of Justice of the European Union, the decision had the binding force and for that reason the UK Government amended the Regulations of 2006 to bring them in line with this decision. Although this case is not related to Art.8, it has been a practice with immigration lawyers in the UK to use the *Zambrano* concession as part of the overall consideration of Art.8 applications when British children/citizens are indirectly involved with the application (their involvement is indirect as they are not subject to removal). The fact that an applicant qualifies under *Zambrano* can therefore be used as an important factor in favour of an applicant in the balancing exercise.

It is worth noting here that EU law is capable of providing the non-EU family members of an EU national, exercising treaty rights of free movement in the UK better protection than Art.8. An EU national exercising treaty rights means an EU national who is in the UK as a student, employee, jobseeker, self-employed etc. Such an EU national is called a ‘qualified person’. Non-EU family members of a ‘qualified person’ have the right to accompany them or to join them. An illegal migrant who is the spouse of an EU national or who is in a durable relationship or otherwise a family member can take the benefit of the EU law. Under the 2006 Regulations they can get permission to stay in the UK for five years and this may in turn lead to permanent residence. Unlike the difficulties faced by human rights applicants as detailed above, an EU family member can easily get permission to stay only on the basis of evidence of their relationship and that their EU family member is a ‘qualified person’. In fact the EU law even provides a better option than the Immigration Rules – there is no need to show maintenance, accommodation, language test etc.

4.13 Other factors

In *UE (Nigeria) and Other v. SSHD*³¹³ the Court of Appeal held that in deciding whether the removal of a person from the UK is compatible with their human rights, their value to the

³¹² A ‘qualified person’ is one who is an EEA national and is exercising treaty rights of movement in the UK either as an employee or as a job seeker or as a student or being self-employed etc.

³¹³ [2010] EWCA Civ 975.

community can and in many cases should be taken into account in the balancing exercise to determine proportionality. The Court held that the proportionality exercise requires a broad exercise of striking a fair balance between the individual and the interests of the community. Contrary to submissions from the Respondent Secretary of State, the interests of the community were not restricted to those that related to the legitimate interest being pursued (i.e. immigration control). Instead, the decision-maker needed to make a judgment in the round, and as such, the value that an individual has in the community is a matter that – in principle – can be a relevant consideration.

In other words, social utility and contribution to the society could be relevant considerations. This is in tune with the real life case study 9 where the contribution of the applicant in reforming a drug addict British girl was given weight by the Immigration Judge.

4.14 Home Office Policy

From time to time, the Home Office operated policies which allowed many illegal immigrants to legalise their stay. Although never stated, these policies can be regarded as a direct or indirect recognition of the applicants' family or private life in the UK. Most of these policies have now been withdrawn. Under immigration rules, especially paragraph 395C, Art.8 human rights issues like the applicant's tie with the UK and length of stay were relevant consideration before refusing an application. To date the biggest concession, which has been regarded as an amnesty by many, is the 'legacy scheme'. Under the scheme about 150,000 illegal entrants who came to the UK before 2007 and who had either an application pending or against whom no enforcement action was not taken were given permission to stay. Although the Home Office never stated what criteria were employed to determine the eligibility under the scheme, following a subject access request they cited paragraph 395C of the Immigration Rules. The scheme as well as paragraph 395C has now been abolished.

Real Life Case Study One

The applicant was from Vietnam. He came to the UK to give testimony in a criminal matter but overstayed. He then met a Vietnamese lady who had refugee status in the UK. This lady later obtained British citizenship. The couple wanted to get married. However, due to the precarious immigration status of the applicant, it was not possible. The relationship produced

a child. The applicant was later convicted for working in a cannabis growing factory and faced deportation. In his deportation appeal the researcher argued that since the applicant has established a family life with his partner/common law wife and daughter, it would be a breach of his and his family Art.8 rights – family life. Since the applicant’s partner is a recognised refugee from Vietnam, it is unreasonable to expect her to follow the applicant to Vietnam. The child of the family cannot speak Vietnamese, and it is also unreasonable to expect her to return to Vietnam with the applicant. Further the researcher was also able to show from the Probation report that the applicant was at low risk of reoffending. All these factors were taken into consideration in the balancing exercise and the appeal was allowed.

Real Life Case Study Two

The applicant was from Jamaica. He has been living in the UK as an illegal entrant for about three years. He met a British girl, who was on drugs. They became friendly and started to live together as a couple. When the applicant was facing removal it was argued that he has established a family life in the UK. In the balancing exercise the Judge has accepted the argument that one of the greatest contribution that the applicant has made is that he has given his British partner, who was on drugs and was literally living in the streets stability and helped her to rehabilitate.

Real Life Case Study Three

The applicant came to the UK with her husband and two children as a visitor and then overstayed. Her children joined school here and started performing well. They have spent seven years in the UK, and after that the researcher applied for the family for permission to stay in the UK on human rights grounds, which were accepted and the family was granted discretionary leave. The researcher argued that the children are in the school – they are integrated with the education system in the UK; the eldest daughter can hardly speak Bengali and the youngest one cannot speak Bengali at all. It will be very difficult for the children to readjust in Bangladesh. They have made many friends in the UK and regard this country as their home.

Real Life Case Study Four

The applicant entered the UK some seven years ago with a valid entry clearance as a Sector Based Worker. This gave him permission to stay in the UK for one year. He overstayed. He met a British divorcee with two children and went through an Islamic marriage (not recognised by the Home Office). He made a Human Rights application, which was refused. Later the Researcher successfully applied for him and he was granted discretionary leave. The arguments which the researcher used and the Home Office accepted included the following:

- (a) The applicant lived in the UK for seven years.
- (b) His wife has two children from a previous marriage and another child by the applicant. The applicant assists his wife with the household chores and children and if the applicant is sent back, she will find it difficult to cope with three children on her own.
- (c) All her children are delivered through caesarean operations – she is not in the best state of health – she is dependent on the applicant physically and mentally. If the applicant is returned she will be devastated.
- (d) Applicant gets on well with the two elder children; they call him ‘father’ and they have no contact with their own father. Together with the wife and children they have made a happy family.
- (e) The children are born in the UK and they are British citizen. They do not know Bangladesh. It is unreasonable for them to follow the applicant to Bangladesh.
- (f) Even it is not possible for the wife to go to Bangladesh to formally marry the applicant and call him back to England, because she cannot leave her two elder children in the UK on their own. If she has to take them to Bangladesh, then it will interfere with their studies.
- (g) The applicant often worked illegally, but used that money to support his British wife and British children. This also shows that he is employable and that if he is given permission to stay he will not be a burden on the State.

Real Life Case Study Five

The applicant and his brother and mother arrived in the UK in 1994 from Sri Lanka. He was only 10 then. His father came here in 1993 and claimed asylum. His mother later claimed asylum as well. Both the claims were refused. In 1996, the applicant had a sister born in the UK who had congenital disease, which was life threatening. Later the Home Office gave

applicant's parents ILR and him and his brother discretionary leave due to the medical conditions of his sister. His sister later died in 2008.

Real Life Case Study Six

The Applicant and her husband came from Bangladesh. The husband came as a student and the applicant as her dependant. A child was born to the couple in Northern Ireland. Since the child was born in Northern Ireland, he was an Irish national by birth. The child had severe learning difficulties. The following arguments were raised by the researcher. The Court later allowed the appeal on human rights grounds.

- (a) The child has been in the UK for eight and a half years and was fully integrated with the education system here.
- (b) Due to his learning difficulties the child was in receipt of special support and care in the UK, which would not be available if the child is to go to Bangladesh. As a result his development will be seriously impaired.
- (c) The child is dependent on his parents for support. Since he is an EEA national, he is not subject to removal. However, if his parents are removed to Bangladesh, he will have no other option but to follow his parents there – thus he will be constructively removed from the European Union.
- (d) The applicant relied on private life that he was involved in charitable activities and was a regular attendee of his local mosque.

Real Life Case Study Seven

The applicant sought entry clearance from abroad to join her husband in the UK who had Tier 1 (General) visa³¹⁴. At the time of the ECO's decision her husband's leave had expired and he himself had applied for further leave to remain and was waiting for a decision. The appeal was allowed on grounds including that it breached her family life under Art.8. By allowing on this point the judge again reinforced the Strasbourg view that Art.8 can be used in entry clearance cases. What is novel in this case and which is certainly going beyond the

³¹⁴ This is a work visa where an applicant is given initially 2 years leave to work or to set up a business.

jurisprudence of ECtHR is that in all cases where the European Court found violation of Art.8 in entry clearance applications such as *Sen* or *Abdulaziz*, the family member who was in the EU had settled/citizen status. However, in the instant case, the husband had limited leave and further this was an entry clearance application.

Real Life Case Study Eight

The applicant was a Bangladeshi student. She was married to a fellow Bangladeshi student. She had visa for over a year. However, her College lost its sponsor licence and the Home Office curtailed her visa and gave her 60 days leave to find another institution. She was studying law. When she found another institution she could not get enrolment in law, but in accountancy. The Home Office refused her visa on the ground that since she had already spent five years in the UK as a degree level student, she could not get any more extension. She could not succeed under the Immigration Rules. However, on the strength of my arguments, the judge allowed the appeal on Art.8 grounds based on the relationship of the applicant with her husband, who was also a student. The unique feature of this case is that under the immigration rules, a student cannot become the dependant of another student in the UK – they need to return to their home country and apply from there. Further a person can only be a dependant of a student, if the main applicant is studying for a post graduate qualification. In the instant case, the applicant's husband was studying for an undergraduate degree. The judge also accepted my submission to consider the following factors to strike the balance in favour of the applicant: the applicant was a genuine student; she had over a year's visa; her visa was curtailed because the Home Office revoked the licence of her college; she was not responsible in any way for the loss of the licence of her college; the Home Office curtailed her visa and gave her 60 days leave to find out another college; at the time of the curtailment the Home Office knew that the applicant had already spent five years in the UK and that any fresh application would be refused on that ground and despite this she was advised to make fresh application; the applicant tried to get admission in law in five Universities; she was accepted by the Metropolitan University to continue with law, but then the University lost its licence; at the time when she was granted the earlier leave, there was no time period restricting students to study for a maximum of five years as a graduate student; the Home Office brought in the changes in law without making any transitional provisions for students who were caught by this sudden change.

4.15 Changes from 9 July 2012

From 9 July 2012, the Government has brought sweeping changes in the family route which will also restrict the huge of human rights arguments, especially Art.8 types of cases. No doubt, there will be legal challenges and the experience of this researcher at this preliminary stage of the changes that the Tribunals are still allowing appeals based on existing jurisprudence.

The principal changes are as follows:

- (a) There will be a presumption of private life in the following circumstances:
 - i. If the applicant has lived in the UK for 20 years – legally or illegally;
 - ii. If the applicant is a minor and has spent 7 years in the UK.
 - iii. If the applicant is under 25 but has spent half of his life in the UK.
- (b) The fact that the UK based spouse was aware of the precarious immigration status will undermine the human rights application.
- (c) The applicant will have to show that there are insurmountable obstacles for the UK based spouse to relocate with the applicant. It appears that the UKBA has gone back to the '*Mahmood*' approach in complete disregard to the House of Lords' authority in *Huang* where the test was stated to be whether it was reasonable to expect the UK based spouse to relocate.
- (d) The applicant will have to show that they satisfy the requirements under the immigration rules as operate to spouses such as sponsor's income being 18,600 etc.
- (e) Discretionary leave has been withdrawn. Instead an applicant will be placed on a 10 year route to settlement, which will be reviewed in every two and a half years.
- (f) In the case of someone facing deportation, an applicant can only rely on Art.8 if he has 'genuine and subsisting' parental relationship with a child who is under 18 and in the UK and one of the following conditions must be satisfied:
 - i. The child is British;
 - ii. The child has lived continuously in the UK for at least 7 years before the application;

In addition the applicant must show that (i) it would not be reasonable for the child to leave the UK and (ii) and there is no other family member in the UK who can care for this child.

He can also rely on Art.8 if he has a partner in the UK. However, the partner has to be either British or has settled status or is with refugee or humanitarian protection status; and (i) the applicant has lived in the UK continuously for 15 years with valid leave and (ii) there are insurmountable obstacles in the family life with the partner continuing outside the UK.

Further if he can show that he has established a private life in the UK he can challenge his deportation. However under the new changes, there will be a presumption of private life if he has lived in the UK for 20 years and has no tie – social, cultural or family with the country where he is to be deported; or that he is under 25 but has spent at least half of his life in the UK and he has no tie – social, cultural or family with the country where he is to be deported.

The full impacts of these changes are yet to be ascertained.

4.16 Conclusion

It appears from an analysis of the relevant cases as discussed above that the English Courts, especially the Tribunals have given the concept of family life and proportionality a much more liberal interpretation than it is under the jurisprudence of the European Court. In their balancing exercise even a trivial matter can tilt the scale in favour of an applicant. They have developed new concepts and started to consider a wide range of matters in disposing of justice under human rights. They are even keener to protect an applicant who has young children in full time education. It is also clear that the Courts, specially the Tribunals are not that concerned whether or not the precarious immigration status was known to the UK based spouse, so long other factors exist which give them the tools to decide in favour of an applicant. How all these will be affected by the changes of 9 July 2012 remains to be seen.

Chapter Five

Private Life and Immigration under English Law

5.1 Introduction

A person may, by living in a particular country, working and forming friendship with others in that country and by getting used to the life style there may establish a private life in that country. As explained in Chapter 2, the ambit of private life is wide. Even if some one's

quality of life is affected or reduced by the action of public authorities there could be issues of breach of private life so far the moral and physical integrity of the applicant is concerned. In this chapter we shall look at how the concept of private life has been developed in the UK in immigration context. Further some of the rules and concessions of the Home Office also indirectly take into consideration many aspects of the private life of the applicants. Some of the issues that we have considered in Chapter 4 are also applicable here, for example, the stage by stage consideration - it has to be established whether there is a private life; if so whether there will be any interference with that; whether such interference is for a legitimate purpose; whether it is proportionate; etc.

5.2 Long residence

If an applicant spends significant part of their life in the UK, he is likely to develop a private life here. The English courts, however have decided that a person's short term stay in the UK does not necessarily establish a 'private life'; otherwise this will open a floodgate for illegal immigrants. In *Hani*³¹⁵ the Tribunal observed, *"An individual who comes to this country seeking to stay here, does not by so doing in our judgment create for himself a right to private life which automatically is going to be affected or interfered with by a refusal of his application. Otherwise every illegal entrant who came to this country and sought asylum would by that act alone be creating a right which would be protected under Article 8(1) and we do not believe that Article 8 is to be so interpreted."*

In *FN (Article 8, removal – viable option) Eritrea*³¹⁶, the Tribunal stated that simple stay in the UK for a number of years whereby the applicant has established a family or private life, does not give rise to any legal basis for stay. Relying heavily on *Abdelaziz*, (discussed in Chapter 2) the Court observed, *"Article 8 does not enshrine a right for foreign nationals to enjoy private or family life in the territory of a member State ... persons who have private or family life relationships ... cannot expect that they can enjoy them in the UK ... because there is no right to enjoy private or family life in the territory of a Member State, the mere fact that a person has established or developed private or family life relationship here does not in itself give rise to any basis for stay."* (para.31).

³¹⁵ [2002] UKIAT 02215.

³¹⁶ [2006] UKIAT 00044

Despite the judicial pronouncements, the immigration rules do recognise the length of stay by an applicant as a relevant consideration for the purpose of deciding whether or not it is appropriate to remove someone³¹⁷. The immigration rules did allow people to seek settlement (indefinite leave to remain) on the basis of long residence – 10 years for people who are legally in the UK and 14 years for others³¹⁸. In *ZH (Bangladesh) v. SSHD*³¹⁹ Sedley LJ, stated that the 14-year Rule is specifically directed to people who have managed to stay in the UK for 14 years or more without lawful authority and that this provision is regarded as an amnesty clause.

By taking into consideration the long residence of an applicant, the Home Office in effect is recognising their private life. It is the experience of this researcher that many students try to prolong their stay in the UK by switching or moving to different courses so that they can extend their stay up to 10 years.

However, the 14-year rule was abolished on 9 July 2012. Under the new changes in the rules a new category for private life has been created based on the number of years spent in the UK (paragraph 276ADE Immigration Rules). An applicant can make an application for leave to remain on the ground of private life, if they can show that they:

- (a) Have been in the UK for 20 years;
- (b) Is under the age of 18 and has been in the UK for seven years and it is not reasonable to expect them to leave the UK;
- (c) Is under the age of 25 but have spent half of their lives in the UK;
- (d) Is over the age of 18 but has lived in the UK continuously for less than 20 years but has no tie (social, cultural or family) with the country where they are required to go.

There are Strasbourg cases which suggest that a person who has lived in a member state for 20 years should not be removed under normal circumstances. (b) above relates to minors and it endorses the earlier 7-year child policy which was upheld by Tribunals in many cases as mentioned in Chapter 4. However, this is subject to an important caveat – it is not reasonable to expect that the child should leave the UK. It remains to be seen how this will be interpreted by Courts. One argument could be that if the child in question is in full time education and as

³¹⁷ Immigration Rules HC395, paragraph 395C.

³¹⁸ Immigration Rules (HC 395) Paragraph 276B.

³¹⁹ [2009] EWCA Civ 8.

such integrated in the UK education system then it should not be reasonable to expect him to leave the UK. However, this has not been fully tested before the Courts as many applications are still pending before the Home Office.

Although the 14-year rule has been abolished, the new changes left the provision of 10 year lawful residence unaffected and it is still possible to apply if someone spends 10 years continuously and lawfully in the UK. However, while a successful application under the 10 year rule will lead to indefinite leave to remain, an application under the new provisions will give applicants limited leave to remain for 30 months which is renewable. After applicants can accumulate 120 months leave in this process then they can apply for indefinite leave to remain.

The fact that the Immigration Rules earlier made provisions for people who have been staying in the UK for 10 years lawfully and 14 years unlawfully gave the Immigration Judges the weapons to argue that nothing short of 10 or 14 years residence, as the case might be, would give rise to any private life that could not be unjustifiably interfered with. However, as we have seen in Chapter 4 that if someone stays for less than 10 or 14 years, as the case may be, but has a close family in the UK, the outcome may be different and in an appropriate case interference may well become disproportionate. In *AZ*³²⁰, the applicant lived in the UK for almost 14 years. He even attended College in the UK and purchased a property. There was also considerable delay on the part of the Home Office in giving a decision and the Court of Appeal accepted that the delay has helped the applicant to establish a private life in the UK. The Court accepted that this was a case based on Article 8 private life and not on family life. However, it refused to give that much weight to the long residence of the applicant since his ‘roots do not have the kind of depth that they might have done were he, for example, married with children’.

The ‘legacy scheme’ as referred to in Chapter 4 also recognises the long residence in the UK as one of the determinative factors. The scheme started with people who have been living in the UK illegally for 10-12 years, and who either has a pending application or who could not have been removed from the UK. However, later people who had been in the UK for 6-8 years were also considered under the scheme.

³²⁰ [2009] EWCA Civ 158.

Further, recently in a number of cases, the Courts accepted that people, who have legally entered the UK even for a temporary purpose, may also establish a private life. This happens mostly in the case of students, who are admitted for a purpose. They are said to have established a private life with their educational institutions. We will see later how the Courts have developed the concept of private life in this context.

5.3 Proportionality and private life

Where there is no existing family life in the UK, but the applicant has established a private life by integrating with the community or making significant contributions to the society, that may be relied on to prevent a removal. However, success rate on this ground is very low.

In *SSHD v. Admir Dema*³²¹ the applicant was a failed asylum seeker from Kosovo. He came to the UK at the age of 18. He had no close relatives and no home in Kosovo to go. He had been working as a volunteer for Red Cross and the Refugee Council, had become fluent in English, and had been interpreting for Albanian asylum-seekers. He was also hoping to go to University. The Tribunal held that the applicant could apply from abroad if he wanted to study or work in the UK. Although the Court recognised the contribution of the applicant both in terms of his personal development and his charitable work as going to his credit and strengthening his position, it was nevertheless not sufficient to tilt the balance in his favour.

However, a favourable position was taken in an earlier decision in *SSHD v. Dardan Dine*.³²² The Tribunal held that it was open for an adjudicator to find in carrying out the balancing exercise between the interests of the individual and those of the community, that the applicant's remarkable efforts to develop his physical and moral integrity would make removal a disproportionate interference with his private life. The applicant was a Kosovar Albanian whose application as there was no well-founded fear in Kosovo. The applicant produced glowing testimonials from his tutors, his employer and the Midlands Refugee Council, which had found his services as an interpreter invaluable. The applicant studied English as a foreign language, took 3-A' Levels and won a place at the Coventry University to study Pharmaceutical Sciences. He had supported himself throughout by his own efforts,

³²¹ [2002] UKIAT 08341.

³²² [2002] UKIAT 06638.

and had never received benefits. The Tribunal found that by developing his private life in the way that he had, rather than being idle, the applicant had made the best of his opportunities.

In another earlier decision in *Tonin Matia v. SSHD*³²³ the Tribunal decided that when a failed asylum seeker has made his home in the UK, the fact that he has been accepted into the community and is popular with his neighbours does not make removal a disproportionate interference with the right to respect for his home. The applicant argued that the ‘home’ for the purpose of Art.8 was his house in a Welsh village. The whole community there had come out in support of his claim. Rejecting this argument the Tribunal pointed out that the converse would not be acceptable, that is, if an applicant were unpopular with his neighbours, then he should not be allowed to stay.

Paragraph 395C (now defunct) of the Immigration Rules, listed some factors which could be taken into consideration before taking a decision to remove someone. These included the age, length of stay, tie with the UK, economic and other contribution to the UK. It may be argued that under paragraph 395C the Home Office was actually taking into consideration the Art.8 rights – family and private of an applicant. One interesting point here to note is that while work by illegal immigrants is strictly prohibited and is often used against them, in terms of applications based on Article 8 including long residence, economic activity by the illegal entrants is regarded as a favourable point in the balancing exercise. Immigration Directorates’ Instructions – Long Residence, April 2009 states that the applicant’s employment record will be a significant consideration.

5.4 Private Life and Physical and Moral Integrity

The issue of physical and moral integrity is closely associated with the concept of private life. If an applicant’s quality of life is significantly reduced, if he is under fear or suffering from agony and pain, if he is restricted from achieving something that he is otherwise, entitled to, such action may interfere with the enjoyment of his private life. The issues here could be similar to those under Article 3; however, the threshold here seems to be lot low than that the one under Article 3 since in a number of cases, notably *Bensaid v. UK* (discussed in Chapter 2) the ECtHR made it clear that actions which are not serious enough to amount to a breach

³²³ [2002] UKIAT 06134..

of Article 3 can nevertheless amount to a breach of Article 8, so far the moral and physical integrity of the applicant is concerned.

5.5 Medical Cases

The discussion above mainly related to the use of Art.8 in domestic cases, that is where the breach is direct as it takes place in the UK. However, Art.8 is also recognised as having extraterritorial effect. Both ECtHR and domestic courts have extended the concept of private life to include the moral and physical integrity of applicants. It is in this respect indirect breach of Art.8 is recognised.

We have seen in Chapter 3 that where an applicant is suffering from an acute medical conditions and if returning them to their country of origin mean that they would be deprived of the treatment that they are currently receiving in the UK, that may in exceptional cases amount to a breach of Article 3. However, in order to reach the high threshold level, the ill-treatment complained of must reach a minimum level of severity. The courts have also accepted that treatment that may not reach the minimum level of severity required to engage Art.3, may amount to a breach of Art.8. In this respect, the threshold appears to be lower than that of Art.3.

In the famous case of *N* (discussed in Chapter 3), it is beyond comprehension why the Appellant's representatives simply relied on Article 3 and why no submission was made under Art.8.

Article 8 private life may be raised in the context of a medical claim. The issue in an Article 8 foreign case (indirect breach) is whether return will result in a real risk of a flagrant denial of an applicant's Article 8 rights in the country of return, usually in respect of the applicant's right to physical and moral integrity.

However in practice in many cases, Article 8 will add little to Article 3 – as the House of Lords said in *Razgar*, “*it is not easy to think of a foreign health care case which would fail under Article 3 but succeed under Article 8.*”

However, what would be the position where the UK has assumed responsibility for the treatment or providing medical care for an applicant? In *D v. UK* (discussed in Chapter 3) the test of assumption of responsibility was given. That case succeeded under Art.3. It may be argued that even if that case had failed under Art.3, it should have succeeded under Art.8 in accordance with the principles of *Bensaid v. UK*.

In *DM (Zambia) v. SSHD* ³²⁴ the initial appeal succeeded both on Art.3 and 8 grounds. However, by the time it went to the higher appeal, Art.8 remained the only issue to be determined. The Appellant, a Zambian national arrived in the UK as a visitor. She immediately became ill and was diagnosed with HIV/AIDS. She received antiretroviral therapy which stabilised her condition. She applied to the Home Office. Although they refused to give her indefinite leave they twice granted discretionary leave giving her in all a period of six years to secure treatment. After that they refused to extend her leave. The Court of Appeal found that while the appellant was in a critical condition in 2001 rendering her unfit for a long time even to travel, by the end of 2007 due to the treatment received in the UK her condition so stabilised that she was then fit to travel. The question was whether upon return to Zambia she would find herself without support, resources or access to medication. The Court found that the appellant have familial and financial support and as a result would be considerably better placed than many Zambians to continue with the therapy she needs to sustain her health and prolong her life.

In terms of protecting the physical and psychological integrity the Court of Appeal accepted that a person's body concerns the most important aspect of one's private life. It is not simply a matter of counting how many friends that a person has in the UK to decide whether or not he has a private life here. A person who is receiving treatment here and then removed to another country, such action can interfere with his moral and physical integrity. Sedley LJ commented: "*To remove an AIDS sufferer from free care and treatment in one of the best health services in the World, which had rescued her from what would otherwise have been a terminal condition, would have seemed to me, at least unless argument persuaded me otherwise, to have been a clear interference with her physical and psychological integrity and thus an invasion of her private life requiring justification.*"

³²⁴ [2009] EWCA Civ 474.

In *JA (Ivory Coast) and ES (Tanzania) v. Secretary of State for the Home Department*³²⁵ the Court of Appeal had to deal with two linked appeals. Appellants, both of them women were HIV patients. They were both granted ELR³²⁶ due to their ill health in accordance with the government's policy then in force. This shows that grant of ELR was appropriate where the UK has assumed responsibility for the care of the migrant. The applicants relied on Art.8 to challenge the Home Office decision not to extend their stay. The Court allowed the appeal of JA and remitted the case back to the Tribunal for redetermination on all issues. In reaching the decision, the courts distinguished the current case from both *D* and *N* on the grounds that both D and N were foreign nationals who had never been lawfully admitted to the United Kingdom.

Although the English Courts are reluctant to intervene when someone is suffering from a life threatening disease, surprisingly they are keener in declaring an interference with rights as a breach of Art.8 when an applicant is suffering from mental conditions.

In *Gezim Januzi v. SSHD*³²⁷, the Court of Appeal recognised the extraterritoriality of Art.8 and endorsed the decision in *Bensaid* that the treatment, which does not reach the severity of Art.3 may nevertheless breach Art.8 where there are sufficiently adverse effects on physical and moral integrity. However, there has to be a sufficiently adverse effect on physical and mental integrity and not merely on health. The test is, whether there are substantial grounds for believing that the applicant will face a 'real risk' of the adverse effect on his mental health, which he feared. It was necessary to consider whether serious harm to an applicant's mental health would be caused, or materially contributed to, by the difference between the treatment and support that he was enjoying in the UK and that, which would be available to him in the receiving country.

If a psychiatrist in the UK concludes that his patient's mental condition will deteriorate by the very fact of returning to his own country, whatever facilities for treating that condition there might be in that country, it is hard to see what other medical evidence might be adduced to counter that opinion. However, Home Office generally insists and the adjudicators/immigration judges on many occasions accept that there will be some form of

³²⁵ [2009] EWCA Civ 1353.

³²⁶ Before the introduction of 'Humanitarian Protection' leave for human rights cases, applicants who could not succeed on asylum grounds, but there were strong human rights issues were granted ELR for a limited period.

³²⁷ [2003] EWCA Civ 1187.

treatment available to the applicant back home and as such there will not be a breach of ‘moral and physical integrity’ principle. Often the credibility of the Medical/Psychiatric reports will be an issue. Many judges would refuse such reports on the ground that the maker of the reports did not have sufficient expertise or based their report simply on the account given by the applicant and that no independent opinion had been expressed³²⁸.

In *HE (DRC – credibility and psychiatric reports) DRC*³²⁹ the applicant was an asylum seeker from Congo. She claimed to have mental health problems including PTSD and claimed that if she was returned her mental health problems will deteriorate so as to engage Art.8. The medical report was rejected on the ground that the doctor relied on the account given by the applicant and that the doctor did not consider (a) any other causes for symptoms of depression and (b) whether any of the matter that he observed could be feigned.

In *R v. SSHD ex parte Razgar*³³⁰ the House of Lords strongly endorsed the *Bensaid* principle. Lord Bingham stated, “... *reliance may in principle be placed on article 8 to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties which the applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving country. The threshold of successful reliance is high, but if the facts are strong enough article 8 may in principle be invoked.*” (Para.9). He then proceeded to show that this may happen even when the situation does not amount to a breach of Art.3, “... *the rights protected by article 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal does not violate article 3, if the facts relied on by the applicant are sufficiently strong.*”

Many of these mental health cases involved victims of Serbs atrocities committed in Kosovo. In some of these cases Art.8 was pleaded successfully. Success in these cases may be attributed to the fact of general sympathy in the UK towards the Kosovans.

³²⁸ Recent Upper Tribunal decision in *JL (medical reports – credibility) China* [2013] UKUT 00145 (IAC) provides a good guidance drawn from previously established case laws as to how to resolve the credibility issues in medical reports

³²⁹ [2004] UKIAT 00321.

³³⁰ [2004] UKHL 27.

In *Fatmir Topali and others v. SSHD*³³¹, the applicant and his wife were from Kosovo and were traumatised by their experience as victims of serious violations of human rights. The Tribunal decided that the medical facilities in Pristina, Kosovo were not so inadequate that the family could not be adequately treated, such as to cause a breach of Art.3. However, looking at the totality of the evidence, the Tribunal found that the combination of lack of proper medical facilities to treat the applicant and his wife together with the past trauma they had suffered, was such that to remove them to Kosovo would be inhumane and would be in breach of their human rights in respect of their physical and moral integrity under Art.8.

In *Gezim Guri v. SSHD*³³² the applicant was suffering from post-traumatic stress disorder requiring hospital treatment at one stage. His condition was being controlled adequately by medicine and counselling, however such treatment would be available in Kosovo where he was to be removed, although it would not be as good as that available in the UK. Held, that it would be a rare case where Art.8 would be engaged because a lesser standard of medical treatment was available to the applicant on removal to his own country than in the UK.

In *Ylika Bushati v. SSHD*³³³ the applicant was raped by Serbian soldiers in the presence of her children and parents-in-law. The Tribunal accepted that the applicant would be stigmatised by her own community upon return since they would be aware of her rape as there were witnesses of the incident. Although this does not reach the high threshold of Art.3, she was sufficiently vulnerable to face a real risk to her physical and moral integrity upon return to Kosovo. Her Art.3 appeal was dismissed, but Art.8 appeal was allowed.

Even in Mental health cases, maintenance of immigration control featured as a relevant consideration in the balancing exercise. In *Sefer Djali v. SSHD*³³⁴ the applicant's dependant wife was suffering from severe post-traumatic stress disorder, after being raped by Serbs in Kosovo and witnessing other dreadful events. It was argued that the return would breach Art.8 as no adequate facilities were available to treat her conditions. Rejecting the argument the court held that even assuming that Art.8 was engaged at all, this was only a borderline case of interference. Given the grave problems of asylum overload in the UK, it was inevitable that the decision-maker (Secretary of State) would regard the interests of

³³¹ [2002] UKIAT 03550.

³³² [2003] EWCA Civ 713.

³³³ [2002] UKIAT 03625..

³³⁴ [2003] EWCA Civ 371.

immigration control as the imperative and overriding factor in such a case. As Simon Brown LJ famously said, “*The approach should be that the needs of immigration control will “often” outweigh or trump an interference with the Article 8(1).*” (Para.14).

*M v. SSHD*³³⁵ is “one of those rare cases” where removal would not be proportionate to the interests of immigration control. The applicant had been deeply traumatised by her experiences in Kosovo. She had been brutally raped and tortured by Serbians. She had responded well to psychotherapy in the UK. Her treatment having reached a “critical point”, returning her to Kosovo before it was completed was likely to undo all the progress she had made. There was evidence that the applicant was interacting with society in her current environment. She had been highly commended in letters from Citizens’ Advice Bureau where she did voluntary work, and from a lecturer at the college where she was studying IT. Psychiatric services were very limited in Kosovo, where most patients were treated pharmaceutically. Even if local psychiatric or counselling support were to become available to her in Kosovo, the very fact of seeking it was likely to lead to the wider knowledge, or surmise, that the applicant had been raped. Such was the stigma attached to rape in Kosovo that there were evidence that victims were rejected by their families. The Tribunal agreed that the above factors would not expose the applicant to treatment sufficiently serious to breach Art.3. However, it would be a breach of the applicant’s right to respect for her physical and moral integrity under Art.8, and disproportionate to the legitimate aims of the UK, to remove her at the present time. This limb of Art.8 is a protection against a lesser level of harm than is required under Art.3 and so is easier to establish. However in light of *Djali* it looks like that in future a case like *M* would not succeed on a proper application of Art.8. In *Djali* the court found it difficult to understand why a different and less stringent approach should be taken to claims based on mental ill-health (Art.8) than to claims by those suffering from AIDS or other physical ailments (Art.3). This was *obiter*, however.

Nevertheless, it appears that the law is actually following this direction. In *MK*³³⁶ the Tribunal decided that whether removal will lead to deterioration of mental health or of physical health, or of both, the criteria are the same for judging whether the consequences will be severe enough to constitute a breach of human rights. The threshold for Art.8 will scarcely be lower than for Art.3, which requires not just exceptional but extreme

³³⁵ (2002) (TH/3623/2001).

³³⁶ [2005] UKIAT 00075.

circumstances, so as to engage very strong, indeed compelling humanitarian considerations. These might be felt to arise where no civilized person of ordinary sensibilities would cause such avoidable suffering.

There has been no success before the courts of any arguments that the return will interfere with an applicant's physical and moral integrity since he will live in constant fear of harm (indirect breach) or that return will interfere with his moral and physical integrity that he currently enjoys in the UK (direct breach). However, these arguments are closely related to arguments based on Art.3 since if there is a fear of harm then Art.3 will be engaged.

What will be the position if an applicant is given wrong treatment in the UK, will then the UK assume the responsibility of putting things right?

Real Life Case Study Nine

The applicant was an illegal entrant. He was convicted of an offence and was detained pending deportation to Algeria. While in detention, he became ill and received treatment, which he claims to be wrong and as a result he developed new complications. Issue arose whether now the UK has assumed responsibility to treat his illness due to the fact that it offered wrong treatment and whether his removal under these circumstances will breach his rights under Art.8. The matter is pending.

5.6 Student Cases

Recently in many cases, the Courts have decided that foreigners, who have come to the UK for a temporary purpose, may even establish a private life which may deserve protection under Article 8. In these cases, the Courts are treating the applicants as victims of a rigorous immigration system. Such a generous attitude also resulted from the harshness of immigration rules and the recently introduced Points Based System (PBS).

The PBS was introduced towards the end of the tenure of the last Labour Government. Under the scheme, prospective migrants were required to score points in order to qualify for leave to

enter or remain in the UK. First the system dealt with only skilled and highly skilled workers and since April 2009 with students. Under the PBS system, a fixed amount of money has to be kept in the account and for a fixed number of days ranging from 28 days to 90 days. If the money falls short even by 1 pound, or if the money is held less than 1 day, the application will be refused. Further, the system also requires certain types of documents to be submitted. If something is missing, application will be refused straightaway. Under the previous system, Home Office would give applicants 28 days to submit any missing documents. Now-a-days, an application can even be refused or returned, because the photos were not taken in accordance with the specific guidance or that even a box has not been ticked off. Many of these refusals can give rise to appeals. However, since 23 May 2011, by virtue of s.19 of the Border Act 2007, an applicant cannot submit evidence or documents in an appeal which he has not submitted with his application before the Home Office. This means that the applicants will not get any chance of producing the missing documents and his appeal is doomed.

The PBS system caused lot of confusion and generated many appeals and judicial reviews. The inherent injustice in the system is quite obvious. An application can be refused for what one can call for minor technicalities and then the applicants will fail in their appeals because either they did not satisfy the strict requirements of the PBS or that they are not allowed to bring fresh evidence to show that they have rectified their mistakes. It appears that even the Immigration Judges do not like it since the system takes the discretion away from the judges and they cannot decide for the appellants even when the appellants come very close to fulfilling the requirements but made mistakes. There have been a lot of criticisms of the Home Office's policies regarding PBS including whether certain practices breach the common law duty of fairness.³³⁷ However, a detailed examination of these cases is outside the ambit of this research. On many occasions, the courts have come to rescue the applicants by finding a breach of their human rights when they cannot succeed under immigration rules.

In *MM (Tier 1 PSW; Art 8; "private life") Zimbabwe*³³⁸ the AIT recognised that a student may build up private life during his stay in the UK, however, the court noted with particular

³³⁷ See *Thakur (PBS decision – Common Law Fairness) Bangladesh* [2011] UKUT (IAC) and *Patel (revocation of sponsor licence – fairness) India* [2011] UKUT00211 (IAC). In both the cases the Upper Tribunal determined that the Home Office decision to refuse a student extension application on the ground that their institution has lost the sponsorship licence while the application was pending without giving the applicant time to find an alternative institution was a breach of common law duty of fairness. This researcher has won many appeals on this ground.

³³⁸ [2009] UKAIT 00037.

attention that the temporary nature of the stay of a student does not give rise to an expectation to right to remain in the UK.

The Courts at that time was not willing to recognise whether the study itself could form an aspect of private life, although in later cases, and from practical experiences, it became clear that is the case now. In *MM*, the court held that even in determining the position of Art.8 in a Tier 1 Post Study Worker case, the 5 stage approach in *Razgar* has to be followed. The Court held: “*Whilst respect for ‘private life’ in Art 8 does not include a right to work or study per se, social ties and relationships (depending upon their duration and richness) formed during periods of study or work are capable of constituting ‘private life’ for the purposes of Art 8.*”

The AIT held in that case that in this type of situations, it is important to evaluate the extent of the applicant’s social ties and relationships in the UK while determining the issue of proportionality. However the Court was of the view that a student who is in the UK on a temporary basis has no expectation of a right to remain in order to further his social ties and relationships if he does not meet the criteria of the PBS. However, the private life relied in this type of cases where the stay of the applicant is by its very nature temporary, is something that can be formed somewhere else although in different social ties after the removal of the applicant from the UK. For this reason ‘private life’ in this type of cases are likely to ‘advance a less cogent basis for outweighing the public interest in proper and effective immigration control’ than the claims which are based upon ‘family life’ where the relationships are more likely to be unique and cannot be ‘replicated’ once the applicant is removed from the UK.

However, later cases show that even when someone is in the UK legally for a particular purpose, such as study, he may well develop a private life which deserves protection to the extent of allowing him to complete the purpose for which he was allowed in the country. In *OA (Nigeria) v. SSHD*³³⁹ the Court of Appeal went further and accepted that the applicant’s study forms part of their private life and accordingly that deserves protection under Art.8. The Appellant came to study in the UK at the age of 16. She passed some courses and managed to extend her student visa. However, she was advised by an immigration lawyer that she could apply for indefinite leave to remain on the ground that she came to the UK at the age of 16 and that her siblings are British citizens and reside in the UK. Although such an

³³⁹ [2008] EWCA Civ 82

application was unlikely to succeed she trusted the lawyer and paid him his legal fees. The lawyer returned her passport which was duly stamped with indefinite leave to remain seal. It was only later when she made enquiries with the Home Office that she realised that her ILR was not genuine. She immediately applied for restoration of her student status. At that time she was studying for ACCA. The Court accepted that there would be a serious impact on her studies, if she is required in the middle of the academic year or course to leave the country. She had the financial resources to continue her studies and which would have led to a degree. There was no cost to the tax payers. Under these circumstances an immigration judge is entitled to place weight on the impact on her of her studies coming to an end, which will thus interfere with her private life under article 8.

Many of the provisions related to PBS were contained in relevant ‘policy and guidance’ and not in actual immigration rules or statutes. The Courts were not happy with the way these policies and guidance were given the force of law bypassing the scrutiny of the Parliament. In a number of decisions, starting from *Pankina v. SSHD*³⁴⁰, the Courts declared such provisions not being law, but only policy or guidance. In *Pankina* the Court said: “*A policy is precisely not a rule: it is required by law to be applied without rigidity, and to be used and adapted in the interests of fairness and good sense.*”

Pankina has far reaching impact and that this researcher has successfully used this judgment in many cases involving human rights issues.

The judgment was given further effect in *FA and AA (PBS: effect of Pankina) Nigeria v. SSHD*³⁴¹ where the Upper Tribunal determined: “*The effect of the decision of the Court of Appeal in Pankina is not limited to the ‘three-month rule’ in relation to evidence of funds. Policy Guidance does not have the status of Immigration Rules for the purposes of immigration appeals.*”

One of the major changes effected by the PBS for student applicants is the way they are required to show maintenance. They could only show the maintenance if the money is held in their own account. The traditional system of showing the finance from a sponsor is not allowed. However, after successful lobbying by different immigration pressure groups, the

³⁴⁰ [2010] EWCA Civ 719

³⁴¹ [2010] UKUT 00304 (IAC).

Home Office agreed that students could show the money in their own account or in the account of their parents or legal guardian provided they could give evidence of their relationship such as birth certificates and letter of consent from their parents/legal guardian.

In *CDS v. SSHD*³⁴² the Court held that funds may be available at the material time if they belong to a third party but that party is shown to be willing to deploy them to support the claimant for the purpose contemplated. The applicant was a Brazilian student who came to the UK as a student and has her visa extended in that capacity. She was sponsored by two doctors, who were not her parents. Her further extension application was refused on the ground that she did not have sufficient money in her account and that under the policy guidance, she was only entitled to rely on her own money or the money kept in her parent's account. Since she was relying on the money held in her sponsors' account, her application was refused.

It was argued on behalf of the appellant that had her sponsors been privy to the new rules, suitable maintenance funds would have been made available to the appellant and would have appeared in her personal bank account in accordance with the 'Maintenance funds' scoring system.

As a result the appellant was unable to complete her studies and take her examinations. The injustice involved in this case was obvious. Firstly, the rules that allowed her entry into the UK to fulfil her educational aspirations have been revoked before completion of the said course and examinations and, secondly, the UK citizens previously deemed suitable sponsors for an individual wishing to be educated in the UK are no longer deemed suitable.

However, the most important aspect of this judgment is the clear endorsement of the view that a foreign student can develop a private life due to his study here, which may in certain cases deserve protection against interference by the Immigration authorities.

To quote from the judgement: *"Article 8 does not give an Immigration Judge a free-standing liberty to depart from the Immigration Rules, and it is unlikely that a person will be able to show an article 8 right by coming to the UK for temporary purposes. But a person who is admitted to follow a course that has not yet ended may build up a private life that deserves*

³⁴² [2010] UKUT 00305.

respect, and the public interest in removal before the end of the course may be reduced where there are ample financial resources available.”

As regards minor or technical breaches of the requirements, in *Pankina*, the Court of Appeal decided that where an applicant marginally or momentarily falls short of a financial criterion, but if otherwise qualifies within the rules, there may be cases which may engage Article 8.

In *SAB, YAB, SAB (Ghana) v. SSHD*³⁴³, the Upper Tribunal after making references to *Pankina* and *CDS* judgments concluded: *“They are examples of how a person guilty of a technical or minor breach of the Rules towards the end of his studies, might, dependent upon the particular circumstances of the case, successfully rely on human rights grounds to be allowed to complete them.”*

The fact that many Immigration Judges are not happy with the rigours of the PBS and that they often resort to private life formula to mitigate the harsh consequences of the PBS is evident by the case of *Abdullah Munawar v. SSHD*³⁴⁴, which drew adverse reaction from certain sections of media and Home Office. In fact the case is devoid of any logic. The Appellant came to the UK as a student in 2008 and made an extension application in 2010. However, the application was refused since the Appellant did not have his maintenance fund in the bank for the required 28 days. The case was refused on immigration grounds in appeal. However, the appeal was allowed under Art.8 on the ground that the Appellant has established a private life in the UK which deserves respect. The judge accepted that the Appellant spent most of his life in Bangladesh. However, he had in addition to his studies formed friendship with fellow students and work colleagues. He had been living with student friends. He was playing cricket at the weekends. He was attending mosque regularly and followed a personal development course. As a result of these activities, the Judge believed that he had built up a private life with a range of social ties and commitments which deserved respect. The judge reminded that the only issue regarding the Appellant’s student application was that he did not meet the strict financial requirements otherwise he satisfied the rules. Since at the time of the hearing the Appellant had completed his course, it was not open to the judge to decide the case on the grounds that not allowing him to complete the course would infringe his Art.8 rights as it was held in *CDS*. Instead, the judge found his social

³⁴³ [2010] UKUT 441 (IAC).

³⁴⁴ Unreported Appeal No: IA/26534/2010, Judgment 20 October 2011.

activities of playing cricket and attending Mosques as evidence of private life meriting protection under Art.8.

The promise shown in *Pankina* that minor breach of immigration rules may be a relevant consideration in an Art.8 assessment in favour of an applicant did not find favour with a subsequent judgment of the Court of Appeal. In *Miah, Bibi, Salman v. SSHD*³⁴⁵ the Court held that there was no ‘near miss’ principle applicable to the Immigration Rules. Stanley Burnton LJ said that although the Secretary of State and the Tribunal must assess the strength of an Art.8 claim, the requirements of immigration control is not weakened by the degree of non-compliance with the immigration rules. In other words, an applicant cannot rely on human rights when he falls short of the requirements of the Immigration Rules.

Real Life Case Study Ten

The applicant was a student and he wanted to extend his student visa. New Immigration rules came which required him to show that he had £1600 in his account for 28 days as evidence of his maintenance. Since he was not aware of this requirement he did not have the fund and his visa extension application was refused. At the appeal, the applicant lost on the immigration ground, since the requirement was that he should have the said amount for 28 days. However, the researcher argued that the applicant has established a private life in the UK – his education. When he has come so close to completion and since he otherwise satisfies the requirements of the rules, he should be allowed to complete his studies. If he is not allowed then it will interfere with his moral and physical integrity and thus will interfere with his rights under Art.8. This argument was accepted.

Real Life Case Study Eleven

From 23 May 2011, new changes were brought by virtue of S.19 of the Border Act 2007 under which in case of PBS appeals no post application evidence can be used. The applicant had more than £1600 in his bank account. However, he should have part of his tuition fee also in his account as it was outstanding. Under the current immigration rule either the full tuition fee has to be paid or the outstanding fee should be shown in the account. Money must

³⁴⁵ [2012] EWCA Civ 261.

be held in the account for 28 successive days. His visa extension application was refused because although he had the maintenance he did not have the tuition fee. He appealed. By the time the case came for hearing, the applicant had the requisite fund in his account. However, under S.19 now this post application evidence could not be submitted at the hearing. The researcher argued before the Court that although as regards the appeal under the PBS rules this evidence is not admissible, the applicant has also a case under the Human Rights – his private life – his education. Since he now satisfies the requirements it will interfere with his human rights if he is not allowed to complete his studies since he has already spent time and money for this course and has been attending regularly. This new evidence about funding should be accepted under the Human Rights appeal. The argument was accepted by the judge and his appeal was allowed under the Human Rights (Art.8). The researcher successfully relied on *CDS* and *OA*.

Real Life Case Study Twelve

The applicant was a student and he wanted to extend his visa. He had the required maintenance for himself, his wife and two children. The applicant had over £7000 in his bank account for more than 28 days. However, during this period for few days the amount fell short by £50 - £140. The applicant also had money in his wife's account and if he had submitted his wife's bank statement together with his own, then his fund would have gone much higher than the required amount. His visa was refused. During his appeal, the researcher argued that the applicant has a private life because of his education in the UK. For a minor or technical breach of the requirements (money being short by £50-£140 for two weeks), when he has a private life, he should not be stopped from completing his study. Relying on *Pankina*, *CDS* and *SAB* it was argued that in this case there could be a breach of Art.8 and that such a minor breach of the requirements should be ignored. The researcher also got the bank statement of the wife admitted in court under the human rights appeal since it was not admissible as post application evidence for PBS appeal.

5.7 Other Cases – Possible Extensions

There are other areas where Art.8 (private life – physical and moral integrity) arguments can be raised. Although at the moment these arguments are not successful one may hope that one day a sympathetic judge may accept them.

5.7.1 Homosexual cases – return and be discreet about your sexuality

Many homosexuals who claimed asylum are often refused on the grounds that if they return to their country and practice their homosexuality discreetly then they will not have any risk. In other words, they do not have to declare their sexual orientation in public and thus avoid being persecuted. Why it cannot be argued that if they cannot lead their life normally and have to remain in fear that if they are caught practising they will be persecuted, that will interfere with their moral and physical integrity by significantly reducing the quality of their life. The Supreme Court later in *HJ (Iran) and HT (Cameroon) v. SSHD*³⁴⁶ rejected this ‘remaining discreet’ argument.

5.7.2 Failed asylum seekers

There are many failed asylum seekers or immigrants who for one reason or other cannot be returned to their country of origin, but who are not officially given permission to stay in the UK. Although there is no immediate prospect of their return to their country of origin since they do not have any immigration status they cannot get work, benefit or other support and they virtually become destitute. The question is why it cannot be argued that the decision not to confer any immigration status when someone cannot be removed with the consequences that they have seriously restricted and reduced their quality of life that such decision has interfered with their moral and physical integrity of the applicant?

In *SSHD v. Limbuela, Tesema & Adam, Shelter intervening*³⁴⁷, the Court of Appeal had to consider the effect of s.55(5) of the 2002 Act, which provided for withdrawal of NASS support from any asylum seekers who fails to claim asylum “as soon as practicable”. The court held that as a result of these provision asylum seekers who are being thrown onto the streets may give rise to a situation where the threshold of Art.3 will be crossed. However, this case could also have been argued as amounting to a violation of Article 8.

³⁴⁶ [2010] 3WLR 386.

³⁴⁷ [2004] EWCA Civ 540.

Sweeney's³⁴⁸ article has covered elaborately how failed asylum seekers' Art.3 rights could be breached. However, there is no reason why a breach of Article 8 – private life – physical and moral integrity argument cannot be raised since if they do not have support, and they become destitute then their quality of life will be significantly reduced.

Real Life Case Study Thirteen

The applicant was from Iran. He claimed asylum, which was refused and he lost his appeal. Home Office did not commence an enforcement action. As a failed asylum seeker, the applicant was not able to receive any state support. He slept rough in the street and in the parks for about seven years. He was not allowed to work – he was not even in good health to work. He obtained a fake passport and tried to go to Finland and to claim protection there. He was stopped in Belgium and returned to the UK under Dublin II Convention. Upon his return the Home Office decided to release him immediately as there was no prospect of returning him to Iran. The researcher submitted that the applicant has nowhere to go, but would become destitute after release. However, the applicant was released and as the researcher thought, he was not heard since then. Perhaps, he was again thrown to the streets.

Real Life Case Study Fourteen

The applicant was born in Liberia. During the Liberian conflict, when he was 2 his father was killed. His mother left the country for Niger and took him with her. His mother was later killed along with other villagers during a raid by the Nigerian Soldiers who came to fight the oil smugglers. He was trafficked to the UK apparently to work in the drug market. After his arrival he realised that he was required to sell drugs. He then escaped. He knows no one in Liberia. He is also not a citizen of Nigeria. His claim for asylum and humanitarian protection was refused by the Home Office. They also rejected the submission that he was stateless. However, no removal directions were issued, apparently due to the fact that neither Nigeria nor Liberia would accept him as their national. He was released from detention and ended up in the streets.

³⁴⁸ Sweeney, J.A (2008) 'The Human Rights of Failed Asylum Seekers in the UK', in *Public Law*, 277-307.

Real Life Case Study Fifteen

The applicant's family originated from Jamaica. He claims that he was born here in the UK. However, he is unable to produce his birth certificate. His parents died many years ago. His brothers and sister, who died recently, were British citizens. They also claimed that the applicant was born in the UK. The applicant is not aware whether his mother registered him under a different name. One of the reasons that the UKBA refused to accept him as British is that the applicant's English has some influence of West Indian accent. The applicant says that he grew up with the West Indian communities and picked up that accent. Jamaican Embassy repeatedly refused to take the applicant back since there is no evidence to show that the applicant was born or ever been to Jamaica. However, the UKBA kept the applicant in detention for more 30 months and accused him for not co-operating with them (by not accepting that he is from Jamaica). Such long detention with no prospect for removal should amount to a breach of Art.8 – interference with moral and physical integrity.

5.7.3 Entry Clearance

In Chapter 3 and 4 we have seen that Art.8 – family life can be pleaded in entry clearance cases. Can it be used in 'private life' context? This issue came for discussion in *Atapattu v. SSHD*³⁴⁹. The applicant was a Chief Officer in Merchant Navy in Sri Lanka. He applied for entry clearance to come to the UK as a student for higher studies. The Entry Clearance office held his passport and other documents for eight months without giving any decision. The applicant brought an action on a number of grounds including an allegation that holding his passport interfered with his private life under Art.8 since he was not able to find suitable employment without his passport and that it also hindered his personal development. Although the Administrative Court referred to ECtHR authorities, which suggest that a ban on employment may interfere with Art.8 private life, in the instant case, there was no breach. The reasons that probably persuaded the court not to find a breach of Art.8 are that the Home Office gave an undertaking that it would issue an entry clearance and that they were found liable for conversion.

³⁴⁹ [2011] EWHC 1388 (Admin).

This case leaves open the issue whether in entry clearance application ‘private life’ of the applicant should be taken into account. The most difficult aspect of this argument is that the alleged private life has not even commenced in the UK. However, it is the view of this researcher that in an appropriate case a breach of private life in its physical and morality aspect can be raised. Suppose an applicant sought entry to see her terminally ill daughter in the UK. She was refused entry clearance on grounds, which in all probability should have not been taken by any reasonable authority. She actually satisfied all the requirements of the rules. The applicant appeals and eventually won her case. She is now granted entry clearance. However, by the time her daughter is already dead. Can she not claim that the decision of the ECO interfered with her physical and moral integrity as she could not be present when her daughter passed away and that it was the wrong decision of the ECO which deprived her of that opportunity?

5.8 Conclusion

The brief survey of case law above including the personal experience of the researcher shows that although private life in general is not affording immigrants a great hope to regularise their stay, some aspects of private life are recognised by the Courts especially when they are not happy with the rigours of the general principles of immigration law affecting the lives of the immigrants. To some extent even the Home Office are accepting private life of the applicants as a determinant factor, especially in long residence cases. Further the English Courts, especially at the lower level (immigration tribunals) are taking the concept of private life even further than what the ECtHR has done. Their disliking of the PBS is also apparent. As a result when an applicant cannot strictly come within the four corners of the relevant immigration rules and policies but the Courts have doubts about the propriety of such rules and policies, they are more keen to find a violation of Art.8 private life thus circumventing the general provisions of the applicable immigration law. In that sense, it may be argued that the concept of private life is being used by the Courts as a readymade tool for developing human rights.

Chapter Six

Conclusion

6.1 Introduction

In Chapters 4 and 5 we have seen how Art.8 is being interpreted by English courts in the context of immigration and how they have developed new principles. In this Chapter the overall position will be assessed and principal findings will be recorded.

6.2 Effectiveness of HRA

HRA98 has been in force for about thirteen years. How successful it has been in protecting individual liberties? A report published in *Guardian*³⁵⁰ shows that there is a negative public perception of the HRA98; there is also distorted reporting of human rights in the media. However, the Human Rights Lawyers Association is very complimentary of the HRA98 and believes that it has created a culture of human rights and that many vulnerable and minority groups have received protection from it³⁵¹.

We have seen in Chapters 1 and 3 that traditionally English Courts take deference to administrative action, especially if it is taken on policy grounds. Scepticisms were expressed whether the Courts would perform any better under the HRA98 regime due to their traditional approach to deference. Ewing argued that when at the pre-HRA period the judges had power to protect civil liberties, which they did not properly use, there was little point in giving them more power under the HRA³⁵². He thought that the Act was futile. Ewing³⁵³ argued that the HRA98 had failed to protect individual's rights, as the courts continue to show deference to the government. He made reference to the Court of Appeal's decision in *A v. SSHD*³⁵⁴, where personal freedom was at risk. However, this case was overruled in the House of Lords. Ewing's criticisms generally centred round civil liberty issues in state security cases – he did

³⁵⁰ *Guardian* "How Effective is the Human Rights Act?"

<http://www.guardian.co.uk/humanrightsandwrongs/effective-human-rights> accessed 26 May 2013

³⁵¹ *HRLA The Human Rights Act: Over Ten Years of Protection, Participation and Accountability*, 1 November 2011.

³⁵² See Ewing, K.D (2004) "The Futility of the Human Rights Act" *PL* 829-52.

³⁵³ *Ibid.*

³⁵⁴ [2002] EWCA Civ 1502.

not consider whether the Act was successful in other areas. However, Lester criticised Ewing for his view on the futility of the HRA98. He thought that since the HRA98 coming into force, the English Courts have developed new principles of public law and ensured that individual rights are fairly balanced with community interests³⁵⁵. Ewing also came under criticism for using ‘absolutist standard’³⁵⁶ since in using their scrutinising role, the courts may give some weight to the justification of the primary decision put forward by Parliament or the Executive, which does not mean that they have abdicated their judicial function. Ewing later returned to the subject and admitted that after the incorporation of HRA, the Courts have shown that they are unquestionably a major irritant for the government in a number of fields though not an obstacle³⁵⁷. However, this study finds significant impact of HRA98 in immigration and more especially in Art.8 related matters.

The concept of judicial deference to executive action has always been a debatable issue whenever questions of reviewing administrative matter come into play. However, this should not be treated necessarily a hindrance to progress. Kavanagh argues that judicial deference is actually a flexible and contextual doctrine. It does not entail an abdication of judicial responsibility for the protection of rights or the rule of law; rather it involves the exercise of a constitutionally appropriate degree of restraint where the context justifies it³⁵⁸. As mentioned earlier the extent to which courts can control administrative decisions always require a delicate balancing act. HRA98 has complicated this balance as now the Courts are faced with decisions of public authorities which may have breached Convention rights³⁵⁹.

There are also fierce critics of the doctrine of deference. Allan argued that ‘deference’ should not be elevated to the status of an independent doctrinal requirement as it will then suggest that the judges should surrender their independence of judgment in favour of superior expertise or superior democratic authority³⁶⁰. For him surrender of judgment is inconsistent with the rigorous scrutiny of government action that the protection of human rights requires.

³⁵⁵ Lester, A (2005) “The Utility of the Human Rights Act: a reply to Keith Ewing”, *PL* 249-58.

³⁵⁶ Kavanagh, A (2009) “Judging the Judges under the Human Rights Act: deference, disillusionment and the ‘war on terror’”, *PL* 287-304.

³⁵⁷ Ewing, KD (2008) “The Continuing Futility of the Human Rights Act” in *PL* 668-93.

³⁵⁸ Kavanagh, A (2010) “Defending Deference in Public Law and Constitutional Theory”, in *LQR* 126(Apr) 222-250

³⁵⁹ Young, A (2009) “In Defence of Due Deference” in *MLR* 72(4) 554-580. Young also advocated for a new model of deference by refining to the doctrine.

³⁶⁰ Allan, T.R.S. (2006) “Human Rights and Judicial Review: A Critique of “Due Deference”, in *CLJ*, 65(3), 671-695 at 694.

No judge should defer to any opinion that they consider doubtful. They must be open to persuasion by each party – government official as much as private individual, deciding each case according to the balance of reason. According to him, deference to government, in defiance of the balance of reason destroys impartiality and independence.

Allan's view actually receives indirect support from the expression of Lord Bingham in *Huang and Kashmiri v. SSHD*³⁶¹. He held that when the Immigration tribunal is dealing with an appeal on Convention grounds in an immigration context, the task of the Tribunal is to find out whether the decision is lawful or unlawful in reference to the compatibility with the Convention. It is not a secondary reviewing function on the grounds of misdirection, irrationality or procedural impropriety – but whether the decision is lawful or unlawful and if unlawful, it must reverse it. He held that concepts like due deference, margin of appreciation simply complicate and mystify what is not a hard task to define though may be difficult task in practice to perform. The Tribunal should first of all establish the relevant facts and then to consider and weigh all the matters in favour of the refusal with reference to justification under Art.8(2) and then consider the facts against the refusal. It is simply performing the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight. With regard to the argument that domestic law does struck the proper balance for the purpose of Art.8(2), he said that this cannot be true in the case of immigration. He said that where for example, housing policy has been a continuing subject of discussion and debate in Parliament for many years, with the competing interests of landlords and tenants fully represented, Immigration Rules and supplementary instructions are not the product of active debate in Parliament where non-national seeking leave to enter or remain are not even represented. He concluded: "*It is a premise of the statutory scheme enacted by Parliament that an applicant may fail to qualify under the Rules and yet may have a valid claim by virtue of article 8,*" (para.17).

6.3 Post HRA – Courts and the Government on Immigration Issues

Post HRA has seen a constant battle between the British Government and the Courts on some Immigration issues. It appears that the government is probably regretting giving powers to Courts to review Home Office decisions on Human Rights grounds. Many cases are decided

³⁶¹ [2007] UKHL 11, esp. paras 11-17.

against the Home Office even when the original Home Office decision was taken on policy grounds. The Judiciary is not taking deference in these matters and often completely discard the underlying Home Office policies. The government occasionally being defeated simply follow the judgment. But often they immediately place statutory instruments before the Parliament to frustrate judicial decisions. Let us consider some of the leading cases from the Higher Courts where the judiciary prevailed despite very strong opposition by the Home Office.

The Home Office introduced Certificate of Approval (COA) requiring any non-EEA national to obtain permission before getting married in the UK. The policy behind this was to prevent bogus marriages. However, in *R (on the App of Baijai) v. SSHD*³⁶², the House of Lords declared that this COA provision interfered with individual's rights to marry under Art12. For making a spouse application, the Home Office increased the age of both the UK spouse and foreign spouse to 21 from 18. Home Office said that the policy behind this was to prevent forced marriages. However, the Supreme Court declared in *Quila and Bibi v. SSHD*³⁶³ that the rule interferes with the Art.8 rights of the applicants.

Home Office often rely on provisions which are not in the rules, but which are mentioned in their guidance and policies as requirements for making applications. Many PBS applications were refused simply because some minor requirements of the guidance were not fulfilled. In *Pankina v. SSHD*³⁶⁴ the Court of Appeal held that the policy guidance is not law since it is not laid before Parliament. *Pankina* also held that if an applicant satisfies all the requirements of the rules except a minor one; that may give rise to human rights considerations. Similar decisions were taken by the Supreme Court in *Alvi v. SSHD*³⁶⁵ and *Munir v. SSHD*³⁶⁶ with regard to Home Office Policy Guidance. Following the decisions in *Alvi* and *Munir* almost overnight the Home Office produced 296 pages of Statutory Instruments before Parliament so that the decisions could have only academic impact and nothing in practice.

³⁶² [2008] UKHL 53.

³⁶³ [2011] UKSC 45.

³⁶⁴ [2010] EWCA Civ 719

³⁶⁵ [2012] UKSC 33

³⁶⁶ [2012] UKSC 32

6.4 Changes to Immigration Rules with Human Rights Contents

Since the Coalition government came to power in 2010 one of their main targets has been to reduce net immigration by bringing in new restrictions on immigration applicants. First they targeted the ‘work route’ applicants, then the ‘student route’ applicants and finally on 9 July 2012, ‘family route’ applicants. We have seen the major changes in ‘family route’ in Chapters 4 and 5, where the Home Office in their view has brought in the Human Rights provisions within the body of the Immigration Rules. Their position is that if someone wants to rely on human rights in immigration cases, they must satisfy the requirements of new immigration rules relating to human rights. The Home Secretary made it clear that their aim is the reduction of immigration to a sustainable level. Question may be asked whether ‘reduction of immigration to sustainable level’ can come within one of the legitimate aims under Art. 8(2) for which private or family life may be interfered with. This is yet to be tested before the Higher Courts.

With regard the imposition of high income threshold and other changes relating to family life human rights considerations the Government felt that the previous rules for family members were vulnerable to abuse and it did not encourage migrants to integrate, and placed a burden on UK taxpayers. It also referred to its desire to reduce net migration levels as a reason for changing them.³⁶⁷ Before the introduction of the changes during a Parliamentary debate the Home Secretary Theresa May stated that the objective of the Government policy was to ensure that people who are coming to the UK should be able to pay for their way. Family migrants and their British-based sponsors should have sufficient financial resources to be able to support themselves and enable the migrant to participate in society without being a burden on the general taxpayer. The Home Secretary also stated that the Government took full account of Art.8. Since this is only a qualified right, it allows the necessary and proportionate interference in the interest of protecting the economic well-being of the UK. Although Art.8 is a qualified right, Parliament had never set out how it should be qualified in practice and for that reason for too long, the Courts have been left to decide cases under Art.8 without the view of the Parliament and thus to develop public policy through case law. It was time to fill that vacuum.³⁶⁸

³⁶⁷ See Changes to Immigration Rules for Family Members – Common Library Standard Note – 18 December 2012, Standard Notes SN06353.

³⁶⁸ See HC Deb 11 June 2012 cc-48-50.

6.5 Challenges to the New Changes

It appears that despite the changes, Courts are not happy to restrict themselves to the new immigration rules relating to human rights in deciding human rights cases. Their position is that the new rules only provide a set of clear provisions, which if an applicant can avail of, will make it easier for them to establish private or family life. However, if they cannot come within the new rules, still the general human rights considerations outside the immigration rules can be relied upon. Once again the Tribunals are taking the lead in this respect.

In *Ogundimu (Article 8 – new rules) Nigeria*³⁶⁹ a Nigerian national and came to the UK at the age of 6 to join his father and had been in the UK for 21 years. He was later given ILR. He had a troubled history of crime both as a juvenile and adult. He faced deportation on the ground that it was necessary for prevention of crime. He had a British child, who lived with his mother, but the Appellant had regular contact. He also had relationship with another woman. The Secretary of State wanted to rely on the post 9 July 2012 rules relating to Art.8 to rebut the Appellant's claim of family life. She argued that since there are no insurmountable obstacles to the Appellant's new partner in moving outside the UK and have a family life with the Appellant and as there is another member of the family, the Appellant's son's mother to care for his son, there was no breach of Art.8.

The Court however, went beyond the new immigration rules and looked to the European and Domestic authorities relating to deportation and family life and concluded that the decision actually breached the Art.8 rights of the Appellant and that it was not in accordance with law. In addition to his private life drawn from his long 21 years of lawful residence, he has also established a genuine family life with his son and his new partner and her daughter. The Court referred to S.55 of the Borders, Citizenship and Immigration Act 2009 to assess the 'best interest' of the Appellant's child and step-child. The Court found that the Appellant was providing his son's positive self-image and that he was a facilitator for his son's social network being established and maintained away from the school environment. This was an important contribution as the son's childhood progression was being hampered. The loss of

³⁶⁹ [2013] UKUT 00060 (IAC)

the Appellant would therefore compromise his son's well-being. It was therefore in the best interests of his son that the Appellant should remain in the UK.

The Court concluded: *“The introduction of the new Immigration Rules (HC 194) does not affect the circumstance that when considering Article 8 of the Human Rights Convention “for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in [this] country very serious reasons are required to justify expulsion.”*

In *MF (Article 8 – new rules) Nigeria*³⁷⁰, the Upper Tribunal refused to remain confined to the new rules. *“However, the new rules only cover Article 8 claims brought under some, not all, Parts of the Rules and only accommodate certain types of Article 8 claims.”*

The Appellant came to the UK in 1998 as an illegal entrant. In addition to his poor immigration history, he also served prison sentence. He married a British citizen who had a teenage girl. He was like a father to this girl, who had no contact with her own biological father. She kept in email contact when he was in prison. He also helped her with her education. He was the primary daytime carer for his mother-in-law when his wife was out at work. The Home Office conceded that it was not reasonable to expect his wife and step daughter to relocate with him and as such the sole issue was whether his criminality and immigration ‘wrong doing’ were serious enough to make his deportation proportionate. The Court accepted that the Appellant cannot satisfy the new rules regarding deportation and Article 8. However, by applying Strasbourg jurisprudence as interpreted by English higher courts found a violation of Art.8. In the balancing exercise the Court held that the fact that the applicant could not qualify under the new rules was a relevant consideration in the proportionality assessment. The Court referred to the conviction of the applicant, his poor immigration history and the fact that he built up his private and family life when he was aware of his precarious immigration status. However, the delay of four years on the part of the Home Office to some extent weakened the Home Office’s claim that deportation is imperative. Further in finding the matter in the applicant’s favour the Court referred to the best interest of the stepdaughter under S.55. Although the Appellant did not have any involvement with the child until she was 13, the fact that she had had no involvement with her biological father previously and as such the later involvement of the Appellant became

³⁷⁰ [2012] UKUT 00393(IAC)

crucial. The Court held that the ‘present is much more important than the past’. It is clear from this decision that the Court took into consideration established legal principles relating to Art.8 which did not find their ways within the immigration rules.

In *MF* the Upper Tribunal also explained the approach to be followed by Immigration Judges in post 9 July 2012 Art.8 cases. They held that prior to the changes of 9 July 2012 cases involving Art.8 ordinarily required a two-stage assessment. Firstly to assess whether the decision appealed against was in accordance with the immigration rules; secondly to assess whether the decision was contrary to the appellant’s Art.8 rights. However, the new Immigration Rules have set out a number of mandatory requirements regarding claims based on Art.8. If these requirements are not met, the Art.8 claims under the rules must be refused. However, even if a decision to refuse an Art.8 claim under the new rules is found to be correct judges must still consider whether the decision is in compliance with an applicant’s human rights under s.6 of the Human Rights Act 1998.

MF was followed in *Izuazu (Article 8 – new rules)*³⁷¹. In *Izuazu* the applicant was from Nigeria. She got married and had five children before that marriage broke down. She visited the UK several times with a multiple entry visa. During these visits she met one Mr Akinola, who was originally Nigerian but has been living in the UK for 23 years and has British citizenship. The applicant had poor immigration history and also she worked in the UK using false National Insurance number. She returned to Nigeria with Mr Akinola and then applied to come to the UK as his spouse. Her application was refused because the ECO was not satisfied that their relationship was genuine and that the accommodation available was adequate. The applicant lodged an appeal but then returned to the UK as a visitor. At this stage it was revealed that she was using false National Insurance number to work and was convicted to 12 weeks imprisonment. She was moved to the custody of immigration and claimed asylum which was refused. However, the First-tier Immigration Judge allowed her appeal on human rights grounds as he found that she was in a genuine relationship with Mr Akinola and that it would be difficult for Mr Akinola to leave the UK – his home for 23 years where he also has a daughter and to go to Nigeria. As such it was not reasonable to expect him to settle in Nigeria to continue with their family life. The Secretary of State appealed.

³⁷¹ [2013] UKUT 00045 (IAC)

The Upper Tribunal decided that the legal test is whether it is reasonable for Mr Akinola to relocate and not the insurmountable obstacles. However, they found that it was reasonable for him to relocate – he had dual nationality and that he married the applicant in Nigeria. During the course of the proceeding the Secretary of State submitted written submissions to the Court in which she stated that while the Immigration Rules do not bind the Courts, in the same way as primary legislation, they are a clear, democratically endorsed statement of public policy which must now be taken into account by the courts when assessing proportionality. The Secretary of State expected the Court to defer to the view endorsed by Parliament on how, broadly, public policy considerations are weighed against individual family and private life rights when assessing Art.8 in any individual case. The Secretary of State declared in that submission that the Government can interfere in the exercise of Art.8 rights where in the public interest it is necessary and proportionate to do so including to safeguard the UK's economic wellbeing by controlling immigration and to protect the public, be deterring foreign criminals and removing them from the UK. Referring to the changes of 9 July 2012, the Secretary of State wrote to the Court (as part of submission) that the new rules now properly reflect the view of the Government and Parliament as to how the balance should be struck between that public interest and individual's rights under Art.8 and the Government expect the Courts to have regard to that view in reaching their decisions.

If the Secretary of State's view is taken as the correct interpretation of the current legal position then s.6 of the Human Rights Act 1998 will become redundant and all the development of law that has taken place in the UK since October 2000 would have been halted. Fortunately, the Court came up with the view that the position under s.6 remains unaltered. The Court held that in cases where the rules of 9 July 2012 apply, judges should proceed by first considering whether an applicant is able to benefit from the new provisions relating to Art.8. Where an applicant does not meet these requirements, then it will be necessary to go for an assessment of Art.8 applying the criteria established by law. The Court called the procedure adopted in the introduction of these rules as a weak form of Parliamentary scrutiny and declared that *“Parliament has not altered the legal duty of the judge determining appeals to decide on proportionality for himself or herself.”* The Court made it clear:

“3. There can be no presumption that the Rules will normally be conclusive of the Article 8 assessment or that a fact-sensitive inquiry is normally not needed. The more the new Rules

restrict otherwise relevant and weighty considerations from being taken into account, the less regard will be had to them in the assessment of proportionality.”

Finally the Court concluded that when considering whether a decision is in accordance with the law, it has been authoritatively established by the higher courts that the test is not exceptional circumstances or insurmountable obstacles. In other words, the Court went back to the pre 9 July 2012 position of ‘reasonableness’ test.

The matter again came before the High Court in *R (on the app of Nagre) v. SSHD*³⁷². The Applicant came to the UK from India in 2006 as a visitor and then overstayed his visa. In 2008 he met a British citizen and from 2009 started living together. They did not have children. His application for leave to remain under Art.8 based on his relationship with his British partner was refused. The UKBA decided the application under the new rules on private and family life. They held that there were no insurmountable obstacles with the family relocating to India. The British spouse has been introduced to the Indian culture and ways in that country via a relationship with him. She is of an age to learn the language of the applicant’s region in India and that she is able to adapt to the cultural, moral and economic aspects of India. In a judicial review application the legality of the new rules was challenged. The Court accepted that although Immigration Rules do not have the same status of primary legislation, or the full democratic legitimacy the new rules were subject to debate in Parliament going beyond what is usual when such rules are made and laid before Parliament. The Immigration Rules do have some degree of democratic endorsement in that they represent the policy of the Secretary of State who is politically accountable to Parliament and ultimately to the electorate and they are laid before Parliament and so are amenable to being called up for a negative resolution in Parliament. (Mandate theory).

The Court accepted that in relation to both private and family life the new rules do not cover every conceivable case in which the Secretary of State may be found to be subject to an obligation under Art.8. Due to the sheer variety of human life and family associations and the wide application of the immigration regime and Art.8 there is a need for a degree of flexibility to make suitable accommodation for individual cases reflecting that variety.

³⁷² [2013] EWHC 720 (Admin)

Both *Izuazu* and *Nagre* stood for the principle that the basic framework of analysis of Art.8 rights as contemplated by Lord Bingham in *Huang* continues to apply despite the changes in immigration law brought over by the Government. Lord Bingham held that an applicant may fail to qualify under the rules but still may succeed under Art.8.

Nagre concluded:

29. Nonetheless, the new rules do provide better explicit coverage of the factors identified in case-law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave.

The review of the authorities cited above show that the new Immigration Rules have not restricted the power of the Court to deal with human rights issues and that there are still matters remaining which are not covered by the changes, and which should be governed by compelling or general human rights circumstances where a judge may decide that an Appellant should be granted leave outside the rules.

The rule relating to spouse maintenance has also come under challenge. As discussed in Chapter IV, the Government introduced an income threshold for sponsoring overseas spouse. So if a British or someone settled in the UK wants their spouse to join them then they must show that they have an annual income of £18,600. The requirement is same whether the application is made for leave to enter or leave to remain (where the applicant is already in the UK legally in some other capacity). Earlier there was no fixed maintenance requirement – immigration rules only provided that the applicant must be adequately maintained and accommodated without recourse to public fund. Since no fixed amount was required, normally the income support level was regarded as a yardstick. So if a sponsoring spouse's income was at the same level as that of the income support (currently around £110 a week) they could have been able to sponsor their overseas spouses. However, under the new immigration rules, the sponsor must have an income of 18,600 and no third party support is

allowed. The changes have seriously affected many British citizens or people settled here, as only a significantly reduced number of people could meet this income threshold. It is the impression of this researcher after long discussions with many colleagues that since the introduction of the income threshold spouse applications have gone down by 50 per cent.

The requirement of £18,600 came before the High Court by way of challenge. In *MM, Majid and Javed v. SSHD*³⁷³, Mr Justice Blake held that the requirement of such an income level is not compatible with Art.8. It was argued before the Court that many people in the UK do not actually have that income and as such why should they be denied from having a family life if they chose to marry someone from overseas. Not surprisingly, the Home Secretary had appealed this decision. The hearing before the Court of Appeal took place in March 2014 and we are yet to receive the decision. It has been reported that one of the arguments advanced by the Secretary of State before the Court of Appeal in support of the threshold is that the affluent people are more likely to integrate than poor people!³⁷⁴

However, the most striking feature of the *MM* case is that it has indirectly recognised the ‘near-miss’ principle as invoking human rights considerations. Justice Blake held that although government’s social and economic policies should be respected when an applicant can satisfy all the requirements of the rules, except one but there are strong family connections with the UK, decision to refuse entry on the ground that rules are not fully complied with can become disproportionate. In his words: “*The courts have recognised that economic and social policies require lines to be drawn somewhere and once drawn they need to be respected as part of the policy choice of the decision maker. This is so but immigration control is not an end in itself and only a means to promote the legitimate aim of economic and social order, and other such aims. In any event, human rights adjudication does reveal cases where a claimant who can only comply with all the rules save one but whose other circumstances generate a significant family nexus with the host state make the application of the brighter line rule disproportionate.*” (Para 153 (iv)).

The changes to immigration rules and the challenges to them are too recent to merit a comprehensive discussion in this thesis.

³⁷³ [2013] EWHC 1900 (Admin).

³⁷⁴ See case report from JM Wilson Solicitors http://www.jmwilsonsolicitors.com/index.php?option=com_content&view=article&&Itemid=0&id=148 (accessed 5 May 2014).

6.6 Summary of the findings

- a. Although at times, the courts are quite restrictive, in general they are more favourable in upholding a breach of Art.8 then Art.3. Lower level of the Judiciary such as the Immigration Tribunals is more likely to be persuaded by Art.8 arguments. *This is evident from reported cases and from the personal experience of this researcher.* Much of the jurisprudence in this area has been developed by the Tribunal – issues of delay, third party rights etc. all originated from the lower level and then later on they got approval from the Highest Courts. *There are cases where the Tribunal has made a new opening of Art.8, but the progress was halted by the Higher Courts. In Chapter IV we have seen that in Hayat the Tribunal extended the Chikwamba principle to cover situation where the sponsoring spouse is not British or settled in the UK. However, the Court of Appeal overturned this decision. Further, the issue of human rights of students as developed by the Tribunal (discussed elaborately in Chapter V) suffered a setback when the Supreme Court in Patel and Others v. SSHD³⁷⁵ declared: “The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8.” (Para.58), since Art.8 is only concerned with family or private life and not with education.*
- b. In determining the proportionality of an action by the Home Office, in the balancing exercise, the doctrine of jumping the queue has little relevance – the test is now whether it is reasonable to expect that the close members of the applicant should follow them to their country of origin. The Court have frustrated the Home Office’s attempt of reintroducing the ‘insurmountable obstacles’ test through the changes of 9 July 2013 in *MF* and *Izuazu*.
- c. A number of factors are considered by the Courts as favourable for the applicant. (a) Home Office delay in deciding a case and consequently where an applicant has established a family or private life. (b) Home Office errors. (c) Problems with entry clearance. This is most certainly an improvement over the ECtHR jurisprudence.
- d. Presence of children can have a strong bearing on the outcome of an application, especially if the children have been living in the UK for seven years and integrated

³⁷⁵ [2013] UKSC 72.

with the UK education system. Under s.55 the Secretary of State has a duty to promote the welfare of the children who are in the UK irrespective of their immigration status. Although the Home Office are not that keen to accept this argument, they normally concede when the matter goes to the High Court or is decided by the Tribunal. This is a further advancement from the ECtHR's jurisprudence.

- e. Education of an applicant can be regarded as an aspect of private life. When a student is in the middle of his studies, and mostly satisfies the requirements of the Immigration Rules, may be allowed to complete their course. Cases like *CDS* and *OA* and Case Studies 10 and 11 make this clear.
- f. It appears that the PBS system is not that popular with the judiciary, because it has left no discretion to the judges. Courts are using human rights arguments to mitigate the harshness of immigration rules. *Pankina*, *SAB*, Case Study 12 confirm this.
- g. Family is being treated as one unit – the rights of third party are recognised, otherwise affected family members may bring action on their rights.
- h. Some apparently minor factors being used by the Courts in the balancing exercise in favour of the applicants, such as contribution to the society (Case Study 2), playing cricket (*Abdullah Manwar*), attending mosques and charitable activities (Case Study 6) as evidence of private life.
- i. Art. 8 can be used both in leave to remain and leave to enter cases (Case Study 7).
- j. In response to judicial activism, the Home Office has brought in changes for tighter immigration control and to restrict the use of Article 8 arguments.
- k. The Courts do not always accept the Home Office arguments that the individual's interest has been balanced in the Immigration Rules.
- l. Lord Bingham's decision in *Huang* has killed the doctrine of judicial deference, at least in human rights related immigration cases. In *Izuazu*, the Tribunal refused to concede to the Home Secretary's submission that the Court should take deference to the new rules as reflecting the view of the government and parliament.
- m. There is uncertainty whether 'near-miss' principle is applicable in the context of an Art.8 application. While *Pankina* suggests that an applicant who otherwise satisfies the requirements of immigration rules but there is a minor breach of immigration rules, this may give rise to human rights considerations; *Miah* makes it clear that there exists no 'near-miss' principle. On the other hand *MM* stands for the principle that if an applicant complies with all the requirements of the rules except one, but there

exists strong family nexus with the UK, rejection of an application can be disproportionate and thus may engage Art.8. However, these cases may be reconciled on the grounds that while *Pankina* and *Miah* dealt with private life *MM* is concerned with family life. Since family life is stronger than private life, a different consideration could be employed and there could still be a 'near-miss' principle in this context. In any case, this researcher believes that human rights exist to mitigate the harshness of general law otherwise there was no need for them. Further *Patel* (as cited above) it was held: "*a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.*" (Para56). Does this mean that where a case otherwise has merits, then a 'near-miss' principle can assist an applicant?

- n. Medical cases, which cannot meet the high threshold of Art.3 can still come within Art.8, especially when there are psychiatric problems.
- o. There are other potential uses of Art.8 when it can be argued that the quality of life has been reduced. However, these remain to be tested. (Case Studies 13, 14, 15 – homosexuality etc).

6.7 Recommendations

This research focused on how right to respect for private and family life can prevent someone's removal from the UK or allow them to come to the UK. There are a lot of related areas which may be of further interest to prospective researchers. One such studies could be to find out the impact of the changes of 9 July on family and private life and how the courts are treating this restrictive Home Office approach to Human Rights.

6.8 Final Words

If Lester³⁷⁶ was correct in arguing that the incorporation of ECHR would protect minorities against the tyranny of elected majorities and ordinary men and women against the misuse of administrative and judicial discretion, then at least in the field of Immigration with regard to Article 8, this can be regarded as a true outcome.

The debate between those who support judicial activism and those who prefer deference is simply whether an elected Parliament or unelected courts should have the final say in determining what the law should be in a democracy³⁷⁷. The purpose of HRA is to allow the courts to apply human rights principles where they were once barred from doing so. For some, the Act was not enacted so that the courts could have the final say in areas where there is no settled human rights answer. However, the judiciary in the exercise of their powers conferred by the Act are taking human rights in the context of immigration to a place where none existed before. From a human rights perspective, this is certainly a welcome move. The law developed so far by the English Courts represents a healthy and dynamic jurisprudence, which in many respect is more advanced and clear than that of the ECtHR. The result is that the English Law has recognised a qualified positive right of an alien not to be removed.

³⁷⁶ Lester, A (1984) "Fundamental Rights: The UK Isolated?" *PL* 46.

³⁷⁷ Klug, F (2003) "Judicial Deference under the Human Rights Act 1998", in *European Human Rights Law Review* 125-133.

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