



SHARPENS YOUR THINKING

A developing gap in the application of articles 5 and 8 of the European Convention on Human Rights in the immigration context - the shifting nature of humanity

BAROS, M.

Available from Sheffield Hallam University Research Archive (SHURA) at:

<http://shura.shu.ac.uk/682/>

This document is the author deposited version. You are advised to consult the publisher's version if you wish to cite from it.

Published version

BAROS, M. (2009). A developing gap in the application of articles 5 and 8 of the European Convention on Human Rights in the immigration context - the shifting nature of humanity. *Journal of immigration asylum and nationality law*, 23 (3), 264-280.

Repository use policy

Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in SHURA to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain.

Journal of Immigration Asylum and Nationality Law

2009

A developing gap in the application of articles 5 and 8 of the European Convention on Human Rights in the immigration context - the shifting nature of humanity

Miroslav Baros

Subject: Immigration. **Other related subjects:** Human rights

Keywords: Immigration; Right to liberty and security; Right to respect for private and family life

*J.I.A.N.L. 264 At a glance

Analysis of the judicial interpretation of ECHR, arts 5 and 8 in the context of immigration reveals significant differences. With respect to art 5 the courts defer to the will of government; when examining authorities' compliance with rights under art 8 ECHR they exhibit an increasingly active challenge and judicial activism. This is a paradoxical development because the entitlements under art 5 ECHR are more fundamental, more directly related to the rule of law and, as such, should enjoy a higher level of protection. The author advances three specific reasons for this unfortunate development all stemming from the very nature of human rights discourse and its confrontational character. They are: the rigidity of human rights argument; balancing between legal, legislative and socio-political requirements; and an inability to state clear purposes and objectives of the measures limiting human rights entitlements.

Introduction

It is argued in this article that a significant gap in the level of judicial activism is developing between arts 5 and 8 of the European Convention on Human Rights (ECHR) in the immigration context. Three groups of reasons, all stemming from the very nature of the concept of human rights are advanced here as an explanation of this rather paradoxical development: the rigidity of human rights argument with its confrontational and exclusive character;¹ the fact that judicial authorities have to balance between legal, legislative and socio-political requirements and standards;² the inability to state clear purposes and objectives of the *J.I.A.N.L. 265 measures limiting human rights entitlements. In one of the first immigration cases against the UK³ the respondent tried to avoid the application of the ECHR's principles and standards by relying exactly on the reasons stated above. The government simply argued that no Convention right applied to immigration control and that only Protocol No. 4 to the ECHR provided some protection to immigrants, but that document was not even ratified by the UK. The stated purpose of the offending legislation was to protect the domestic labour market. So in the view of the UK government the point was not

about the fundamental nature of the entitlements that the applicants claimed but about whether the obligations under the ECHR were voluntarily accepted or not.⁴ The Court of course rejected this position and reminded the UK government that regulating the right to enter may indeed engage the relevant ECHR's articles.⁵

The incongruity of human rights discourse with its inherent confrontational character has led to a paradoxical development in the immigration context: the pace of the development of two particular rights under the ECHR is taking a different shape. A higher threshold of protection and judicial challenge to the state's authorities can be detected in relation to the right to private and family life under Article 8 ECHR than in relation to the right to liberty and security of the person under art 5 ECHR, which is, notwithstanding indivisibility of human rights, one of the most fundamental rights.⁶

Hierarchical terms in relation to human rights have been expressed domestically already. In *Al-Fayed v Commissioner of Police of the Metropolis*⁷ where, having considered an argument that proportionality should be imported into the test for the lawful exercise of a power of arrest, Auld LJ (implicitly rejecting any separate proportionality requirement) stated that:

‘The extent, if at all, of that narrowing of the ambit or lightening of the burden on the claimant will depend on the nature of the human right in play - in this context one of the most fundamental, the Article 5 right to liberty.’⁸

The point will be demonstrated by analysing the most recent case law, legislation and the Home Office's policies in relation to the application of arts 5 and 8 ECHR.

***J.I.A.N.L. 266 The right to liberty and security of person**

‘No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.’⁹

That detention is unlawful unless authorised by law has long been recognised under the domestic law. Although dissenting in *Liversidge v Anderson*¹⁰ Lord Atkin stated that freedom from unlawful detention ‘is one of the pillars of liberty’ and ‘in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act.’¹¹

According to the Universal Declaration of Human Rights 1948 (UDHR) the right to liberty and security of person is the most fundamental of all rights. It is no surprise that this general consensus and the most ‘definitive statement on human rights in contemporary society’¹² coupled it with the right to life in art 3.¹³

All subsequent universal and regional human rights documents accorded the same fundamental character to the right of liberty and security of person.¹⁴ The fundamental character of the right is also emphasised by the corresponding duty of the state to provide compensation for its breach¹⁵ and to allow access to a court for a review of the legality of the detention.¹⁶ The international adjudication has always linked the right to the Rule of Law.¹⁷

Even failure to enable judicial control over interferences by the executive with the individual's right to liberty violates the rule of law.¹⁸

A prolonged arbitrary detention is categorised as a violation of customary international law of human rights together with genocide, slavery, torture or other cruel, inhuman, or *J.I.A.N.L. 267 degrading treatment or punishment and systematic racial discrimination¹⁹ requiring instantaneous and unconditional application.

The requirements of art 5 go beyond benevolence and good will arguably implicit (although not sufficiently given) in the traditional concept of liberties and freedoms; it requires not only the protection of liberty but the security of the person as well. This protects the individual against arbitrariness often present in a deprivation of liberty. A detention is arbitrary if it was pursued in bad faith or if it was not proportionate.²⁰ There is therefore a clear positive element in art 5, as the European Court of Human Rights (ECtHR) in *Amuur v France*²¹ emphasising the point required that 'any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness...'²²

Secondly, the exceptions to the general prohibition to detain are clearly stated in art 5 ((1)(a)-(f)); they provide an exhaustive list of circumstances in which a person can be lawfully deprived of his liberty²³ meaning that interference with the individual's right to liberty and security may be effectuated for the specified purposes only, which reduces the latitude of states in determining what may constitute legitimate impingement.

The security of the person, currently not requiring more than 'physical' liberty²⁴ does imply a positive duty absent from the merely 'liberty' of the person, is certainly likely to develop further through the international judicial interpretation of the requirement.

Finally, the two layers of assessing lawfulness of a detention confirm the seriousness of the right; the procedural and substantive elements so to speak. The former relates to the ECtHR's requirement that any deprivation of liberty must be prescribed by law²⁵, while the latter relates to proportionality of the measure to restrict liberty.²⁶

*J.I.A.N.L. 268 The right is not absolute in the sense that 'in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations'. The measures however must be taken only 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'.²⁷ Although the ECtHR acknowledges a 'wide margin of appreciation' to the contracting parties to determine whether the life of the nation is threatened,²⁸ it does reserve the right to judge whether the conditions for derogations exist. In the Greek Case the Court expressed its view on the point by saying that:

'Such a public emergency may then be seen to have, in particular, the following characteristics:

- (1) It must be actual or imminent.
- (2) Its effects must involve the whole nation.
- (3) The continuance of the organised life of the community must be threatened.

(4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.²⁹

Clearly, international jurisprudence and international human rights documents have always emphasised the fundamental nature of the right, the disregard of which in its application is the underlying theme of this article.

The application to the right to liberty and security of persons in the UK

The realisation of the right to liberty and security of person in the UK, especially in the immigration context has paradoxically been highly politicised and susceptible to the discretionary area of executive judgment.

The principal standard in terms of effective challenge to executive powers in relation to detention was adopted rather early in the domestic jurisprudence. In *R v Governor of Durham Prison ex p Hardial Singh*³⁰ the Court ruled that the power to detain individuals is subject to certain limitations. Detention can be authorised only if: a) in one case pending the making of a deportation order and, in the other case, pending a removal; b) the power of detention is impliedly limited to a period which is reasonably necessary for carrying out the deportation, which will depend on the circumstances of the particular case; c) the Secretary of State should not exercise the power of detention if it is apparent to him that he is not going to be able to operate the machinery provided in the [the 1971 Immigration] Act for removing persons who are intended to be deported within a reasonable period.³¹ In *R (I) v SSHD* the Court approved *Singh* and summarised the issue as follows:

*J.I.A.N.L. 269 ‘(a) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;

(b) The deportee may only be detained for a period that is reasonable in all the circumstances;

(c) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;

(d) The Secretary of State should act with reasonable diligence and expedition to effect removal.³²

Initially domestic judicial attitude endorsed this strict standard. In *R (Sedrati) v SSHD*³³ the court declared that the terms of Sch 3, para 2(1) of the Immigration Act 1971 did not create a presumption in favour of detention upon the completion of the sentence.

In *A v Secretary of State for the Home Department and X v Secretary of State for the Home Department*³⁴ the Lords, adopting an unusually confrontational stance criticised both the government and parliament for allowing foreign nationals suspected of being engaged in terrorism to be held indefinitely without charge or trial. The case marked the beginning of a more active judicial involvement in assessing government policies in relation to national security.³⁵ An important implication of the case is that the courts will have greater role in making sure that the rule of law must be respected when the executive decides what is in the

interest of national security, departing from an earlier extremely deferential position in *Rehman*.³⁶

In the recent past there has been a three-prong attack on the spirit of the ECHR in relation to art 5. First of all jurisprudence is developing in the way that the balance is shifting in favour of the state; secondly, legislative innovations made it more difficult to succeed under art 5 and finally the ECtHR's 'quality of law' requirement³⁷ has been compromised by the Home Office unpublished policy with regard to the detention of foreign national prisoners as well as the detained fast track processes (DFT) to deal with the so-called straightforward asylum cases.³⁸

In *R v SSHD, ex p Saadi and Others*³⁹ the Lords ruled that detaining asylum applicants for administrative convenience did not violate art 5 ECHR; the case in which 'the principle of *J.I.A.N.L. 270 sovereignty prevailed over human rights.'⁴⁰ How far the court was prepared to go in supporting the government policy to compromise human rights standards in dealing with asylum applications expeditiously was demonstrated in the following passage:

'Arguably detention to process rapidly an asylum claim can be seen as action with a view to removal if the claim is not allowed and it is not limited to a case against a person in respect of whom a removal decision has been taken'⁴¹.

Although said in *obiter* it does implicitly contradict the very spirit of the ECHR. Surprisingly, the ECtHR supported the UK government position on this.⁴²

In *R (A) v SSHD*⁴³ the Court found that the detention of a Somali national for three years and 10 months,⁴⁴ effectuated after a criminal sentence, was lawful throughout due to the risk of further offending and the claimant's refusal to accept voluntary repatriation to Somalia. The risk of absconding threatened the very purpose of the deportation order (is there a blurring of a purpose and objective?), while the appellant's refusal to voluntarily return to Somalia was deemed a 'self-induced' detention as described by Lord Browne-Wilkinson in *Tan Te Lam and others v Superintendent of Tai A Chau Detention Centre and others*.⁴⁵ Public safety concern prevailed over the considerations and principles from *Singh* elevating it to the very purpose of detention.

The *Singh*'s principles were further compromised in *R (M) v SSHD*⁴⁶ where an Iraqi national was detained for 17 months awaiting deportation and although there was no prospect of deporting him the Court ruled that there was a substantial risk of absconding and re-offending and on that basis the detention was deemed lawful.

Finally, in *SK (Zimbabwe) v Secretary of State for the Home Department*,⁴⁷ the Court of Appeal allowed the Secretary of State's appeal against a declaration by Mr Justice Munby that the claimant had been unlawfully detained by the Secretary of State for about 19 months. The main issue in the case was the Secretary of State's failures to carry out the requisite reviews of the detention pursuant to the Rules and the Manual. Indicative of the argument developed in this article was the Court's interpretation of the requirement. The fact that the requisite review of the detention in the immigration context was not given the same legal status as in public law⁴⁸ the Court did not find a problematic in terms of compliance with the Convention but rather exonerating feature. As Lord Justice Laws put it: 'I cannot see how compliance with the letter of the Rules or Manual could be said to be *a sine qua non* of a lawful exercise of the power to detain unless paragraph 2(2) (or other main legislation) made

it so. But it does not.⁴⁹ Although strictly legally speaking the Court was probably right in expressing its view that in order to avoid any arbitrary action the Convention does 'not necessarily require the imposition of any *J.I.A.N.L. 271 specific system of internal mechanics as the means of avoiding it'⁵⁰ the attitude shows a minimalistic approach to the protection of human rights as required by the spirit of the Convention with its implicit relegation of the 'quality of law' requirement as developed by the ECtHR.

Turning to the legislative side, the UK Borders Act 2007⁵¹ established a system of automatic deportation of foreign criminals who have been sentenced to a period of imprisonment for 12 months or a period of imprisonment for one of the offences specified in the Nationality Immigration and Asylum Act 2002.⁵² An automatic deportation will be made unless certain exceptions apply.⁵³ In addition the Act has extended the powers of detention and made them unrelated to the primary purpose - deportation because even if the steps for deportation have not been initiated. Section 36(1)(a) empowers the Secretary of State to detain a person who has served a period of imprisonment while he considers whether s 32(5) applies, and where the Secretary of State thinks that automatic deportation provisions apply, pending the making of the deportation order (s 36(1)(b)). This is certainly a significant expansion of discretionary powers since under the previous legislation (the 1971 Immigration Act) there was no power to detain for deportation if there was no power to deport.

Finally, the new Home Office's unpublished policy with regard to the detention of foreign national prisoners⁵⁴ has made it likely that the art 5 entitlements would be compromised since it is inherently in conflict with the ECtHR's 'prescribed by law' requirement.⁵⁵ In *Abdi and Others v SSHD* the High Court ruled that this policy was unlawful.⁵⁶ The main legal issue turned out to be whether an executive decision could create a presumption of detention considering that the existing law as interpreted in *R (Sedrati) v SSHD*⁵⁷ did not allow for that *J.I.A.N.L. 272 kind of presumption. The defendant's position in this case was indicative of the changing nature of protection of entitlements under art 5. The defendant (the Secretary of State) in *Abdi and Others* seemed to argue that this silent change was indeed quite legal. In one of the emails sent by the defendant on 21 December 2006 that the court examined it was stated: 'The Home Secretary has been very clear in his statements that there will be a presumption of detention in all FNP cases until removal. We need to ensure that all staff are applying that'.⁵⁸ The court reminded the defendant that:

'[T]he defendant of course has no free standing power of detention in this context: the defendant's powers derive from statutory provisions. Those statutory provisions have been interpreted by the Court in *Sedrati*. I do not think that it can for this purpose be circumvented by seeking to distinguish a legal (persuasive) presumption from a factual (evidential) presumption. No statutory amendment has been made in this regard in the aftermath of *Sedrati*. The defendant must apply the law: the defendant cannot displace it by executive decision.'⁵⁹

In addition to the new policy, the Detained Fast Track processes are still employed in relation to the straightforward asylum cases by the Home Office. It seems however that the introduction of the practice had more to do with reducing the number of successful asylum claims than with the nature of the cases. In its briefing paper of February 2009 *Bail for Immigration Detainees (BID)* found that in the last three months of 2008, 20% of all asylum seekers in the UK were granted refugee status. During the same period only 3% who had their claim decided at Harmondsworth and 7% at Yarl's Wood were recognised as refugees.⁶⁰ Worryingly, according to the organisation a significant number of unsuitable cases are

routinely fast tracked. Women who experienced rape, female genital, mutilation, domestic violence, trafficking, forced prostitution or sexual assault, victims of torture and children are also subject to the processes.⁶¹

In the light of the above analysis it appears that the threshold of protection of the right to liberty and security of person in the immigration context in the UK has been significantly narrowed in spite of its fundamental character.

The right to respect for private and family life

According to art 8 ECHR ‘everyone has the right to respect for his private and family life, his home and his correspondence’ and ‘there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’⁶²

In the immigration context, however the right is subject to the traditional right of states to regulate entry into their territory. The ECtHR expressed its view on this point in *Moustaquim v Belgium*.⁶³

*J.I.A.N.L. 273 Both UDHR⁶⁴ and ICCPR⁶⁵ protect against arbitrary interference with family life. But the positive element applies only to respecting an existing private and family life,⁶⁶ it does not create a positive obligation to allow the establishment of a family life.⁶⁷

The very essence of the right therefore allows⁶⁸ for a greater margin of appreciation⁶⁹ than Article 5 ECHR. The application of the right is however undergoing significant modification and endorsement through the domestic judicial interpretation.

The application of the right to respect for private and family life in the UK

The leading case in the field,⁷⁰ although establishing the principle that immigration control must be exercised consistently with Convention obligations, implicitly created another principle that states are not obliged to respect the choice of immigrants as to *where* they would want to exercise their right to family life under art 8.⁷¹

But the right to respect for private and family life seems to be the most indicative of perceiving the ECHR as a living instrument.⁷² It developed from a minimal requirement to respect the right based on the principle that the contracting parties have the right ‘as a matter of well-established international law and subject to their treaty obligations to control the entry, residence and expulsion of aliens’⁷³ to a more liberal and protective stance requiring authorities to protect ‘the network of personal, social and economic relations that make up the private life of every human being’.⁷⁴

The domestic jurisprudential attitude is developing at an unprecedented speed. 25 June 2008 represents probably the most important departure, not only from previous case law,⁷⁵ but from the spirit of the primary legislation. The initial, fairly deferential position by the courts was *J.I.A.N.L. 274 unexpectedly replaced by the House of Lords in *Huang v SSHD*; *Kashmiri v SSHD*.⁷⁶ The Lords reminded authorities that exceptionality is not a part of the test; the test is already provided by art 8 ECHR itself. In terms of succeeding under art 8

ECHR in the immigration context it would suffice that the refusal of leave to enter or remain ‘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.’⁷⁷ The court explicitly departed from the previous implicit judicial endorsement of Immigration Rules by saying that they are not ‘the product of active debate in Parliament.’⁷⁸

The new watershed in terms of the substance of art 8 ECHR has been established in *Beoku-Betts v SSHD*.⁷⁹ The Lords ruled that:

‘[t]he legislation allowed, indeed required, the appellate authorities, in determining whether the appellant's art 8 rights had been breached, to take into account the effect of his proposed removal upon *all the members of his family unit*. Together those members enjoyed a single family life and whether or not the removal would interfere disproportionately with it had to be looked at by reference to the family unit as a whole and the *impact of removal upon each member*. If overall the removal would be disproportionate, all affected family members were to be regarded as victims.’ (Emphasis added).

As Baroness Hale explained: ‘[t]he central point about family life, ... is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed’.⁸⁰

This bold and expansive interpretation of the requirement under art 8 injected immigration law with humanity and raised the threshold of human rights protection in a way that would have been very difficult to achieve by primary legislation. In fact, the current statutory provisions do not even envisage this kind of scenario. Under s 7 of the HRA 1998 anyone affected by a decision may apply and argue that their Convention rights have been violated. In the immigration context, however, under Nationality, Immigration and Asylum *J.I.A.N.L. 275 Act 2002 only the person to whom the immigration decision is addressed can allege that a human rights breach has occurred.⁸¹

The apparent discrepancy was dealt with by the Lords in the following terms:

‘The disadvantages of the narrow approach are manifest. What could be less convenient than to have the appellant's article 8 rights taken into account in one proceeding (the section 65 appeal), other family members' rights in another (a separate claim under section 7 of the Human Rights Act)? Is it not somewhat unlikely that the very legislation which introduced “One-stop” appeals--the shoulder note to section 77 of the 1999 Act--should have intended the narrow approach to section 65? [Now ss. 82 and 84 Nationality, Immigration and Asylum Act 2002]. Surely Parliament was attempting to streamline and simplify proceedings. And would it not be strange too that the Secretary of State (and the Strasbourg Court) should have to approach the appellant's article 8 claim to remain on one basis, the appellate authorities on another? Unless driven by the clearest statutory language to that conclusion, I would not adopt it. And here the language seems to be far from decisive. Once it is recognised that, ... “there is only one family life”, and that, assuming the appellant's proposed removal would be disproportionate looking at the family unit as a whole, then each affected family member is to be regarded as a victim, section 65 seems comfortably to accommodate the wider construction.’⁸²

The new approach was applied in *Nzumvira v SSHD*,⁸³ where the Court ruled that the Secretary of State had failed to apply the broader test for assessing infringements under art 8 ECHR of a failed asylum seeker contained in *B v Secretary of State for the Home Department* and confirmed in *Am (Jamaica) v SSHD*⁸⁴ the Court of Appeal ruled that consideration of rights under art 8 ECHR in respect of deportation or asylum generally required consideration not only of the art 8 rights of the individual concerned but also the art 8 rights of his or her whole family.

The impact of administrative convenience and delay on entitlements under art 8 may indeed be significant. In *EB (Kosovo) v SSHD*,⁸⁵ the key case in the area, the Lords, summarising the Convention jurisprudence, opined that art 8 ECHR ‘imposes on member states not only a negative duty to refrain from unjustified interference with a person's right to respect for his or her family but also a positive duty to show respect for it’. The Lords established, what seemed to be a standard in relation to the impact of delay on entitlements under art 8. Delay might, depending on the facts, be relevant in any one of three ways:

1. The applicant might during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier;
2. An immigrant without leave to enter or remain was in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant entered was likely to be, initially, tentative, being entered into under the shadow of severance by *J.I.A.N.L. 276 administrative order. But if months passed without a decision to remove being made ..., it was to be expected that that sense of impermanence would fade and the expectation would grow that if the authorities had intended to remove the applicant they would have taken steps to do so;
3. If the delay was shown to be the result of a dysfunctional system which yielded ‘unpredictable, inconsistent and unfair outcomes’, then ‘the weight otherwise be afforded to the requirements of firm and fair immigration control may be reduced’.⁸⁶

Interestingly, the Lords also expressed their view that ‘the adjudicator had not accurately or adequately addressed the human problem raised by the claimant's appeal.’⁸⁷

Consistency and fairness were previously invoked in the context of art 8 in *SSHD v (R)S*⁸⁸. The case is more relevant in terms of the development of judicial review since it put the boundaries on the Secretary of State's discretion by holding that there had been a deliberate and unlawful decision to postpone a category of cases solely to deal with a backlog, without any regard for fairness and consistency. The Court of Appeal concluded that, had S's case been dealt with within a reasonable period of time, he would have obtained first exceptional leave to remain and then indefinite leave to remain and therefore the Secretary of State's failure to do so amounted to illegality. These, arguably higher standards putting boundaries on discretion seem to apply more readily in the context of art 8 than in relation to the rights under art 5 ECHR.

The rulings, especially *EB (Kosovo)* seem to indicate the new approach, and that is a legitimate expectation by the claimant that ‘sense of impermanence’ would fade with the delay has to be considered. But surprisingly, the same standard was not applied in *AL (Serbia) v SSHD and R (Rudi) v SSHD*⁸⁹. The Lords ruled that the policy of the Secretary of State⁹⁰ ‘was not devised as a piece of social engineering with a view to safeguarding the welfare of

families. It had a much more pragmatic purpose: ... It was to save public funds by clearing the ground to promote greater efficiency in the future.’⁹¹ According to Baroness Hale ‘the essence of the policy was its efficiency, not its compassion’⁹². Dealing with backlog for administrative convenience was declared fair in *AL*, but not in the previous case. The answer to *EB (Kosovo)* was to address ‘the human problem’, but in *AL (Serbia)* the ‘question demands a practical, commonsense answer.’ Although not an *impact of delay case*⁹³ Mr Al and Mr Rudi were almost in the same situation as Mr EB. In both cases unaccompanied minors came from Kosovo via Macedonia in 1999 and unsuccessfully claimed asylum. They could have benefited from the Secretary of State's policy to be granted exceptional leave to remain with the chance of obtaining indefinite leave to remain had they arrived with their parents. The main distinguishing feature which eventually led to a different outcome was the fact that in *AL (Serbia)* the decision on asylum claim was made with a shorter, although not insignificant delay. The delay itself in *EB (Kosovo)* led the Lords to adopt a more compassionate view, *J.I.A.N.L. 277 conspicuously absent in *AL (Serbia)*. The applicants in the latter case were unlucky so to speak for not being able to benefit from delay.

The analysis above indicates that the current domestic position on arts 5 and 8 ECHR seems to be developing at a different pace. In relation to art 8 it is possible to discern greater judicial activism with a more liberal and protective jurisprudence giving substance to the right to respect for private and family life, while entitlements under art 5 are subject to vigorous judicial balancing between legal and legislative inevitably exhibiting greater degree of deference to the authorities and legislation. For the purpose of the proposition a useful comparison may be drawn between *C and D (by their litigation friend S) v SSHD*⁹⁴ and *R v SSHD, ex p Saadi and Others*.⁹⁵ Both cases related to art 5 ECHR and although decided on a different basis⁹⁶ one of the implications of *C and D* is that it is easier to succeed under art 5 if a family makes a claim than a single person. Compassion may be an influencing factor when reaching a decision but it should not be elevated to the status of a deciding consideration. It is not clear why the submission that there was no risk of absconding did not succeed in *Saadi* while it was the main legal consideration sufficient for finding violations of arts 5 and 8 in *C and D*. To make matters even more confusing according to the domestic law families can be detained on the same footing as all other persons liable to detention.

Conclusion

As suggested above one of the main characteristics of human rights discourse is rigidity of argument with implicit exclusiveness and a winner-looser outcome. Its confrontational character allows the defendant (a state) to argue that, in spite of their fundamental nature the claimed rights cannot be applied simply because they were not consented to.⁹⁷ In reality this means that duties imposed on states by other than human rights law, operate more efficiently in terms of protecting individuals' rights and entitlements. A comparison between two particular cases decided by the European Court of Justice in the context of nationality⁹⁸ illustrates the point sharply. In *Airola v Commission*⁹⁹ the European Court of Justice adopted a more protective stance in relation to the applicant relying on EC law than in *R v SSHD, ex p Kaur (Manjit)*¹⁰⁰ where the applicant invoked European Convention on Human Rights. Interestingly the Court had an option in both cases to rule under EC law,¹⁰¹ but in the first case it did exactly that and interfered with the state's national jurisdiction; while in the context of human rights law, in the latter, the Court gave primacy to national sovereignty. It follows that human rights law allows for greater margin of appreciation than other international political or economic commitments.

*J.I.A.N.L. 278 The nature of human rights and more generally international law, allowing states to choose which status to give to the international human rights document, resulted in the discrepancy suggested in this article. The underlying philosophy in the context of arts 5 and 8 ECHR seems to be that it is politically less costly to deal with consequences of mistakes that may occur in the context of art 8 ECHR than in relation to art 5. It is difficult to accept responsibility if a foreign prisoner re-offends or absconds or if he or she represents a danger to national security. On the other hand, being mistaken in respecting the right to family life and privacy may not lead to such dangerous consequences. This distinction seems to be a reason for the different treatment and lack of judicial activism in the recent practice in relation to implementing art 5.

Having to balance between legal and legislative standards and requirements or simply to balance between conflicting claims, relates to the distinction between jurisprudential reasoning and proper application of law (legal) and the limitation on the judiciary to go beyond parliamentary intention in interpreting law in accordance with human rights (legislative or deferring to the will of parliament). This is clearly expressed in s 3 of the Human Rights Act 1998 requiring the courts to interpret legislation 'as far as possible' in accordance with the Convention.¹⁰²

This balancing exercise usually ends in adopting a more deferential stance towards the legislative. As Lord Roger put it in *Ghaidan v Godin-Mendoza* : '[h]owever powerful the obligation in section 3(1), it does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen.'¹⁰³

The balancing exercise essentially means compromising human rights standards, requirements and principles developed by the ECtHR. The greater the balancing, the greater the potential for human rights violations. According to Duncan Kennedy, a leading critical legal scholar, the point of an appeal to a right, or the reason for making it, is that it cannot be reduced to a mere value judgment, that one outcome is better than the other. Legal reasoning refers to interpretative fidelity of judges who are bound by the legal formulation of the right; the duty to be faithful to it in their interpretation and application; this duty is counterbalanced so to speak by legislative duty, which is appealing to the political values of the community. Rights are according to Kennedy, mediators between the domain of pure value judgments and the domain of factual judgements.¹⁰⁴ There is a distinction between rules and reasons for rules in other words, and that is why the courts have to balance between a proper application of law, where they are bound and limited by the internal logical structure and coherence of the rules, with the underlying reasons for having those rules. This second part is outside and pre-exists legal reasoning. This phenomenon seems to be most visible in the context of art 5 ECHR - either to interpret and apply properly the entitlements under art 5 or to uphold public order and national security. The problem with this philosophy is that the 'either or' approach may lead to the 'neither nor' (human rights or national security) because the Rule of Law requires an effective protection of both.

Another reason for the discrepancy that is developing in the application of the two rights is failure to clearly state the objective of an offending legislation or measure capable of violating *J.I.A.N.L. 279 human rights and consequently inability to comply with the purpose of detention. As the Court in an Australian case said:

‘A law requiring the detention of the alien takes its character from the purpose of the detention. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive.’¹⁰⁵

It is inherently difficult to state the objective clearly if too wide discretionary powers are given to the authorities. In relation to art 5 the international human rights standards require that purpose and objectives are the same: *removal* ; if there is a secondary purpose,¹⁰⁶ (like to *prevent* entry) the objective becomes blurred and different from purpose and the situation creates great potential for human rights violation because the secondary purpose would be governed by a motivation, not by a clear objective and legitimate purpose.

It is difficult to resist the impression that judicial activism is more detectable in relation of art 8 than art 5 in the immigration context. A comparison between two particular cases may illustrate the point.

In *B v SSHD* the House of Lords, increasing the threshold of protection of Article 8 in the immigration context expressed its view that:

‘[i]t would be strange if the secretary of state and the Strasbourg Court had to approach an appellant's art 8 claim to remain on one basis and the appellate authorities on another. Only the clearest statutory language would support such a conclusion; here, the language was far from decisive. Once it was recognised that there was only one family life and that, assuming the appellant's proposed removal would be disproportionate looking at the family unit as a whole, each affected family member was to be regarded as a victim, section 65 seemed comfortably to accommodate the wider construction.’¹⁰⁷

The Court therefore went well beyond the primary legislation's requirement that in the immigration context only the person to whom a decision is addressed can claim human rights violations and increased the threshold of protection of entitlements under art 8 ECHR.

In *SK (Zimbabwe) v SSHD* the court narrowed the threshold of protection by relegating the status of the review requirement of detention to a non-binding and not necessary prerequisite. As it ruled:

‘I cannot see how compliance with the letter of the Rules or Manual could be said to be a sine qua non of a lawful exercise of the power to detain unless paragraph 2(2) (or other main legislation) made it so. But it does not. Munby J was in my judgment wrong to hold, as I understand him to have done at paragraph 68 of his judgment, that such compliance was “a necessary prerequisite to the continuing legality of the detention”.’¹⁰⁸

From a political and pragmatic point of view one can appreciate the philosophy behind the different standards, but from the Rule of Law point of view and legal certainty the distinction *J.I.A.N.L. 280 is difficult to maintain. The distinction seems to be an approach rather than different context or particular circumstances of the cases; the approach that showing respect to art 5 entitlements in the immigration context is subject to significant a balancing exercise and political pragmatism, a kind of pragmatism with its implicit ‘either or’ approach (either entitlements under art 5 ECHR or public order, prevention of crime or even national security). As suggested above this is not in accordance with the spirit of the Convention, the ECtHR's

interpretation of it and the Rule of Law, all requiring an inclusive rather than exclusive approach to effective protection of human rights.

Dr Miroslav Baros

Senior Lecturer in Law, Sheffield Hallam University ,

Faculty of Development and Society

Special thanks go to Gina Clayton and Stephen Riley who provided invaluable comments on an earlier draft of the article.

J.I.A.N.L. 2009 23(3), 264-280

[1.](#)

C R Sunstein ‘Rights and their Critics’ (1995) Vol70 *Notre Dame Law Review* 727. The author identifies six particular reasons for failure of the human rights discourse to protect the individual's entitlements under the human rights documents.

[2.](#)

See also D Kennedy ‘A Critique of Adjudication’ 1997, cited in H Steiner, P Alston, R Goodman *International Human Rights in Context: Law, Politics, Morals* (OUP, 2008) pp 481-484.

[3.](#)

Abdulaziz, Cabales and Balkandali v UK (1985) 7 EHRR 471.

[4.](#)

See M Koskeniemi ‘The Pull of the Mainstream’ (1990) Vol 88 *Michigan Law Review* 1946. The author argues that the consensual nature of international law allows state authorities to often disregard the most fundamental norms of the law with an almost grotesque and harmful implication that states have to comply with the basic rules only if they accepted them voluntarily.

[5.](#)

Supra 3, para 494. The claimants were three women lawfully settled in the UK whose husbands, treated as aliens according to the existing law could not join them.

[6.](#)

According to the concept of indivisibility of human rights there should be no distinction between fundamental and other human rights implying a hierarchy between various human rights according to their fundamental character (see T Van Boven, ‘Distinguishing Criteria of Human Rights’ in K Vasak & P Alston (eds) *The International Dimension of Human Rights*

(Greenwood Press/ UNESCO 1982) Vol 1 at p 43. See however T Meron 'On a Hierarchy of International Human Rights' (1986) Vol 80 *Am.J.I.L.* 21. According to the author 'hierarchical terms constitute a warning sign that the international community will not accept any breach of those rights'. Even more 'they (more fundamental human rights) may contribute to the crystallization of some rights, through custom or treaties, into hierarchically superior norms, as in the more developed national legal systems.'

[7.](#)

[2004] EWCA Civ 1579.

[8.](#)

Ibid para. 83. See also the principles established by the House of Lords in *R v SSHD, ex p Bugdaycay* [1987] AC 514; *R v SSHD, ex p Brind* [1991] 1 AC 696.

[9.](#)

Magna Carta (1297) XXIX (c. 9).

[10.](#)

[1942] AC 206. This dissenting opinion however had a significant impact on the development of the law and a gradual retreat from the decision in the case that occurred subsequently.

[11.](#)

Ibid 245.

[12.](#)

R K M Smith *Textbook on International Human Rights* (Oxford, 2003) at p 40.

[13.](#)

Article 3 UDHR: Everyone has the right to life, liberty and security of person'. In the immigration context Article 9 specifically states: 'No one shall be subjected to arbitrary arrest, detention or exile'.

[14.](#)

Article 9 (1) International Covenant on Civil and Political Rights 1966 (ICCPR): 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'. Article 9 (4) ICCPR: Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. Article 10 (1) ICCPR: All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Article 5 (1) ECHR: Everyone has the right to liberty and security of person. Article 6

African Charter on Human and Peoples' Rights: Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

15.

Article 5(5) ECHR: 'Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation'.

16.

Article 5 (4) ECHR: 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.

17.

Amuur v France [1996] 22 EHRR 533, para 50. More recently *Sadaykov v Bulgaria* 2008 (App no 75157/01 C/C) applicant, born in Chechnya, settled in Bulgaria, imprisoned for terrorist offences and on release detained depending deportation - see para 23. The ECtHR held that there were violations of art 5(1) (f) and art 5(4) of the Convention.

18.

Article 5 (3) ECHR: 'Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial'. See *Brogan v UK*, 1988, 11 EHRR 117, para 58.

19.

See for example 'Restatement (Third), the Foreign Relations Law of the United States' (1987) Vol 2 *American Law Institute* 161.

20.

See *Engel v Netherlands* [1976] 1 EHRR 647, para 58; *Tsirlis and Kouloumpas v Greece* [1997] 25 EHRR 198, para 56; *Bozano v France* [1987] 9 EHRR 297. A detention must also be necessary, not only legal as the ECtHR put it in *Witold Litwa v Poland* (No.26629/95). In *Litwa v Poland* the applicant was held for six hours in a 'sobering up' centre deemed legal under Polish law and the court expressed its view that 'no consideration appeared to have been given to the alternative measures for dealing with intoxicated people permitted under Polish law... These include being taken home or to a public-care establishment; detention in a sobering-up centre being the most extreme option.

21.

Amuur v France supra 17.

[22.](#)

Ibid, para 50.

[23.](#)

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:(a) the lawful detention of a person after conviction by a competent court;(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

[24.](#)

Engel v Netherlands [1976] 1 EHRR 647, para 58; *East African Asians v UK*, 1973, EHRR 76, para 220.

[25.](#)

In *Sunday Times v UK* (1970-80) 2 EHRR 245 the court established the principle that domestic law must be sufficiently precise and accessible to the individual.

[26.](#)

See *Engel v Netherlands supra* 24 and *Tsirlis and Kouloumpas v Greece* [1997] 25 EHRR 198. In *Soldatenko v Ukraine* [2008] ECHR 2440/07 the Court held that if a measure was legal domestically it could still be arbitrary under the proportionality requirement.

[27.](#)

Article 15 ECHR; in very similar manner art 4 ICCPR allows for derogation.

[28.](#)

Lawless v Ireland, 1979-80, 2 EHRR 1; *Ireland v UK*, 1979-80, 2, EHRR 153.

[29.](#)

Greek Case (1969) 12 YB 1, para 153.

[30.](#)

[1984] 1 WLR 704. The claimant was served with a deportation order and detained for five months under para 2(3) of Sch 3 to the 1971 Act following a two-year prison sentence for burglary.

[31.](#)

Ibid 706.

[32.](#)

[2002] EWCA Civ 888. The applicant was an Afghani asylum seeker who was detained for 16 months after serving his criminal sentence. For a comprehensive discussion see C Sawyer & P Turpin 'Neither Here Nor There: Temporary Admission to the UK' (2005) Vol 17 *International Journal of Refugee Law* 688.

[33.](#)

[2001] EWHC 410 (Admin).

[34.](#)

A v Secretary of State for the Home Department and X v Secretary of State for the Home Department [2004] UKHL 56; the Lords declared the purported derogation from art 5 ECHR unlawful.

[35.](#)

For a useful case comment, see A Tomkins 'Readings of A v Secretary of State for the Home Department' Summer 2005 *Public Law* p 259.

[36.](#)

See *Secretary of State for the Home Department v Rehman* [2001] UKHL 47. The House of Lords ruled that the question of whether something is in the interest of national security is not a question of law for the courts to review, but one of judgment and policy for the executive alone.

[37.](#)

The 'quality of law' refers to 'prescribed by law' (art 9,2; 10,2 11,2 ECHR) or 'in accordance with law' (art 8, 2 ECHR) standard. See *supra* 25 and *infra* 55. For a detailed analysis of the standard, see Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia Publishing 2002) at pp 9-13.

[38.](#)

For the practice see Bail for Immigration Detainees: Briefing Paper on the Detained Fast Track of February 2009, available at: [http://www.biduk.org/library/BID`briefing`paper`on`DFT`Feb`09.pdf](http://www.biduk.org/library/BID%20briefing%20paper%20on%20DFT%20Feb%2009.pdf) accessed 8 April 2009.

[39.](#)

[2002] UKHL 41.

[40.](#)

G Clayton *Textbook on Immigration and Asylum Law* (OUP, 2008) at p 28. Four applicants were held between seven and ten days in the Oakington detention centre in order to speed up the asylum procedure.

[41.](#)

Supra 39, para 43.

[42.](#)

Saadi v UK [2008] ECHR 79. The Court has only found a violation under art 5.2. - the right to reasons for detention.

[43.](#)

[2007] EWCA Civ 804.

[44.](#)

The appellant had been sentenced to eight years for the rape and indecent assault of a 13 year old girl. For 19 months however there was no prospect of forced removal to Somalia.

[45.](#)

[1996] 4 All ER 256.

[46.](#)

[2008] EWCA Civ 307.

[47.](#)

SK (Zimbabwe) v Secretary of State for the Home Department [2008] EWCA Civ 1204.

[48.](#)

The court was comparing the present situation with *Roberts v Chief Constable of Cheshire Constabulary* [1999] 1 WLR 662 and s 40 of the Police and Criminal Evidence Act 1984 (PACE), which required reviews of the detention of persons in police custody at stated intervals.

[49.](#)

Supra 46, para 25.

[50.](#)

Ibid, para 33.

[51.](#)

For an insightful discussion see A Berry & H Majid 'Border Trouble' (2008) *New Law Journal* at www.new-lawjournal.co.uk.

[52.](#)

UKBA 2007, s 32 (1-3): In this section 'foreign criminal' means a person (a) who is not a British citizen, (b) who is convicted in the United Kingdom of an offence, and (c) to whom Condition 1 or 2 applies. (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months. (3) Condition 2 is that (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c 41) (serious criminal), and (b) the person is sentenced to a period of imprisonment.

[53.](#)

UKBA 2007, s 33. There are five categories of exceptions and they include situations where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction; where removal of the foreign criminal in pursuance of the deportation order would breach a person's Convention rights, or the United Kingdom's obligations under the Refugee Convention; where the removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would breach rights of the foreign criminal under the Community treaties.

[54.](#)

Prior to April 2006 the Home Office's Operational Enforcement Manual guiding the policy relating to the detention of FNPs pending their deportation from the UK created a rebuttable presumption in favour of release (see OEM, para 55.3). But in April 2006 this policy changed and Criminal Case Directorate caseworkers were given verbal instructions that no foreign national prisoners should be released prior to consideration of deportation, creating an express presumption in favour of detention (see *Abdi and Others v SSHD* [2008] EWCA 3166, Admin, para 30). For a detailed exposition of the genesis of the policy see paras 9-28.

[55.](#)

According to *The Sunday Times v UK* [1979] EHRR 245 the law limiting a right must be 'adequately accessible' and 'precise' in to allow individuals to know the content of the law and regulate their conduct accordingly. The Home Office's policy does not clearly satisfy either of the elements of the 'prescribed by law' requirement. The requirement of lawfulness incorporates the requirement that the municipal law upon which the detention is based is accessible and foreseeable in its application (see Application No 9174/80 *Zamir v United Kingdom* 40 DR 42, 1983, EComHR.)

[56.](#)

Abdi and Others v SSHD [2008] EWCA 3166 (Admin). Davis J held that the SSHD's presumptive detention policy, as introduced from April 2006 and as applied to foreign national prisoners whom she has decided to deport was unlawful as being contrary to law and the provisions of para 2 of Sch 3 to the 1971 Act. The judge also described the Home Office's conduct as 'unedifying' and 'disquieting' and that the substance of the policy was unlawful; such policy was also unlawful because it was insufficiently published or accessible prior to its publication in the Enforcement Instructions and Guidance issued on 9 September 2008.

[57.](#)

Supra 33.

[58.](#)

Supra 56, para 43.9.

[59.](#)

Supra 56, para 115.

[60.](#)

Supra 38, based on Home Office 'Control of Immigration: Quarterly Statistical Summary United Kingdom' October - December 2008.

[61.](#)

Ibid.

[62.](#)

Article 8 ECHR.

[63.](#)

Moustaquim v Belgium (1991) 13 EHRR 802.

[64.](#)

Article 12 UDHR: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'.

[65.](#)

Article 17 ICCPR contains the same wording as art 12 UDHR.

[66.](#)

Marckx v Belgium (1979) 2 EHRR 330.

[67.](#)

See Clayton, *supra* 40 at pp 292-5.

[68.](#)

See however, G Cvetic 'Immigration Cases in Strasbourg: The Right to Family Life under Article 8 of the European Convention' (1987) Vol 36 *International and Comparative Law Quarterly* 647. The author argues that art 8 ECHR imposes a positive obligation on states parties to the Convention to respect the entitlements under art 8 elevating them to the status of 'well established rules of international law' (p 647). In *Ciliz v Netherlands* (No 29192/95, 2000) and in *Osman v UK* (2000) 29 EHRR the ECtHR implied that art 8 may impose a positive obligation; the initiation of procedures in family law courts to enable family life to be established in the immigration context in the former and to protect the family against attacks in the latter.

[69.](#)

As to the doctrine of the margin of appreciation generally see D J Harris, M O'Boyle & C Warbrick *Law of the European Convention on Human Rights* (London, 1995) at pp 12-15.

[70.](#)

Abdulaziz, Cabales and Balkandali v UK (1985) 7 EHRR 471.

[71.](#)

See N Blake and R Husain *Immigration, Asylum and Human Rights* (Oxford, 2003) at pp 177-180.

[72.](#)

Tyrer v UK judgment of 25 April 1978, Series A, No 26, at § 31. According to this principle the Convention must be interpreted in the light of changing social, political and even technological conditions. It is also a reflection of the fact that the Court is not bound by its own case law and that it reserves a right for itself to change the law in the future depending on the changing societal developments.

[73.](#)

See *Moustaquim v Belgium*, *supra* 63.

[74.](#)

See *Slivenko at al v Latvia* 2003, No 48321/99, para 96.

[75.](#)

R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 386; *Huang v Secretary of State for the Home Department* [2006] 1 QB 1. The cases emphasised the unique

nature of immigration control and immigration rules, by establishing a presumption that decisions based on immigration rules are in general proportionate and that claims under art 8 would succeed in a small minority of exceptional cases (Lord Bingham at p 20 in *Razgar*).

[76.](#)

[2007] 2 AC 167. In summary, the House of Lords found as follows:- (1) The role of the appellate immigration authority, particularly when viewed in the light of the relevant statutory machinery (the HRA and the immigration legislation), is not a secondary, reviewing function. In deciding whether the decision under challenge is compatible with the Convention, the Immigration Judge is not restricted to considering whether the Secretary of State misdirected himself, acted irrationally or was guilty of procedural impropriety. The Immigration Judge must decide for him or herself whether the decision is compatible with Convention rights ie whether it constitutes a proportionate interference with family life. The main importance of the case law is in illuminating the core value which article 8 exists to protect, namely that the family (or extended family) is the group upon which many people most heavily depend, socially, emotionally and financially.

[77.](#)

Ibid, para 16.

[78.](#)

Ibid, para 17.

[79.](#)

Beoku-Betts v Secretary of State for the Home Department, [2008] UKHL 39. See also *AF (Jamaica) v Secretary of State for the Home Department* CA (Civ Div) (2009). The Court of Appeal ruled that although the Asylum and Immigration Tribunal had considered art 8 of the European Convention on Human Rights 1950 in deciding to allow a person to be deported, it had only considered the family life of the potential deportee himself. The family life of the family as a whole had to be considered: the potential deportee's wife and children had to be considered as potential victims themselves.

[80.](#)

Ibid, para 4.

[81.](#)

Section 82 (1) Nationality, Immigration and Asylum Act 2002: 'Where an immigration decision is made in respect of a person he may appeal to an adjudicator...'

[82.](#)

Supra 79, para 43.

[83.](#)

R (on the application of Benoit Nzumvira v Secretary of State of the Home Department) (2008) QBD (Admin) 9/12/2008.

[84.](#)

Am (Jamaica) v Secretary of State for the Home Department (2008) CA (Civ Div) 26/11/2008, unreported.

[85.](#)

[2008] UKHL 41.

[86.](#)

Ibid, paras 14-16.

[87.](#)

Ibid.

[88.](#)

[2007] EWCA Civ 546.

[89.](#)

[2008] UKHL 42.

[90.](#)

According to the policy families with children who had claimed asylum before 1 October 2000 would be granted indefinite leave to remain if they were still living as a family unit in October 2003. The claimants were not part of a family and they claimed that the purpose of the policy was to protect vulnerable young people being victimised by delay in the asylum process.

[91.](#)

Supra 89, para 7.

[92.](#)

Ibid, para 47.

[93.](#)

The appellants argued that they were victims of discrimination contrary to art 14 ECHR.

[94.](#)

[2007] EWHC admin 1654. S lived illegally in the UK for about three years. After being arrested for a minor offence she claimed asylum. Together with two children she was detained in the Oakington detention centre for 14 days. Her application for asylum was refused and a decision to remove her was made. Subsequently together with her children she was detained in the Yarl's Wood removal centre for four months. The court decided that there was no risk of absconding and on that basis there was a breach of arts 5 and 8 ECHR.

[95.](#)

Supra 39.

[96.](#)

In *Saadi* the main argument turned out to be a legal assessment of the government's policy to detain asylum seekers for administrative convenience while C and D was decided on the basis that there was no risk of absconding.

[97.](#)

See Koskenniemi, supra 4.

[98.](#)

For excellent exposition of the current position on nationality see G Clayton, supra 40, pp 156-9.

[99.](#)

Airola v Commission (Case 21/74) [1975] ECR 221. The applicant argued that she was discriminated against under Italian law on the basis of sex, thereby violating an EC law - prohibition of sex discrimination.

[100.](#)

R v Secretary of State for the Home Department, ex p Kaur (Manjit) (Case C-192/99). The applicant claimed that her human rights from Protocol 4 to the ECHR were violated - nationals right to enter their states.

[101.](#)

Ms Kaur argued that her human right from Protocol 4 was a fundamental right and as such forming a part of EC law.

[102.](#)

Human Rights Act 1998, s 3: 1) 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. This section ... (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation...

[103.](#)

Ghaidan v Godin-Mendoza, [2004] UKHL 30, para 110.

[104.](#)

See supra 2.

[105.](#)

Al-Kateb v Godwin [2005] Part 1 Case 15 [HCA] para 45.

[106.](#)

Ibid, para 17.

[107.](#)

B v SSHD, supra 82, [2008] UKLH 39.

[108.](#)

SK (Zimbabwe) v Secretary of State for the Home Department, supra 46, para 25.