



## A short talk on The Human Rights Act 1998 - Eight Years On

### **Introduction**

The purpose of the Human Rights Act as explained by the Prime Minister in introducing the Human Rights Bill was,

*“to give people in the United Kingdom opportunities to enforce their rights under the European Convention in British Courts rather than having to incur 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. And it stands alongside our decision to put the promotion of human rights at the forefront of our foreign policy”.*

Chapter 1 of the Bill examined the case for incorporation and stated that British Judges will be enabled to make a distinctively British contribution to the development of the Jurisprudence of Human Rights in Europe. The purpose of today’s talk is to look at the development of Human Rights in the UK in the context of Immigration law.

### **European Convention of Human Rights**

Section 1 of the Human rights Act defines the rights and fundamentals set out in-

- (a) Articles 2-12 and 14 of the convention,
- (b) Article 1-3 of the First Protocol
- (c) Article 1 of the thirteenth protocol

as read with Articles 16- 18 of the convention.

The Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation.

## **Derogation, Reservations and other protocols**

Derogation – Article 15 allows for a derogation of rights in times of war – Article 5 (3) provides for a derogation (in the case of reasonable suspicion of criminality).

Reservation- Article 64 allows a State to enter a reservation when a law in force is not in conformity with a convention provision. The United Kingdom has a reservation in respect of Article 2 of the protocol. Article 2 sets out the principles. The first states that no person shall be denied the right to education. The second is that, in exercising any functions in relation to education and teaching, the State shall respect the right of Parents to ensure that such education and teaching is in conformity with their religious and philosophical convictions. The reservation makes it clear that the United Kingdom accepts this second principle only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable expenditure.

Other Protocols- Protocol 4, 6 and 7 guarantee a number of rights additional to those in the original convention itself and its First Protocol. There is no obligation upon states who are party to the original convention to accept these additional protocols, but the Government has taken the opportunity to review the position of the United Kingdom on Protocols 4, 6 and 7.

Protocol 4 contains a prohibition inter alia, on the freedom of movement. Protocol 4 was signed by the UK in 1963 but not subsequently ratified because of concerns about what is the exact extent of the obligation regarding a right of re entry. Protocol 6 concerns abolition of the death penalty (there was no need to ratify this). Protocol 7 contains a prohibition on the expulsion of aliens without a decision in accordance with the law or opportunities for review; a right to a review of conviction/ sentence after criminal conviction, right to compensation on a miscarriage of justice. The general provisions of Protocol 7 reflect principles already inherent in our law and when inconsistencies with our own legislation has been removed, the Government will consider ratifying Protocol 7.

## **Practice Direction under the Human Rights Act 1998**

Any authority referred in Section 2 of the Human Rights Act 1998

- (1) The authority to be cited should be an authoritative complete report and
- (2) The party must give to the court and any other party a list of authorities he intends to cite and copies of the reports not less than three days before the hearing.
- (3) Copies of the complete original texts issued by the European court and commission either paper based or from the court's judgement database (HUDOC) may be used.

Section 2 of the Human Rights Act on the interpretation of the convention states that account must be taken of Judgement, decision, declaration or advisory opinion provided, decisions of the commission and decision of the committee of ministers in the execution of judgement. Section 6 makes it unlawful for public authorities to act in a way which is incompatible with a convention right.

This does not allow for recommendations by the council of ministers to be considered. An important recommendation in the field of Immigration, regarding the rights of long term immigrants was referred in **Uner v The Netherlands [ 2006] 873;**

1. Recommendation Rec (2000)15 states, *inter alia*:

“4. As regards the protection against expulsion

a. Any decision on expulsion of a long-term immigrant should take account, having due regard to the principle of proportionality and in the light of the European Court of Human Rights' constant case-law, of the following criteria:

- the personal behaviour of the immigrant;
- the duration of residence;
- the consequences for both the immigrant and his or her family;
- existing links of the immigrant and his or her family to his or her country of origin.

b. In, application of the principle of proportionality as stated in Paragraph 4.a, member states should duly take into consideration the length or type of residence in relation to the seriousness of the crime committed by the long-term immigrant. Moreover, member states may provide that a long-term immigrant should not be expelled:

**- after five years of residence, except in the case of a conviction for a criminal offence where sentenced to in excess of two years' imprisonment without suspension;**

**- after ten years of residence, except in the case of a conviction for a criminal offence where sentenced to in excess of five years of imprisonment without suspension.**

**After twenty years of residence, a long-term immigrant should no longer be expellable.**

c. Long-term immigrants born on the territory of the member state or admitted to the member state before the age of ten, who have been lawfully and habitually resident, should not be expellable once they have reached the age of eighteen.

Long-term immigrants who are minors may in principle not be expelled.

d. In any case, each member state should have the option to provide in its internal law that a long-term immigrant may be expelled if he or she constitutes a serious threat to national security or public safety.”

The Strasbourg system does not provide a strict principle of precedence, the court attaches greater weight to more recent decisions when deciding cases before them; and it is submitted that a similar approach should be taken under HRA. Judgements of the Grand Chamber will take precedence over those of the Chamber. By comparison decisions of the committee of ministers are unlikely to be persuasive, since there is no right to address the committee (so the reference to the recommendation above by the European court in Uner allows weight to be attached to it). **R (Alconbury Developments Ltd v Environment**

**Secretary)**[ 2003] AC Lord Stynn *said that in the absence of some special circumstances the court should follow any clear and constant jurisprudence of the Court of Human Rights.*

**R (Anderson) v Secretary of State for the Home Department [2003] 1 AC 837**; the court of appeal decided it had to apply the approach taken in a number of Strasbourg decisions even though it questioned their correctness; and explained its conclusion by relying on the courts deeper understanding of the scope of convention rights.

### **Jurisdictional reach of the Convention**

The leading case **R (Al- Skeini) v Secretary of State for Defence [2008] 1AC 529-** This was an HRA claim made by relatives of six deceased Iraqi civilians who had been killed by British Soldiers in the period following the completion of major combat operations in Iraq, prior to the authority of an Iraqi interim Government. In five cases the deceased had been shot in separate armed incidents involving British Troops. On the preliminary issue of whether the HRA extended to these cases, the House of Lords held that the HRA has the same extra territorial effect as the convention. As far as this judgement is relevant to immigration, extra territorial exercise of jurisdiction by a state include cases involving the activities of its diplomatic or consular agents ( this allows a reliance on HR in entry clearance cases , particularly important because the changes to the rules allowing only for a limited right of appeal in the case of Tier 1- 5 applicants)

### **The Human Rights convention**

**Article 3 - no one shall be subjected to torture or inhuman or degrading treatment or punishment.**

This is an unqualified right, so a person's physical integrity can not be afforded limitations in protection, even where the terrorism provisions are in play. In **Tomasi v France A /241 A (1993) 15 EHRR**, the French government argued without success that the police could be excused for mistreatment during interrogation in circumstances of the fight against terrorism. The only way that Article 3 can be limited is by taking a restrictive approach to the definition of torture, inhuman and degrading.

Extradition or Deportation will be inhuman or degrading treatment in breach of Article 3 if it results in severe suffering to an ill person, the separation of a mother from her child, the detention of an unaccompanied young child in adult facilities, the removal of a stateless person who will not be received elsewhere or a real risk to the Applicant of ill treatment or death by either private groups or the state ( this could include Prison condition that the individual will be subjected to;

- **Soering v United Kingdom (1989) 11 EHRR** it was held that extradition of an Applicant to the United States would have resulted in a breach of Article 3, it was not potential punishment but the death row phenomenon of intense anguish during the delay between the imposition and execution of sentence, in conditions of incarceration that elevated the risk of ill treatment.
- **Chahal v United Kingdom (1996) 23 EHRR; Hilal v United Kingdom (454) 33 EHRR** 2 held that the deportation where someone suffered serious risk of torture/ degrading treatment, the court rejected any arguments on terrorism and/ internal flight.
- **Bensaid v United Kingdom (2001) 33 EHRR 10** the court held that a return of a Schizophrenic Applicant to Algeria where he would have difficulties in obtaining medication did not constitute a breach of Article 3. The risk that the Applicant would suffer a deterioration in his condition on return to Algeria was to a large extent speculative.
- **Hurtado v Switzerland** – the commission confirmed that Article 3 imposes upon the state a ‘ specific positive obligation to protect the physical well- being of persons deprived of their liberty. Adequate medical facilities must be provided for the treatment of sick or injured prisoners, either in the prison or elsewhere

## Recent Developments

### Article 3 and Third Country Cases

Paragraph 2 Schedule 3 Asylum and Immigration (Treatment of Claimants etc) Act 2004, sets down the Secretary of State's power to remove a person to a safe third country within the EU. This list is supposed to create an un-rebuttable presumption that it is safe to return a person there for the purposes of the refugee convention.

**R (Nasseri ) v SSHD [ 2007] EWHC 1548 (admin) McCombe J** made a declaration of the incompatibility of the deeming provision in Paragraph 3 (2), Part 2, Schedule 3 to the 2004 Act ;

*'[39] in this case...it is the Act itself that compels the breach of Article 3. Unlawful refoulment is itself a breach of Article 3. Failure to conduct an adequate investigation of the risks of loss of life or torture or inhuman and degrading treatment is a breach of substantive Article and it is that investigation that the deeming provision impedes.....'*

*[40] In the present case, the deeming provision can only work to prevent an investigation of a potential breach of Article 3. It does so, in absolute terms. In the words of the Defendant's written argument it is 'mandatory' and ...the Secretary of State simply has no discretion to consider whether Greece will remove the Claimant in breach of its Human Rights.....' This is not simply a denial of a remedy; It directs the Defendant not to comply with the substantive obligation of investigation arising under Article 3.'*

**R (JN) v SSHD [ 2008] EWCA civ 464**, the Secretary of State appealed the decision of McCombe J and the court of appeal allowed the appeal, holding that the deeming provision was not incompatible. Although Laws LJ held that ' there is no freestanding duty as such to

investigate risk' said to arise under the ECHR where a case had been certified under para 5, Schedule 3, Part 2,

*'.....If the state is to avoid breach of Article 3 by removal of an individual to another territory where he might be ill treated or whence he might be sent elsewhere and ill treated there, the authorities of the first state plainly have to apprise themselves of the relevant law and practice of the place to which the removal will be effected. Otherwise they cannot know whether their actions will violate the ECHR or not. This is not a distinct, separate or adjectival duty, but a necessary incident of the substantive obligation to fulfil Article 3. It is underlined by the need of rigorous scrutiny where an individual claims that expulsion will expose him to Article 3 ill treatment.'*

JN has since successfully petitioned the House of Lords and has obtained a stay of removal by consent pending the outcome of that petition which set down to be heard sometime next month. In JN the Claimant is arguing that conditions in Greece is itself is a breach of Article 3 (asylum seekers in Greece face homelessness, poverty, overcrowding in Immigration detention camps, lack of competent interpreters). Similar challenges are brought in respect of Italy.

### **Article 5 ' Everyone has the right to liberty and security .'**

Article 5 – Everyone has the right to Liberty and security of the person. No one shall be deprived of his liberty save in the following (lists of circumstances in which an individual may be deprived of his liberty) – those subjected to criminal proceedings 5 (1) (a- c), those minors subject to an educational supervision 5 (1) (d), those suffering mental health issues, infectious disease / vagrants, to prevent unlawful entry or for the purposes of deportation/ extradition.

Article 5 (4) –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.

Article 5 (5) Everyone who has been a victim of arrest/ detention in contravention of the provisions of this Article shall have enforceable right to compensation.

- **R v Governor of Brockhill Prison ex parte Evans [ no 2 ] [ 2001 ] 2 AC**

Lord Hope of Craighead held at paragraphs 38c- 38e that even if the decision to detain was lawful there was nevertheless an additional requirement that the domestic law must be sufficiently accessible to the individual and that it must be sufficiently precise to enable the individual to foresee the consequences of the restriction (in order for there to be no breach of Article 5)

- **Nadarajah/ Amirthanathan v SSHD [ 2003 ] EWCA CIV 1768**

Paragraph 39

Personal liberty is a right of high constitutional importance in which relatively slight deference to the executive is appropriate. The requirement in Article 5 that any reference with the right to liberty must be lawful and in accordance with a procedure prescribed by law is designed to provide protection against arbitrary conduct. While there is no requirement for detention to be necessary in order to achieve the aim for which it is imposed, it must nonetheless be proportionate to that aim.

Paragraph 51

Article 5 (1) (f) does not merely apply to asylum seekers. It applied to illegal immigrants of all descriptions. It applies equally to those who are being removed having been refused leave to enter and to aliens being deported by order of the court at the conclusion of a sentence of imprisonment.

Paragraph 54

Thus the relevance of Article 5 is that the domestic law must not provide for or permit detention for reasons that are arbitrary .

Paragraph 64-69 addressed the issue of accessibility of policy ;

We shall approach this question on the basis of the evidence relating to the appeals before us. In the **Sunday Times v The United Kingdom (1979) 2 EHRR 245**, a case dealing with Article 10 rights, the ECT HR held at paragraph 49 that the phrase ‘

prescribed by law' in Article 10 (2) required that the law must be adequately accessible: the citizen must have an indication which is adequate in the legal circumstances of the legal rules which are applicable to the given case.'

Another requirement recognised in that decision was that the law should enable those affected by it, reasonably to foresee the consequences of their actions. Of course, if the law is not accessible, this requirement will also not be satisfied. In our judgement, these principles apply to the question of whether detention of N and A was lawful in the present case.

Paragraph 66 referred to known and unknown policy.

At Paragraph 67, the court dealt with the unpublished policy and stated:

In this respect we conclude that the Secretary of State's policy was not accessible, nor was the effect of failure to commence proceedings, of which notice had been given to the Immigration Service, foreseeable.

Paragraph 68,

The Secretary of State cannot rely upon this aspect of his policy as rendering lawful that which was, on the face of it, at odds with his policy, as made public.'

## **Recent developments**

### **Abdi and others v SSHD [ 2008]EWCA 3166**

The issue of legality of a policy that provided a presumption in favour of detention was considered by Davis J . His Judgement made the following points;

- Any policy regarding detention cannot be a blanket policy that provides for no exceptions. The policy regarding foreign national prisoners did not operate in this manner.
- A policy containing a presumption in favour of detention is not lawful. The policy regarding foreign national prisoners violated this principle.
- The policy was also unlawful because it was sufficiently accessible and

- Detention is not unlawful if the SSHD can prove on balance of probabilities that a detainee would have been detained in any event.

### **A and v The United kingdom [ 19<sup>th</sup> February 2009 ] ECHR**

- Merely keeping the possibility of deportation under review was not “action ... being taken with a view to deportation”; it was action, unrelated to any extant deportation proceedings, that might make the deportation a possibility in the future. Detention pursuant to such vague and non-specific “action” would be arbitrary.
- Article 5 § 1(f) does not demand that detention be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. Any deprivation of liberty under the second limb of Article 5 § 1(f) will be justified, however, only, for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1(f) (*Chahal*, cited above, § 113). The deprivation of liberty must also be “lawful”. Where the “lawfulness” of detention is in issue, including the question whether “a procedure prescribed by law” has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of “arbitrariness” in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (*Saadi v. the United Kingdom*, cited above, § 67). To avoid being branded as arbitrary, detention under Article 5 § 1(f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued .

Circumstances can exist where court can exercise power in absence of bad faith not to award damages or can reduce the damages against the background fact.

## **Austin (FC) (Appellant) & another v Commissioner of Police of the Metropolis**

**(Respondent)[2009] UKHL 5**

The Appellant participated in a May Day demonstration in 2001 against globalisation and was placed in a police cordon during the demonstration. The question for the court was whether the way in which she was treated was incompatible with her Convention right to liberty. Underlying that question is an important issue of principle. The right which is guaranteed by article 5(1) is an absolute right. But it must first be held to be applicable. To what extent, if at all, is it permissible in the determination of that issue to balance the interests of the individual against the demands of the general interest of the community? The appellant submitted that it was plain she was deprived of her liberty, whereas the court held that it was necessary to consider the proportionately of the action to deprive her of her liberty. The act of the police cordon was not arbitrary deprivation of liberty, and it was necessary for the purposes of crowd control.

### **Article 8 – Everyone has the right to Private and Family Life**

Article 8 (1) – Everyone has the right to respect of his private and family life, his home and his correspondence.

Article 8 (2) There will no interference with the right except as is in accordance with the law or necessary in a democratic society.

The concept of Private life is broad concept and is not susceptible to exhaustive definition. It encompasses the idea of an inner circle in which an individual may live his own personal life as he chooses and from which he may exclude the outside world. Under the concept of family life, protection is afforded to family ties which the individual has already established. There is no right under Article 8 to establish a family or break up a family, for example, by way of divorce. The strength of the ties revealed by this enquiry serves not only to indicate whether a relationship is within Article 8 (1) but also affects the strength of justification which a state will need to establish under Article 8 (2) if it is to interfere with it.

## **Kugathas v SSHD [ 2003] 31**

24. There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life.

25. Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties: see S v United Kingdom (1984) 40 DR 196 and Abdulaziz, Cabales and Balkandali v United Kingdom [1985] 7 EHRR 471. Such ties might exist if the appellant were dependent on his family or *vice versa*. It is not, however, essential that the members of the family should be in the same country. The Secretary of State accepts that that possibility may exist, although in my judgment it will probably be exceptional. Accordingly there is no absolute rule that there must be family life in the United Kingdom, as the Immigration Appeal Tribunal held.

### **Recent developments**

**Huang v SSHD [ 2007] 11HL** – The House recognised as much in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, paras 17-20, 26, 27, 60, 77, when, having suggested a series of questions which an adjudicator would have to ask and answer in deciding a Convention question, it said that the judgment on proportionality,

"must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage" (see para 20).

If, as counsel suggest, insufficient attention has been paid to this requirement, the failure should be made good.

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. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* above, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test.

#### **JN (Uganda) [ 2007] 802**

Sedley LJ observed in *AG (Eritrea)* there will be many cases in which it can properly be said that on no view of the facts could removal be disproportionate. In other words, even where the wrong test has been applied, the same outcome would have been inevitable if the right test had been applied. The question for us is to whether this is such a case. In my judgment it is not. Whilst I am not to be taken as stating or implying a view as to the ultimate merits, it seems to me that there is sufficient in the circumstances of this case for it to call for proper reconsideration by the AIT applying the correct test.

#### **Juliet Najja [2008] AA/01379/2005**

I consider the questions posed by Lord Bingham (Huang) in relation to the facts of this appeal. In my view there can be little room for doubt that the Respondent's decision does amount to an interference with the exercise of the Appellant's right to respect for private life in the United Kingdom. The Appellant has now been living here for just over fourteen years as at the date of the hearing before me. During her residence in the United Kingdom she has from the outset worked with the permission of the Respondent and is now in employment with the London Borough of Ealing. She has done well in her role and has achieved

promotion on several occasions. The Appellant has established very strong links with members of the church she attends and is heavily involved in church activities and has been for a number of years. She is homeowner and has contributed to the UK economy through her work; payment of taxes and pursuing her private life here...

### **Chikwamba v SSHD [ 2008] HL 1779**

Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad. Besides the considerations already mentioned, it should be borne in mind that the 1999 Act introduced one-stop appeals. The article 8 policy instruction is not easily reconcilable with the new streamlined approach. Where a single appeal combines (as often it does) claims both for asylum and for leave to remain under article 3 or article 8, the appellate authorities would necessarily have to dispose substantively of the asylum and article 3 claims. Suppose that these fail. Should the article 8 claim then be dismissed so that it can be advanced abroad, with the prospect of a later, second section 65 appeal if the claim fails before the ECO (with the disadvantage of the appellant then being out of the country)? Better surely that in most cases the article 8 claim be decided once and for all at the initial stage.

**AB (JAMAICA) v SSHD[ 2007] CIV 1302-** it has been held unjustifiable to expect a British citizen who has lived in the UK will be relevant : it has been held that it is unjustifiable to expect a British citizen who has lived in the UK for all his life either to move to a foreign country with his immigrant spouse or forfeit his marriage, assuming that marriage is genuine.

**EB (Kosova) v SSHD [2008] 3 WLR 17,** paragraph 12, it will rarely be proportionate to uphold an order for removal of a spouse if there is close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal of if the effect is to sever a genuine and subsisting relationship between parent and child. The court also examined delay and decided that delay can be relevant in one of three ways:

- During the period of delay, the asylum seeker might develop closer personal ties, as a result a claim under Article 8 might be strengthened.
- Delay might give rise to an expectation that what had initially been impermanent relationships would be permanent.
- Delay might be relevant in reducing the weight otherwise given to the requirements of firm immigration control.

### **Beoku- Betts v SSHD [2008]**

*Referred to Sezen v Netherlands* ([2006\) 43 EHRR 30](#) is a case in point. Noting that the case concerned "a functioning family unit where the parents and children are living together", para 49 of the judgment continued:

"The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by article 8 of the Convention and that to split up a family is an interference of a very serious order. Having regard to its finding . . . that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same [as when a 10 year exclusion order remained in force] as long as the first applicant continues to be denied the right to reside in the Netherlands".

### **Erimako (R on the application of) v Secretary of State for the Home Department [2008] EWHC 312**

This case differs from other cases in that what was sought was leave to remain for a limited period so as to enable the fertility treatment to be completed. However, there is no evidence as to what that period would be, indeed if any period can sensibly be determined as at the present time. In any event, however, one has to place the position of Mr and Mrs Erimako, distressing though it may be, in the context of other cases involving Immigration control, cases in which persons with life abbreviating illnesses or life threatening illnesses have been held not to be entitled to remain in this country, notwithstanding the discrepancy between medical treatment available in this country and in their home country.

Given the circumstances of this case, Mr Harris accepted that, in effect, his submission was that a person or persons in this country, otherwise without any right to remain in this country, should be entitled to remain in this country in order to undertake fertility treatment. That is a contention that I am unable to accept. It cannot be the case that the Home Secretary is under a duty to grant leave to remain, even for a limited period in such cases and in particular, in a case such as the present where the prospects of Mr and Mrs Erimako are regrettably uncertain.'

Article 12 – Men and Women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right

The Court of Appeal has interpreted the right to marry only where circumstances permit and so rejected the claim of an illegal immigrant detained with a view to deportation that the authorities should provide facilities for him to marry at a local registry office; **R v Home Secretary ex parte Bhajan Singh [ 1976] QB 198.**

### **Recent development**

#### **R (On the application of Baiai and others) v SSHD [ 2008] UKHL 53**

This appeal concerned the right to marry protected by Article 12 of the European Convention on Human Rights, (Human Rights Act 1998) which provides that "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right" and Section 19 Asylum and Immigration (Treatment of Claimants etc) Act 2004. The issue was whether the requirement of certificate entitlement by Section 19 involved a disproportionate interference with Article 12 right to marry. The Court of Appeal held that it did.

The appeal concerned those who have to obtain permission in order to be married. All those, who were subject to immigration control had to obtain permission from the SSHD in order to marry. A fee of £295 was payable by the person requesting permission. The process was governed by Section 25 of the 2004 Act empowered the Secretary of State to make regulations requiring persons seeking permission to marry under section 19(3)(b) (or other subsections irrelevant for present purposes) to make an application and pay a fee. In February 2005 the Immigration Directorates issued instructions on authority to marry under what was not correctly described as the 2005 Act. It stated that under the Act persons

subject to immigration control who wished to marry in the UK must meet an additional qualifying condition before they can give notice of the marriage: they must have an entry clearance or be settled in the UK or (relevantly to this appeal) "have a Home Office certificate of approval". Chapter 1, section 15, para 3, of the Instructions ("Criteria for Granting a Certificate of Approval") makes provision for postal application and states:

*"In order to qualify for a certificate of approval, a person must have valid leave to enter or remain in the UK as follows. He must have:*

*been granted leave to enter or remain in the UK totaling (sic) more than 6 months on this occasion; and have at least 3 months of this leave remaining at the time of making the application."*

*The Instructions state that a certificate of approval will be refused if there is good reason to believe that there is a legal impediment to the marriage, as on grounds of age, consanguinity or an existing marriage. A certificate of approval would normally be refused to a person not qualified to be granted one, but a certificate could be granted on compassionate grounds, of which further details were given in Annex NN to the Regulations.*

The Immigration Directorates' Instructions, promulgated (it is understood) without express parliamentary sanction, provide for the denial of permission to marry (save on compassionate grounds, relatively rarely allowed in practice) to all those who are in the country without leave, or whose grant of leave to enter or remain in the UK on the occasion in question did not total more than 6 months, or who did not have at least 3 months remaining at the time of making the application for permission. The purpose of the scheme was to eliminate sham marriages.

The vice of the scheme was that none of these conditions, although of course relevant to immigration status, has any relevance to the genuineness of a proposed marriage, which is the only relevant criterion for deciding whether permission should be given to an applicant who is qualified under national law to enter into a valid marriage. It may be that persons falling within the categories specified in the Instructions are more likely to enter into a marriage of arbitrary and unjust interference with the right to marry, convenience than others, and that may be a very material consideration when the genuineness of a proposed marriage is investigated. But the section 19 scheme does not provide for or envisage any investigation at all, because (as has been explained in the evidence) such investigation is too expensive and administratively burdensome. Thus, subject to the discretionary

compassionate exception, the scheme imposes a blanket prohibition on exercise of the right to marry by all in the specified categories, irrespective of whether their proposed marriages are marriages of convenience or whether they are not. This is a disproportionate interference with exercise of the right to marry.

Section 19(3)(b) of the 2004 Act should be read as meaning "has the written permission of the Secretary of State to marry in the United Kingdom, such permission not to be withheld in the case of a qualified applicant seeking to enter into a marriage which is not one of convenience and the application for, and grant of, such permission not to be subject to conditions which unreasonably inhibit exercise of the applicant's right under article 12 of the European Convention"

### **Summary of Judgement**

House of Lords repeated the court of appeal judgement that convention rights (in this case the right to marry) are available to anyone in the UK whether for a short time or illegitimately.

### **Article 14- Right not to be discriminated against**

Article 14 – The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language , religion political or other opinion, national or social origin association with a national minority, property, birth or other status.'

### **Belgian Linguistic Case (No2 ) (1968) 1 EHRR 253**

The principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the convention must not only pursue a legitimate aim: Article 14 is likewise

violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and aim sought to be realised.

### **A (FC & Others v SSHD [ 2004] UKHL 56**

Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is not the measure in issue but the difference in treatment between one person or group and another..'

### **Recent Development**

### **AL (Serbia) (FC) v SSHD; R (on the application of Rudi) v SSHD [2008] UKHL 42**

The appeal concerned the issue whether the one off policy- the family amnesty discriminated for the purposes of Article 14 of the European Convention Human Rights (Human Rights 2006). The "one-off exercise to allow families who have been in the UK for three or more years to stay" was first announced on 24 October 2003. The original criteria were (i) that the applicant had applied for asylum before 2 October 2000; and (ii) that the applicant had at least one child or step-child aged under 18 on 24 October 2003 who was financially and emotionally dependent upon him and had been living here as part of the family unit since 2 October 2000. Such families would be eligible if the asylum application had not yet been decided; or if it had been refused but was subject to appeal; or if it had been refused and there was no further avenue of appeal but for some reason the family had not yet left or been removed. Certain families were excluded, for example if a family member had a criminal conviction or anti-social behaviour order against him.

Also relevant was the policy concerning unaccompanied minors. It is acknowledged that unaccompanied asylum seeking children need especially sensitive treatment. The policy is not to remove them while they are children unless suitable arrangements can be made for their reception in their home country. If this is not possible, the policy before 8 November 2001 was to give them four years exceptional leave to remain, which would ordinarily lead to indefinite leave to remain thereafter. From 8 November 2001, the policy was to give them

limited leave to remain for four years or until their 18th birthday, whichever was shorter. If they had not had the full four years, applications to remain would be dealt with on their merits .

Article 14 provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, s

The focus of Article 14 is on the difference of treatment, and whether the difference on treatment can be justified.

The House of Lords examined the reasons for the Family Amnesty. The SSHD reasons was to "clear the decks", to reduce the back-log so as to make the system more efficient in the future (accepted as a legitimate aim). The easiest way to do this would have been to choose a neutral criterion, such as the date on which the person entered this country, as had been done in a previous such exercise. It was accepted that arbitrary distinction was often necessary and could be justified: see, eg, the age rules in ***R (Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173**.

The House of Lords decided that the purpose of the Family Amnesty was in recognition of the difficulties of effecting family removals. Unaccompanied Minors were dealt with another Policy which meant that they were granted temporary leave until they reached the age of 18, at which point their claims could be dealt with. Therefore the difference of treatment was justified by the fact that accompanied minors did not obtain any temporary leave . The House of Lords decided that the discrimination was a proportionate interference for the purposes of maintaining Immigration control.

### Summary Judgement

Unaccompanied minors were not discriminated against accompanied minors by an arbitrary policy which could be justified for the proportionate needs to obtaining Immigration control.

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