A0169

Lecture for ILPA 15 June 2001

ECHR and Immigration

1. This lecture reflects the submissions made in two recent and as-yet undecided cases in which the effect of the incorporation of the ECHR in out domestic law was considered.
2. In this document "the Court" is the European Court of Human Rights; "the Convention" is the Convention for the Protection of Human Rights and Fundamental Freedoms, as agreed by the Council of Europe at Rome on 4th November 1950; "the refugee Convention" is the 1951 Convention relating to the Status of Refugees;

3. In a starred case before Collins J and Messrs Ockleton and Freeman, the IAT has already indicated that the test to be applied in considering claims for asylum under article 3 of the Convention, the test to be applied is the same as that applied under the refugee Convention. The IAT also indicated that it was not minded to restrict the applicability of the Convention in cases where the individual sought to resist expulsion to article 3.The case is **KLODIANA KACAJ** (Appeal Ref.: CC/23044/2000) and a judgement was promised in June.

Relationship between ECHR and a refugee claim

4. The refugee Convention and the ECHR are separate obligations undertaken by the United Kingdom and have no necessary link in terms of the content or manner of enforcement. On the other hand, both are invoked by persons seeking to avoid expulsion from the United Kingdom on the grounds that they would face harm abroad. The determination of the validity of such claims falls to be determined by the Immigration Appellate Authority.
5. When this is done in any case the same facts will give rise to a claim under both conventions and the interaction between them will be focused upon. In this context it is important to recall that the ECHR has a special status as an international "constitutional instrument" (Clayton & Tomlinson *The Law of Human Rights* paragraph 6.21)

6. The submission proceeded by comparing the requirements of the definition of refugee with the extra territorial application of ECHR:

A *a well-founded fear*

7. It is a common legal approach to seek evidential support for a case in the reaction of those who are involved. Clearly it is a relevant consideration in deciding whether a person really does face a danger to know his attitude to the alleged danger. If an apparently sensible person appears terrified at a proposed course of action, this may suggest that it involves some danger for her.

8. There is, however, nothing in the approach of the Court that suggests that this is a formal requirement of a successful invocation of article 3 ECHR. Nor is it required in the other main source of extra-territorial effect given to ECHR namely article 8 (private and family life). It was submitted that it is not a requirement of the extra-territorial effect of any part of the ECHR.

B *persecution*

9. In refugee convention, the harm protected against is "persecution". This is an entirely general term often simply equated to "serious harm" in terms of the conduct struck at. According to Professor James C. Hathaway in *The Law of Refugee Status* (Butterworths, 1991) at page 112 "persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community." (*Horvath v Secretary of State for the Home Department* [2000] 3 All E R 577 per Lord Hope of Craighead at page 581d)

10. The ECHR is for our purposes the measure of the international community's recognition of core human rights entitlements. In terms of the conduct struck at, virtually any of the rights guaranteed by the ECHR could amount to "persecution" in terms of the refugee Convention.

11. Although article 3 is in terms more restrictive as to the conduct involved than the refugee convention, it appears that the ECHR as a whole would cover those forms of conduct, which might foreseeably constitute persecution.

12. It appears that conduct that constitutes a breach of article 3 would always be enforceable extra-territorially (*Soering v United Kingdom* (1989) 11 EHRR 439 paragraph 88).

13. It is accepted, however, that the Convention does not govern the actions of States not parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 ECHR cannot be read as justifying a general principle to the effect that a Contracting State may not expel an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention (*Soering v United Kingdom* (1989) 11 EHRR 439 paragraph 86).

14. Nevertheless, the Court has recognized that in the right case, other articles may have extra-territorial effect in the context of expulsion:

Article 2 The basis on which it was inapplicable in *Soering* was that it was capital punishment of the kind permitted by the article (paragraphs 101 to 103).

Article 6 In *Soering* (at paragraph 113) the Court did not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. Two conclusions can be drawn from this passage:

(a) that any idea that extra-territoriality is restricted to those articles of the Convention from which, by reason of article 15-2, derogation is not competent, is unfounded (contrast *M A R v United Kingdom* EcommissionHR 16 January 1996) ;

(b) that for article 6 to have extra-territorial effect would require a serious breach. Subject to that qualification, however, it is submitted that this article can have extra-territorial effect.

The matter was again left open in the recent decision in *Hilal v United Kingdom* ECtHR (6 March 2001) at paragraphs 70 and 71.

Article 4 Paragraph 1 is not derogable which points to it having extra territorial effect (See also *Ould Barar v Sweden* EcommissionHR 19 January 1999). Article 4-2 contains prohibitions on conduct of the same kind as but of a lesser seriousness than the conduct struck at by article 4-1. It is suggested that a flagrant breach of article 4-2 would have the potential of extra-territoriality.

Article 7 This article is not derogable which points to it having extra territorial effect.

Article 8 This article has extra-territorial effect in the context of private and family life (*Berrehab v Netherlands* (1988) 11 EHRR 322 paragraph 23). There is no basis on which to distinguish between different applications of the article.

In *Bensaid v United Kingdom* (ECtHR 6 February 2001) the Court recognized in the context of expulsion (paragraph 46) that not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity.

The test

16 In *R v Secretary of State for the Home Department ex parte Sivakumaran* [1988] 1 All ER 193; [1988] 1 AC 958 the House of Lords held that when deciding whether an applicant's fear of persecution was well-founded it was sufficient for a decision-maker to be satisfied that there was a reasonable degree of likelihood that the applicant would be persecuted for a Convention reason if returned to his own country (see Lord Keith at p 994F and Lord Goff of Chieveley at p 1000F). .

17 The test applied by the Court in article 3 cases is that there are "substantial grounds for believing that the person in question, if expelled would face a real risk" of treatment contrary to the article.

18 Although both parts of the test appear in paragraph 88 of the decision in *Soering*, the applicant's submission as recorded in the Commission's report of 7 June 1990 in *Cruz Varas v Sweden* (at paragraph 77) was in terms of a real risk and the whole test was first formulated in paragraph 69 of the Court's decision in that case on 20 March 1991 (*Cruz Varas v Sweden* (1991) 14 EHRR 1).

19 In its decision of 26 September 1991 *Vilvarajah v United Kingdom* (1991) 14 EHRR 248 the Court referred to the decision of the House of Lords in *Sivakumaran* [1988] 1 All ER 193 and (at paragraph 69) quoted extensively from those speeches of their Lordships from which the domestic test derives. The Court then (at paragraph 107) applied the test from *Cruz Varas*.

20 It was submitted that the test applied by the Court (paragraphs 109 to 115) is not higher than the "reasonable degree of likelihood" approach in *Sivakumaran.*

21 In the context of article 13, the Court has recognized that the test applied by the British domestic courts in judicial review of decisions in expulsion matters coincides with the Court's own approach under article 3 (*Smith & Grady v United Kingdom ECtHR* (27 September 1999) at paragraph 138; *Vilvarajah* paragraphs 120, 123-6).

22 Moreover, the Court's decision in *Hilal v United Kingdom* (6 March 2001) (at paragraphs 56 onward) appears to build on the approach of the adjudicator who would have applied the *Sivakumaran* test. Similarly, in *Ahmed v Austria* (1996) 24 EHRR 278 at paragraph 42 the Court attached particular weight to the fact that the Austrian Minister of the Interior had granted the applicant refugee status within the meaning of the Geneva Convention finding credible his allegations that his activities in an opposition group and the general situation in Somalia gave grounds to fear that, if he returned there, he would be subjected to persecution. No suggestion was given that the test in article 3 was different.

23 In considering ECHR cases in which expulsion is resisted on the basis of apprehensions of treatment which would fall to be considered under the heading of persecution, the test which should be applied is the same as that applied in asylum cases.

24 In this regard, in formulating the approach it did in *Sivakumaran* the House of Lords clearly had in mind the nature of the danger faced by the individual and not any special wording of the refugee Convention. If the risks are comparable, it would be illogical to apply two tests. The practical disadvantage of having to consider the same danger against two standards is considerable.

C *for reasons of race, religion, nationality, membership of a particular social group or political opinion*

25 There is no comparable requirement restricting the extra-territorial application of ECHR although article 14 may give rise to such a violation of the Convention where the substantive article is not violated (*Abdulaziz, Cabales & Balkandali v United Kingdom* (1985) 7 EHRR 471 paragraph 83).

D *is outside the country of his nationality*

26 There is no comparable requirement restricting the extra-territorial application of ECHR. The only requirement is that

the person be physically present and thus within the jurisdiction of the respondent State (*D v United Kingdom* (1997) 24 EHRR 423 paragraph 48).

E *is unable, or owing to such fear, is unwilling to avail himself of the protection of that country;*

27 The principle of extra-territorial effect has been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection (*Ahmed v Austria* paragraph 44).

28 However, in *D v United Kingdom* at paragraph 49, the Court recognized that aside from these situations and given the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court held that it must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State.

Generally

29 The protection afforded by the extra-territorial application of ECHR is wider than that afforded by the Refugee Convention. The Court has compared the protection it provides with that afforded to refugees: *Chahal v United Kingdom* (1997) 23 EHRR 413 paragraphs 76 and 80; *Ahmed v Austria* paragraph 41).

30 The ECHR was first given effect in the context of expulsion in the Court's decision in *Soering*. At paragraph 88 the Court dealt with the fact that torture was already dealt with in the United Nations Convention Against Torture and

Other Cruel, Inhuman or Degrading Treatment or Punishment:

"The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 (art. 3) of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3)."

31 It was submitted that the same considerations apply *a fortiori* in asylum cases where, unlike extradition cases, the state is not under a treaty obligation to expel the individual concerned.

32 The correct approach in a claim for "asylum" will be for the decision-maker to address himself first to the ECHR and only once that protection is refused to consider whether the applicant might qualify for Refugee status under the 1951 Convention.

33 The primary reason for this is that the protection in ECHR is wider than the 1951 Convention and the cases in which the latter applies and the former does not will be few. The following arguments are adduced:

a. The approach is consistent with the status of the ECHR as a "constitutional instrument"
b. Because there are fewer requirements for ECHR protection, the complexities of the law on refugee convention will in most cases be avoided.
c. Conflation of approach will inevitably in any event occur as, for example, in *Danian v Secretary of State for the Home Department* [1999] INLR 533 (Court of Appeal at

pages 553 and 566); *Puzova v Secretary of State for the Home Department* IAT 9 March 2001 paragraphs 134-5.

d. ECHR has a Court which sets the standard and develops the law while the 1951 Convention is much less coherently enforced by external means. This leads to regional variations (as illustrated by the issuing of a Joint Position of the European Council (OJ 1996 I63/2)) and national variations (as illustrated in *R v Secretary of State for the Home Department ex parte Adan* (House of Lords 19 December 2000).

34 In a petition for judicial review argued before Lord Mackay of Drumadoon in the Outer House of the Court of Session, **CHARANJIT SINGH** sought to apply to the hearing of his asylum appeal by a part time adjudicator the principles set out by the Scottish Court of Criminal Appeal in the case of *Starrs and another v Ruxton* 2000 UKHRR 78. His propositions were:

The petitioner is entitled to a determination by an independent and impartial tribunal. This arises in three different ways:

(a) by operation of article 6 of the Convention;

(b) at common law;

(c) **by reason of a legitimate expectation.**

Each of these approaches, it was said, although free standing, informs and affects the others.

35 It was also submitted that, by reason of his terms and conditions of service, the special adjudicator who heard and decided the petitioner's appeal on 21 November 1997 was not an independent and impartial tribunal. It should be noted that the terms and conditions of service of adjudicators have altered substantially since 1997 and that the case will probably only be of interest as to the extent to which the attempt to apply article 6 to immigration cases, particularly pre-incorporation ones, succeeds.

a) Article 6 of the Convention

36 "Article 6 applies to the determination of refugee status under the refugee Convention".

37 In *Maaouia v France* (ECtHR 5 October 2000) the Court held that proceedings for rescission of an exclusion order do not concern the determination of a "civil right" for the purposes of article 6-1 (paragraph 38). It is not, therefore,

a decision relating to refugee status which is a status conferred as a right by a specific treaty and implemented by domestic statute (Asylum and Immigration Appeals Act 1993 (c 23) sections 2 and 8) rather than a discretionary decision of an administrative character.

38 A better comparison would be social security cases such as *Lombardo v Italy* (1992) 21 EHRR 188 paragraph 17 where entitlement was the key to the application of the article and *Salesi v Italy* (1993) 26 EHRR 187 paragraph 19 where the fact that the issue was determined by a court was also relevant.

39 Moreover, in expulsion cases, the Court does not exclude that an issue might exceptionally be raised under Article 6 by a decision in circumstances where the applicant has suffered or risks suffering a flagrant denial of a fair trial in the destination country (*Soering v United Kingdom* (1989) 11 EHRR 439 paragraph 113; *Chahal v United Kingdom* (1996) 23 EHRR 413 paragraphs 73 & 74 at pages 454-5; *D v United Kingdom* (1997) 24 EHRR 423 paragraphs 47 to 49 at page 447).

40 The case of *Maaouia* was used in the decision of the IAT in *MNM v Secretary of State for the Home Department* (1 November 2000 at paragraph 13) without giving counsel for the appellant to make submissions on it. Contrary to the view expressed at paragraph 14 the Court did not reach its view in *Maaouia* on the basis of the pre-existing decisions of the Commission. In fact, it failed to adopt the Commission's approach. Rather, the Court took the view that in adopting article 1 of protocol 7 which provides procedural safeguards relating to the expulsion of aliens the Contracting States clearly intimated their intention not to include such proceedings within the scope of article 6-1 of the Convention (paragraph 37). This is, however, a fallacious approach to the issue: the decision to provide rights in this field is clearly not a statement about the content of the Convention but a reaction to the way in which it has been interpreted. It also runs contrary to the approach of the Court in *Ekbatani v Sweden* (1988) 13 EHRR 504 paragraph 26 which, it was submitted, should be preferred.

41 The Court in *Maaouia* arguably did not adopt the reasoning of Commission decisions on asylum and it was submitted that its value as an authority is thereby diminished accordingly. In any event, as the IAT pointed out at

paragraph 11 of *MNM*, the basis of the Commission decisions in *Uppal v United Kingdom* (1979) 3 EHRR 398 (paragraph 2 at page 398) and *VP v United Kingdom* (application number 13162 decided 1987) is unsound. These cases have been superceded by the introduction of an enforceable right to asylum by the 1993 Act.

42 The case of *Adams & Benn v United Kingdom* cited by the IAT in *Maaouia* (at paragraph 11) is based on the distinction between public and private law. It was submitted that this approach is contrary to the intention of the drafters (Clayton & Tomlinson paragraph 11.164) and the fundamental aims of the Convention namely the rule of law and the avoidance of arbitrary state conduct (Convention preamble). In these circumstances, the approach should not be followed (Lester & Pannick paragraph 2.2.2 note 2; *Brown v Stott* 2001 SLT 59 at pages 74H-I and 79I-K).

43 Even if the adjudicator is not expected to be a Court, the Court will apply the requirements of article 6 to an administrative body and the review expected of it (*Kingsley v United Kingdom* ECtHR 7 November 2000 paragraphs 53 to 59).

The Human Rights Act 1998

44 The hearing before the adjudicator took place on 21 November 1997 and he announced his decision that day. His decision was therefore before the coming into force of the Human Rights Act 1998 on 2 October 2000.

45 The petitioner submitted that he is nonetheless entitled to rely directly on the 1998 Act at this stage in moving the Court to reduce his decision with the result that the matter will be reheard by an adjudicator.

46 In interpreting the 1998 Act it must be recalled that the reason why Articles 1 and 13 of the Convention are not 'incorporated' in schedule 1 to the 1998 Act is that the Act itself is intended to effectively secure enjoyment of the substantive Convention rights before the national courts (Grosz et al: Human Rights: The 1998 Act and the European Convention (2000) paragraphs 1.06 - 1.07).

47 At column 475 on 18 November 1997 the Lord Chancellor said of what is now section 8 of the Act: *"The Bill gives effect to Article 1 by securing to people in the United Kingdom the rights and freedoms of the convention. It gives effect to Article 13 by establishing a scheme under which convention rights can be raised before our domestic courts. To that end, remedies are provided in Clause 8. If the concern is to ensure that the Bill provides an exhaustive code of remedies for those whose convention rights have been violated, we believe that Clause 8 already achieves that and that nothing further is needed.*

"We have set out in the Bill a scheme to provide remedies for violation of convention rights and we do not believe that it is necessary to add to it. We also believe that it is undesirable to provide for Articles 1 and 13 in the Bill in this way. The courts would be bound to ask themselves what was intended beyond the existing scheme of remedies set out in the Bill. It might lead them to fashion remedies other than the Clause 8 remedies, which we regard as sufficient and clear. We believe that Clause 8 provides effective remedies before our courts. It is noteworthy that those who have supported these amendments have not suggested any respect in which Clause 8 is deficient."

48 The domestic courts should therefore be slow to adopt an interpretation of the Act which denies them the jurisdiction to determine whether there has been a violation of rights secured by the European Convention.

49 In the context of compliance with the Convention judicial review has been viewed by the Court as a necessary element albeit that in domestic terms it constitutes a separate process (*Kingsley v United Kingdom* ECtHR 7 November 2000 paragraphs 34, 51 & 55).

50 The petitioner submitted that compliance with Article 6-1 must be judged as against the proceedings as a whole (including the petition for judicial review). Accordingly a failure by the Court to (i) consider whether the adjudicator was independent and impartial within the meaning of Article 6-1, and (ii) to reduce his decision if it did not, would in itself be unlawful under section 6 of the 1998 Act.

51 In so submitting, the petitioner argued that he did not seek to apply the 1998 Act retrospectively in the present case, because the question is whether the decision of the domestic court (which will be taken after commencement) complies with section 6-1, not whether the decision of the adjudicator (taken before commencement) so complies. However in order to decide, whether its own decision complies with section 6, this court has to consider whether, if it dismisses the petition, there will have been a violation of the petitioner's rights under Article 6-1. If so, ran the argument, the Court must pronounce the remedies sought.

52 It is only possible to decide whether the dismissal of the petition will result in a breach of the petitioner's rights under Article 6-1 by looking at the proceedings as a whole, that is, by looking at whether the adjudicator was independent and impartial. That involves considering whether the adjudicator complied constitutionally with Article 6-1 of the Convention as a quite separate question from whether by his decision he acted in breach of section 6 of the 1998 Act.

The relevant provisions of the 1998 Act

53 Section 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with Convention rights.

Public authority 'includes a court or tribunal': section 6(3)(a)

Tribunal means 'any tribunal in which legal proceedings may be brought': section 21(1).

The petitioner appealed to the adjudicator by virtue of section 8(4) of the Asylum and Immigration Appeals Act 1993 (c 23) as amended. It was submitted that this appeal constituted 'legal proceedings' and that the adjudicator is accordingly a 'tribunal' for the purposes of the 1998 Act.

54 Prior to the coming into force of the 1998 Act the United Kingdom had ratified the Convention and recognised the right of individual petition in article 34 (formerly 25). The petitioner accordingly had a right under the Convention to an Article 6-1-compliant tribunal before the coming into force of the 1998 Act. It was, however, a right which was not justiciable in the domestic courts. It was submitted that it is clear from sections 1 and 21(1) (definition of "the Convention") that in defining 'Convention rights' the Act did not create rights under the Convention the but merely gave the means whereby they might be enforced in domestic courts.

55 It is perfectly possible therefore for a court sitting after the coming into force of the 1998 Act to determine whether the inferior court reaching a decision prior to the Act was constituted in a way which was incompatible with the appellant's 'Convention right' under Article 6-1. The difference is that the court may grant a remedy by virtue of the 1998 Act because of the infringement of this right, whereas the court sitting prior to the 1998 Act could not have done so.

56 It was submitted that, just as there is nothing in section 7 of the 1998 Act which restricts the application of section 3 (*J A Pye (Oxford) Limited v Graham* (English Court of Appeal 6 February 2001 paragraphs 6, 52 to 53, & 58 to 59 per Mummery LJ; paragraph v per Keene LJ) there is nothing that runs contrary to the application of section 6(1). If it is correct that the breach of section 6(1) is the one involved in the rejection of the present proceedings by this Court, section 7(1)(b) permits the petitioner to rely on the Convention right in these proceedings. He is not required to bring proceedings against the Court under section 7(1)(a).

57 The duty on the domestic Court has been recognised in *MNM* (paragraph 17) and *Macdonald v Ministry of Defence* (EAT 19 September 2000) per Lord Johnston at paragraph 16.

58 This argument was upheld when *Macdonald* was overruled by the Inner House of the Court of Session on 1 June 2001 to the extent that Lord Prosser accepted that the Convention rights under the Act could be invoked to defend a pre-incorporation decision.

The obligation on the domestic court under section 6(1)

59 The domestic court is bound by s. 6(1) to reach a decision in this case which is compatible with the petitioner's Convention rights under Article 6-1.

60 Article 6-1 provides that 'in the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing... by an independent and impartial tribunal'.

61 The determination of the petitioner's civil rights and obligations is by the adjudicator. It is necessary to view compliance with Article 6 against the proceedings for determination of the right or obligation as a whole. It has been held that the provision of a right of appeal does not purge a breach of Article 6 as a result of the failings of a professional discipline tribunal: it prevents it from happening in the first place (*Tehrani v UK Central Council for Nursing* 25th January 2001 Lord Mackay of Drumadoon paragraphs 55 – 60). However (at paragraph 56) Lord Mackay recognised (under reference to *De Cubber v Belgium* (1985) 7 E.H.R.R 230, at 248, paragraph 32 and *Findlay v United Kingdom* (1997) 24 E.H.R.R 221, paragraph 79)that the position is different in relation to courts of law, which form part of the judicial system of a country, which is party to the Convention. Such courts, even of first instance, must provide the required guarantees of independence and integrity to comply with Article 6-1. It was submitted that the adjudicator is in the latter category rather than the former.

62 On either basis, however, if the adjudicator was not a tribunal which was independent and impartial within the meaning of Article 6-1, there will be no [continuing] breach of Article 6-1 if, notwithstanding the failings of the adjudicator, his decision is subject to subsequent control by a judicial body with full jurisdiction and which does provide the guarantees of Article 6-1: (*County Properties v Scottish Ministers* 2000 SLT 965 at paragraph 24; *Tehrani* paragraph 52; *Albert & Le Compte v Belgium* (1983) 5 EHRR 533 at paragraph 29; *Bryan v United Kingdom* (1995) 21 EHRR 342 paragraph 40).

63 The concept of full jurisdiction involves that the reviewing court not only considers a complaint of a lack of impartiality or independence in the tribunal below, but also that it has the ability to quash the impugned decision, and that having done so it will either then retake the decision itself, or will remit the matter for a fresh decision by a properly independent and impartial body (*Kingsley v United Kingdom* ECtHR 7th November 2000 paragraph 58). In that context it is important to recall that Convention rights

are intended to be practical and effective, not theoretical and illusory (*Artico v Italy* (1980) 3 EHRR 1 paragraph 33).

64 While the possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for an initial violation of one of the Convention's provisions: in this case the particular defect in question did not bear solely upon the conduct of the first-instance proceedings: its source being the very composition of the tribunal consisting of the adjudicator, the defect involved matters of internal organisation. To cure that defect the domestic court would require to quash the determination of the adjudicator so that the matter was heard by an adjudicator who was an independent and impartial tribunal (*De Cubber v Belgium* (1984) 7 EHRR 236 paragraph 33; *Kingsley* paragraph 59).

65 Accordingly, ran the argument, if the adjudicator was not properly independent and impartial in terms of Article 6-1, and the Court did not reduce his decision so that the case is heard by an adjudicator who does satisfy the article, there will have been a breach of Article 6-1, because the domestic court will not have had and exercised the 'full jurisdiction'.

66 Neither party took the opportunity to make further submissions after the House of Lords decision in *Alconbury* on 9 May 2001.

(b) Common Law

67 In those countries in which there is no written right to an independent and impartial tribunal, it may be said to be an "unwritten norm" (*Reference re section 6(2) of the Territorial Court Act (NWT* (1997) 152 DLR 132 Northwest Territories Supreme Court paragraphs 34, 35 & 37; *Reference re Public Sector Pay Reduction Act* 150 DLR (4th) 577 Supreme Court of Canada (paragraphs 83 & 84).

68 The decision in *Starrs* is consonant with the pre-existing approach to independence and impartiality in Scots Law:

"It is inconsistent with the common law nature of the office [of judge] that its tenure should be precarious..." (Lord Robertson in *Mackay & Esselmont v Lord Advocate* 1937 SC 860 at 865 applied by the Inner House of the Court of Session in *Clancy v Caird* at page 448C (Lord Sutherland).

69 In *Cameron v King and others* (1902) 10 SLT 429 Lord Kincairney (in the Outer House) said of magistrates of the peace sitting as a licensing authority: "...it is their duty to exercise that discretion fairly and (as it is said) judicially. They must be without interest, and must hear the parties with political impartiality. The

mere risk of bias, it has been said, is enough to vitiate their conclusions..."

70 "The test is not "Has an unjust result been reached?" but "Was there an opportunity afforded for injustice to be done?" If there was such an opportunity, the decision cannot stand" (*Barrs v British Wool Marketing Board* 1957 SC 72 at page 82 per LP Clyde).

71 The maxim "justice must not only be done: it must also be seen to be done" is, of course, also part of Scots domestic law and is applicable to all persons performing judicial duties (*Bradford v McLeod* 1986 SLT 244 per Lord Justice-Clerk Ross at page 247).

72 The position at common law is the same as the Convention (per Lord Coulsfield in *Clancy* at page 470C) except that Scots law does not recognise the public/private law distinction (*West v Secretary of State for Scotland* 1992 SC 385 at page 413).

73 It was submitted that the approach of the IAT at paragraph 16 in *MNM* is indicative of the rights of the petitioner at Common Law except in relation to a determination within a reasonable time (*R v Secretary of State for the Home Department ex parte Phansopkar*.[1976] 1 QB 606 per Lord Denning MR at page 621D).

(c) legitimate expectation

74 It was submitted that even if the law does not otherwise require that an adjudicator be an independent and impartial tribunal, fairness requires that the state be held to supplying such a tribunal consequent upon various promises (*R v Devon County Council ex parte Baker* [1995] 1 All ER 73 per Simon Brown LJ at page 89e-f; *Attorney-General for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 at pages 636D to 638G).

75 The Wilson Committee's report upon which the introduction of the adjudicator system was based repeatedly stressed the need for an independent review (paragraphs 83-84, 87, 93, 100, 105, 110, 141, 144, 152-4; Hansard HL volume 300 column 1420; HC volume 776 column 490).

76 In its Consultation document "Review of Appeals" of July 1998 (6/20 of process) the Immigration Appellate Authority, of which the adjudicator forms part, was described as "independent" (paragraph 1.2) and "a judicial body" (paragraph 1.3).

77 The extent to which adjudicators were at the material time regarded as independent and the importance of them actually being so is well illustrated in the English Court of Appeal decision in *Secretary of State for the Home Department v Danaei* [1998] Imm A R 84 at pages 90, 92-94 & 95 per LJJ Simon Brown and Judge.

78 No indication was given from the bench as to the likely outcome or, indeed, when a decision might be reached.

Mungo Bovey QC
Advocates Library
Parliament House
Edinburgh
15 June 2001
[16]

Barrister
Tooks Court Chambers