BASIC ECHR CASE LAW AND THE HRA 1998

Introduction

The UK has been a signatory to the European Convention of Human Rights since it came into operation in 1953. The Convention has thus been binding on the UK government since this time, and since 1955 persons in the UK have been able to bring individual petitions. It should be clear therefore that human rights case law has been relevant to immigration practice for many years, and indeed the High Court held that ECHR arguments should be raised where relevant at the earliest possible stage in 1991, see the case of ex parte Zibirila Alassini. The 1998 Human Rights Act, which came into force on 1st October 2000 incorporates the European Convention of Human Rights (ECHR) into English law. This course will firstly establish the circumstances in which immigration & asylum lawyers are using Human Rights case law; will look secondly at the way in the Human Rights Act brings ECHR into English law and lastly will review the most significant case law from the European Court in Strasbourg and that generated by the domestic courts, particularly over the last year.

Circumstances in which ECHR law is used:

1. To found an application to remain in the UK. It is possible to make an application to the Home Office solely relying on a principles of human rights law, where the rules do not cover an application you wish to make.
2. To found an appeal where you wish to resist removal from the UK under s.65 (1) IAA 99 states : 'A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's enter or remain in the United Kingdom racially discriminated against him or acted in breach of his human rights may appeal to an adjudicator against that decision'
3. To support an application made under the Immigration Rules or under a policy or practice of the Home Office.
4. You may be required to give any human rights argument available to a client you represent under the 'one stop' procedures set out in s.74 & s.75 of IAA 1999. These procedures require details of human rights and other potential applications available to applicants to be given prior to any appeal they may be in the process of exercising to enable to these arguments to be considered in a single appeal on all immigration issues.
5. At appeal in a combined appeal with other issues: s65(3) IAA.
6. In the High Court in judicial review proceedings: s.6 HRA.

The Human Rights Act 1998

Whilst the ECHR has always recognised the prerogative rights of sovereign States to control the admission and expulsions of aliens (indeed the ability to control frontiers is recognised in customary international law as an essential incidence of statehood and government – Montevideo Convention), the protection guaranteed in the articles of the

ECHR provides minimum standards which a State cannot breach in the exercise of such a prerogative right. Whilst initial scepticism as to the relevance of ECHR obligations (R v Secretary of State ex p Salamat Bibi , R v IAT ex p Chundrawadra) has been gradually replaced by an increasing acceptance on the part of domestic courts to take into consideration the ECHR (Murray Hunt, Using Human Rights Law in English Courts, pp.207-251, Ahmed and Patel; Kebilene; note the long title of the act – to give "*further* effect to rights and freedoms guaranteed under ECHR") hitherto Convention rights have only had 'soft' impact on domestic law through the medium of *Wednesbury* jurisdiction. The Human Rights Act 1998 ensures that Convention rights assume determinative importance save in the limited situations where by unambiguous provision of primary legislation, the decision taker is constrained to act in a manner which breaches Convention rights.

The broad scheme of the Human Rights Act 1998
The broad scheme of the Human Rights Act 1998 is to respect the principle of Parliamentary sovereignty, while "bringing rights home" (the stated intention of the Government) and placing the agenda of Human Rights at the epicentre of the UK's legal system. Thus the Human Rights Act 1998 does not give power to judges to strike down primary legislation that is inconsistent with a protected Convention right, rather all that it possible is to declare such legislation incompatible with a Convention right. The power to take remedial legislative action is reserved to Parliament.

But two deceptively simple provisions of the Human Rights Act 1998 will have the most profound changes on the UK's legal landscape (Lord Hope in Kebilene "It is now plain that the incorporation of the ECHR into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary"). Section 3 contains a revolutionary provision for the interpretation of all legislation, whether passed before or after the Human Rights Act 1998, in a manner that is consistent with Convention rights, so far as it is possible to do so. In the first major case to consider the Human Rights Act 1998, R v DPP ex p. Kebilene [1999] WLR the House of Lords recognised the impact of section 3. Lord Cooke envisaged that s.3 would permit an interpretation of a legislative provision as long as the interpretation was "a *possible* meaning" (original emphasis) and even if it was not "the natural and ordinary meaning" of the provision. Lord Hope held that a generous and purposive approach would have to be applied to issues raising compatibility with the ECHR, which in the hands of national courts "should be seen as an expression of fundamental principles rather than as a set of mere rules." (Lord Cooke's view of "so major a new canon of interpretation" appears to go beyond the Marleasing principle as to the construction of domestic law where Community law issues are engaged. This at the very least reverses R v Secretary of State ex p. Brind; not only will the construction of ambiguous legislative provisions be informed by the ECHR but also neutral provisions of statutes conferring broad discretionary powers, which have been held to be unambiguous. See further Lord Steyn in R v A (the 'rape shield' case) commenting that section 3 displaces to some extent the basic principle that legislative words are the starting point of the interpretative exercise.

Section 6 places an independent duty on a public authority (including Courts and tribunals) not to act in a manner that is inconsistent with a Convention right. To a considerable extent this gives the Human Rights Act 1998 considerable 'horizontal' scope: whilst bodies exercising wholly private functions are not bound to act consistently with a Convention right, the adjudicating Court or tribunal is so bound: Sedley LJ in Douglas v Hello; Venables and Thompson. (Section 6 may be seen as a proper and logical consequence of the importance of Article 1 ECHR, which places a duty upon the State to secure the rights protected within the ECHR to all those within its jurisdiction.)

However Lord Hobhouse in Kebilene prophetically envisaged a limitation to the retrospective effect of s.3, and considered that "there are clearly arguable questions as to the breadth to be ascribed to the construction of statutes which will be required of the courts by s.3(1)")

The lead case on retrospectivity is now R v Lambert HL. There the HL held that s.22(4) did not apply to appeals brought against pre-2.10.2000 convictions so as to give the HRA retrospective effect, but also that where s.22(4) did not apply, nor did section 3. This is likely to have limited impact in immigration given the undertaking in Pardeepan (for an example where retrospectivity may – on different facts - have been an issue see Laws LJ in Mahmood).

The Human Rights Act 1998 incorporates into domestic law Articles 2-12 and 14; Articles 1-3 of the First Protocol and Articles 1-2 of the Sixth Protocol. The proposition that Article 1 is not incorporated because the Human Rights Act 1998 itself secures Convention rights appears sound. More unfortunate however is the omission of Article 13. The justifications that the Human Rights Act 1998 itself provides an effective remedy for the vindication of Convention rights and its incorporation might have tempted judges to go further the remedies provided in the Human Rights Act 1998 (Lord Chancellor's comments, Hansard 18.11.97, col 475; Home Secretary 220.5.98,col 979) are flawed. Article 13 itself provides substantive guarantees and has been the subject of considerable jurisprudence (Vilvarajah Chahal D Smith and Grady). That jurisprudence sheds light on how the substantive Articles of the ECHR are to be vindicated, and as the Lord Chancellor recognised (Hansard 19.1.98, HL Deb Vol 584) will have to be taken into account by the Courts under s.2 Human Rights Act 1998 when considering whether a breach has occurred A *Wednesbury* analysis of the SSHD's reasoning process will not be sufficient to comply with Article 13 standards at least where judicial review is not capable of asking the correct legal questions: Smith and Grady.

Section 7(6) of the Human Rights Act 1998 provides that only those who would be victims under the ECHR are able to bring proceedings under the Human Rights Act 1998 or rely upon it in other proceedings. The Strasbourg definition of victim as a person actually or prospectively but *directly* effected (Klass v Germany (1978) 2 EHRR 214; Marckx v Belgium(1979) 2 EHRR 330) is far narrower than the test for *locus* in judicial review domestically (R v Secretary of State ex p. World Development Movement [1995] 1 WLR 386 at 392G-396C and 403E). This means that public interest organisations such as JCWI will not be able to take cases under the Human Rights Act 1998 (In R v

Secretary of State for Social Security ex p. B and JCWI [1996] 4 All ER 385, CA, the Applicants were successful in quashing regulations restricting benefits pending an asylum decision or an appeal) Whilst it is clear that in the context of an 'ordinary' judicial review action brought by an organisation that is not a victim, the interpretative obligation in s.3 Human Rights Act 1998 may well have profound effect (in the context of the JCWI case, it would no doubt have been argued that the regulation-making power was to be narrowly construed so as not to breach Article 3), the further submission that Convention rights have been or will be breached will be excluded. Where an individual victim is available, the increasing practice of the courts to allow third party interventions (See Lord Chancellor's comments in Hansard 24.11.97 HL Deb. Col 832-834; House of Lords: HL Practice Directions and Standing Orders, Directions 34 and 29; R v Bow Street MSM ex p. Pinochet Ugarte (No 1) [1998] 4 All ER 897; (No 2) [1999] 1 All ER 577; (No 3) [1999] ; Court of Appeal: R v Chief Constable of North Wales Police ex p. AB [1998] 3 WLR 57, at 66G-H where Lord Woolf MR commented that on the value of interventions from the SSHD and NACRO and endorsed the intervention-favourable conclusions of the JUSTICE/Public Law Project Report on Public Interest Interventions; High Court: R v Secretary of State ex p. Kaur (CO/985/98); ECtHR: HLR v France (1997) 26 EHRR 29)) will in all probability mean that a public interest organisation will have standing to make submissions on all relevant issues, including the argument that Convention rights will be breached.

Basic Human Rights Case law

Absolute Rights

Article 2 the right to life

Allows for the death penalty where this is a sentence of a court, also allows for deaths consequent on the minimum necessary use of force when quelling a riot or insurrection, to prevent someone escaping lawful arrest or escape from lawful custody and to defend a person from unlawful violence.

Note that this does not actually legislate against the death penalty itself – this is done by article 1 of the sixth protocol, to which the UK is also a signatory.

Note that there have been few cases in Strasbourg which have actually dealt with article 2 as the preferred option has been to deal with issues which might seem to touch on the right to life under article 3 freedom from torture, inhuman and degrading treatment – see below *Soering v UK* on the death penalty & *D v UK* concerning a man dying of a fatal illness.

Osman v UK [1999] Fam Law 86: Article 2 means that a state must in certain circumstances provide protection against extra-judicial killing

Kaya v Turkey 1998 28 EHRR: the applicant was a Turkish Kurd from Diyarbakir in the south-east of Turkey. He was detained in a prison, his brother was a farmer killed in his village in the province of Diyarbakir by the Turkish security forces. Witnesses for the applicant stated that he had been killed running away from Turkish gendarmes during a military operation. They stated that they had fired over 100 bullets into his body, and then planted a fire arm on him and taken photographs. The Turkish government claimed that he was killed during an incident in which their was firing between gendarmes and terrorists. The Court assessed that medical evidence and other evidence gave rise to doubt that the Turkish government's version was correct. The Court found that Article 2 requires proper investigation of an unlawful killing. Failure to do this will amount to a breach of article 2. The autopsy was defective and incomplete, there was no proper forensic examination of the body and it had clearly been assumed that the applicant was a terrorist so investigation was not necessary.

Cruz Varas v Sweden 1991 14 EHRR 1 see below, protocol 6 article 1 prohibits the return to a state where the person is likely to be subjected to the death penalty.

Article 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment

Note there are no permitted derogations even in the case of national emergency, war or the like. The case law concerns breach on expulsion, but their could be arguments about the UK treatment of asylum seekers amounting to a breach of the UK's obligations under this article, provided the threshold of a minimum level of severity of treatment is met.

The UN Convention Against Torture 1984 defines torture as having three elements: severe pain or suffering; this should be intentionally inflicted for purposes of obtaining information or a confession or for punishment or to intimidate or to coerce or to discriminate against the person and finally it has to be inflicted by someone acting in an official capacity with out the consent of the person being tortured.

Selmouni v France 1999 29 EHRR 403 consider whether various brutal acts (beatings, kicking, threatened with a gun against the neck, pulling hair, sexual assault, threats with a blow lamp) inflicted on a Moroccan man arrested in connection with a supposed drugs offence by French police amounted to torture or were ill treatment. The Court held that the ECHR was a living instrument and acts previous seen as ill-treatment might now be termed torture.

Ireland v UK 1978 2 EHRR 25 hooding, wall standing, subjection to noise, sleep deprivation and deprivation of food and drink were found to be inhuman and degrading treatment rather than torture.

Aydin v Turkey 1997 BHRC 300: the applicant was a 17 year old Turkish Kurdish woman who was found to have been ill-treated and raped by the Turkish security forces. She had

been taken from her home by a group of village guards and gendarmes who were investigating PKK activities. This was recognised as torture.

Soering v UK 1989 11 EHRR: the applicant was awaiting extradition to Virginia in the US where he faced the prospect of waiting on death row for between 6 to 8 years. The Court held that to extradite him in the context of the 'death row syndrome' was cruel and inhuman and degrading treatment. It also held that the expelling state was responsible for all the foreseeable consequences of the extradition. This principle confirming what the Home Office call 'extra territorial affect' is vital to immigration and asylum lawyers.

Cruz Varas v Sweden 1991 14 EHRR 1: the applicant was a Chilean refugee who had suffered persecution for his anti-Pinochet politics. He claimed to be at risk because he was a member of a radical group that had tried to kill Pinochet, and to have been tortured in the past. Apart from his risk of political persecution it was alleged that he was psychological traumatised so as to make return to Chile inhuman and degrading treatment. He was expelled to Chile, but escaped to Argentina and at the time of the Court hearing his whereabouts were unknown. The Court found however that delay in the applicant's telling of his full story went against his credibility and that a democratic revolution in Chile meant that he would no longer be at risk. This was the first refugee case to be taken to Europe. The Court confirmed the principle of the responsibility of the expelling state in relation to a refugee claim.

Vilvarajah v UK 1991 14 EHRR 248 the expulsion from the UK of Tamil refugees from Sri Lanka was challenged after it had taken place. The case failed as the Court held that at the point of expulsion the UK government did not have evidence that the applicant's position was any worse than others in the Tamil community. A mere possibility of ill-treatment was not enough to give rise to a breach of article 3. The Court found this despite accepting the evidence that the applicants had in fact been subjected to treatment contrary to article 3 when they were returned to Sri Lanka. Although the case was not successful on the facts the Court held in principle that the expelling state was responsible where there was a real risk of article 3 breaches taking place.

Chahal v UK 1996 23 EHRR 413 a Sikh from India claimed that he would be tortured if expelled. The UK government argued that he was a terrorist. In a landmark case, the Court confirmed that it was irrelevant in the sense that article 3 rights confer protection to all who ever they may be including terrorists and those who pose a threat to national security. Further they were not convinced by the assurances of the Indian government that Chahal would be would be protected like other Indian citizens – and preferred the expert evidence that ill treatment was in fact a real possibility. This case demonstrates an important additional protection beyond the 1951 Refugee Convention with its exclusion clauses.

HLR v France 1997 26 EHHR 29 the applicant was afraid of being killed by Colombian drugs barons. The Court held that on the facts that a case was not made out but confirmed that where there was a real risk of an article 3 breach by a non-state agent this could

found a case under article 3. Note that HLR was a convicted drugs trafficker. The state where the applicant is being expelled to has to provide protection so that there is no real risk otherwise the expelling state will commit a breach of article 3 by removing the applicant.

Ahmed v Austria 1996 24 EHRR 278: concerned the expulsion of a Somali man from Austria where he had been recognised as a refugee (on the basis that his father and brother had been executed on account of their political connections and he feared the same) because he had committed a couple of minor criminal offences (attempted theft of a wallet & threatening a police officer). This was found to be unlawful.

Hilal v UK (application number 45276/99) 6/3/2001: breach of Article 3 to return applicant to Tanzania who had well-founded fear of persecution in Zanzibar owing to commonality across police and security services.

Harabi and Giama DR 46 (1986): the repeated bouncing back of asylum seekers is a breach of article 3

TI v UK (No 43844/98) Decision 7/3/2000 re admissibility: the application was deemed inadmissible. The applicant was a Sri Lankan who claimed that he was at risk from the Tamil Tigers in the Jaffna peninsular, and in Colombo was at risk from the Sri Lankan authorities as he was suspected of being a Tamil Tiger. He had been detained by both the Tamil Tigers and the Sri Lankan authorities. His claim for asylum was made initially in Germany, but was rejected by the Federal Office for the Recognition of Refugees, and then by the Administrative Court. He came to the UK and claimed asylum again here. The UK authorities proposed to return him under the Dublin Convention to Germany. He obtained medical evidence which showed he had scars consistent with torture. He tried to judicially review his removal but this was unsuccessful. He then brought his case to Strasbourg alleging that his removal would be a breach of the UK's obligations under article 3 as Germany would return him to Sri Lanka where he would face a real risk of prohibited treatment. The UK's responsibilities under article 3 were held to be engaged if he faced indirect removal to Sri Lanka, and also the UK could not rely simply on the fact that Germany was a signatory to the ECHR. However on the facts the Court was satisfied that Germany would not immediately or summarily remove the applicant to Sri Lanka, and that this decision would be reviewed by the Administrative Court in Germany.

D v UK 1997 24 EHRR 423 the applicant was in the UK because he had couriered drugs here and been caught. He had served his prison sentence, and was awaiting deportation back to his country of nationality St Kitts. He contended that it would be a breach of article 3 to expel him and the Court agreed on the basis that he would have died on the streets from AIDS relating illnesses with no care what so ever. There was no need for an element of fault on the part of the state to which Mr D was being expelled. But see below for the limitations.

X v SSHD CA [2001] INLR 2 205: the applicant for judicial was a citizen of Malta who suffered from paranoid schizophrenia who had been detained in a mental hospital instead

of in immigration detention facilities due to his ill-health. He was refused exceptional leave to remain in the UK. The applicant did not wish to return to Malta and return to Malta would inevitably cause a deterioration in his mental health. The Secretary of State had evidence that there were adequate facilities for his treatment in Malta, if not to UK standards, and that return to Malta would not reduce his life expectancy or subject him to acute mental suffering.

Bensaid v UK 6th February 2001 unreported was not successful in arguing that a schizophrenic Algerian should be allowed to remain as there was no real risk that treatment would not be available

Article 4 the right not to be subjected to slavery or forced labour

Note that article 4 (2) allows for compulsory military service, although it may be that article 9 may provide some basis to assert a right to conscientious objection

Qualified Rights

Article 5 the right to liberty

Note this article has two possible spheres of interest in relation to immigration and asylum clients. Firstly it may be a source of protection in relation to an act of immigration detention. Secondly it may be an article to be argued in opposing expulsion to a state where this right would be violated.

1.Cases relevant to detention in the UK:

Article 5 (1) (f) states that persons can only be detained if this in accordance with a procedure prescribed by law, and it is to prevent unauthorised entry into the country or concerns a person against whom deportation or extradition action is being taken. Article 5 (4) provides that anyone deprived of his liberty should be entitled promptly to take proceedings to a court by which the lawfulness of his detention can be decided. Further article 5 (5) gives an enforceable right to compensation to those unlawfully arrested or detained.

Ammur v France 1996 22 EHRR: The French government argued that asylum seekers held in an international zone were not detained because they could have removed themselves when ever they liked! The Court held that supposed international zone at the airport was a fiction, and that the detention was not voluntary simply because the asylum seekers could technically have left. Unfortunately the Court also held that the expulsion of Somali asylum seekers to Syria did not pose article 3 risks to them.

Chahal v UK 1996 23 EHRR: a Sikh from India claimed that he would be tortured if expelled. The UK government argued that he was a terrorist. He had been detained for over 5 years when his case was examined by the Court. The Court found that his detention violated article 5 (4) because the '3 wise men' procedure where by there was no right to representation, no right to know the evidence relied upon by the Secretary of State etc did not constitute a Court. This in turn led to the Special Immigration Appeals Commission being established for hearing bail and other hearings in relation to national security cases. Note also the new procedures laid down in the 1999 IAA for automatic bail hearings which have not yet come into force.

Maged Osman Saadi and Osman v Secretary of State for the Home Office: Administrative Court decision dated 7/9/2001: the 4 claimants are Iraqi Kurds who were detained in Oakington reception centre so as to achieve speedy decisions in their cases and to assist administration. They were not assessed as likely to abscond. As they were not an absconding risk and did not face removal their detention was found to violate article 5(1) (f), and in the alternative that if such detention were permissible under the article that it was not proportionate in the interest of speedy decisions. This case is pending judgment in the CA.

2. Cases relevant to expulsion

Drozd & Janousek v France & Spain 1992 Case 21/1991/273/344: this concerned the explusion of two men, one Spanish and one Czech, from Andorra (where they had committed armed robbery) to France and Spain. The applicants to the Court argued that if this happened that they would have their right to liberty violated as their had been defects in their right to a fair trial in the Andorran procedures. The Court held that only a flagrant breach of the right to a fair trial would make deprivation of liberty on expulsion a breach of the Convention.

Article 6 the right to a fair trial

Note this again has two spheres of relevance. The first is whether the asylum and immigration procedures breach this right, the second is in the context of an expulsion.

1.Cases relevant to UK procedures.

Maaouia v France 39652/98 5th October 2000: the applicant was a Tunisian national married to a French woman, who was severely disabled. He was sentenced to 6 years imprisonment for armed robbery and assault and made the subject of a deportation order. confirms article 6 applies to criminal charges and to proceedings to determine civil rights and obligations. However decisions about the entry and residence of aliens are not seen as civil rights because immigration decisions are seen as administrative discretions and not to be equated with private law rights.

MNM (00 th 02423) 1 November 2000:* Collins J in a starred IAT decision held that article 6 does not apply to asylum appeals, albeit that given common law protection

afforded independently of Article 6, the only difference was likely to be in the entitlement to a hearing within a reasonable time.

Saleem v Secretary of State for the Home Department [2000] INLR 413: the common law recognises the rights guaranteed by article 6 as applicable in cases before the immigration appellate authority.

R v Immigration Officer ex parte John Quaquah [2000] INLR 196 : the applicant wasa man charged with participation in the Campsfield riot and acquitted, who then brought an action for malicious prosecution against the Home Office. The Home Office tried to remove him from the UK. He resisted removal on the basis that it would be a violation of the equality of arms principle. He was successful and was granted a period of leave to remain for these proceedings.

Article 8 the right to respect for family and private life

Note that this article requires a staged analysis of any set of facts.

Firstly it is necessary to establish that there is family or private life.
Secondly it is necessary to establish what 'respect' involves and whether there is an interference with respect to family or private life.
Thirdly it is necessary to see whether this interference is in accordance with the law.
Fourthly it is necessary to see whether this interference is proportionate.

Cases about family and private life and whether there is an interference:

Abdulaziz Cabales and Balkandali v UK (1985) 7 EHRR 471: A landmark case where the government's argument that Article 8 did not apply to immigrants was rejected. Equally the applicants' submission that Article 8 gave a choice of matrimonial home was also rejected, and could be interfered with through immigration controls.

Berrehab v Netherlands (1988) 11 EHRR 322: family life existed between the parents and the child of their marriage even after the parents had separated. The father saw his young daughter regularly. He was legally resident in the Netherlands. Immigration control alone was not sufficient to justify interfering with this family life by requiring the father to leave the Netherlands and simply visit his daughter from abroad – which was found to be an impracticable way of maintaining family life.

Marckx v Belgium (1979) 2 EHRR 330: the case involved a challenge based on the lack of rights of illegitimate children in Belgium at that time. The Court concluded that family life can exist between siblings, grandparents and grandchildren

Moustaquim v Belgium (1991) 13 EHRR 802: A Moroccan national had lived in Belgium since the age of one with his family. He had a long criminal record as a juvenile. He was deported as a result of a custodial sentence. The Court found that family life can exist between any relatives depending on the strength of emotional ties. They found that all of

his close relatives were in Belgium, he had grown up there and been educated there and only been to Morocco twice on holiday. It was found that it was disproportionate to deport him.

Poku v UK (1996) 22 EHRR CD 94: The applicants were as follows a Ghanaian man, Mr Samuel Adjei, with indefinite leave to remain in the UK as a result of a marriage which had broken down; his new wife, Ama Poku, and their two children (both British Citizens), his wife's previous partner and her child by this partner (the former a British Citizen, the latter entitled to register as a British Citizen) and Mr Adjei's daughter by a previous relationship. Ama Poku suffered from medical problems and her children had all been born prematurely. Her former partner maintained contact with her son regularly, and Mr Adjei cared for his daughter by his previous relationship approximately half of the time. It was argued that if Mr Adjei and Ms Poku had to return to Ghana to exercise family life there that this would deny Ms Poku's son by her previous relationship contact with his father, and deny the very significant role Mr Adjei played in the upbringing of his daughter. The Commission found the fact that everyone was lawfully in the UK bar Ama Poku, and that a number of the applicants were British Citizens did not lead to the conclusion that there was a breach of article 8. They found that Mr Adjei's knowledge that his wife had been served with a deportation order at the time of their marriage was relevant as to whether there was an interference with the right to family life – and distinguished the case from *Berrehab*.

Gul v Switzerland (1996) 22 EHRR 93: a Turkish couple were granted the Swiss equivalent of ELR on medical grounds, as the wife needed to continue to live in Switzerland for medical reasons (she was an epileptic who had fallen into a fire) – the treatment not being available in Turkey. Their young daughter was in care of foster parents because of the mother's inability to care for her because of the mother's injuries, and they wanted to bring their son to Switzerland. The Court held that the family could have relocated to Turkey as they had visited their son there, and 'and it had not been proved that she could not later have received appropriate medical treatment in specialist hospitals in Turkey'. The Court seemed to ignore the fact that the father had originally claimed asylum, and that his claim had never been refused – he had been forced to withdraw it to accept his ELR. They also ignored the younger child's needs in relation to her relationship to the foster family. A very unfair decision on the facts, and only explicable by the visits to Turkey, with a strong dissenting opinion from two judges.

Beldjoudi v France (1992) 14 EHRR 801: An Algerian national born in France of parents who were at that time French. He was married to a French woman. He had no connections with Algeria, and did not know Arabic. He had a more serious criminal record that Mr Moustaquim. He had his parents, his siblings, his wife and all of her relatives in France. The Court found that his having been in prison for a total of 10 years had not severed his family life. They also found that his wife would have had difficulties adapting to live in Algeria, and deportation would endanger their marriage. The Court balanced a long criminal record against family ties, and decided that it was not proportionate to deport the applicant.

Nasri v France (1995) 21 EHRR 458: the applicant was an Algerian deaf mute man of 35 years of limited intelligence & education who had lived virtually his whole life in France along with parents and siblings. He had arrived in the UK at the age of 5 years and never left. He had no understanding of Arabic. His family were particularly important to him given his lack of language. He had a serious criminal record, more serious than Beljoudi or Moustaquim which included gang rape. The Court applying the classic 'long-stop' proportionality exercise, balanced the whole wealth of private life and family ties the applicant had to France against his criminal record, and concluded that it would not be proportionate to deport him.

R v Secretary of State for the Home Department ex parte Isiko 20/12/2000 CA 2001 INLR 175: Peter and Susan Isiko were Ugandan nationals who entered the UK various times between 1987 and 1991 and were declared illegal entrants in 1992. In 1993 they had a son Shemy born in the UK. In 1994 Peter committed a rape and was sent to prison for 6 years. In 1997 Peter and Susan divorced. In 1999 Peter married Wendy a British Citizen whilst he was in prison. Peter and Wendy had a daughter. Peter had made one and Susan had made two asylum claims that had failed. The SS then proposed to remove Peter, Susan and Shemy from the UK. They claimed that this would breach their article 8 rights as removal would separate Peter from Wendy and her child by him, as she would have to stay in the UK as she had a child by a previous marriage, who in turn had daily contact with the father. The High Court quashed the decision to remove the applicants, the SS appealed to the CA who allowed the appeal finding that level of scrutiny required was higher as the case involved fundamental rights. The Court found that respect for family life allowed the SS to consider the fact that Wendy, the British wife, knew about the precarious immigration position of Peter when she married him. The SS was entitled to regulate immigration to the UK – and to consider public policy considerations (for instance those relating to false asylum claims designed to postpone removal from the UK and serious criminal offences), and article 8 does not impose a general obligation to respect the choice of residence of a married couple.

R v Secretary of State for the Home Department ex parte Amjad Mahmood CA 8/12/2000 [2001] INLR 1: the Home Office wished to remove the applicant although he was married to a British Citizen and had a British child. The Court found that the family could exercise their right to family life in Pakistan, and/or the applicant could apply for entry clearance from abroad. As the case involved fundamental freedoms the Court was required to adopt a more intensive standard of review, however the SS did have a margin of discretion in such matters. Dicta of Lord Phillips MR, assimilating proportionality to a *Wednesbury* review were disapproved of in *R(Daly) v SS* HL.

Article 9: the right to freedom of thought, conscience and religion

Note this right is absolute in relation to the freedom of thought, conscience and religion but the manifestations of it can be limited in accordance with the law so far as this is

necessary in a democratic society, in the interests of public safety, for the protection of public health or morals and for the protection of the rights and freedoms of others.

May be relevant in relation to conscientious objection

X v Austria (1973) 43 CD 161: the Court found that article 9 does not impose on states an obligation to recognise conscientious objectors and does not prevent a state from punishing those who refused to do their military service.

Thlimmenos v Greece App 34369/97 6th April 2000 Court: The Court based its decision on article 14 but the commission opinion expressed the view that punishment for refusal to do military service motivated by religious beliefs (here being a Jehovah's Witness) may breach article 9.

Sepet & Bulbul v Secretary of State for the Home Department [2001] EWCA Civ 681: The Court of Appeal held by a majority that there was not a right to conscientious objection in international law, and thus denial of this right did not amount to persecution.

Article 10: free speech

R(Farrakhan) v SS (1st October 2001): Interference with an immigrant's rights to impart his ideas in person and the domestic community's right to receive them had to be justified by evidence. This the SS had failed to do. Article 16 (restriction on the political activity of aliens) was to be narrowly construed and did not arise on the facts of this case.

Article 14: non discrimination

This is not a free standing right to operates in conjunction with the other rights protected, and prevents discrimination on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a minority, property, birth or other status.

Abdulaziz Cabales and Balkandali v UK (1985) 7 EHRR 471: the Court held that there was a breach of article 14 as there was an unjustifiable difference between the admission of different sex spouses.

Pawandeep Singh v Secretary of State for the Home Department 2 December 1999, currently applying to the Court: A case arguing that the adoption rules discriminate indirectly on grounds of race against Indian subcontinent families.

Thlimmenos v Greece App 34369/97 6th April 2000 Court. The Court recognised that discrimination is not only treating similarly situated individuals differently, but also treating the same those who are relevantly different. The Greek authorities' failure to respect the applicant's religious conviction as the reason for his refusal to perform

military service (which then grounded exclusion from the accountancy profession) was discriminatory.

R v SSHD ex parte Arman Ali [2000] INLR 89: High Court held that the immigration rules about accommodation and support must be interpreted to allow third party support as otherwise they would discriminate against old or ill people with family support, as otherwise the rules would amount to a breach of article 14 in relation to article 8 rights.

Article 13: effective remedy

Note the debate as to whether judicial review is a remedy with respect to ECHR rights. *Soering v UK* says it is, *Chahal v UK* says it is not in respect to national security issues, *Smith and Grady v UK* (about gay men in the armed forces) said that it was not because of the high threshold of the irrationality test.