ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
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THE EUROPEAN COURT OF HUMAN RIGHTS AND UK IMMIGRATION AND ASYLUM LAW

AN ANALYSIS OF IMPLEMENTATION

JULY 1993

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INTRODUCTION

On 8th March 1951 the UK ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Convention entered into force on 3 September 1953 and is binding on all those States which have ratified it. The European Court of Human Rights (the Human Rights Court) established by the Convention is responsible for interpreting the obligations contained in the Convention.

"We are parties to the Convention and to the right of individual petition. We are therefore duty bound to make the changes required to comply with the Convention as interpreted by the court" Mr Leon Brittan, Secretary of State for the Home Department (as he then was) (Hansard 23.7.85 col.894).

The Human Rights Court has clarified, on numerous occasions, the interpretation of Convention provisions as they relate to refugees and immigrants. Despite the assurance of the Secretary of State in 1985, current UK immigration law and practice do not reflect the rulings of the Human Rights Court in this area.

This report looks at provisions of the Convention as interpreted by the Human Rights Court in the light of current UK immigration law and the ways in which the divergence of the two may give rise to breaches of the former. At the Conclusions, ten Recommendations are put forward which, if adopted would bring UK law into line with the Human Rights

Court's rulings.

The relevant decisions of the Human Rights Court concern Article 3 - protection from inhuman and degrading treatment or punishment, Article 8 - respect for private and family life, Article 13 - the right to effective remedies and Article 14 - non-discrimination, of the Convention.

The duties set out in the Convention are owed to everybody, regardless of nationality or immigration status, who comes within the jurisdiction of the UK. Article 1 states

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms in Section I of this Convention."

Under Article 53 ECHR, the Contracting Parties undertake to abide by the decisions of the Human Rights Court in any case to which they are parties. The judgments of the Court do not constitute binding precedents of the kind familiar to the common law. Nevertheless the Court's judgments are of central importance to the application of the Convention since they give a clear indication of the principles which the Court has used to reach its decision and which it will apply to any future case which comes before it.

While Article 53 requires the Convention parties to abide by the decisions of the Court, the Committee of Ministers supervises the execution of those decisions (Art. 54).

The Secretary General has power under Article 57 to request any Contracting State to furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention. This power has not yet been developed extensively. It has been used on five occasions, most recently in July 1988. Sometimes the requests cover the whole Convention, on other occasions only specific articles, for example the 1988 request encompassed only Article 6.

There is, however, no general periodic reporting mechanism analogous to that established by Article 40 of the International Covenant on Civil and Political Rights. Moreover, the information furnished by the contracting States is not examined critically e.g. by reference to information provided by third parties such as non-governmental organisations.

ILPA supports the introduction of a periodic reporting mechanism which would require Contracting States to conduct a regular audit of their domestic law's compliance with the provisions of the Convention in the light of the principles enunciated in the decisions of the Court.

This report focuses on potential problems in relation to the compatibility of UK rules with the Convention. It is essential, however, to stress that the Convention is primarily concerned with how individuals are treated in particular cases. At least two consequences flow from this. However correct the law may be on its face, the Convention

may be infringed if there has been a failure to respect Convention rights adequately in the individual case.

This is particularly pertinent in immigration and asylum cases when so much will turn on whether, for instance family life is under threat or if the applicant, on the facts, is at risk of ill-treatment contrary to Article 3 of the Convention. It is important that those responsible for taking immigration or asylum decisions should have regard to the principles of the Convention when exercising discretion.

It is hoped that this account of the current anomalies will facilitate the regularisation of the UK's position with regard to its obligations under the Convention. This seems a particularly opportune moment to consider these obligations as new Immigration Rules are soon to be introduced once the **Asylum and Immigration Appeals Bill 1992** has to come into force.

DUTY TO PUBLISH ALL RELEVANT RULES

Currently the published UK Immigration Rules (HC 251) as amended, contain only part of relevant information on how any particular application will be dealt with. The rules are supplemented by extensive secret instructions, which in some cases run directly contrary to provisions on the face of the published rules.

For example, there are well known 'secret' guidelines on the treatment of established heterosexual relationships where marriage has not been contracted. Yet the Immigration Rules give no hint that such a relationship has any relevance to an immigration application. Indeed, the rules relating to marriage give not the slightest indication that a marriage certificate itself may not be necessary.

The importance of publishing internal instructions which form an intrinsic part of administrative practice was underlined by the Human Rights Court in the case of **SILVER AND OTHERS v U.K.**(Judgment of 25 March 1983 Series A 61 (1983) 33) and has been reiterated on numerous occasions since. The **SILVER** case concerned the Prison Act and Rules and the unpublished Orders and Instructions which supplemented their provisions. The Court held that:

"the law must be adequately accessible; the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case".

It held that the Orders and Instructions did not meet this requirement because they "were not published". The Human Rights Court noted that the unpublished Orders and Instructions were part of a practice to which the accessibility and foreseeability must be applied.

The foreseeability requirement was defined as follows:

"a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable a citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which any given action may entail".

This foreseeability test is currently not met by the rules and guidelines by which UK immigration control is operated. The myriad of secret instructions outside the published rules have the effect that a person cannot possibly regulate his or her behaviour on the basis of the published instructions alone and foresee the consequences with a reasonable degree of certainty.

Secondly by maintaining a full set of secret instructions which, in some circumstances, run contrary to the published law the Immigration Appellate Authority (IAA), The Tribunal structure established to adjudicate on the application of immigration and asylum law, is deprived of the power to allow or dismiss an appeal on the basis of the true state of the rules. The IAA is limited to the application of the

published rules only which renders its determinations absurd where the secret guidelines are contrary to the published rules.

IMPLICATIONS FOR UK LAW

All relevant instructions which form an intrinsic part of administrative practice in immigration and asylum law must be published.

ARTICLE 3 - INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

EXTRACTS FROM THE JUDGMENTS OF THE HUMAN RIGHTS COURT

SOERING 1/1989/161/217 A no 138

para 91. "In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country".

CRUZ VARAS AND OTHERS 46/1990/237/307 A no 201

para 70. "Although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above [**SOERING**] principle also applies to expulsion decisions and a fortiori to cases of actual expulsion..."

VILVARAJAH 45/1990/236/302-306 A no. 215

para 107. "In its Cruz Varas judgment of 20 March 1991 the Court noted the following principles relevant to its assessment of the risk of ill-treatment (Series A n. 201, pp. 29-31 SS 75-76 and 83):

(1) In determining whether substantial grounds have been shown for believing the existence of a real risk of treatment

contrary to Article 3 the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained proprio motu;

(2) Further, since the nature of the Contracting States' responsibility Under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting States at the time of expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears;

(3) Ill-treatment must attain a minimum level of severity it it is to fall within the scope of Article 3. The assessment of this minimum, is, in the nature of things, relative; it depends on all the circumstances of the case.

para 108. The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe ...".

Following the three judgments cited above, expelling someone to a place where he or she may face torture or inhuman and degrading treatment or punishment can of itself violate Article 3.

IMPLICATIONS FOR UK LAW

1. Returning a person to a country where he or she may face inhuman or degrading treatment or punishment violates Article 3. The UK criteria for granting asylum to persons fleeing inhuman or degrading treatment qualify and restrict the Convention meaning as both the current Immigration Rules and the Asylum and Immigration Appeals Bill only recognise "Convention refugees".

The UN Convention and Protocol relating to the status of Refugees 1951 and 1967, define a refugee as a person outside the country of persecution who has well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion (Article 1(A)(2)). This definition has been adopted in the Immigration Rules (HC 251 para 140) and by reference in the Asylum and Immigration Appeals Bill 1992 (clause 1).

Article 3, however, concerns an absolute right: the offending treatment does not have to relate to political opinion, race, religion or some other criteria, but concerns only the status of the individual as a human being. This makes it automatically more extensive than the rules for granting asylum in UK law.

There is no express provision in UK law reflecting the obligation under Article 3 as defined by the Human Rights Court which may result in breaches of the Convention by the UK authorities.

2. A second conflict lies with the definition of persecution, which limits the UK's obligation under domestic law. This has been elaborated by the English courts as 'harass for heretical opinion or pursue with injurious consequences' (R v Immigration Appeal Tribunal ex parte Jonah [1985] Imm AR 7). In another case it was noted that while a particular religious group could neither evangelise nor practice their religion in Pakistan, they would not be persecuted unless they did evangelise (Ahmad (Gulzar) and ors v Secretary of State for the Home Department [1990] Imm AR 91). So, if persecution can be avoided through modifying one's behaviour it may not give rise to refugee status.

In the decision of **DENMARK, FRANCE, NORWAY, SWEDEN & THE NETHERLANDS v GREECE** degrading treatment or punishment was defined as treatment that "grossly humiliates him before others or drives him to act against his will or his conscience" (Yearbook 13 1970 p. 108). This interpretation could apply to the case of a religious group such as referred to above, and highlights the disparity between UK law and ECHR rulings.

The later case, **IRELAND v UK** (1978) gave a definition of degrading treatment elaborated around a more active interference with individual rights. Nonetheless the disparity - and hence potential for further breach - still exist.

3. If removing someone to potential inhuman and degrading treatment or punishment may violate Article 3, preventing them from escaping such treatment may also give rise to an issue under this Article. The **SOERING** judgment makes clear that inhuman and degrading treatment does not have to be suffered at the hands of a party signatory to the Convention for that party to bear responsibility; responsibility arises when the actions of a Contracting Party are the immediate cause of the applicant facing such treatment.

Article 1 requires Parties to secure to everyone within their jurisdiction the Convention rights and freedoms. As established by the Court and the Commission, the notion of jurisdiction set forth in Article 1 is not limited as to territorial applicability, but comprises the idea of state jurisdiction over the individual through state organs or authorities.

Clearly embassy staff overseas have jurisdiction over applicants for visas to enter the UK. Therefore a visa policy operated outside the UK may raise issues under Article 3 if it prevents people facing torture

or inhuman or degrading treatment or punishment from escaping such treatment.

This is particularly true if the UK is the only feasible destination. The Home Secretary has accepted the principle of the United Nations High Commissioner for Refugees (UNHCR) that "Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State", (R v Secretary of State for the Home Department ex parte Yassine & Ors [1991] Imm AR 357). Therefore the existence of some other consular post of itself may not relieve the UK embassy of its obligation to consider the application of Article 3.

4. There is no provision of the Immigration Rules which permits the issue of entry clearance to seek refuge in the U.K. Yet nationals of countries to which mandatory visa requirements apply must obtain visas in some capacity just in order to arrive in the UK to claim asylum. Carriers such as airlines and ferry companies carry out the enforcement of this policy as under the Immigration (Carriers Liability) Act 1987 they are fined in respect of any passenger who needs and does not have the required visa.

The Civil Liberties Committee of the European Parliament has expressed its disapproval of carrier sanctions in general on the ground that they prevent genuine refugees from fleeing persecution. In cases

where no other destination is reasonable, these sanctions may constitute a contravention of Article 3.

5. Expulsion - deportation or removal as an illegal entrant - of long-term resident non-nationals is discussed more fully under Article 8, below. However in the recent case of **BELDJOUDI** 55/1990/246/317 A no 234-A, concerning the deportation of a non-national who had lived in France since birth and was now over 40 years old, Article 3 was raised before the Commission. It was not pursued before the Human Rights Court but in a separate opinion, Judge De Meyer considered that to expel someone from a country which had been effectively 'his' since birth to a country with which he had no connection other than formal nationality constituted inhuman treatment.

6. Clause 3 of the **Asylum and Immigration Appeals Bill 1992** provides that every person who has claimed asylum is required to have his or her fingerprints taken. Whilst the taking of fingerprints cannot be classified, per se, as degrading treatment since it is a routine procedure for the issue of identity documents in many countries, it may take on this characteristic here since the only other people required to have their fingerprints taken in the UK are those under suspicion of having committed an 'arrestable offence' under the Police and Criminal Evidence Act 1984. This provision then puts asylum seekers in the same class as suspected criminals which

may fall within the concept of degrading treatment as elaborated by the Strasbourg authorities.

In the **EAST AFRICAN ASIANS** case [1981] 3 EHRR 76, the Commission considered treatment to degrade a person if it **lowers him in rank, position, reputation or character, whether in his own eyes or in the eyes of other people,** and specified also that it must reach a **certain level of severity.** To subject asylum seekers to treatment otherwise reserved for suspected criminals may lower them in rank, position, reputation and character, both in their eyes and those of the UK population. This treatment may well be contrary to the spirit of Article 3 particularly it applies disproportionately to visible racial groups (see below). This argument is particularly acute in the case of children, of whatsoever an age, who may be fingerprinted as dependants of the applicant under clause 3(2).

ARTICLE 3 and ARTICLE 14

Article 14 of the Convention:

The enjoyment of the rights and freedoms as 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.

EXTRACTS FROM JUDGMENTS OF THE HUMAN RIGHTS COURT

ABDULAZIZ, CABALES & BALKANDALI 15/1983/71/107-109 A no 94 para 72. "For the purposes of Article 14, a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that it to say it does not pursue a 'legitimate aim' or there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'..."

IMPLICATIONS FOR UK LAW

Should fingerprinting be found to be degrading treatment in the context of asylum applicants then the selection for fingerprinting on the basis of their status as asylum seekers may be discriminatory, contrary to Article 14. If this is an excessive infringement of their dignity and the purpose of such a measure cannot objectively be justified or the requirement of proportionality not be met then there may be a breach of this Article in conjunction with Article 3.

ARTICLE 8 - FAMILY AND PRIVATE LIFE

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In view of the importance of this Article to immigration matters this section is divided into three parts: ADULTS; CHILDREN; SPOUSES AND OTHER RELATIVES.

ADULTS:

EXTRACTS FROM JUDGMENTS OF THE HUMAN RIGHTS COURT

MOUSTAQUIM 31/1989/191/291 A 193

BELDJOUDI 55/1990/246/317 A 234-A

Both of the above cases concern non-nationals who were either born in the host country or who had lived there from a very early age. Their applications to the Human Rights Court arose from decisions to deport them for various criminal offences.

As is the case for many "second generation" immigrants, the applicants' close relatives were all based in the host country. Family life being thus established in the expelling countries, and deportation being held to interfere with each applicant's right in this respect, the judgments revolve around paragraph 2 of Article 8.

In both cases it was held that the deportation orders were in accordance with the law and that they pursued aims compatible with the Convention, being for the prevention of disorder or crime. In order for this interference with the right to family life to be deemed necessary in a democratic society, however, it must be proportionate to the legitimate aim pursued, according to the Court's established case-law. In both cases the Human Rights Court found a violation of Article 8 on this ground.

MOUSTAQUIM

para 44. "Mr Moustaquim's alleged offences in Belgium have a number of special features ... The latest offence of which he was convicted dated from 21 December 1980. There was thus a relatively long period between then and the deportation order ..."

para 45. "... at the time the deportation order was made, all the applicant's close relatives - his parents and his brothers and sisters had been living in Liège for a long while; one of the older children had acquired Belgian nationality and the three youngest had been born in Belgium.

Mr Moustaquim himself was less than two years old when he arrived in Belgium. From that time on he had lived there for about twenty years with his family or not far away from them. He had returned to Morocco only twice, for holidays. He had received all his schooling in French. His family life was thus seriously disrupted by the measure taken against him".

para 46. "Having regard to these various circumstances, it appears that, as far as respect for the applicant's family life is concerned, a proper balance was not achieved between the interests involved, and that the means employed were therefore inappropriate to the legitimate aim pursued".

BELDJOUDI

para 75. "... Mr Beldjoudi's criminal record appears much worse than that of Mr Moustaquim ... It should therefore be examined whether the other circumstances of the case ... are enough to compensate for this important fact".

para 77. "Mr Beldjoudi ... was born in France of parents who were then French ... Furthermore, Mr Beldjoudi married a French woman. His close relatives all kept French nationality until 1 January 1963, and have resided in France for several decades.

Finally he has spent his whole life - over forty years - in France, was educated in French and appears not to know Arabic. He does not seem to have any link with Algeria apart

from that of nationality".

para 79. "Having regard to these various circumstances, it appears from the point of view of respect for the applicant's family life, that the decision to deport Mr Beldjoudi, if put into effect, would not be proportionate to the legitimate aim pursued and would therefore violate Article 8".

IMPLICATIONS FOR UK LAW

These judgments indicate that the deportation of long-term resident non-nationals, even for quite serious criminal offences, infringes their right to family life.

The direction in which the Human Rights Court is moving may be discerned from the comments made by Mr H G Schermers of the European Commission for Human Rights in the case of **LAMGUINDAZ v UK** ([16152/90] October 1992). Mr Lamguindaz had been resident in the UK for 12 years, from the age of seven, when the Home Secretary decided to make a deportation order against him following his conviction for wounding. Mr Schermers considered that:

> "Even independent of human rights considerations, I doubt whether modern international law permits a State which has educated children of admitted aliens to expel these children when they become a burden. Shifting this burden to the State of origin of the parent is no longer so clearly acceptable under modern international law. It is at least subject to doubt

whether a host country has the right to return those immigrants who prove to be unsatisfactory".

1. Under the current Immigration Rules provision is made for balancing the public interest against any compassionate circumstances of the case. Examples of circumstances which may be relevant to deportation following a conviction are given in para 164 and include length of residence in the UK and strength of connections with the UK, the so-called 'integration test' (Baktaur Singh v IAT [1986] 2 All ER). However, as the case of **LAMGUINDAZ** (above) illustrates, these interests are not currently balanced in accordance with the case law of the Human Rights Court.

   The Immigration Rules need to be amended to give the correct weight to factors to be taken into account, and specifically the family ties of proposed deportees in the UK. It should be clearly spelt out that when family life exists almost exclusively in the UK deportation is not an appropriate option.

2. The law as it currently stands does not permit the IAA to allow an appeal on the basis of the factors set out in the Rules para 164 where the decision to deport is based on overstaying or otherwise breaching conditions of leave unless the prospective deportee has been in the UK for 7 years. It is arguable whether these factors may even be taken into consideration where the

appellant claims to be a refugee. Accordingly no effective remedy as required by Article 13 may exist where a breach of Article 8 is alleged by a prospective deportee in these circumstances.

3. There is no provision of UK law which requires the considerations set out by the Human Rights Court to be applied in respect of illegal entrants.

Where it is established that a person has entered the UK by deception, even if that deception was practiced many years earlier and by a third party, for instance, where a child of the family was presented as a legitimate child, nothing in UK law protects the person's family or private life.

In such a circumstance in UK law the person may be removed once it has been established he or she is an illegal entrant irrespective of the private and family life consequences.

The Immigration Rules should be amended so that the factors set out by the Human Rights Court in balancing respect for private and family life against the public interest must apply wherever expulsion under whatever guise is contemplated. Any such decision must be subject to an effective appeal right within the statutory Tribunal system (IAA) for consideration on the merits.

3. In a concurring opinion in **BELDJOUDI**, Judge Martens suggested the decision should have been made on the ground of long residence alone:

> "I believe that an increasing number of Member States of the Council of Europe accept the principle that such 'integrated aliens' should be no more liable to expulsion than nationals, an exception being justified, if at all, only in very exceptional circumstances."

In other words, even in the unlikely event of family life not being established in the UK, deportation or removal should not generally be considered for 'integrated aliens'.

The Commission and Human Rights Court have consistently held that a decision to expel is not a criminal sanction or the determination of a civil right within the terms of Article 6(1) but an administrative act. Where an expulsion results from criminal convictions, as it most frequently does in the case of long-term residents, Mr Schermers expressed the view in his separate opinion in **LAMGUINDAZ** that "in reality expulsion is often a more heavy punishment than a prison sentence.... expulsion following a prison sentence should be seen as an additional punishment" and considered that this constituted a violation of Article 8 in conjunction with Article 14.

CHILDREN:-

EXTRACTS FROM JUDGMENTS OF THE HUMAN RIGHTS COURT

BERREHAB 3/1987/126/177 A no 138

Berrehab had been lawfully resident in the Netherlands by reason of his marriage to a Dutch woman. They had a child together but the marriage had broken down. As a result he lost his residence status. He was then refused an independent residence permit and was expelled from the Netherlands.

para 21. "The Court ... has held that the relationship created between the spouses by a lawful and genuine marriage such as that contracted by Mr and Mrs Berrehab has to be regarded as 'family life' ... It follows from the concept of family on which Article 8 is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to 'family life' ..."

para 23. ... "The two disputed measures thus in practice prevented the applicants from maintaining regular contacts with each other although such contacts were essential as the child was very young. The measures accordingly amounted to interference with the exercise of a right secured in paragraph 1 of Article 8".

para 29. "... As to the extent of the interference, it is to be noted that there had been very close ties between Mr Berrehab and his daughter for several years ... that the effect of the interference was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young.

Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the means employed and the legitimate aim pursued".

The **BERREHAB** decision recognises that the parent child relationship is protected by Article 8 against state interference even where that interference takes the form of the implementation of immigration control.

IMPLICATIONS FOR UK LAW

1. In UK law there is no protection from expulsion for parents of minors who are either British citizens or who have indefinite leave to remain (or permanent residence rights) and are resident in the UK.

   This deficiency of UK law was drawn to the attention of the Strasbourg authorities in the case of **FADELE** before the Commission [app. 13078/87]. The applicant, a Nigerian, returned to the UK to take care of his three children after their mother was killed in a car accident. He was refused leave to remain and removed after one year. All three children had British

citizenship and had lived all their lives in the UK.

The Commission declared the case admissible and the UK government settled the matter permitting the return of Mr Fadele and his children to UK before the case reached the Court. It appears likely from the judgment in **BERREHAB** that the Court would have found a breach of Article 8 had this case proceeded.

Similar breaches appear to be continuing to occur in the UK. For the most part these concern either parents who are considered to have entered by deception or whose marriages have broken down within the first 12 months and therefore have no right to remain on that ground.

Two recent cases with similar facts illustrate this first situation: **RE THANIA AHMED** ([1991] Imm AR 405); and **RE A (A MINOR)** (CA, reported in Family Law, April 1992). In the latter case, a Bangladeshi woman settled in the UK attempted (unsuccessfully) to use wardship proceedings regarding her child to prevent her husband being removed. He was deemed by the Home Office to have concealed his real reason for entry to the UK (to settle) and to be therefore an illegal entrant.

The wife had been settled here since 1987; married since 1988 and the child was born in 1989. The father was to be removed approximately 2 years after his

arrival. In **BERREHAB** the removal of the father at an early stage of the child's development was held to constitute a disproportionate interference with family life in breach of Article 8, but UK law does not reflect this approach.

Recognising the disparity between the approach taken by the Court and the Immigration Rules, applicants have tried to use these judgments to appeal against UK expulsion decisions. **BERREHAB** was specifically argued in R v IAT ex parte Girishkumar Somabhai Patel ([1990] Imm AR 153). Mr Patel married a British citizen soon after his arrival in 1985 and applied to remain as a husband which application was refused. A child was born to the couple in 1986, who was then four years old at the time of this hearing. The argument based on the Human Rights Court's decision in **BERREHAB** was rejected as having no effect in domestic law. This situation, in which the UK is falling short of its international commitments to human rights, should be rectified without delay.

2. Article 8 requires that any interference with the right to respect for family and private life must, inter alia, be "in accordance with the law". The constant jurisprudence of the Commission and Human Rights Court demonstrates that the law must be "accessible" and "foreseeable". Therefore all secret instructions impacting on the right to family and private life must be published.

SPOUSES AND OTHER RELATIVES:-

EXTRACTS FROM JUDGMENTS OF THE HUMAN RIGHTS COURT

ABDULAZIZ, CABALES & BALKANDALI 15/1983/71/107-109 A no. 94

para 78. "... the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention..."

para 79. "... the Court is not convinced that the difference that may nevertheless exist between the respective impact of men and women on the domestic labour market is sufficiently important to justify the difference of treatment..."

IMPLICATIONS FOR UK LAW

1. If asylum seekers are refused refugee status they may be granted exceptional leave to remain outside the Rules. This commonly involves the grant of leave to remain for one year only which is usually extended thereafter for three more years. After a further extension of three years they may be granted indefinite leave to remain. However, family reunion is excluded during the first four years of residence, unless the applicant can argue the existence of 'compelling compassionate circumstances'.

This is an interference with rights of persons granted exceptional leave to remain to family life as guaranteed under Article 8. The interference appears unjustified, particularly when compared to the respect for family life a person recognised as a refugee can expect.

Similar considerations will apply both in cases of those recognised as refugees and those granted exceptional leave to remain. A grant of exceptional leave to remain must constitute an acceptance that the applicant cannot safely be returned to his or her country of origin. In such circumstances there is no question that family life could be enjoyed in the country of origin (**ABDULAZIZ CABALES & BALKANDALI** above). Accordingly, it is unlikely that an interference with family life which amounts to a prohibition on it is justified under paragraph 2 of Article 8.

2. The contravention of Article 8 discussed above regarding persons granted exceptional leave to remain also violates Article 14.

Article 14 requires that the right to family life under Article 8 shall be secured without discrimination on any ground, such as status. However the status of people with exceptional leave to remain is clearly the ground on which their right to family life is denied.

Contracting states do have a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment under the Convention. Nonetheless, it is difficult to maintain that this difference of treatment has the 'objective and reasonable justification' required in **ABDULAZIZ CABALES & BALKANDALI** (above).

Elsewhere, the Immigration Rules provide that family members of students and dependants of people coming to work may be admitted, although the applicant in these cases may be resident for less than four years. These provisions suggest that a four year absence from family would be deemed unacceptable in otherwise similar situations, as does the treatment of those recognised as refugees. It is submitted that there are no grounds for differentiating between these categories of immigrants and persons granted exceptional leave to remain, or certainly none that would satisfy the **ABDULAZIZ** principle of proportionality.

3. Para 31 of the Immigration Rules provide:

"The wife and children under 18 of a passenger admitted under paragraphs 26 to 30 [as a student] should be given leave to enter for the period of his authorised stay if they can be maintained and accommodated without recourse to public funds".

This provision does not extend to the husbands of women students. Their admission is discretionary and outside the Immigration Rules. It is understood but nowhere stated by the Government that their admission is considered according to whether they are needed to look after the children and whether they can be financially supported by their wives. If these criteria are not satisfied, or if the discretion is not exercised in the student's favour for some other reason, female students' family life will be interfered with. As the discretion is outside the Immigration Rules it cannot be reversed by the Immigration Appellate Authorities.

It is unlikely that this interference can be justified according to the provisions of Article 8 paragraph 2. The 'legitimate aim' of such exclusions is 'the interests of ... the economic well-being of the country'; but the condition that they can be maintained and accommodated without recourse to public funds would meet this 'pressing social need' as required by Article 8(2) (see **inter alia, BELDJOUDI,** above).

The lack of provision in the Immigration Rules for the admission of husbands of female students therefore contravenes Article 8.

ARTICLE 13 - RIGHT TO AN EFFECTIVE REMEDY

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

EXTRACTS FROM JUDGMENTS OF THE HUMAN RIGHTS COURT

ABDULAZIZ, CABALES AND BALKANDALI 15/1983/71/107-109 A no.94 para 93. "The Court has found that the discrimination on the ground of sex of which Mrs Abdulaziz, Mrs Cabales and Mrs Balkandali were victims was the result of norms that were in this respect incompatible with the Convention. In this regard, since the United Kingdom has not incorporated the Convention into its domestic law, there could be no 'effective remedy' as required by Article 13... Recourse to the available channels of complaint (the immigration appeals system, representations to the Home Secretary, application for judicial review ...) could have been effective only if the complainant alleged that the discrimination resulted from a misapplication of the 1980 Rules. Yet here no such allegation was made nor was it suggested that the discrimination resulted in any other way".

The Human Rights Court accordingly concluded that there has been a violation of Article 13.

IMPLICATIONS FOR UK LAW

Although the Strasbourg authorities have made it clear that the Convention offers no guarantee of the right in domestic law to challenge violations of the Convention on that ground alone, it has always insisted that the "aggregate of remedies" available to an aggrieved individual must be effective (Leander. A116 1987, Young James & Webster B39 1984 p49).

The Commission and Human Rights Court have had numerous occasions to examine the operation of judicial review in the UK legal system. Whilst the Commission formed the view in **VILVAVAJAH** that the lack of a right of appeal on the merits before removal for refused asylum seekers did constitute a breach of Article 13, the Court reversed this view holding that in asylum cases, judicial review was an effective remedy since "the Courts have stressed their special responsibility to subject administrative decisions in this area to the most anxious scrutiny where an applicant's life or liberty may be at risk".

This does not, however, mean that judicial review would be considered an effective remedy in all cases, and indeed even in **VILVAVAJAH** two of the judges, including Judge Walsh, found that there had been a Violation of Article 13. Judge Walsh's separate dissenting opinion is instructive.

"It appears to me that a national system which it is claimed provides an effective remedy for a breach of the Convention

and which excludes the competence to make a decision on the merits cannot meet the requirements of Article 13".

Fortunately Judge Walsh's concerns are now being remedied in the Asylum and Immigration Appeals Bill 1992 insofar as asylum seekers are concerned. However, the Human Rights Court in **VILVARAJAH** only expressed its confidence in judicial review as an effective remedy in cases where the applicant's life or liberty was at risk.

The Court has expressed no such confidence in judicial review in relation to other immigration decisions, and it is by no means clear that in those situations where there is no right of appeal to an independent adjudicator on the merits that other appeal rights (.e.g under Section 5, Immigration Act 1988) or judicial review would be regarded as an effective remedy. This will be even more problematic when the new Asylum and Immigration Appeals Bill comes into force removing the right of appeal in cases where a refusal is mandatory.

Potential breaches of Article 13 occur in those situations raising issues under Article 8 where judicial review is the only remedy, particularly in those situations where a refusal mandatory under the Immigration Rules inter alia:-

: Spouses of female students

: "Sole responsibility" of children

: primary purpose refusals where the marriage is recognised as genuine

: separated parents with regular and frequent contact

with minor children

: adoptions

: dependent relatives not qualifying under the rules

: over age children not qualifying under the rules

: common law spouses

: homosexual couples

: illegal entrants

In every instance where an issue of private or family life arises there must be an effective right of appeal on the merits to the IAA.

CONCLUSIONS AND RECOMMENDATIONS

The central aim of this survey of domestic implementation of the case law of the Human Rights Court in the areas of immigration and asylum is to encourage the UK to comply with its human rights obligations in this field.

Specifically, UK immigration law and rules should be amended to take account of the following points:

1. All relevant instructions which form an intrinsic part of administrative practice in immigration law must be published and subject to review by the IAA.

2. The requirements for the grant of asylum are too narrow to avoid breaches of Article 3. The Immigration Rules should be amended to include protection from expulsion in accordance with the Human Rights Court's rulings prohibiting return of persons to inhuman and degrading treatment or punishment.

3. The Immigration Rules should be amended to include provisions for the issue of entry clearance to persons fearing inhuman or degrading treatment or punishment.

4. Carrier sanctions legislation should be amended so that it ceases to result in infringements of Article 3 by preventing persons fearing inhuman or degrading treatment or punishment from reaching the UK.

5. The fingerprinting of asylum seekers should not be routine if a contravention of Articles 3 and 14 is to be avoided. The fingerprinting of children should not be necessary.

6. The factors to be considered by the Home Secretary when deciding whether to make a deportation order, or issue removal directions in respect of an illegal entrant, should be redrafted taking account of the Human Rights Court's decisions on Article 8, the right to respect for private and family life. It should be made clear that in the case of fully 'integrated aliens' - that is to say those who have spent substantial parts of their lives in the UK, been educated here, and whose immediate family are also established in the UK - the fact of their integration weighs so heavily against an expulsion that this should only occur in the most exceptional circumstances if at all.

7. Provision must be included in the Immigration Rules for parents to obtain leave to enter or remain on the basis of their relationships with minor children resident here as current practice contravenes Article 8 as interpreted by the Human Rights Court.

8. The current discriminatory interference with family life suffered by persons granted exceptional leave to remain should be ended. Their situation should be regularised to provide for admission and residence of

their dependants in the UK at least from the moment of grant of status. Such provision would reduce the risk of breach of Article 8 and 14.

9. The provision of the Immigration Rules for admission of the spouse of a male student must be extended to female students. This discrimination contravenes Articles 8, 13 and 14.

10. An effective remedy by way of an appeal on the merits to the Immigration Appellate Authority must be provided in all circumstances where an issue of inhuman or degrading treatment (Article 3) or private and family life (Article 8) arises. The Adjudicator or Tribunal must have the power in law to allow any appeal where on the facts and circumstances of the case a breach of a Convention right would otherwise occur.

As mentioned in the introduction to this report, there is currently no reporting mechanism being used effectively to monitor failures to comply with the provisions of the Convention which do not come before the Commission and Human Rights Court by way of individual petition. It is hoped that these examples of the UK's irregular position will encourage such a mechanism to be introduced to ensure the protection in practice of human rights which is already guaranteed in name.