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Editorial Policy

Aims of the Journal

To encourage the publication of original analysis or critique of law and policy on different categories of migrants, on refugee and asylum issues and on nationality laws, at UK, comparative, European and international level; to encourage the publication of work on such topics that links the development of law to migration flows between states and regions of the world; to provide updates and news features on recent developments in UK law; to publish reviews of texts related to the concerns of practitioners and academics.

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British protests that followed those in the US after the killing of George Floyd are the latest painful struggle to push British society to acknowledge and understand how racism permeates past and present. Indeed, the two cannot be separated. Those who cannot or will not understand the present cannot understand the past, as historian David Starkey's crass comments on genocide and slavery demonstrate. The reverse is also true; the painstaking reconstruction by academics of slavery's legacy in our buildings and institutions changes what we understand the present to be.[1]

This is also true for much of the history of British immigration and nationality law. The racist thought systems behind legislation such as the Commonwealth Immigrants Acts 1962 and 1968, and the concepts of 'patrial' in the Immigration Act 1971 and 'right of abode' in the British Nationality Act 1981 are starting to be better understood but their modern day legacy was certainly not appreciated by the Home Office or its political leaders when it implemented the hostile environment. In the words of Wendy Williams in her *Lessons Learned Review* of the Windrush scandal, that individuals had been living lawfully in the UK for decades without evidence of their entitlement had been 'institutionally forgotten'.[2] In consequence, the question of how to prevent their entanglement in the hostile environment was not considered. Yet, that failure might have mattered less were it not for other institutional factors that meant that both politicians and civil servants failed to note early warning signs, failed to take complaints seriously and failed to adapt their practices. Wendy Williams stops short of describing the Home Office as institutionally racist specifically as regards the Windrush scandal, but its entrenched culture of heartlessness cannot be disconnected from the viciously anti-migrant political mindset that has characterised both past and present administrations, under which questions of immigration status have superseded basic standards of humanity because the humanity of some has not been acknowledged or given full weight.

The problem is that, while the right of states to control immigration is almost entirely unquestioned legally and normatively, the tougher the policy, the greater the likelihood of discrimination against citizens and residents. The idea that restrictive external controls can be balanced by the promotion of equality and non-discrimination internally has its own history of failure and carries no authority now that a sizeable proportion of the population lead transnational lives, and convoluted immigration laws and internal bordering have become a normal part of everyday life. Whether a person is a citizen, a lawful resident, a tolerated presence or an unauthorised migrant is not a binary question and the answer may fluctuate through time but the person is always a human being, of worth in their own right as well as one who is loving and loved and with substantial claims to live where they have settled. The wellbeing of countless citizens and residents, including thousands of children impacted by the minimum income requirement for spouses and partners, depends on immigration status decisions that, technically speaking, concern only a 'foreigner' (human rights compensating only in limited ways for this singular focus). The rebarbative rhetoric of immigration control sends a clear if implicit message about the wider social acceptability of fellow citizens and residents whose names, skin colour or religion reflect their own migration heritage.

1 *Legacies of British Slave-ownership* at https://www.ucl.ac.uk/lbs/.
2 *Windrush Lessons Learned Review: Independent Review by Wendy Williams* March 2020 HC93 p 44.

Anger at and dread of the immigration system are unsurprising when one considers not just its present cruelty based on an accumulation of coercive power and limited accountability but the sordid history of legal rules that did not just permit but were aimed at enabling race discrimination and whose shadow has not disappeared. If black lives are to matter according to all possible meanings, those in charge of the immigration system must have the humility to recognise that it was not built on neutral foundations and that it cannot operate as if the past does not exist or that the present is not connected to it.

Helena Wray

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Immigration and Social Security Co-ordination (EU Withdrawal) Bill

The Bill (the clauses of which were covered in the previous issue) completed its Third Reading in the House of Commons on 30 June 2020. During the committee and report stage, a significant number of amendments were tabled to the bill. These fell into two broad categories:

1. amendments designed to improve the terms of the bill; and
2. amendments designed to improve issues in immigration law more generally.

However, none of these were successful. The Bill now continues to the House of Lords.

Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020

These Regulations were laid before Parliament on 18 May 2020 and came into force on 8 June 2020. They amend the Civil Legal Aid (Remuneration) Regulations 2013, which set the fees applicable in respect of civil legal aid. These Regulations introduce a new 'stage 2(c)' standard fee in relation to immigration and asylum appeals to the First-tier Tribunal (Immigration and Asylum Chamber) that use the new reformed online procedure. Parties are now required to use the new online procedure in relation to most appeal types as a result of the circumstances arising from the coronavirus pandemic. The online procedure requires a submission of an Appeal Skeleton Argument (known as an 'ASA') at an early stage of the proceedings, with a view to encouraging the Home Office to review the file and either withdraw decisions or concede issues, where it is appropriate for them to do so. Inevitably, the ASA involves additional work. As these Regulations have been introduced to require the mandatory use of the ASA during the current pandemic, they will expire on 8 June 2021. The Ministry of Justice will be consulting on a long-term solution in the intervening period.

The Regulations have been extremely controversial. When they were published, ILPA released a statement saying that it was concerned that '… in real terms, the new immigration and asylum legal aid fixed fee amounts to a reduction at a time when legal aid practitioners are least able to afford it. This should be seen in the context of a system that has faced very severe cuts over the last decade, the provision of legal aid is now severely limited and Law Centres face financial crises.' Similar statements were made by the Law Society, the Bar Council, the Young Legal Aid Lawyers, and 20 barristers chambers.

At the time of writing, the Labour Party has tabled a motion (prayer) in the House of Commons that the Regulations be annulled, and there are a number of potential legal challenges being brought.

Statement of changes to the Immigration Rules: CP 232, 14 May 2020

CP 232 was laid before Parliament on 14 May 2020. The main changes include:

- expanding the scope of the EU settlement scheme to include family members of persons of Northern Ireland;
- expanding the scope of the domestic abuse provisions in the EU settlement scheme, to include victims of domestic abuse of any family member who falls within the scope of the scheme, rather than just spouses;
- adding further requirements to the Representative of an Overseas Business category, with the effect of restricting how many people will be able to join; and
- a variety of changes to the Start-Up, Innovator and Global Talent routes within Appendix W of the Immigration Rules.

Tribunal Procedure (Coronavirus) (Amendment) Rules 2020

This legislation provides for various amendments to tribunal procedure in light of Coronavirus. Among other things, rule 10 inserts new rule 4A into the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 to confer a power on the First-tier Tribunal to decide a case without a hearing where:

1. the matter is urgent;
2. it is not reasonably practicable for there to be a hearing (including a hearing where the proceedings would be conducted wholly or partly as video proceedings or audio proceedings), and;
3. it is in the interests of justice to do so.

Rule 5 makes a similar amendment in relation to the Tribunal Procedure (Upper Tribunal) Rules 2008.

Charles Bishop, ILPA

Left to Grieve Alone: Migration, Dignity and Dying in the Time of Covid-19 – Some Early Reflections

Syd Bolton and Catriona Jarvis

At a glance

During a period of emergency legal and public health measures instituted by States around the world in response to the Covid-19 pandemic, migrants, due to their uncertain and temporary status, are placed in an even more vulnerable situation than usual. Legal, administrative and practical barriers and obstacles to accessing essential social, health and other services require authorities to put into effect urgent provisions to ensure that migrant persons and their families do not suffer additional discrimination in relation to the risks from this pandemic. In the matter of the protection, treatment and deaths of migrants, all international human rights laws, norms and standards should be maintained and applied to identify risks to migrants and to prevent such discrimination, in life and in death. The Last Rights Project has developed standards in the form of The Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys (2018). Based on established human rights law and global best practice, it offers an approach that is readily applicable to the situation of migrants during this pandemic.

Introduction

At the date of compiling these reflections, well over 460,000 people across the globe have lost their lives directly to the covid-19 virus and an unknown number more will have died indirectly as a consequence. In the UK alone, one of the worst affected countries in the world, over 40,000 deaths attributed to the virus have been recorded. Data specifically counting and recording the deaths of migrants is either not collected or unavailable. The lives of millions of others have been affected by the loss of family members and by the shattering of their means of economic well-being or even survival. For many millions more, already living in appalling and impoverished, precarious conditions, lacking status and recognition within their own countries or as migrants, those privations will, inevitably, be more acutely felt and it might reasonably be predicted, fall upon their shoulders disproportionately. Children will be left orphaned, the most vulnerable people abandoned to their fates, and whenever the storm starts to calm and a new normality emerges across the globe, a new way of life for all of us will have to be negotiated and re-constructed. Migrants are already amongst the most vulnerable in our societies, denied or unable to access many aspects of welfare and health protections and will be put at greater risk of exposure to this pandemic and its consequences.

In this context, it is important to ask how do we frame and hold to account the implementation of policies and powers used in response to the pandemic in a way that respects human rights, humanitarian laws and international rights instruments? The right to life, non-discrimination, respect for private and family life, the rights of the child, refugee protection, cornerstones of progressive democracy, and its values, especially that of human dignity, are all brought into sharp relief and seriously challenged during this global crisis.

This article will mainly consider this last question in the context of the impact of Covid-19 on migrants and in particular some of the significant issues arising from the treatment and deaths of migrants during the pandemic.[1]

The Last Rights Project and The Mytlini Declaration

The Last Rights Project has worked since the start of 2016, in the context of deaths during irregular migration, to address the many legal and practical issues arising for families who have lost their loved ones on migration journeys, whether they are seeking those who have gone missing, or are known to have died, including the circumstances of their deaths, legal redress and practical measures of burial, mourning and commemoration. With the collective efforts of many experts across different professional disciplines, an underlying framework of international human rights and a set of principles and minimum standards were drafted in the form of The Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys signed and published on 11 May 2018 ('The Mytilini Declaration').[2]

The document contains provisions which, although arising primarily from concerns about the high numbers of deaths at sea on the Mediterranean crossings to Europe and on particularly dangerous land border crossings like the Sonora Desert in the USA and Mexico, nonetheless are readily applicable to the situation of migrants during this pandemic, and arguably even more pressing as none of the concerns for the safety of migrants during this period is diminished, only exacerbated. The Mytilini Declaration is mainly predicated upon the inherent right to life, the right to the truth, and equality of treatment. For migrants and indeed all other members of society these fundamental rights are of magnified significance during this global crisis.

Two legal statements

Sitting behind the Mytilini Declaration are two key documents: 'The Dead, the Missing and the Bereaved at Europe's International Borders, Last Rights Proposal for a Statement of the International Legal Obligations of States', September 2017[3] and the 'Last Rights Extended Legal Statement and Commentary' of January 2019,[4] neither of which is intended to be exhaustive, as to the law upon which the Mytilini Declaration rests. The first, as its name indicates, has a mainly European focus whilst the more recent has a wide, international reach.

This is not the place to elaborate in detail on either of these, but it is helpful at this point to highlight in brief the main sources of law on which we have drawn in order to articulate for

1 Migrants in this article refers to all migrants, documented and irregular, refugees and asylum seekers and their families.
2 The Mytilini Declaration is at: https://drive.google.com/file/d/1n9ZZ5LjI9KkEf7Lfzqv_yB1R9bAy0G8B/view.
3 Available at: https://drive.google.com/file/d/0ByFv9rzlqJaBLWJuOHVZeGd2NWNOVUNHVUgtOEJZTEdlZ2tR/view.
4 Available at: https://drive.google.com/file/d/1P7RGtTQw95gFL-o6iBzxmVRsDngxpHHc/view.

the first time, the obligations of states toward the missing, the dead and the bereaved and the rights of those groups, in the context of migratory journeys. The below is an extract from the 2019 Extended Legal Statement and Commentary (internal citations omitted).

> 'There is a substantial body of legal principles and rules in both customary and treaty law that applies to the treatment of the dead in the context of armed conflict. These principles and rules derive from what The Hague Conventions call "the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience" and what the International Court of Justice referred to as "elementary considerations of humanity, even more exacting in peace than in war." But while international law addresses the treatment of the dead and next of kin in armed conflict, the obligations on states in respect of persons who die outside the context of an armed conflict have received less attention.'

This statement is intended to address that issue. It draws upon international human rights law, international humanitarian law, international criminal law and international maritime law. It is premised on the principle that until there is a more adequate codification of the law applicable to their human rights obligations with respect to the dead and missing, States remain bound by treaty obligations including the duty to respect human dignity.

The law of armed conflict, also known as international humanitarian law, establishes important principles applicable to the dead and missing in armed conflict. These principles are, in turn, rooted in fundamental human values that are not confined by or limited to notions of reciprocal treatment by parties to a conflict as is the case in international humanitarian law. For this reason, the content of principles that have been adopted by international humanitarian law from that earlier system of fundamental human values, may be regarded as lending themselves to transposition to peacetime contexts.

It should be stressed that the principles proposed in this document flow from fundamental international human rights law. To the extent that reference is also made to international humanitarian law, this is mainly because that body of law has developed useful formulations and terminology with respect to the treatment of the dead and missing.

The requirement that the dead be treated with respect and dignity existed as a fundamental human value long before there were any attempts to identify and codify international law. In Antigone, Sophocles treats the importance of burial as a principle incapable of being overridden by government. Homer condemns Achilles' disrespect for the body of the opponent whose life he has just taken. Similar principles are found in the customs, traditions and literature of all peoples.

Human dignity lies at the core of all international human rights law. The applicable declarations and treaties do not, as a general rule, set out any detailed principles with respect to the treatment of the dead. To some extent, this has been addressed in the case law of international human rights courts and tribunals.

Specific rights with relevance in this area include the right to life, the prohibition of cruel, inhuman and degrading treatment, the right to equality and the prohibition of discrimination, the right to family life, the right to property and the right to legal personality. Special attention is directed to the protection of children, in accordance with the priorities established by international human rights law.

These international obligations are complementary to, and inform, the rights and obligations concerning dead persons and their families set out in applicable national legislation.

That these matters remain to be properly addressed does not however reduce or mitigate the humanitarian and human rights duties of those States whose involvement is direct and immediate.

It is important to note that Last Rights applies a wide meaning to the term 'family', mindful of non-discrimination requirements, to include not only a spouse and minor children, but also adult partners in close relationships, adult children, siblings, both child and adult, especially where a sibling, who may be a minor child, has become a head of household which may also include children who have been treated as children of the family.

The core obligations of States as set out in the Mytilini Declaration

Irrespective of national jurisdiction the Mytlini Declaration provides (inter alia) that all states should, in accordance with core international legal obligations, many of which are subject to a requirement that reasonable means be exercised:

- Collect, examine and preserve all bodies.
- Respect the bodies of the dead and guarantee chain of custody of the bodies from recovery to the final destination.
- Take all reasonable steps to identify the deceased and to determine the cause and manner of death.
- Undertake effective investigations to deliver justice, accountability and réparations.
- Make every effort to locate and notify the family of the dead and missing.
- Collect and preserve for all missing migrants ante mortem and background information and genetic information of the biological relatives.
- Collect and preserve for all unidentified remains all recovery and post mortem information, including post mortem DNA samples.
- Preserve any personal effects of the dead, and take reasonable steps to restore them to the family or retain the effects in a repository.
- Provide all necessary assistance to families of identified deceased migrants for the issuance of a death certificate.
- Facilitate repatriation of the remains of the dead to their family if possible.
- Where the remains are not repatriated to the family, dispose of them in a manner that is dignified and respectful to the person.
- Record the location of burial of the unclaimed and unidentified remains and respect and maintain gravesites in the countries where the bodies are found.
- Provide special protection for children of missing and dead migrants.
- Create national mechanisms in countries of origin, transit and/or destination related to missing migrants, which should include governments, civil society, families, associations of families, migrant communities and experts.

Last Rights Statement to all Governments regarding the Covid19 pandemic

On 24 March 2020, The Last Rights Project issued a statement about the pandemic addressed to all governments reminding them of their duties to treat migrants without discrimination in relation to this emergency and in relation to deaths.[5]

5 Available at: https://docs.google.com/document/d/1tBOtw1tFPNw5IJPpxsZAujM8Yoh2zd7XQuwfiUL0cAQ/edit.

'Where funerals attended by relatives cannot be held for public health reasons, such burials and services should be carried out in accordance with the culture and beliefs of the deceased where this is known and culturally appropriate burial sites established.

Every opportunity and assistance must be given to families to mourn their loved ones and in due course, once restrictions are lifted, to travel to the place of death, to receive their mortal remains and property and to facilitate repatriation and burials.

As with all members of society, refugees and migrants should have equal access to a transparent legal process of independent investigation, inquiry or inquest for ascertaining the cause(s) of death and be enabled to participate in those procedures. Emergency measures should not curtail such procedures.

It is imperative that all States immediately establish the necessary recording and data preservation systems to ensure that these basic human rights measures are fulfilled and that information is published to enable families, wherever they may be located to access information, in their own languages about tracing, mourning and representing their loved ones in death.'

The immediate context

One of the immediate concerns as the pandemic sweeps across different countries at different stages, has been the impact on migrants in a variety of settings; for example, detainees pending deportation; migrants living in designated holding centres, reception facilities and informal slums and camps; migrants in society at large but with no access to public funds or health services; those with pending legal claims and appeals; those who have limited status with restrictive conditions, those who are separated by national borders from their families. Migrant workers in frontline positions are working (like others) without access to adequate personal protective equipment (PPE). Even European Union citizens' enjoyment of freedom of movement is curtailed and internal borders across EU member state frontiers and points of entry have been 'closed' conditional upon returning residents entering periods of quarantine under emergency powers. Others are unable to travel across countries with lockdown laws in place in order to reach their loved ones or to attend funerals. Travel within countries has been limited to essential journeys and narrowly construed criteria. These conditions are being slowly relaxed as countries bring the spread of the virus under 'control' to varying degrees but for some, like migrants detained in camps in Greece and elsewhere, lockdown measures remain strictly in place, whilst for settled residents and even holidaymakers they are removed.

As highlighted by Crisis Group in their recent report 'COVID-19 and Conflict-Seven Trends to Watch',[6] the many effects of the virus, not only the disease itself, are felt across the world including in conflict zones and it seems likely that it will only continue to spread:

'… areas of active conflict are at high risk of Covid-19, including north-western Syria and Yemen where an outbreak could rapidly overwhelm aid efforts and make one of the world's most serious humanitarian catastrophes even more dire. There is a long history of contagion spiking in camps for internally displaced persons and refugee camps.

6 Crisis Group *COVID-19 and Conflict - Seven Trends to Watch* 24 March 2020.

> Also of concern are the Rohingya refugee camps in Bangladesh, where over one million people live in overcrowded conditions, with sanitation facilities and health care services limited to a bare minimum. A government ban on internet and mobile phone services in the camps limits access to vital preventive information, while high levels of malnutrition make it likely that both the refugees and local residents are more susceptible to the disease. Should COVID-19 reach the camps, humanitarian agencies expect it to spread like wildfire, potentially triggering a backlash from Bangladeshis who live in the surrounding areas and are already unnerved by the refugees' prolonged stay.
>
> In these cases – as for displaced communities in Iraq and elsewhere in the Middle East, Africa and Asia – there is a risk that internally displaced persons and refugees facing large-scale outbreaks of COVID-19 in the camps where they reside may aim to flee again to safety, leading local populations or authorities to react forcefully to contain them, which creates the potential for escalating violence. States attempting to stop the spread of the disease are likely to view new refugee flows fearfully. Colombia and Brazil, for example, closed their borders with Venezuela after previously taking a relatively generous approach to those fleeing the crisis there, but the pressure to escape worsening poverty and health risks in Venezuela could force rising numbers of migrants to use illegal crossings.
>
> The COVID-19 emergency could also exacerbate the humanitarian crisis in Central America tied in part to the Trump administration's immigration policies, as well as the region's already high levels of violent crime. Having announced the closure of its southern border to all non-essential traffic from 21 March, the U.S. may seek to strengthen efforts to halt the arrival of migrants and refugees from Central America and return them to host countries. El Salvador and Guatemala nevertheless suspended in mid-March all incoming flights of Central American deportees from the U.S., and it remains to be seen whether Washington can convince them to resume the service given that both countries have grounded all other international passenger flights.
>
> At a time of grave threat to Central America's fragile economies, moves to continue U.S. and Mexican deportation flights could expose growing numbers of displaced people to a frosty reception once they land, as locals may fear that the arrivals are spreading disease. Many deportees are likely to face the choice of heading back to the U.S. border, with the support of trafficking networks, or becoming victims or accomplices of the region's pervasive criminal groups and street gangs.
>
> In many cases, COVID-19's impact on refugees and IDPs will be felt disproportionately by women, who often form the majority of displaced populations in conflict-afflicted regions. These women's access to services and ability to feed their families are already deeply constrained by stigma relating to their ties (real or alleged) to armed groups. Exposed to sexual exploitation or abuse, with their rehabilitation or integration back into communities a low priority for feeble or indifferent governments, displaced women and children stand poised to be affected fast and first by the economic crises that will accompany the spread of the disease.'

Virtually all countries affected by the pandemic have introduced strident emergency powers in an effort to control the spread of Covid-19. Some in Europe have used the provisions

under art 15 of the European Convention on Human Rights ('ECHR') to derogate from the normal obligations under that convention, others have considered that their measures can be implemented in ways consistent with the ECHR in its totality. The Council of Europe has issued a helpful 'toolkit' for its member states, setting out states' duties when enacting emergency powers.[7] Derogation from the right to life (art 2 ECHR) and the prohibition of torture, inhuman and degrading treatment (art 3 ECHR) is not permissible.

There is already evidence of urgent legal actions that are being taken to address the particularly difficult position of migrants, both lawfully resident and undocumented, affected by the actions of states and the courts (see later).

In Portugal and Ireland, during the period of the pandemic emergency (a timeframe not yet known), migrants will have access to healthcare, without risk or fear of being reported to the immigration, border and security authorities.

In some countries there have been strong interventions, including legal proceedings in the UK[8] seeking the release of immigration detainees, some, but by no means all of whom have been released as a result[9] arguing that a lack of any coherent policy to identify and release vulnerable detainees was unlawful and a breach of arts 2 and 3 ECHR. It was argued that there was significant additional risk of contracting the virus in such conditions as well as risk of deaths in detention caused by measures known as 'cohorting,' ie placing all detainees suspected of carrying the virus together in segregated spaces. Futher, these spaces constituted unlawful detention by reason of there being no current realistic prospects of removal of a detainee due to international border closures. Likewise, calls to suspend deportations, extend visas and treat migrants as having full access to healthcare without immigration enforcement consequences during the pandemic have been made. In some countries, such as Portugal and Ireland, such access to healthcare has been agreed.

Refused asylum seekers will not be evicted from their temporary accommodation for a short emergency period, temporary leave to remain permissions and related conditions will be extended. However, recognised refugees in Greece are already being evicted from the accommodation allocated to them on grant of status and find themselves homeless once more.[10] Refugee doctors and nurses are being fast-tracked into service after previously being prohibited from working. But by and large the picture is of *ad hoc* and hard fought for concessions on an issue by issue basis, depending on the country.

Citizen families around the world are in general being repatriated at government funded expense to return to their family homes. Whilst many migrants with limited leave have chosen to return to their home countries either for safety or the comfort of family, this is not the case with undocumented migrant families and asylum seekers, who remain separated and isolated from one another in third countries; unable, as before the virus, to achieve family reunion or *in extremis* to enter or leave a country temporarily to attend funerals, inquests or other legal proceedings. These obstructions to travel add significant emotional and psychological burdens to an already anxious and traumatic period, significantly interfering with the usual norms of life and making huge inroads into our fundamental values of dignity and respect for family life. As our lives have concomitantly been forced inwards into our homes, the use of information technology has

7 https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40.
8 *The Queen on the application of Detention Action v Secretary of State for the Home Department* ref CO/1101/2020.
9 'Home Office releases 300 from detention centres amid Covid-19 pandemic' *The Guardian* 21 March 2020.
10 'Refugees, Migrants Moved Out of Makeshift Camps in Athens' Center' *The National Herald* 17 June 2020.

escalated, but for migrants and many of society's poorest, such alternative communications are not affordable or no longer available through community support groups and libraries as they shut their doors.

Whilst the measures imposed by most affected states *may* be considered and shown ultimately to have been necessary in the urgency of the fight to contain the crisis and *may* have implicit public consent for the time being, the democratic deficit in this process is at its highest outside wartime measures. How long these measures remain in force and to what extent, how they disproportionately impact upon particular social groups and how much they become the new 'normal' will be revealed in the fullness of time. It is of immediate and fundamental importance to ensure that even during the imposition of emergency powers these powers do not derogate from human rights norms but are implemented fully in accordance with them.

Additionally, there are inevitable and impossible decisions being made on a minute by minute basis, as this article is written, by health professionals and others which will determine, in the desperate competition for necessary life-saving resources, who gets the chance to live and who will die. Emergency powers and necessary medical procedures are determining whether we die with family, or in our communities, or in hospital or a care home, or even in our own home, and alone. Migrants are all the more likely to be distant from their relatives, unable to access healthcare, without access to internet communications, or left without means of economic survival.

In the midst of the pandemic crisis, the shock of so many deaths may lessen as we become inured to the daily death tolls as simply representing numbers, but the real-life accounts of those deaths are all harrowing and traumatic. Preventing people from becoming merely part of a statistic, exactly like the large numbers of people who have died on migration journeys, requires their deaths to be understood and documented, recorded and accounted for. Ensuring the dignity of everyone, sick, dying, deceased and bereaved is an essential part of our individual and collective acts of coming to terms with, rationalising, preventing future avoidable deaths and preventing impunity for such deaths. Transparency in how and on what basis life and death decisions are made, at an international, national, local and individual level will help determine the extent to which our human rights values were and will be maintained and upheld.

The immediate theatre of a crisis is not the best or easiest place to start an objective analysis, nor for identifying responsibility for things that may have gone wrong, but it is necessary to ensure that rigorous scrutiny of all actions during this crisis can be made at all times. Transparency is critical and with it our ability to assess the extent to which any specific measure is compatible with our human rights standards. This is not just a role for political assemblies and structures and the media, but for independent monitoring bodies and experts, non-governmental organisations, lawyers on behalf of their clients, courts, citizens' bodies and family associations.

The obligation to conduct an effective official investigation, for example pursuant to art 2 (the right to life) under the European Convention on Human Rights ('ECHR'), arises where there is a killing or a death that occurs in suspicious circumstances whether or not imputable to State agents. Although death from this virus is a natural cause and not suspicious per se, surrounding circumstances may require further investigation to establish any contributory factors, underlying conditions, acts or omissions, particularly where people die

in immigration detention and other restricted conditions.[11] The bereaved relatives of asylum seekers placed in overcrowded temporary accommodation, migrant workers without adequate protective equipment, those not admitted to hospital in a timely way or denied emergency treatment during triage, may have legitimate concerns to ensure that proper investigation and recording of any contributory actions leading to a possibly avoidable death are properly pursued. The actions of states in managing this crisis will undoubtedly be scrutinised at length following this pandemic but every family is entitled to know the full circumstances of the death of their loved one.

Recent studies estimate as many as 4.8 million 'unauthorised' migrants are living in the European Union.[12] Many will be living under assumed identities, others overstaying or unknown to the authorities, will be unable or unwilling to reveal themselves to health and other authorities, due to so called 'hostile environment' policies, exclusions from access to services and risks of deportation for them and their families. This population is most vulnerable to Covid-19 and the attendant risks of death, but with the added possibility that these deaths will not be counted, examined or treated with the same scrutiny and respect as those of legally resident and settled populations.

Much can already be learned from the experiences of families who have lost their loved ones on migrant journeys and forced disappearances, where the circumstances of those deaths are not always readily transparent, or are even actively suppressed and denied; where the grieving family may have little or no part in the funerals and burials of their loved ones, nor be involved in any inquest or legal investigation and recording of the causes of death. Lack of immigration status, restrictions of movement and risks to their own status already prevent many bereaved families from access to justice for their deceased relatives. Restrictions on travel and other practical obstacles will have a serious impact on the manner in which migrant families are able to engage with administrative procedures and funerals during this pandemic. So too, these difficulties may now be visited upon settled nationals.

The view from the United Kingdom

Although the UK government introduced a Coronavirus Emergency Act 2020 and Regulations, it rapidly passed this wide-ranging legislation through Parliament (before going into an extended recess) on the basis that there was no need for derogation from or suspension of compliance with the UK's obligations under the ECHR and that all the emergency measures would therefore be compliant with the ECHR. It remains to be seen whether that will be honoured. Indeed, it is already being tested in the courts as the impact of the pandemic becomes more apparent for migrants in particular contexts (detention, access to health-care, status, work visas, asylum support and accommodation, family reunion appeals etc).

The UK emergency powers contain many actual and potential restrictions on individual movement and activities, and these do not need to be visited in detail for the purpose of this article. The application of these measures will be assessed at length in due course, whether by

11 See UK Parliament Joint Committee on Human Rights, 'Deaths in Custody', Third Report, Session 2004–05, 14 December 2004, HL 15-I/HC 137-I and HL 15-II/HC 137-II. These criteria derive from a number of judgments including, *Paul and Audrey Edwards v UK* ECtHR, App no 46477/99, 14 March 2002, ECHR 2002-II; *Seidova and others v Bulgaria* ECtHR, App no 310/04, 18 November 2010; *Hugh Jordan v UK* ECtHR, App no 24746/94, 4 August 2001.

12 Pew Research Center *Europe's Unauthorized Immigrant Population Peaks in 2016, Then Levels Off* 13 November 2019.

public inquiry or other democratic forum of accountability but there are particular sections of the legislation that do require at least some illumination and consideration.

Recalling that the Mytilini Declaration requires:'… states to collect, examine and preserve all bodies, … respect the bodies of the dead and guarantee chain of custody of bodies from recovery to final destination … and take all reasonable steps to identify the deceased and to determine the cause and manner of death, … undertake effective investigations to deliver justice, accountability and reparation;'[13] one of the most striking sections of the UK Coronavirus Act 2020 concerns what was initially entitled 'Death Management Systems' in the draft Bill, but which has now been enacted in various provisions of the Act.[14] These measures provide a framework for dealing with an anticipated mass casualty situation which, at the time of writing, has very quickly been realised with over 40, 000 Covid-19 related deaths officially recorded across hospital, social care and private homes though the true figure will likely be much higher. This is in addition to many other non-Covid-19 attributed causes of death, recorded during the same period.[15]

The provisions for 'Transportation, storage and disposal of dead bodies' contained in Sch 28 to that Act provide powers widening existing funeral transportation and crematorium operating arrangements. It also provides for mass burials and cremations. These powers ultimately reside with the Secretary of State for the Cabinet Office. Other provisions include the exclusion of deaths from Covid-19 from jury inquests and for the relaxation of normal oversight measures for medical cause of death certification and cremation requests.[16] Whilst these measures may, arguably, within the context of a national emergency, be sensible, practical and even necessary, the potential consequences on particular communities, individual rights and for accountability more generally, are of concern, not least for migrants and their families.

The potential for deaths to be hastily (and wrongly) certified or contributory causes not considered, is increased during periods of intense pressure on medical and death administrative processes during this pandemic. Temporary medical examiners who have not treated the patient, are deployed to complete certificates and cremation forms, without necessarily having been able to speak to family members or the patient's health practitioner. This is of particular concern where a migrant may be alone in the UK and processes are carried out in the absence of available family members. Likewise, the absence of systematic Covid-19 testing and lack of post mortems, where Covid-19 is classified as a natural cause of death so that there is no automatic obligation in most cases to refer the death to a Coroner prior to registration of the death, may lead to an expeditious cremation or burial without any family members present or even aware of their loved one's death. All these factors provide a ready scenario for injustice and later difficulties in tracing the deceased's relatives.

Where migrant workers have died in the course of their hospital work for the NHS and/or as a patient brought into hospital or in the community, it will be particularly difficult for families to understand the true circumstances of their loved ones' deaths, or to know about their death at all if there is no available contact information concerning family overseas. Likewise,

13 Section A, paras 5,6,7,8.

14 See ss 18–21 (registration of deaths), 30–32 (Inquests) and 58 (powers in relation to bodies). Coronavirus Act 2020.

15 See https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases.

16 See Schs 13, 28 Coronavirus Act 2020 and guidance available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877302/guidance-for-doctors-completing-medical-certificates-of-cause-of-death-covid-19.pdf and https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878093/revised-guidance-to-medical-practitioners-completing-form-cremation-4.pdf.

where a person who is a migrant dies under an assumed identity (a not uncommon situation), if DNA samples are not taken as routine, ante-mortem data not preserved and stored as part of basic post-mortem evidence preservation steps, then significant material to enable family tracing will be lost for all time. As has been said, death under an assumed identity is thus a form of double jeopardy for this group of migrants and their loved ones.

As this article was being written, and after much pressure on behalf of bereaved families, a compensation scheme was agreed by the UK government for all health and social care workers who died in service working for the National Health Service and for care providers. Migrant workers whose bereaved families are in the United Kingdom will also be offered Indefinite Leave to Remain.[17]

It is not suggested that deceased migrants will deliberately receive any lesser treatment than citizens in the UK in the clinical and administrative treatment of their individual deaths, or at all. However, the acceleration of body disposal from hospital to burial, given the dilution of safeguards and increased pressures on hospitals and funeral management, and the particular dislocation of migrants from their families, may mean that the state does not fully investigate and consider the circumstances of the deceased and their families, and in this way, deny families the truth about their loved ones' deaths and a meaningful part in their funeral, burial and commemoration.

Legal proceedings in the UK during the pandemic

The UK suspended substantive asylum and other immigration appeal hearings, although some appeals have been dealt with on 'paper only' and bail applications are still possible using videoconference facilities Gradually, courts and tribunals are listing more cases for remote hearings and face to face hearings.[18]

Expert professional bodies like the Immigration Law Practitioners Association (ILPA) and others like Joint Council for The Welfare of Immigrants, Free Movement and Detention Action highlighted their concerns recently in evidence to the UK Parliament House of Commons Home Affairs Select Committee, regarding the legal status, health, protection and support of migrants and their families, including detainees, asylum seekers in overcrowded temporary accommodation, those who have no recourse to public funds, those whose leave has expired and are treated as overstaying in breach of their conditions, loss of rights of families of migrant workers on the death of a migrant whilst working in the UK.

Identification, burial and repatriation

Multiple burial sites known as 'saff graves' have been prepared by some Muslim communities[19] who usually wish to bury their loved ones within 24 hours of death in accordance with religious and cultural practices, to accommodate both the speed and numbers of burials that Covid-19 is causing, with every person being buried with minimum separation of each body within the communal burial site. This may cause subsequent identification problems for migrants, including later requests for repatriation if the bodies are not sufficiently and specifically identifiable in such

17 See https://www.gov.uk/guidance/coronavirus-covid-19-bereavement-scheme-for-family-members-of-nhs-and-health-and-social-care-workers.

18 See https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/#tribunals.

19 'Mass graves dug in Bromley as Muslim community struggles to cope with number of deaths' *Kent Live* 14 April 2020.

a mass burial setting. Cremations are also forbidden within Islam, but without knowledge of a person's religion it is possible some migrants may not receive the funeral they would ordinarily have expected. Indeed, the emergency provisions allow for a designated Local Authority or the National Authority to direct the manner of body disposal including cremation. In the UK and many other countries, countless bodies have been transferred to makeshift temporary morgues awaiting their final resting places. Many undocumented and irregular migrants using false identities and those without identity documents will potentially have been buried or cremated without having been identified or family members traced with no future possibility of doing so without DNA and other post mortem data being collected and stored.

The Mytilini Declaration requires States: 'to make every effort to locate and notify the family of the deceased … facilitate repatriation of the remains of the dead if possible … and where not … dispose of them in a manner that is dignified and respectful to the person … record the location of the burial … respect and maintain gravesites'.[20]

The burial location is an important element of the investigation required under the right to life. To protect information from getting lost, particularly in the context of mass fatalities and unknown identities and with the passing of time, it is essential to map, register and preserve burial sites. Bodies should be buried in individually marked graves in sites that are registered.[21]

The International Committee of the Red Cross (ICRC) has now issued recommendations and guidance to authorities for the dignified management of the dead during Covid-19,[22] corresponding to many of the requirements contained in the Mytilini Declaration (which is itself firmly based on existing international law and best practice not least applying as interpretative tools, some of the ICRC's own work in the context of international humanitarian law).

The ICRC guidance provides inter alia that: '[e]very effort should be made to ensure the reliable identification of the dead, failing which their proper documentation and traceability are essential for making their future recovery and identification possible.'[23]

The guidance also advises that: 'Mass graves are **highly discouraged**. They are often a demonstration of poor planning by authorities, show a disregard for the wishes, cultural/religious rites of families and communities. Single graves are respectful and dignified. They promote the traceability of human remains. This can only be accomplished; however, by collaborative planning between authorities and other relevant industries, such as funeral homes, crematoriums and cemeteries and most importantly the families.'[24]

Whilst the UK emergency measures do not rule out mass burials or large-scale cremations and 'saff' graves are multiple individual graves rather than a mass burial site and in accordance with approved religious practice, some countries' authorities, eg Tunisia and the USA, have previously resorted to the mass and undocumented burial of unknown migrants and others may, due to possible lack of resources and other emergency factors be more inclined do so during this pandemic. The risks of burial in an undocumented and unknown grave are real and ever-present risks for migrant families.[25]

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20 Section A, paras 13,14,15,16.

21 Human Rights Council (2010), Progress report of the Human Rights Council Advisory Committee on best practices on the issue of missing persons, 22 March 2010, A/HRC/14/42, available at https://documents-ddsny.un.org/doc/UNDOC/GEN/G10/124/33/PDF/G1012433.pdf?OpenElement, paras 67–68.

22 International Committee of the Red Cross *Protection dignity and respect for deceased individuals and their families in COVID-19* 21st April 2020.

23 ICRC Forensic Unit *Covid-19 General Guidance For The Management Of The Dead* p1(available online 31 March 2020).

24 Ibid p 9.

25 See International Organisation for Migration (2016) *Fatal Journeys Volume 2 Identification and Tracing of Dead and Missing Migrants* (available at: https://reliefweb.int/sites/reliefweb.int/files/resources/fataljourneys_vol2.pdf).

Participation by family members

Migrants' families overseas may not have any realistic opportunity to challenge the cause of death and to seek an inquest, or even to contribute to the medical understanding of any possible underlying causes. The likelihood of individual deaths becoming simply part of a growing statistic will increase. Where cremations have taken place, families will have no opportunity to obtain a post-mortem of their own, or repatriate and bury their loved ones, nor, in the present and likely future lockdowns and travel restrictions, be able to travel to mourn and take part in funeral ceremonies. Whilst this is of course a great difficulty for all sections of society, it is amplified in the context of migrant workers, undocumented migrants and asylum seekers and other migrants whose families overseas may themselves be locked down, be ill or have died without the knowledge of family member or loved ones.

The so-called 'hotspots'

For people who have gone missing, died or have been bereaved in the context of a migration journey prior to the Covid-19 pandemic, our experience has shown that the ability of families to search for and recover their loved ones is significantly impeded by many obstacles, including international borders, legal restrictions, language and communications barriers, lack of evidence and access to the forensic apparatus of the state as well as difficulty in obtaining legal advice and representation. We know also that those who are held in detention, or at registration and deportation centres, in makeshift camps and settlements, experience additional obstacles and barriers in seeking information about the fate of their loved ones. The Covid-19 pandemic has seen a disproportionate enforcement of lockdown on people in such confinements and degraded circumstances. The appalling and overcrowded conditions of the Greek 'Hot Spot' camps on the Aegean islands of Lesvos, Samos and Chios in particular, (there are also such camps on Leros and Rhodos), have had additional curfews imposed but with little or no possibility of maintaining social distancing or hygiene in such overcrowded and slum conditions, and with next to no health or social care services even without Covid-19 to contend with, despite the best efforts of the migrants and refugees themselves.

The arrival of an epidemic of some kind, because of these conditions, has long been anticipated but without any contingency provisions being made to prevent or address such an outbreak. Hospitals built for small island populations lack sufficient equipment and staff to cope with treating the health conditions of the resident population let alone the more than 20,000 who are held on these islands under the so-called EU-Turkey Agreement.[26] During the winter of 2015/16, multiple fatalities were suffered when boats went down in the course of journeys, but the mortuary on Lesvos had only two spaces. The arrival of an emergency makeshift morgue enabled some 60 to 70 bodies to be kept and 'stored' in basic refrigerated conditions whilst post-mortem and identification work could be conducted, but this facility has not been upgraded since then and will undoubtedly be called into use for the Covid-19 outbreak should the virus take hold in this very fragile environment.

A makeshift coronavirus testing and isolation container has been installed on the periphery of Moria camp on Lesvos but is only a 'sticking plaster' response to the situation. Refugees, other migrants and such volunteer teams that remain functioning on the islands are

26 Available at: https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

having to take their own actions, providing washing materials, improvised masks and circulating information about risk reduction. On the mainland of Greece, the migrant holding centres and other places of accommodation are experiencing growing numbers of Covid-19 cases with similarly inadequate provision. Some countries, such as Germany have agreed to transport up to 500 unaccompanied children to safety but the UK government has once again declined to share such responsibilities.[27]

The European Court of Human Rights has recently considered urgent 'Rule 39' applications for interim measures against the Greek government. One, the case of *MA v Greece*[28] in relation to an elderly migrant held in one of island 'hotspot' camps, another *EI and Others v Greece.*[29] In the *MA* case, the Court's notification letter to the Greek government asked: 'Which measures have been taken or are planned to be put in place at the hotspots in relation to the COVID-19 risk, in particular for vulnerable people like the applicant?' The following week, having considered the response, the court granted interim measures and requested the Greek authorities to transfer the applicant, 'or at least to guarantee … reception conditions which are compatible with Article 3 of the European Convention on Human Rights and the applicant's age and to provide to the applicant adequate healthcare and assistance compatible with his state of health'. The court went on to say that in relation to so-called refugee camps and refugee identification centres (RIC) throughout Greece, access to hospitalisation, isolation and supplies for protection (masks, gloves disinfectants) '**the actual availability of these supplies in the RIC's is essential**'.

In *IE v Greece*, the court granted interim measures in favour of a baby and its parents, that they be removed from the camp to reception conditions 'compatible with Article 3 ECHR'. It however, rejected the claims of other migrants in the same application. Despite the Court's evident concern for the health and indeed risk of death of the most vulnerable migrants in these camps there has so far not been any large-scale transfer of 'vulnerable' migrants from the islands nor any serious scaling up of measures to respond to the pandemic risk. In other refugee and migrant accommodation centres in mainland Greece, many cases of Covid-19 are now being identified and responded to by the Greek authorities on an ad hoc rather than planned basis, mostly by using quarantine measures in situ, with the assistance of international agencies like the International Office for Migration (IOM).[30]

Guidance on Covid-19 from the European Commission

In its Communication on Covid-19 *Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement*,[31] the European Commission calls for temporary restrictions on non-essential travel to the EU but exempts from such restrictions persons in need of international protection and for humanitarian reasons. Restrictions must be non-discriminatory, and take into account the principle of non-refoulement … fully respecting the protection of people's health and fundamental rights in line with the EU Charter of Fundamental Rights, … access to the asylum procedure to the greatest extent possible,

27 'Germany agrees to take in 50 young migrants from Greek islands' *Reuters* 8 April 2020.
28 ECtHR App no 15192/20.
29 ECtHR App no 16080/20.
30 'IOM Responding to New COVID-19 Outbreak in Greece' IOM Press Release 21 April 2020.
31 Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement [2020] OJ C/126/02.

in particular all applications for international protection must be registered and processed. Emergency and essential treatment of illness including for Covid-19 must be ensured.

Despite this, some states have used the 'lockdown' measures and emergency conditions as a pretext for increasingly draconian responses to migrants crossing the Mediterranean, with coastguards and even vigilante operations pushing migrants' boats back to their departure countries, refusing to allow disembarkation and continuing refoulement practices to places such as Libya, where, it has been established, migrants are at serious risk of torture, cruel, inhuman and degrading treatment and death.[32] Greece, prior to the pandemic, suspended its asylum procedures during mounting political tensions with Turkey at its land border, in violation of its international legal obligations to refugees and this has persisted into the Covid-19 period with many refugees stuck on the Turkish side of the border in dangerous and deteriorating health conditions.[33]

The weaponising of Covid-19

The risk of death on migrant journeys is greatly heightened, not just from Covid-19 but from the indirect consequences of significantly scaled down search and rescue operations both by the state and by human rights activist groups as personnel and resources are depleted or focussed on other aspects of the pandemic. Deaths at sea continue to occur because of the inherent dangers of such journeys but migrants and rescuers are now being placed at increased risk of harm and death by hostile coastguard actions, a depletion of search and rescue resources and the difficulties for humanitarian activists in continuing to provide assistance due to the pandemic risks and lockdown measures. Undoubtedly, whilst media attention is focused on this global health crisis, hostile border security enforcement is increased, and the deaths of refugees and migrants seeking to cross borders is under-reported. Recently Maltese and Italian governments closed ports to rescue vessels on public health grounds due to the Covid-19 virus risk and denied disembarkation of migrants and crew because of the pandemic, in likely violation of its maritime law and human rights obligations.[34]

The Maltese authorities also face allegations that a privately-owned fishing vessel known as the *Dar al Salam*, which also sails under the name *Mae Yemenja*, is carrying out 'search and rescue' functions in place of the Maltese coastguard and instead, is returning rescued migrants to Libya, despite the fact that Libya is not considered a safe place, and despite the fact that the migrants have just escaped from detention or other situations in which they were held in circumstances contrary to arts 2 and/or 3 ECHR, rather than disembarking them in Valletta or other safe harbour. In what appear to be more and more frequent 'push-backs by proxy' that amount to refoulement in many if not all cases, increasing numbers of lives are lost both in the course of these unlawful activities as drownings occur and following the return of the migrants to the dangers that face them in Libya.[35]

A boat carrying migrants including Syrians was recently refused entry to Cyprus. A woman said to be from Aleppo is quoted as saying:

> 'It was very crowded, the waves were high and the boat was moving a lot. I held my children tight. The police said you cannot enter because of the coronavirus, we said we

32 'Over 400 migrants returned to Libya over weekend' *InfoMigrants* 16 March 2020.
33 *UNHCR statement on the situation at the Turkey-EU border* UNHCR 2 March 2020.
34 'COVID-19 port closures leave migrants stranded at sea' *The New Humanitarian* 13April 2020.
35 'Private fishing vessel heading for stranded migrants' *Times of Malta* 29 April 2020.

> were joining our husbands and families and if you are scared about coronavirus you can put us in a camp alone or quarantine. But they refused and then the boats started to circle.'[36]

Unverified stories appeared in Greek media at the beginning of April 2020[37] suggesting that Turkey was planning to send Covid-19 positive migrants to Europe. One story in Greek newspaper Kathimerini was headlined: 'Turkey pushing Covid-infected migrants to cross into Greece, officials believe'.

Those who have succeeded in arriving on Greek islands from Turkey during the lockdown period and afterwards have been subjected to crude quarantine arrangements without shelter, at the sides of roads. 'Hotspot' reception and detention camps remain in strict lockdown long after the relaxation of such provisions for Greek society and access to even basic health services and safe and sanitary conditions remains practically impossible and illusory, putting migrants at even greater risk of illness and death during this pandemic.

The International Health Regulations 2005, a comprehensive global framework established under the constitutional powers of the World Health Organisation ('WHO') and applicable to all WHO member states, provides the regulatory basis on which global health is protected, particularly from infectious diseases.[38] Part V of those regulations sets out public health measures to be taken at ports in relation to travellers and art 43 of those regulations allows states to implement additional measures in relation to such public health risks.

However, there is no exception to international maritime law obligations to rescue people in distress at sea and to disembark rescued passengers at the nearest port of safety. In a joint statement on Covid-19 the WHO and the International Maritime Organisation ('IMO') emphasise that these regulations should be implemented 'with full respect for the dignity, human rights and fundamental freedoms of everyone … avoiding unnecessary restrictions on port entry to ships, persons and property on board …'.[39]

Failure to provide any safe measures to disembark rescued passengers even on grounds of public health risk will likely breach arts 2 and 3 ECHR in addition to international maritime law and public health law. Those who die in migrant transit or reception camps, or en route, or whose families go missing at this time of crisis are likely to have little or no access to systems to try to find their loved ones or to find out what has happened to them, let alone attend a burial. Opportunities to pursue investigations and judicial remedies for these deaths including seeking redress for states' actions will be even more difficult than already was the case. Meanwhile, family reunification and resettlement as well as refugee status determination processes are inaccessible or temporarily suspended and in some places, like Greece, non-admissibility decisions are made, leaving thousands at risk of summary deportation under the EU-Turkey Statement.[40]

In a significant intervention, the Commissioner for Human Rights of the Council of Europe, Dunja Mijatovic said that the current Covid-19 pandemic is exacerbating the weaknesses of Europe's human rights protection system and that: 'Once the pandemic is under

36 'Cyprus pushes Syrian refugees back at sea due to coronavirus' *Al Jazeera* 30 March 2020.
37 'Turkey pushing Covid-infected migrants to cross into Greece, officials believe' *Ekathimerini.com* 11 April 2020.
38 World Health Organization *International Health Regulations* (2005) Third Edition.
39 World Health Organization/International Maritime Organisation *A Joint Statement on the Response to the COVID-19 Outbreak* 13 February 2020.
40 Oxfam *Massive number of rejections in Greece deny people fair asylum process, Oxfam and GCR say* Press Release 11 May 2020.

control, however, states will have to redouble their efforts to solve longstanding shortcomings in law, practice and discourse that are so damaging to human dignity and human rights'.[41]

Beyond regional and category specific human rights instruments the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant On Economic, Social and Cultural Rights provide the overarching basis of all people's fundamental rights including health, welfare and protection of refugees and migrants. As Hathaway concludes unequivocally, '[the] direct obligation of states to provide the substance of basic survival rights to the most vulnerable … inheres even when a state is faced with extraordinary resource constraints. It should moreover be interpreted to apply once a state becomes aware of an imminent risk to vulnerable persons, not simply once the necessities of life have already been denied.'[42] Those obligations need to be respected more than ever in the way that states address the urgent needs of all migrants during this pandemic.

Conclusion

Despite the undoubtedly heroic and compassionate acts of so many people, many themselves migrants, in going about their usual, unnoticed roles in society, caring, providing essential services and tending to our sick, human dignity is certainly being placed in jeopardy during this pandemic in every aspect of our lives. None more so than in the bleak and isolated moments of dying and death for the many thousands who have lost their lives already and for their families, left behind to grieve alone and in isolation, unable to see their loved ones in their final moments, unable to grieve together, to attend funerals and to pay our last respects. All the dignities we afford to each other and wish for ourselves in death, are rendered to the barest necessities. Patients are unable to see their loved ones in their final moments, reliant on the comfort and courage of the health and care professionals standing knowingly in harm's way to try to save lives, themselves placed in undignified jeopardy with inadequate and improvised protective equipment.

If during this pandemic and its aftermath we are unable to ensure equality of treatment in access to health care, and to obtain answers to questions beyond the immediate medical causes of death, about the circumstances and consequential factors surrounding our loved ones' deaths we will only exacerbate those indignities and lessen the meaning of the right to life itself.

Migrants are already no strangers to many of the injustices and indignities now suddenly experienced by the rest of society and are entitled to the fullest respect for their own lives, to expect no less than everyone else, in the protections we all need from this virus and in the way in which we are laid to rest, to mourn and have our deaths accounted for.

In the ongoing responsiveness of states to this pandemic and in readiness for an anticipated 'second wave' later this year and next, every effort must be made to understand and address the specific vulnerabilities and circumstances of migrants and ensure that they are not excluded by accident or design from measures intended to protect life and deal with death in an accountable and dignified way.[43] It is already clear that in the initial period of this pandemic it is migrants

41 Commissioner for Human Rights, Council for Europe *Challenges to human rights have intensified in Europe* Press Release 21 April 2020.

42 James C Hathaway, *The Rights of Refugees Under International Law* (CUP 2005) 498.

43 Since commencing this article The Last Rights Project has been provided with funding to carry out a short period of research to investigate how bereaved families of migrants in different regions of the world are being treated with respect to access and information about their loved ones, burial and funeral arrangements, recording of deaths and measures to enable traceability where the identities of those who have died cannot be ascertained. The principles set out in the Mytilini Declaration will form the basis of the report and recommendations which is expected to be published in about October 2020.

who have been most exposed to harm due to their lack of legal, economic and social equality on the margins of societies, whether that is stranded at sea, quarantined in atrocious migrant camps, or accommodated in overcrowded asylum reception facilities and detention centres. In the aftermath of this pandemic, as states review their own crisis management and inevitably look to develop new ways of managing our societies, migrants and their rights must not be sacrificed to the expediency of closed borders, restriction of freedoms and discriminatory monitoring. We must continue to fulfil our duties to maintain family unity and protect those in need of international protection.

Syd Bolton and Catriona Jarvis
The Last Rights Project – an initiative of Methoria, a UK registered charity no. 1188043

British or Irish or both?

Alison Harvey[★]

At a glance

In June 2019 I was asked by the Northern Ireland Human Rights Commission and the Irish Human Rights and Equalities Commission to undertake a piece of work to identify and recommend amendments to British nationality law required to give effect to the Commitment in the Belfast ('Good Friday') agreement that the 'people of Northern Ireland' as defined therein could identify as Irish, or British or both.

My paper, with its proposals, has now been published. This article sets my proposals in their historical context to demonstrate that questions of nationality in Northern Ireland do not march in step with questions of sovereignty, and why a bespoke nationality law solution for Northern Ireland is needed to reflect the agreement reached in Belfast.

Introduction

In June 2019 I was asked by the Northern Ireland Human Rights Commission and the Irish Human Rights and Equalities Commission to undertake a piece of work to identify and recommend amendments to British nationality law required to give effect to the Commitment in the Belfast ('Good Friday') Agreement that the 'people of Northern Ireland', as defined therein, could identify as Irish, or British or both.[1] My paper, with its proposals, has now been published.[2]

Two assumptions underlay the commission given to me. First, that existing UK law did not already do all that was required of it to give effect to the agreement. Second, that the problems would not be resolved by the legal challenge brought before the immigration tribunal by Jake Parker de Souza.[3] I shall examine the validity of those assumptions in the course of this paper.

My thesis is that questions of nationality in Northern Ireland do not march in step with questions of sovereignty, and that a bespoke nationality law solution for Northern Ireland is needed to reflect the agreement reached in Belfast.

I finish on the case for the beneficiaries of such a bespoke solution being wider than the 'people of Northern Ireland' as defined in the Belfast Agreement.

★ I am grateful to Professor Bernard Ryan for his comments on an earlier draft of this paper. The final version, and the errors therein, are very much my own.

1 The research brief is available at https://www.nihrc.org/uploads/general/Birthright_research-spec-June2019.pdf (accessed 10 May 2020).

2 A legal analysis of incorporating into UK law the birthright commitment under the Belfast (Good Friday) Agreement 1998, Northern Ireland Human Rights Commission and Irish Human Rights and Equality Commission, 26 May 2020, https://www.ihrec.ie/documents/legal-analysis-of-incorporating-into-uk-law-the-birthright-commitment-under-the-belfast-good-friday-agreement-1998/ (accessed 10 May 2020).

3 *Secretary of State for the Home Department v Jake Parker De Souza* [2019] UKUT 355 (IAC).

The 'Belfast Agreement'

The Belfast Agreement is concerned with sovereignty and with the rights of individuals, including to nationality. It consists of a treaty between the British and Irish governments and a multi-party agreement between all the political parties of Northern Ireland with the exception of the Democratic Unionist Party. Both documents were concluded on 10 April 1998 and approved subsequently by referenda, with the people of Northern Ireland voting on the multi-party agreement and the people of Ireland voting on whether the government should sign the treaty and amend the constitution.

The Treaty between the Government of Great Britain and Northern Ireland and of the Government of Ireland provides at Article 1 that the governments:

> '(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.'

The multiparty agreement between the two governments and the eight political parties is in the same terms.

Annex 2 *Declaration on the Provisions of Paragraph (vi) of Article 1 In Relationship to Citizenship* provides:

> 'The British and Irish Governments declare that it is their joint understanding that the term 'the people of Northern Ireland' in paragraph (vi) of Article 1 of this Agreement means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.'

British and Irish citizenship

The Belfast Agreement is an international treaty registered with the United Nations,[4] and the meanings of 'British citizenship' and 'Irish citizenship' in it are thus matters of international law. In the *Nottenbohm* case the International Court of Justice said that '[…] nationality is a legal bond having at its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.[5]

As a matter of international law then, the Belfast Agreement recognises that Northern Ireland can be populated by people who recognise that bond to the UK, to Ireland, or to both, and their freedom to do so is compatible with, in the words of the Agreement, 'whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland that they are free to do so'.

4 2114 UNTS 473 (signed 10 April 1998, entered into force 2 December 1999).
5 *Liechtenstein v Guatemala* [1955] ICJ 1.

That statement, in nationality law terms, is not a departure from what has gone before, but, as described below, a recognition, and a continuation, of it.

The agreement expresses the existing bond of the people of Northern Ireland to both States in terms of their 'identities and traditions', not the least of which is their historic entitlement to both citizenships. It is also constitutive of that bond: the 'people of Northern Ireland' have a right to vote, by virtue of that status rather than their existing Irish nationality, on whether Northern Ireland should part of form part of a united Ireland. Their fellow Irish citizens cannot elect to keep them out; equally the people of Northern Ireland have a right of veto: unless a majority of them vote for a united Ireland, Northern Ireland will remain part of the UK.

'Well, I wouldn't start from here': British and Irish nationality laws as they affect Northern Ireland

By the time of partition into Northern Ireland and the Irish Free State, British nationality and immigration law had been codified into the British Nationality and Status of Aliens Act 1914,[6] as amended, the first of the nationality laws of the modern era. Professor Bernard Ryan has told this story in much more detail in his masterly article 'The Ian Paisley Question: Irish Citizenship and Northern Ireland'[7] to which the following account owes much.

On 31 March 1922, the Irish Free State (Agreement) Act 1922 came into force in the UK.[8] The Schedule to the Act was the Articles of Agreement for a Treaty between Great Britain and Ireland, dated the sixth day of December, nineteen hundred and twenty-one: the Anglo-Irish Treaty of 1921. It provided:

> 'Article 1. Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.'

Persons born in the Dominions were British subjects under the British Nationality and Status of Aliens Act 1914.[9] Thus, those in the Irish Free State, like citizens of Canada, Australia, New Zealand, and the Union of South Africa, were treated as British subjects.

On 6 December 1922, the Irish Free State Constitution[10] came into force. Article 3 of the constitution made provision for citizenship of the Irish Free State:

> 'Every person, without distinction of sex, domiciled in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) at the time of the coming into operation of this Constitution, who was born in Ireland or either of whose parents was born in Ireland or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) for not less than seven years, is a citizen of the Irish Free State (Saorstát Eireann) and shall within the limits of the jurisdiction of the Irish Free State

6 1914 c.17, as amended.
7 (2003) 25 Dublin University Law Journal 116–147.
8 12 & 13 Geo. 5 c. 4.
9 S1(1)(a) 'any person born within His Majesty's dominions and allegiance'.
10 Constitution of the Irish Free State (Saorstát Eireann) Act, 1922.

> (Saorstát Eireann) enjoy the privileges and be subject to the obligations of such citizenship: Provided that any such person being a citizen of another State may elect not to accept the citizenship hereby conferred; and the conditions governing the future acquisition and termination of citizenship in the Irish Free State (Saorstát Eireann) shall be determined by law.'

Observe the protection against statelessness afforded by 'being a citizen of another State'. Observe also 'within the limits of the jurisdiction of the Irish Free State (Saorstát Eireann)'. To both of these we shall return below. The jurisdiction of the Free State was the island of Ireland.[11]

Section 21(1) of the Constitution of the Irish Free State (Saorstát Eireann) Act 1922, as originally enacted, provided that 'Save as is otherwise provided by this Act, every citizen of Saorstát Eireann who, after he has attained the age of twenty-one years, becomes a citizen of another country shall thereupon cease to be a citizen of Saorstát Eireann'.

The Northern Ireland Parliament gave notice, as it was entitled to do, that it did not wish to come under the jurisdiction of the Free State.[12] In *Re Logue* [1933] 67 ILTR 253 it was held that, because the notice took effect after the Constitution of the Irish Free State (Saorstát Eireann) had come into operation, most of those domiciled in Northern Ireland had, by the time notice was given, already become citizens of the Irish Free State under art 3 of the Constitution of the Irish Free State (Saorstát Eireann).[13]

No provision had been made for them to lose that citizenship, thus persons in Northern Ireland were citizens of the Irish Free State not because the Irish Free State sought to extend its jurisdiction over Northern Ireland after notice had been given by Northern Ireland that it did not wish to be part of the Irish Free State, but because the territory of Northern Ireland had, albeit briefly, been a part of that State. The citizenship derived from an historical status, rather than a present-day claim. The precise characteristics of the citizenship as they came to be understood derived, as Professor Ryan explains in his article, from the view taken by the court in *Re Logue*.[14]

The UK maintained that all citizenships of the countries of the Commonwealth were derivative, 'local' citizenships. The Commonwealth countries could select their citizens from among British subjects, but could not make a person who was not a British subject a citizen.[15] British subject status was the status recognised for international purposes.

This is both recognised and challenged by the words of art 3. The words 'within the jurisdiction of the Free State' recognise it. The hint of an intention to challenge it is present in the statement that a person could opt not to accept the citizenship of the Irish Free State, provided that this would not leave them stateless. There would have been no possibility of this if it were accepted that all citizens of the Irish Free State were British subjects as a precondition of acquiring citizenship of the Irish Free State.

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11 Article 12 of the Schedule to the Irish Free State (Agreement) Act 1922, s 5 of the Free State Constitution Act 1922, Art 3 of the Constitution of the Irish Free State.

12 Parliamentary papers of Northern Ireland pp191–192, see S de Mars, C Murray, A O'Donoghue & B Warwick, *Bordering Two Unions: Northern Ireland and Brexit*, Bristol 2018.

13 See B Ryan 'The Common Travel Area between Britain and Ireland' (2001) 64 Modern Law Review 855–874 and B Ryan, 'The Celtic Cubs: the controversy over birthright citizenship in Ireland' (2004) 6 European Journal of Migration and Law 173–193.

14 'The Ian Paisley Question: Irish Citizenship and Northern Ireland', op. cit.

15 For a detailed exposition of how this worked, see the judgment of Martineau J in *Taylor v Canada (Minister of Citizenship and Immigration)* 2006 FC 1053 (Can LII).

The challenge emerged more clearly during the period 1922 to 1949. The Irish Free State, subsequently Irish, and UK, views of the status of Irish citizenship diverged, with Ireland regarding it as its own citizenship, that it could confer or withhold according to its own laws, and the UK regarding it as a derivate, 'local' citizenship.

The Constitution (Amendment No 26) Act 1935 removed the words 'within the limits of the jurisdiction of the Irish Free State (Saorstát Eireann)' from Art 3 of the Constitution and reworded the proviso at the end of Art 3 changing 'the conditions governing the future acquisition and termination of citizenship *in* the Irish Free State (Saorstát Eireann)' to '***of*** the Irish Free State (Saorstát Eireann)' (emphasis added).

The Nationality and Citizenship Act 1935[16] repealed, or purported to repeal, those parts of the British Nationality and Status of Aliens Act 1914 which were law within Irish Free State.[17] Provision was made for Irish Free State citizenship,[18] citizenship of Ireland from 29 December 1937. The 1935 Act provided that a person who became a citizen of another country ceased to be an Irish citizen.[19] It provided:

> **'34.**—Every person who is a citizen of Saorstát Eireann by virtue of Article 3 of the Constitution and every person who is or becomes a citizen of Saorstát Eireann by or under this Act shall be such citizen for all purposes, municipal and international.'

The UK protested when the Bill was passing through the Irish parliament. The Minister recorded that the UK:

> '[…] informed the Irish Free State Government that the Bill cannot be regarded as making provision for the maintenance of what is known as 'the common status' of subjects of His Majesty on the basis of common allegiance to the Crown as contemplated in the conclusions of the Imperial Conference of 1930 relating to nationality'.[20]

The Minister goes on to state that 'At the same time I am advised that the Bill does not purport to, and could not in any case, deprive any person of his status as a British subject'.[21]

A schedule to Ireland's Aliens Act 1935, passed in conjunction with that Act, exempted citizens of the UK, the Dominions and India from the provisions of the Aliens Act.[22]

When, in *Murray v Parkes* [1942] 2 KB 123[23] a man convicted under the National Service (Armed Forces) Act 1939[24] prayed in aid in the English courts the 1931 Statute of Westminster,[25] in seeking to assert that the repeal of the British Nationality and Status of Aliens Act 1914 by the Irish Nationality and Citizenship Act 1935 meant that he was not a British subject, he lost. The Court held that Ireland had not seceded but that, even if it had, he was a British subject under the British Nationality and Status of Aliens Act 1914, domiciled in the UK, and there was no question of his having lost that nationality at any point of secession.

16 No 13 of 1935.
17 Section 33.
18 Section 1.
19 Section 21.
20 HC Deb 27 November 1934 vol 295 col 645 see https://api.parliament.uk/historic-hansard/commons/1934/nov/27/citizenship-bill (accessed 8 May 2020).
21 ibid.
22 No 15 of 1935, see M Daly, 'Irish Nationality and Citizenship since 1922' (2001) 32 Irish Historical Studies 377–407.
23 See *Murray v Parkes* (1942) 2 KB 123, (1943) 8 The Cambridge Law Journal 26.
24 2 & 3 Geo. 6, c. 81.
25 1931, c.4.

This was not a simple case of conflict of laws. Ireland could say what it liked about a person's losing French citizenship and France continue to treat that person as French or *vice versa*. In the case of the UK, the positions taken by Ireland and UK reflected different understandings of the effect of the Statute of Westminster 1931 on the Articles of Agreement for a Treaty between Great Britain and Ireland, (the Anglo-Irish Treaty) of 1921. And of the relationship between Ireland the UK. As it was succinctly expressed in a memorandum by the Department of Justice in the Free State:

> 'The Irish Free State Constitution is considered by the British merely as a delegation of authority by the British Parliament (or as they sometimes call it the 'Imperial' Parliament) to a subordinate Parliament.'[26]

That memorandum recorded the opinion of the then Irish Free State Attorney General in 1925 that Parts I and III of the British Nationality and Status of Aliens Act 1914 Act did not bind the Dominions.[27]

A parallel in recent times is the European Union's reaction to attempts by member States to create 'citizenship; by investment' programmes allowing wealthy individuals to buy their national citizenships and thus buy into citizenship of the European Union.[28]

Ireland was not alone in wanting to recognise persons as its nationals without the need for the imprimatur of the UK, as Ireland was very well aware.[29] The UK reaction to the passage of Ireland's Nationality and Citizenship Act of 1935 was to state that the Irish Free State had not done what it purported to have done.[30] The reaction to the *fait accompli* of the Canadian Citizenship of 1946,[31] which made express provision for persons not British subjects to become citizens of Canada, led to the convening in 1947 of the British Commonwealth Conference on Nationality and Citizenship,[32] which representatives of Ireland attended. Out of this came the British Nationality Act 1948,[33] which came into effect on 1 January 1949 and allowed the Dominions to pass their own citizenship laws, independent of reference to British subject status. This nearly, but not quite, coincided with Ireland leaving the Commonwealth and the Crown's dominions on 18 April 1949. The 'not quite' turned out to be very significant.

In the debates on the British Nationality Act 1948 the Attorney General, Sir Hartley Shawcross, acknowledged that the former Taoiseach, de Valera's, 1935 statement that the laws of no other country could affect the status conferred by Irish nationality laws was legally and constitutionally correct.[34] He declined to be drawn on whether Ireland remained part of the Commonwealth or not, or to comment on the correctness of *Murray v Parkes*.[35] Without those

26 Extract from a memorandum on nationality and citizenship prepared by the Department of Justice at the request of the Department of External Affairs for the Conference on the Operation of Dominion Legislation No. 288 NAI DT S5340 Annex 7, October 1929 (undated) see https://www.difp.ie/docs/Volume3/1929/1355.htm (accessed 1 May 2020).

27 ibid, citing Attorney General's reference 98-25, a minute addressed to the Minister for External Affairs of 2 April 1925.

28 See 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Investor Citizenship and Residence Schemes in the European Union, {SWD (2019) 5 final}, COM (2019) 12 final, Brussels 23 January 2019.

29 ibid. See Daly (n 22) 330–381.

30 See Daly (n 22) 387.

31 Loi sur la citoyenneté canadienne, S.C. 1946 c.14.

32 See https://discovery.nationalarchives.gov.uk/details/r/0e6e5b5a-b900-4653-9935-d1e81c15bcc8 (accessed 10 May 2020).

33 1948, c.56.

34 HC Deb 07 July 1948 vol 453 col 505 see https://api.parliament.uk/historic-hansard/commons/1948/jul/07/british-nationality-bill-lords (accessed 8 May 2020).

35 HC Deb 07 July 1948 vol 453 col 507, see also col 412.

clarifications his acceptance hangs suspended in time: it is unclear whether he accepted de Valera's statement as true in 1935, when it was made,[36] or true in 1948, on the other side of a world war that had signalled the end of the imperial era.

One approach is to look for acceptance of de Valera's 1935 contestation in the letter of UK law. On that approach, it was not accepted. The British Nationality and Status of Aliens Act 1914 was not amended: no accommodation was made. Irish citizenship continued to be treated as a local citizenship.

Another approach is to look at what happened 'on the ground'. The Irish Free State began issuing passports in 1923. These read 'Citizen of the Irish Free State and of the British Commonwealth of Nations'.[37] The British government instructed its consular officials overseas not to accept these passports because it wanted them to bear the description 'British subject' in line with the British Nationality and Status of Aliens Act 1914, as amended.[38] Passports that were not in the correct form were confiscated.[39] In 1930 Ireland began issuing passports bearing the legend 'one of His Majesty's subjects of the Irish Free State' which was acceptable to the UK.[40] The passport question was recognised by both States to be closely linked to the question of the absence of a passport barrier between them, meaning that each had to be satisfied with the other's arrangements for issuing passports.[41]

Thus, the Attorney General's statement in 1948 reflected the new dispensation, for which the British Nationality Act 1948,[42] and subsequently the Ireland Act 1949,[43] were to make provision.

The British Nationality Act 1948 provided that 'foreign country ' meant a country other than the United Kingdom, a colony, a country mentioned in subsection 1(3) of the Act, Eire, a protectorate, a protected state, a mandated territory and a trust territory,[44] leading Sir D Maxwell Fyfe to comment during the debates 'What the status of Eire nationals under this Bill is to be, heaven only knows.'[45]

When pressed to explain during the passage of the Bill that became the Ireland Act 1949, the Act reflecting in UK law Ireland's definitive break from the Commonwealth, why the position had been taken in the 1948 Act that Ireland was not a foreign country, the Attorney General said:

> 'We feel that it is the facts, and the historical associations between the two countries; the innumerable relations between our respective citizens; our geographical contiguity;

36 Dáil Éireann, deb. liv, 410–11, 28 November 1934 cited in Daly (n 22) 387.

37 Joseph P Walshe to Diarmuid O'Hegarty (Dublin) enclosing a memorandum (copy) from Desmond FitzGerald to Walshe and with explanatory notes by Walshe (D3/12/91), No 179 NAI DT S1971 28 December 1923; Memorandum by Joseph P Walshe to Desmond FitzGerald (Dublin) on the registration of the Anglo-Irish Treaty at the League of Nations; No. 290 NAI DFA 417/105 1 December 1924.

38 Extracts from a memorandum from Gearóid Ó Lochlainn to Joseph P Walshe on Irish Free State Passports (Confidential) No 113 NAI DFA D1971/1/1 20 August 1927. See M Daly, 'Irish nationality and citizenship since 1922' (2001) 32 Irish historical Studies 377–407.

39 ibid.

40 M Daly, 'Irish nationality and citizenship since 1922' (2001) 32 Irish historical Studies 377–407. Confidential Report from Michael MacWhite to Joseph P Walshe (Dublin) (1008-61-31) (Confidential) No 567 NAI DFA 19/2, 8 September 1931.

41 Memorandum by the Department of External Affairs on the League of Nations Passport Conference, with covering letter for Michael MacWhite, signed by Seán Murphy (for Joseph P Walshe), (LN 42/67) No 5 NAI DFA Berne Embassy Box, 5 28 April 1926 https://www.difp.ie/docs/1926/League-of-Nations-Passport-Conference/726.htm (accessed 7 May 2020).

42 1946, c36.

43 1949 c41.

44 Section 32(1).

45 Joseph P Walshe to Diarmuid O'Hegarty (Dublin) enclosing a memorandum (copy) from Desmond FitzGerald to Walshe and with explanatory notes by Walshe (D3/12/91) No 179 NAI DT S1971, 28 December 1923, see https://www.difp.ie/docs/Volume2/1923/515.htm (accessed 7 May 2020).

> our ties of business and a hundred and one other ties of a non-legal nature, which ought to lead us to think of the Republic of Ireland as different from a foreign country. That is the theory on which we have proceeded; it is based on what is a continuing state of affairs and is, we think, better enunciated in a declaration rather than by a deliberate enactment and a change in the law.'[46]

There is no equivalent provision in Irish law. Ireland has always regarded the UK as a foreign country,[47] along with every other country in the world, while the UK continues not to regard Ireland as a foreign country, just as it does not regard States members of the Commonwealth as foreign countries.[48]

The British Nationality Act 1948 did not make provision for Irish citizens to become British subjects, a synonym under the Act for Commonwealth citizens.[49] But provision was made for certain Irish citizens, including 'the holder of a British passport issued by His Majesty's government in the United Kingdom or the government of any colony, protectorate, United Kingdom mandated territory or United Kingdom trust territory' to elect to 'retain' British subject status by giving simple notice in writing.[50]

The word 'retain' gives pause, given that it had been the position of the Irish government since 1935 that a person could not be born a citizen of Ireland and a British subject, but the Attorney General told the House of Commons:

> '… whilst there is much in this Bill which the Government of Eire do not like, they have not dissented from the view that existing citizens who are British subjects may claim to retain that status without prejudicing their Irish citizenship. For the rest, all citizens of Eire will, without having the legal status of British subjects, in fact continue to enjoy in the United Kingdom all the rights and privileges of our own citizens, just as to some extent British subjects going to Eire, I believe, enjoy special privileges which are not afforded to aliens in that country.'[51]

The UK had not allowed the Irish Free State, and subsequently Ireland's, assertion of the independence of its citizenship to push it into the accommodation that became necessary when Canada did the same thing. While the Attorney General's comments imply a greater acceptance than was the case around the retention of British subject status, the objections do not concentrate on the word 'retain' but on the notion of persons having British subject status at all, and alternative formulations suggested by the Irish government use the word 'retain'.[52] There is on both sides an acknowledgement, albeit tacit, that the relationship between their two citizenships did not fit neatly into the standard imperial and post-imperial models.

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46 HC Deb 16 May 1949 vol 465 col 195, https://api.parliament.uk/historic-hansard/commons/1949/may/16/clause-2-republic-of-ireland-not-a (accessed 14 May 2020). See Daly (n 22) 390 on threats to treat Ireland as a foreign country, judged by the UK to risk greater difficulties for it than for Ireland.

47 Irish Nationality and Citizenship Act 1956, s2.

48 British Nationality Act 1981, s 50(1).

49 Section 1(2).

50 Section 2.

51 HC Deb 07 July 1948 vol 453 col 505.

52 No 252 NAI DFA 408/68, *Memorandum from Frederick H. Boland to Éamon de Valera (Dublin)* 30 December 1946, https://www.difp.ie/docs/Volume8/1946/4352.htm; No. 271 NAI DFA 408/68 *Department of External Affairs Memorandum for the Government on Nationality and Citizenship, 16 January 1947* https://www.difp.ie/docs/Volume8/1947/4365.htm; No. 270 NAI DFA 408/68*Memorandum by the Department of External Affairs for Éamon de Valera (Dublin) 'Notes on British Nationality Proposals* https://www.difp.ie/docs/Volume8/1947/4370.htm (all accessed 13 June 2020). See Daly, M. op. cit, 388–389.

It would have been fascinating to see how this played out in the 1948 Act as to the status of the people of Northern Ireland but the question did not arise, for the prosaic reason that the UK was unaware at the time of its passage of *Re Logue* and its ramifications.[53]

The Republic of Ireland Act 1948[54] came into force on 18 April 1949 constituting Ireland as a republic outside the Commonwealth. It was during the passage of the Bill that became the UK's Ireland Act 1949,[55] in an exchange of telegrams on 27 and 28 May 1949, that the decision in *Re Logue* became known to the British government.[56]

The particular issue that then fell to be addressed in the Bill was that Ireland regarded a person who was born in Ireland of a Irish father and who, on 6 December 1922, was domiciled in Northern Ireland, as a citizen of the Irish Free State, subsequently of Ireland, and that meant that such a person had not become a Citizen of the UK and Colonies under s 12(4) of the 1948 Act. The government amended the Ireland Bill to insert what became s 5 so that such a person did not cease to be a British subject on 1 January, 1949, and became on that date a Citizen of the UK and Colonies unless he or she was a citizen or potential citizen of some other Commonwealth country.[57] This came to be regarded as an acceptance of *Re Logue*.[58]

When enacted, the 1956 Act provided for every person born in the island of Ireland to be a citizen of Ireland[59] but 'pending the reintegration of the national territory'[60] for this not to apply to those born in Northern Ireland on or after 6 December 1922 unless they, or their parents, made a declaration to this effect. The effect of the declaration was retrospective to birth. Those born before 6 December 1922 were Irish without need for a declaration,[61] as were those born stateless after that date.[62]

The Act provided that the first generation, wherever born, born to an Irish father or mother born on the island of Ireland before 6 December 1922, was born Irish[63] and that so were the second generation born to such persons, provided they were born before 17 July 1956 when the Act came into force.[64] As to those born after that date, members of the second generation born on the island of Ireland no longer needed to register the birth (those born outside the island did).[65] That obviated the need for a declaration for most persons born in Northern Ireland.

The British government considered objecting to the provisions, but decided not to do so. The logic was that it was too late to protest *jus soli* provision to which it had acquiesced in 1949 with the amendment of the Ireland Act 1949 and that it could not protest the *jus sanguis* provisions 'which most people regard as being of less importance than the first one' if it did not protest that pertaining to the *jus soli*.[66] This is expressed as being about public opinion

53 See 'The Ian Paisley Question: Irish Citizenship and Northern Ireland', op.cit.
54 No 22 of 1948.
55 1949, c.41.
56 See PRO CJ/149, May 1949 cited in 'The Ian Paisley Question: Irish Citizenship and Northern Ireland', op.cit.
57 HC Deb 01 June 1949 vol 465 cc2 237-2238 see https://api.parliament.uk/historic-hansard/commons/1949/jun/01/ireland-bill.
58 See the Ian Paisley Question: Irish Citizenship and Northern Ireland', op.cit.
59 Section 6(1) read with s 2. There are exceptions at s 6(5) for the children of diplomats.
60 Section 7(1).
61 Section7(2)(a).
62 Section 6(3). See Daly (n 22) 402.
63 Section 6(2).
64 Section 6(4).
65 Section 7(2).
66 Home Secretary Lloyd George to Brookeborough, 27 April 1956, PRO DO 35/6393, cited in 'The Ian Paisley Question: Irish Citizenship and Northern Ireland', op. cit.

rather than substance, for it was the *jus sanguinis* provision, removing the need for a declaration, that would lead to indefinite transmission of Irish citizenship in Northern Ireland, but the extent to which that was appreciated is not clear. It appears to have understood that the *jus sanguinis* provision would have some impact and the only possible impact it could have was on transmission to subsequent generations. So, the Northern Ireland parliament protested, but was not supported by Westminster.[67]

The notion that a father could transmit nationality to a child wherever born was a feature of the British Nationality Act 1948.[68] But a father who himself had not been born in the UK and Colonies, or its predecessor, the 'Crown's Dominions and allegiance', could not under the Act transmit to the second generation born overseas save in limited circumstances. He could not do so in the other former Dominions unless the child failed to become a citizen of that independent country.[69] But he could do so in a 'foreign' country provided he registered the birth at a United Kingdom consulate.[70]

Thus, while the registration had the effect of a link between the people of Northern Ireland and Ireland, the impression created by registration, by analogy with the 1948 Act, is of Ireland treating Northern Ireland as a foreign country, and of a different relationship from that of the UK and the Commonwealth former Dominions.[71]

In summary, following the passage of the 1956 Act: Irish citizens were not regarded as aliens in the UK, or Ireland as a foreign country. That remains the position to this today.[72] The UK government had at first failed to appreciate that people of Northern Ireland were Irish citizens. By the time it realised, Ireland had acquiesced in the language of certain Irish citizens 'retaining' their British subject status as though they had never lost it. Reacting to this to make clear that Irish citizens domiciled in the UK became Citizens of the UK and Colonies, the UK ended up acquiescing in persons being Irish citizens by virtue of birth in a place by then within its jurisdiction. Unsurprisingly, this overshadowed the significance of the ease of transmission of Irish nationality from parent[73] to child on its territory, a less strange concept as a matter of nationality law. Accidental as this sequence was, the sequencing made each individual step easiest to accept.

Thus, by the end of that sequence, it was established that the acquisition of Irish citizenship by birth on territory within the UK was not to be regarded as a hostile act. To understand just how radical this is, contrast it with the arguments put forward in the 1920s by the UK before the International Court of Justice in the *Tunis and Morocco* case[74] and, at present, controversy over the decision of the Russian government to offer Russian nationality, by individual naturalisation, to former Ukrainian nations living in the territory of the former Ukrainian government.[75]

For its part, the Irish government had not objected to its nationals being able to elect to 'retain' a British subject status that, under a strict interpretation of its own laws, they had already lost.

67 'The Ian Paisley Question: Irish Citizenship and Northern Ireland', op. cit.
68 British Nationality Act 1948, s 5(1). Women could not under the Act transmit to children born overseas.
69 Section 5(1)(d).
70 Section 5(1)(b). For a discussion of these procedures, see *Advocate General for Scotland v Romein* [2019] UKSC 6.
71 See Daly (n 22) 394–5 for a description of the registered.
72 See British Nationality Act 1981, s 50(1).
73 Section 7 of the Irish Nationality Act 1956 remitted transmission from father or mother.
74 Nationality Decrees issued in Tunis and Morocco: Advisory Opinion No 4 [1923] PCIJ, Ser B, No 4 7, discussed by B Manby, ' Nationality and Statelessness among persons of Western Saharan Origin' (2020) 34 IANL 1–39.
75 Discussed in Manby, ibid 24 with reference to Anne Peters 'Passportisation: Risks for international law and stability – Part I' EJILTALK! 9 May 2019 and Eric Fripp's 'Passportisation: Risks for international law and stability – Response to Anne Peters' EJILTALK! 30 May 2019.

All the ingredients of the right under the Belfast Agreement of the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, were present, for the link between sovereignty and nationality had been broken.

After the Belfast Agreement

Irish law was amended following the Belfast Agreement as envisaged in the Agreement. To give effect to the Belfast Agreement the changes provided that birth on the island of Ireland, would confer not Irish citizenship but an entitlement to be recognised as an Irish citizen, which a person could assert by doing an act that only an Irish person could do.[76] These amendments were made at the same time as amendments, resulting from a separate political agenda, that removed pure *jus soli* from Irish law. Henceforth only those born to a parent who was Irish or settled could be born with 'an entitlement to Irish citizenship' by virtue of birth in the island of Ireland.[77] The descent provisions were unchanged,[78] a point to which we shall return later.

Ireland had removed the word 'alien' from its immigration law by the Immigration Act 1999,[79] replacing it with 'non-national'. It made the same amendment to the Irish Nationality Act 1956 in 2004,[80] when it also deleted the definition of 'Ireland' from the 1956 Act.[81]

McCarthy

The Belfast Agreement concluded, common membership of the EU and the continuance of what had come to be known as the 'common travel area' was not a backdrop against which what it meant for individuals to be Irish or British or both in nationality law terms, divorced from the question of sovereignty, was thrown into sharp relief. That changed with the UK government's reaction to the *McCarthy* case, C*ase* C-434/09 of 5 May 2011.[82]

The European Court of Justice held that Ms McCarthy, a dual Irish and British national, could not rely on EU free movement law rights to have her non-EEA partner remain with her in Northern Ireland. It held that Directive 2004/38/EC did not apply 'to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State'.[83]

Ms McCarthy was not a 'person of Northern Ireland' within the terms of the Belfast Agreement, for she had not been born in Northern Ireland.[84] There is, unsurprisingly, no mention of Northern Ireland, or of the Belfast Agreement, in the judgment.

While the case was before the UK tribunal, the UK changed the law[85] so that dual British Irish nationals, including the 'people of Northern Ireland' could henceforth rely on EU law rights of free movement only under the same terms as persons who were British nationals only, ie on

76 Section 6 (1), inserted by Irish Nationality and Citizenship Act 2004, 38/2004, s 3(a).
77 Section 6A, inserted by s 4 of the Irish Nationality and Citizenship Act 2004 38/2004.
78 Section 7.
79 No 22 of 1999, s 1(1).
80 Irish Nationality and Citizenship Act 2004 (No 38 of 2004) s 2(a).
81 Section 21 of the 1956 Act, inserted by s 2(a) of the Irish Nationality and Citizenship Act 2004, s 15/2001.
82 [2011] 3 CMLR 10.
83 Paragraph 43.
84 See Daniel Holder, The Right to be British, or Irish, or both, 23 April 2019, available at https://thedetail.tv/articles/the-right-to-be-british-irish-or-both (accessed 1 September 2019).
85 See Immigration (European Economic Area) Regulations 2006 (SI 2006/1003): 'EEA national' means a national of an EEA State who is not also a British citizen'.

the basis of the *Surinder Singh* case,[86] in which the Court of Justice held that free movement laws applied to nationals retiring after exercising free movement rights in another member State. No distinction was made between beneficiaries of the Belfast Agreement, the 'people of Northern Ireland' and British citizens who were dual nationals because they held another EEA nationality.

Whether the UK was right to apply *McCarthy* to the 'people of Northern Ireland was not tested before the Court of Justice. The point came before the Upper Tribunal (Immigration and Asylum Chamber) in the unreported case of *Mr Abdul Khalique v Secretary of State for the Home Department* IA/07412/2013.[87] In that case, Upper Tribunal judge Kopieczek recorded the respondent Secretary of State's position as accepting that a person of Northern Ireland had a right to choose Irish or British citizenship, or both, but regarding existing mechanisms of renunciation as the means to exercise this right.[88] Mr Khalique won his case on the basis that his partner had the right to identify herself solely as Irish. The tribunal relied on *Robinson v Secretary of State for Northern Ireland and Others (Northern Ireland)* [2002] UKHL 32, as authority for the proposition that the Northern Ireland Act 1998 was passed to implement the Belfast Agreement[89] which, amongst other things, recognises the right of the people of Northern Ireland to identify themselves as Irish, or British, or both.

Things might have been very different had the determination been reported by the tribunal, as one might have expected of such a significant decision, or had the Home Office changed its policy as a result. It was not reported and the Home Office did not change its approach to other cases with similar facts. Only Mr Khalique and his partner benefited from his victory. Other family members of Irish persons of Northern Ireland who sought to challenge the policy were refused.[90] Family members of the people of Northern Ireland were dealt with under the UK Immigration Rules. These, following amendment in 2012,[91] impose stringent requirements to which EEA nationals are not subject, in particular a minimum income threshold,[92] which has been criticised for is differential impact on regions of the UK with lower median income. In a report published on 27 January 2016, the Migration Observatory at the University of Oxford found that approaching half of those working in the North East, South West, and Northern Ireland did not meet the threshold.[93]

On 6 September 2016, the Home Office, on reconsideration, refused US Citizen Jake Parker de Souza's application under the Immigration (European Economic Area) Regulations 2006[94] to be given a residence card confirming his right to reside under EU law as Emma de Souza's spouse. It said that Emma de Souza, a person of Northern Ireland, was a British citizen unless and until she renounced her British citizenship. The De Souzas's response was that she could not renounce that which she had never accepted: she had always identified as Irish, not British, and not both.

On 31 October 2017, First-tier Tribunal judge S Gillespie, following *Khalique*, found in Mr Parker de Souza's favour. The Home Office appealed. The case was heard on 10 September 2019, and on 14 October 2019, in *De Souza (Good Friday Agreement: nationality)* [2019] UKUT 355 (IAC) the Upper Tribunal found for the Home Office.

86 C-370/90.
87 Available at https://tribunalsdecisions.service.gov.uk/utiac/ia-07412-2013 (accessed 25 December 2019).
88 Paragraph 16.
89 Khalique, paras 23 and 24.
90 Emma de Souza has described such persons making themselves known to her, see eg 'We were just two people who fell in love' *Irish Times* 23 May 2020.
91 Appendix FM to HC 395 inserted by Statement of Changes in Immigration Rules HC 194.
92 See further HC 395, Appendix FM-SE.
93 The minimum income requirement for non-EEA family members in the UK https://migrationobservatory.ox.ac.uk/resources/reports/the-minimum-income-requirement-for-non-eea-family-members-in-the-uk-2/.
94 SI 2006/1003.

The De Souzas put their case on the basis that Emma de Souza was an Irish citizen, and only an Irish citizen. They proposed reading the words 'if they consent to identify as such' into s 1(1) of the British Nationality Act 1981*: '*A person born in the United Kingdom after commencement … shall [if they consent to identify as such] be a British citizen if'.

The Upper Tribunal rejected this argument. The plain words of the statute could not be construed in this way to give effect to an unincorporated international treaty, a proposition for which it relied, *inter alia*, on *R (Miller) v Secretary of State* [2018] AC 61 [2017] UKSC 5.[95] That aspect of the decision is difficult to impugn.

The tribunal also rejected the notion that the words could be read into the statute to give effect to Ms de Souza's rights to private life under art 8 of the European Convention on Human Rights. It was prepared to assume that Emma de Souza's right to self-identification was an aspect of her private life protected by the Convention. But, it held, the interference was for the legitimate aims of avoiding statelessness, and of maintaining a clear and coherent system of nationality law. It pointed to s 12 of the British Nationality Act 1981, the right to renounce, as a mechanism open to Ms de Souza and held that the requirement to give notice of renunciation was proportionate. It had not been presented with evidence that a £200 fee for renunciation presented a material barrier to renunciation in Ms de Souza's case.

The Upper Tribunal commented, in support of its reasoning, that the notion of 'nationality based on consent' raised a host of difficulties. What, it asked, would happen in the case of children? And an 'undisclosed state of mind' could change from time to time. It went on:

> '40: […] if Article 1(iv)/(vi) needs to be construed as preventing the United Kingdom from conferring British citizenship on a person born in Northern Ireland, at the point of birth, the inescapable logic is that Ireland cannot confer Irish citizenship on such a person at that point either. The result is that a person born in Northern Ireland is born stateless. That would be a breach of both countries' international obligations to prevent statelessness. It is not conceivable that the two governments intended such a result.'

My reading of the judgment is that these comments are *obiter* and that even without reference to practical difficulties the Upper Tribunal did not consider that the British Nationality Act 1981 could be read as counsel for the De Souzas suggested

At paragraph 39 of the determination the Upper Tribunal held, again *obiter* in the light of the reasoning above,

> '39. The omission ['from the 1998 Act of anything touching upon the issues of self-identification and nationality', paragraph 38 of the determination, referring to the Northern Ireland Act 1998] also underscores the correctness of the Secretary of State's submission that, properly construed, Article 1(iv)/(vi) does not, in fact, involve giving the concept of self-identification the meaning for which the claimant argues. If the parties to the multi-party agreement and the governments of Ireland and the United Kingdom had intended the concept of self-identification necessarily to include a person's ability to reject his or her Irish or British citizenship, it is inconceivable that the provisions would not have dealt with this expressly. By the same token, it is equally inconceivable that the far-reaching consequences for British nationality law would not have been addressed by the 1998 Act.'

95 Paragraph 33 of the determination of the Upper Tribunal, citing para 32 of *Miller.*

It further doubted that the matter fell within the scope of the appeal, which concerned rights under EU law, for Mr Parker de Souza brought his appeal on the grounds that he should be issued with a residence card as the spouse of an EEA national.

What could a right to identify and be accepted as 'Irish, or British, or both' mean without a right to reject Irish or British citizenship? One contender is to be given all the rights attendant upon such identification, without changing nationality. This is one way of reading *Khalique*. But this too the Upper Tribunal denied Mr Parker de Souza. It refused his appeal. Its reference to 'an undisclosed state of mind' raises the possibility that it thought that to 'identify' as British or Irish or both meant no more than to hold a state of mind.

As to a breach of art 8, that is always a fact-sensitive evaluation.[96] The tribunal paid heed to the £200 fee, but not to the impact on Ms De Souza's 'psychological and moral integrity[97] of being forced to identify as British as a prerequisite to renouncing that citizenship. Nothing in the determination hints that the tribunal might have come to a different decision faced with someone loathe to give up their British citizenship, but forced to do so to be able to keep their partner with them.

The prohibition on a residence card being issued to a family member of a dual national is a matter of secondary legislation[98] and, as described above, applying the prohibition to the people of Northern Ireland goes beyond *McCarthy*. Secondary legislation is vulnerable to being quashed or declared invalid if it is incompatible with human rights.

Alongside their legal case, Jake and Emma de Souza ran a powerful campaign, in the UK, in Ireland and in the United States. Whether that campaign, or the considerations weighed above, prevailed, as they were preparing to try to challenge the judgment in the Court of Appeal, on 8 January 2020, the British government published *New Decade, new approach*[99] *an agreement between the British and Irish governments on the basis of which it was proposed to restore the Executive in Northern Ireland*. In it, it accepted that the family members of 'the people of Northern lreland' should be treated in the same way as the family members of EEA nationals for the purposes of UK immigration law in the transition out of the EU:

> '13. The Government has reviewed the consistency of its family migration arrangements, taking into account the letter and spirit of the Belfast Agreement and recognising that the policy should not create incentives for renunciation of British citizenship by those citizens who may wish to retain it.
>
> 14. The Government will change the rules governing how the people of Northern Ireland bring their family members to the UK. This change will mean that eligible family members of the people of Northern Ireland will be able to apply for UK immigration status on broadly the same terms as the family members of Irish citizens in the UK.
>
> 15. This immigration status will be available to the family members of all the people of Northern Ireland, no matter whether they hold British or Irish citizenship or both, no matter how they identify.'

96 *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, para37.
97 *Bensaid v United Kingdom* App no 44599/98, judgment of 6 February 2001.
98 Now the Immigration (European Economic Area) Regulations 2016, SI 2016/1052, para 2(1).
99 Available at https://www.dfa.ie/media/dfa/newsmedia/pressrelease/New-Decade-New-Approach.pdf (accessed 11 January 2020).

'Consistency' suggests that the government did consider that reading the 'people of Northern Ireland' in the same way as other British citizens with regard to EU law rights was inconsistent with the Belfast Agreement, and that the policy change was principled, as well as having the pragmatic aim of avoiding renunciation of British citizenship.

On 14 May 2020, the government published Statement of Changes in Immigration Rules CP 232. This amends Appendix EU to the Immigration Rules, with effect from 24 August 2020, to provide that a person who holds only British citizenship, a person who holds only Irish citizenship, or a person who holds both, will, if born in Northern Ireland, be eligible to bring their family members in the UK on the same terms as are afforded to nationals of EEA States under the EU settlement scheme.[100]

As heralded, the approach differentiates 'the people of Northern Ireland' from other British citizens, and it does so across the board, not on the basis of any election that they make to be British, or Irish or both. This leaves hanging the Upper Tribunal's other *obiter* reasons for rejecting Mr de Souza's appeal: the risk of statelessness and the argument that nationality based on consent, relying on an 'undisclosed state of mind' would create insuperable practical problems.

Irish law, a matter of fact in the UK courts, was not argued before the Upper Tribunal. As described, Irish law does not confer Irish citizenship at birth by reason of place of birth. It provides an entitlement to be recognised as an Irish national.

What if the UK were to mirror Irish law, and provide for an entitlement to British nationality? Such an approach would sit unhappily with the UK's obligations under the 1961 UN Convention on the Prevention and Reduction of Statelessness,[101] and indeed its obligations, having signed, although never ratified, the European Convention on Nationality 1997,[102] not to pass new laws subsequent to signature contrary to the objects and purposes of a Treaty.[103]

Irish law protects those born on the island of Ireland against statelessness but it provides:

> '6(3) A person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country.'[104]

An entitlement under UK law would therefore prevent this provision kicking in.

The UK Supreme Court in *Secretary of State for the Home Department v Al Jedda* [2013] UKSC 62 approved the words of the United Nations High Commissioner for Refugees 'Guidelines on Statelessness No 1:[105]

> 'An individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question. Therefore, if an individual

100 For details of how the scheme will apply to the people of Northern Ireland see my June 2020 briefing paper 'EU settlement scheme extended to the people of Northern Ireland: what does it mean for me?', available at https://www.nihrc.org/uploads/publications/FINAL_EU_Settlement_Scheme_extended_to_the_people_of_Northern_Ireland.pdf (accessed 21 June 2020).

101 UNTS Vol 989, No 14458, p 175.

102 ETS No 166.

103 Vienna Convention on the Law of Treaties UNTS Vol 115, No 18232, p 332.

104 Irish Nationality and Citizenship Act 1956, s 6(3).

105 The definition of 'Stateless Person' in art 1(1) of the 1954 Convention relating to the Status of Stateless Persons, HCR/GS/12/01. See now the UNCHR Handbook on Protection of Stateless Persons 2014, para 23.

> is partway through a process for acquiring nationality but those procedures have not been completed, he or she cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention'.

This is in line with the summary conclusions of the expert meeting convened by the Office of the United Nations High Commissioner for Refugees, in Tunis, Tunisia, 31 October–1 November 2013:[106]

> 'Where the 1961 Convention requires that a person shall not lose or be deprived of nationality if this would render him or her stateless, States are required to examine whether the person possesses another nationality at the time of loss or deprivation, not whether they could acquire a nationality at some future date.'

In the Immigration Act 2014 the UK passed primary legislation making an exception to the probation on deprivation resulting in statelessness to include cases where the Secretary of State had 'reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.' But it did so in express reliance on its reservation to the 1961 UN Convention on the Reduction of Statelessness, which made express provision for States to retain their laws existing on ratification in respect of deprivation resulting in stateless.[107] No equivalent provision exists permitting States to retain (or pass) laws resulting in children being born stateless.

UK law provides that a person born in the UK and not recognised by any State by operation of its law acquires an entitlement to register as British on reaching the age of five, provided that they remain stateless at that time.[108] But there is a line of authority beginning with the case of *R(Bradshaw) v Secretary of State for the Home Department* [1994] Imm AR 359, reviewed in *AS (Guinea) v Secretary of State for the Home Department, United Nations High Commissioner for Refugees intervening* [2018] EWCA Civ 2234, that before being accepted as stateless, and to discharge the burden of proof upon them, a person must apply to those States which might consider them to be and might accept them as a national.

Thus, if the UK mirrored Irish law in its statelessness provisions it would appear that the child would be forced to assert his/her entitlement under Irish law rather than being recognised as British under the UK statelessness provisions.

But there is more. Under British nationality law, a person is born British by descent if born to a parent (now defined to include a mother and a father, not married to the mother, who can prove paternity[109]) outside the UK.[110] As we have seen, not so in Ireland. The Irish 'by descent' provisions apply on the island of Ireland just as much as outside it.[111] Whether born on the island of Ireland or outside it, if a person is born Irish 'by descent' no question of 'entitlement' arises. Many of the people of Northern Ireland who are born with an entitlement to

106 Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality (accessed 20 August 2019) https://www.refworld.org/pdfid/533a754b4.pdf.

107 Immigration Act 2014, s 64, inserting s 40($A)(c) into the British Nationality Act 1981. See Harvey, 'Recent Developments on Deprivation of Nationality on Grounds of National Security and Terrorism Resulting in Statelessness' (2014) 8 IANL 336–354.

108 British Nationality Act 1981, Sch 2, para3.

109 British Nationality Act 1981, s 50.

110 British Nationality Act 1981, s 2.

111 Irish Nationality and Citizenship Act 1956, s 7.

Irish citizenship by virtue of place of birth, are already Irish citizens, not 'entitled to be' Irish but Irish citizens tout court, because they are born, on the island of Ireland, to an Irish parent.

Beyond *New decade new approach*

Statement of Changes in Immigration Rules CP 232 attests to a UK confidence in making a special case for the people of Northern Ireland. Perhaps on the basis that, with Brexit, the effects of their inclusion in the EU settlement scheme will, like that scheme, be time limited. But those effects will be felt for some years to come. There will be those who do not acquire 'settled status' under the scheme until 2025. There is provision for family members whose relationship with the person of Norther Ireland was formed before 30 December 2020 to join them after that date. The scheme also provides for children born subsequently to a couple but this is unlikely to be of relevance to the people of Northern Ireland for, as discussed, a child of the first generation born overseas will be a British and an Irish citizen in any event.[112]

As to the practical considerations associated with 'nationality by consent', highlighted by the Upper Tribunal, it was those that my paper sought to tackle.

Proposals

The proposals I make in my paper are very detailed, there are a total of 37 recommendations, but the broad lines can be summarised as follows.

All the 'people of Northern Ireland' whether identifying as Irish, or British, or both, should be given a right of abode in the UK by amendment of s 2(1) of the Immigration Act 1971. This guards against discrimination and makes election, including with retrospective effect, administratively manageable because such election would not affect rights and entitlements, for example to social benefits.

All Irish citizens in the UK should benefit from the protection of the proposed s 3ZA of the Immigration Act 1971, to be inserted by the Immigration and Social Security (EU Withdrawal) Bill currently before parliament.[113] This would provide a secure legislative footing for the understanding that they are in the UK without limit of time or other restrictions on their stay and thus are settled for the purposes of British nationality law.[114] It would provide certainty as to the nationality of their children born in the UK, including in Northern Ireland.

While the law would continue to provide for persons born in Northern Ireland to be born British citizens, the UK State would not be allowed to make an assumption as to their British citizenship without their having had an opportunity to assert their right not to be identified as British citizens. An express prohibition on statelessness would be required. Such express prohibition should use the language of the 1954 Convention 'recognised by any State as a national by operation of its law' and thus that the person was 'entitled' to Irish citizenship would not, without more, be sufficient. It might be possible, however, for the UK and Irish governments to reach agreement so that renouncing British nationality in these circumstances could be recognised as an act that only an Irish person could do under Irish law, or for other administrative communication.

112 See Annex 1 to Appendix EU, definition of 'family member of a qualifying British citizen'.
113 Bill 104 of session 2020–2021, cl 2.
114 British Nationality Act 1981 s 50.

There should be a one-off opportunity for those who had previously been recognised as British citizens to change that election after the law changed. Persons with parental responsibility would have a one-off opportunity to elect for their children, and those children a one-off opportunity to elect on reaching the age of majority.

For those born after the law changed, persons with parental responsibility could elect, once, for their child. The child could elect once for him/herself as an adult. There would be no fees and no mandatory forms.

A person would not be able to elect for a child not to be recognised as British where this was against the wishes and feelings of the child. Similarly, to elect for a person without capacity not to be recognised as British would require the approval of the Court of Protection. Declining the benefits of a nationality is a serious matter and I identify no reason of public policy why the voice of the child, however young, should not be heard in such cases.

An attorney or deputy would not be able to elect for a person lacking capacity not to be recognised as British without the imprimatur of the Court of Protection for this.

There would be circumstances in which a person could elect for the child to be treated as British, by not voicing an objection, even where this were against the wishes and feelings of the child, but this would depend upon the age and majority of the child (as is now the case for registration of a child as British[115]). An attorney or deputy could make this decision for a person lacking capacity.

Election could have retrospective effect: back to birth, or to the age of majority, unless the person had previously held a British passport, in which case it could be retrospective back to the date of their handing in that passport. As set out above, giving all the 'people of Northern Ireland' a right of abode would create the space for retrospectivity.

Changes after a first election as an adult would be by renunciation and resumption under ss 12 and 13 of the British Nationality Act 1981, as for other British citizens, and would not be retrospective in effect but there would be no limit on how often a person could renounce or resume, and the fee to do so could not exceed the costs of providing the service.

It is integral to the proposals that procedures be simple, quick, and either free, or low cost.

The people of Northern Ireland'

Statement of Changes in Immigration Rules CP 232 was not concerned with the entitlements of Irish citizens, or dual Irish/British citizens, as opposed to British citizens. It turned 'the people of Northern Ireland' into a domestic immigration law concept.

The differential treatment of 'the people of Northern Ireland' and other residents of Northern Ireland, indeed other British citizens generally, in respect of matters of family reunification, will be stark. Some parts of it will feel particularly strange because the definition of the 'people of Northern Ireland' in the 1998 Belfast Agreement does not sit comfortably with developments in nationality law since that date, many of which have been aimed at eliminating the modern day effects of historical discrimination or at keeping pace with changes in adoption law and in methods of human fertilisation.[116]

In my paper I argued that, because of this, changes to nationality law to give effect to the Belfast Agreement should be made with regard to the wider context of nationality law and

115 Nationality Guidance: Registration as a British citizen: children, 6 of 16 April 2020.

116 See A Harvey, Nationality law: righting the wrongs of history: (2017) 31 IANL 289–307 and A Harvey, 'Discrimination in British Nationality Law' in D Prabhat (ed), *Citizenship in Times of Turmoil?: Theory, Practice and Policy*, (Edward Elgar Publishing).

that the beneficiaries of the changes to the law should be a wider cohort than the 'persons of Northern Ireland' in the Belfast Agreement.

Strong contenders to benefit from changes alongside the 'people of Northern Ireland', are, at a minimum, those born in Northern Ireland who are, or become, Irish nationals or are entitled to Irish nationality, whether they exercise that entitlement or not, and who are registered during their minority as British citizens.

A strong case can also be made for those born in Ireland who are, or become, for whatever reason, Irish nationals or are entitled to Irish nationality, who register as British citizens, whether during their minority or not, on the basis of their birth. This would include persons registering on the basis of having lived in the UK continuously for 10 years from birth.[117] It would include those registering on the basis of birth after 13 January 2010[118] to a serving member of the UK's armed forces.[119] It would include those registering because their father was a British citizen at the date of their birth but could not pass his nationality to them because he was not married to their mother and the birth pre-dated changes to British nationality law that recognise such children as British by birth.[120]

I recommend also, regardless of whether or not they were born in Northern Ireland, that those adopted as children by parents, at least one of whom is a British citizen, ordinarily resident in Northern Ireland, in circumstances in which they become British citizens as a result of that adoption,[121] who (for whatever reason) are or become Irish, or are entitled to Irish citizenship, be included in the cohort.

The cohort of those who would be affected were these proposals implemented is small, because very often a person who has not acquired British citizenship through one parent will have acquired it through the other, and even where a parent is not a British citizen they may be settled in the UK and thus able to pass on their British citizenship to children born in Northern Ireland. Thus many of those who would otherwise have benefited from an extension of the cohort will be British already. But treating them differently from others born in Northern compounds the discrimination and disadvantage that developments in British nationality law have sought to address in the years since 1998.

The project of amending British nationality law to eliminate discrimination is not yet complete, and future developments could be prefigured in arrangements to give effect to the Belfast Agreement, or taken into account at a later date. One is pending: amendment to give effect to the declaration of incompatibility under the Human Rights Act 1998 given in R*(K) v Secretary of State for the Home Department* [2018] EWHC 1834. There it was held that that s 50(9A) of the British Nationality Act 1981 discriminates on the grounds of birth status contrary to art 8, read with art 14 of the European Convention on Human Rights. Section 50(9A) does not permit rebuttal of the presumption that the husband of the mother is the father of the child. Other contenders, more technical, are discussed in my paper.

It is for Ireland to determine the nationality laws of Ireland, but it would be open to the UK government to indicate its enthusiasm for, or lack of objection to, that wider cohort benefit from entitlements to Irish citizenship.

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117 British Nationality Act 1981, s 1(4).

118 The appointed day for the purposes of s 1(1A) of the British Nationality Act 1981.

119 British Nationality Act 1981, s 50.

120 Under s 4E to 4I of the British Nationality Act 1981.

121 Those who are adopted in the UK or a qualifying territory or under the law of a State in which the Hague Convention on Adoption is in force and which is certified in pursuance of art 23(1) of the Convention British Nationality Act 1981, s 1(5).

It may also be necessary to augment my proposals to deal with children born in Northern Ireland to a mother not British or settled in circumstances where an Irish father, who is not also British, is not ordinarily resident in the UK at the time of the birth of his child in Northern Ireland. While the physical absence of the father from the UK at the time of the birth would not prevent the child being born one of the 'people of Northern Ireland', there is a mismatch between the requirement under the British Nationality Act for a parent to be settled and the definition in the Belfast Agreement that the 'people of Northern Ireland' includes those who parents are British or settled, or Irish. A child born to an Irish citizen who is not ordinarily resident in the UK and thus not settled, would not become a British citizen under s 1 of the 1981 Act, although it is unclear in practice how closely the ordinary residence of Irish parents is scrutinised.

While 'the people of Northern Ireland' has been turned into a definition for the purposes of UK immigration law I propose that for the purposes of amendments to British nationality law it should be a guiding principle, emblematic but not exhaustive of the concept of 'a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties' to Northern Ireland, in all its nationality law complexity.[122]

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122 *Liechtenstein v Guatemala* [1955] ICJ 1.

A Comparison of the *Hardial Singh* Principles and Article 5(1)(f) ECHR

Alexander Schymyck

At a glance

Detention pending deportation and removal is not subject to any statutory limitation in the United Kingdom. The power to detain is limited by two distinct bodies of law; domestic administrative law and European human rights law.

This article argues that domestic administrative law, through the Hardial Singh principles, provides a higher level of protection of the right to liberty than the European Convention on Human Rights. This conclusion is defended through a detailed critical analysis of the Hardial Singh principles and the interpretation of art 5(1)(f) by the European Court of Human Rights, which are then compared. It also comments on why the two bodies of law have developed in this way and advances some suggestions concerning the improvement of the Hardial Singh principles.

Introduction

The European Court of Human Rights (ECtHR) and domestic courts have expressed differing views on the relationship between the *Hardial Singh* principles and art 5(1)(f) ECHR. In a recent Grand Chamber decision, the ECtHR praised the UK for 'applying a test similar to – indeed, modelled on – that required by Article 5(1)(f) of the Convention in the context of "arbitrariness".'[1] By contrast Lady Hale has said that the *Hardial Singh* principles 'were not inspired by Article 5(1)(f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and it does not follow that, because detention would be permissible under Article 5(1)(f), it is also permissible under United Kingdom law'.[2] Resolving this dispute is important because, if the Strasbourg court is correct, then the *Hardial Singh* principles can be explained and justified as a straightforward product of the Human Rights Act 1998. If the *Hardial Singh* principles do provide a higher standard of protection than art 5(1)(f) ECHR, then it will be necessary to find an explanation for them within domestic administrative law.

I begin by conducting a detailed analysis of what the *Hardial Singh* principles are and how they are applied in practice, before identifying how art 5(1)(f) has been interpreted by the ECtHR and comparing the two bodies of law. I conclude that the *Hardial Singh* principles provide a higher level of protection of the right to liberty than art 5 ECHR in the context of immigration detention.

1 *JN v United Kingdom* (App no 37289/12) judgment of 19 May 2016 at [98].
2 *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 at [199].

The core elements of the *Hardial Singh* principles

This section begins by explaining the authoritative formulation of the *Hardial Singh* principles before describing the intensity of review with which they are applied. It then considers each of the four principles in turn and identifies some problems in their application. Finally, it summarises the core elements of the *Hardial Singh* principles, which is the basis for the analysis in the rest of the paper.

Formulation of the Hardial Singh principles

The *Hardial Singh* principles developed from the *ex tempore* judgment of Mr Justice Woolf in *R v Governor of Durham Prison ex parte Hardial Singh*.[3] The leading authority on the *Hardial Singh* principles is *R (Lumba) v Secretary of State for the Home Department*,[4] which resolved the formulation of the *Hardial Singh* principles and provided detailed guidance on their application. Until that point, the application of the *Hardial Singh* principles had been governed by two Court of Appeal decisions which used different formulations of the principles.[5]

The main issue before the court in *Lumba* was whether the application of a secret policy, which required detention of all foreign national prisoners after the expiry of their criminal sentences, had rendered detention unlawful. One of the two appellants, Walumba Lumba, also argued that his detention was unlawful under the *Hardial Singh* principles. Lord Dyson gave the leading judgment on both issues and his formulation of the *Hardial Singh* principles was supported by everyone except for Lord Phillips.[6]

Lord Dyson approved his own formulation of the *Hardial Singh* principles from the Court of Appeal decision *I (Afghanistan)*.[7] This formulation of the *Hardial Singh* principles originates in submissions made on behalf of the Secretary of State in *I (Afghanistan)* and was not opposed by the Secretary of State in *Lumba*:

> (i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
> (ii) the deportee may only be detained for a period that is reasonable in all the circumstances;
> (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;
> (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal.'[8]

3 [1984] 1 WL. 704. For an account of the development of the *Hardial Singh* principles before the Supreme Court decision in *Lumba*, see Harriet Samuels, 'Administrative detention in immigration cases: the Hardial Singh principles revisited' (1997) PL 623–629 and Alex Goodman & Justin Leslie 'The Limits of Detention: Case Law Since Hardial Singh' (2010) 15 JR 242–251.

4 [2011] UKSC 12; [2012] 1 AC.245.

5 *R. (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888; [2003] INLR 196 and *R. (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804.

6 *Lumba* per Lord Hope at [171], Lord Walker at [189], Baroness Hale at [218], Lord Collins at [219], Lord Kerr at [250]. and Lord Brown and Lord Rodger at [362].

7 [2002] EWCA Civ 888; [2003] I.N.L.R. 196.

8 *Lumba* (n 2) [22].

In addition to re-formulating the *Hardial Singh* principles, Lord Dyson provided a further explication of the third *Hardial Singh* principle. In the quoted passage, Lord Dyson adhered closely to the words used by Woolf J in *Ex p Hardial Singh*, so the third *Hardial Singh* principle is defined in terms of the Secretary of State's state of mind and uses an unusual test based on the ambiguous word 'apparent', which can mean either that something is obvious or that it seems true but may not be. To clarify the meaning of the third *Hardial Singh* principle, Lord Dyson rephrased it as: 'if there is no realistic prospect that deportation will take place within a reasonable time, then continued detention is unlawful'.[9]

One unusual feature of the law in this area is that the correct formulation of the *Hardial Singh* principles was not settled through argument before the appellate courts. In both *I (Afghanistan)* and *Lumba* the parties relied on the same formulation of the *Hardial Singh* principles. As a result, Lord Dyson's formulation has become authoritative without him having to provide reasons for adopting it.[10]

Standard of review

The *Hardial Singh* principles are a rare instance in judicial review in which the court substitutes itself for the primary decision-maker, and decides for itself whether detention complies with the *Hardial Singh* principles. This approach goes beyond ordinary forms of substantive review like rationality or proportionality. This article uses the term 'full merits' review to describe this approach, although it is also known as 'full intensity' or 'correctness' review.[11] Dame Elizabeth Laing has identified this aspect of the *Hardial Singh* principles as an example of 'judicial activism', although she concludes that it is justified by the particularly vulnerable constitutional position of immigration detainees.[12]

In *A (Somalia)*, which established this approach to the *Hardial Singh* principles, the Secretary of State submitted that the court should apply the *Hardial Singh* principles using *Wednesbury* unreasonableness, albeit with a heightened level of scrutiny.[13] Toulson LJ rejected this argument without detailed explanation, asserting that, 'it must be for the court to determine the legal boundaries of administrative detention … In my judgment, that is the responsibility of the court at common law and does not depend on the Human Rights Act'.[14] Longmore LJ agreed with Toulson LJ without providing any further reasons.[15]

Keene LJ agreed with Toulson LJ but provided an explanation based on the court's duty to act in accordance with Convention human rights.[16] He relied on the decision of the House of Lords in *Huang*, which held that an immigration tribunal hearing a statutory appeal must act as the primary decision-maker rather than reviewing the decision of the Secretary of State.[17]

Keene LJ asserted that the Human Rights Act 1998 has the same effect in an unlawful detention judicial review.[18] However, his explanation is based on an inaccurate description of the

9 ibid [103].
10 *Lumba* (n 2)[25].
11 Woolf, Jowell, Donnelly and Hare, *De Smith's Judicial Review* (8th edn, London 2018) para 11-088.
12 Dame Elizabeth Laing, 'Two Cheers for Judicial Activism', ALBA Summer Conference 2016. Available online at: https://judicialpowerproject.org.uk/debating-judicial-power-papers-from-the-alba-summer-conference/.
13 *R (A (Somalia)) v Secretary of State for the Home Department* [2007] EWCA Civ 804 at [61].
14 ibid [62].
15 ibid [67].
16 Human Rights Act 1998, s 6.
17 [2007] 2 AC 167.
18 *A (Somalia)* (n 13) [74].

requirements of art 5 ECHR, which does not require the court to act as if it were the primary decision-maker.[19] While the Human Rights Act 1998 does not prevent domestic courts from ignoring the Strasbourg court and adopting a different interpretation of the ECHR, Keene LJ appears to have been unaware he was doing so and provides no reasons for disregarding a clear and consistent line of Strasbourg authorities.[20] Therefore, the only authoritative explanation is Toulson LJ's assertion that full merits review is required by the common law.

First Hardial Singh principle – purpose of detention

The first *Hardial Singh* principle is rarely engaged in practice. Where it has been raised, the courts have taken a common-sense approach and relaxed the principle to allow for very short periods of detention for other purposes where necessary. The Court of Appeal has held that detention can be maintained for a short period after a decision to release while alternative arrangements are made for care of the detainee; the case concerned a child but the same principle applies for vulnerable adults.[21] However, it is not legitimate to detain an individual to protect them from themselves, although a detention centre GP can detain such an individual under the Mental Health Act 1983 instead.[22] The effect has been to limit instances of detention in breach of the 1st *Hardial Singh* principle to extreme cases, such as when the Secretary of State detained a convicted terrorist but only intended to deport him if he could ensure that the individual would be detained on return his home country.[23]

The House of Lords arguably missed an opportunity to apply the first *Hardial Singh* principle in the *Belmarsh* case, which was decided before Lord Dyson authoritatively resolved the formulation of the *Hardial Singh* principles in *Lumba*.[24] In *Belmarsh*, the House of Lords considered *Ex parte Hardial Singh* as it was interpreted by Lord Browne-Wilkinson in *Tan Te Lam*; a formulation which did not include the first *Hardial Singh* principle.[25] On that basis, the court accepted that s 23 of the Anti-terrorism, Crime and Security Act 2001 had displaced the *Hardial Singh* principles from being applied to suspected international terrorists.[26] The exclusion of the *Hardial Singh* principles made it necessary to consider the compatibility of s 23 with the ECHR under the Human Rights Act 1998.

If the House of Lords had applied the *Hardial Singh* principles as they were stated in *Lumba*, the court may have found a breach of the first *Hardial Singh* principle. Section 23 did not create a new power to detain, it merely altered the application of existing immigration detention powers: 'A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely)'.[27] This clearly excluded the second and third *Hardial Singh* principles and any argument brought under the fourth *Hardial Singh* principle insofar as the alleged delay

19 See sub-section entitled 'Requirements of Article 5 ECHR' below.
20 A clear and consistent line of Strasbourg caselaw would normally be followed by domestic courts, see *Pinnock v Manchester City Council* [2011] 2 AC 104 at [48].
21 *FM v Secretary of State for the Home Department* [2011] EWCA Civ 807 at [60].
22 *OM (Nigeria) v Secretary of State for the Home Department* [2011] EWCA Civ 909 at [32].
23 *HXA v The Home Office* [2010] EWHC 1177 (QB) at [174].
24 *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.
25 ibid [8] citing *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97.
26 ibid [31]–[32].
27 Anti-terrorism, Crime and Security Act 2001, s 23(1).

related to an issue specified in the legislation.[28] However, s 23 did not explicitly alter the purpose of immigration detention. Like any provision purporting to limit a fundamental right, s 23 should be interpreted strictly. On a narrow reading, s 23 extends the scope of immigration detention to cases in which enforcing deportation is the purpose of detention, but there is an obstacle preventing deportation for an indefinite period of time. It does not permit detention for the purpose of protecting national security. But the *Belmarsh* detainees were detained for the purpose of protecting national security rather than for the purpose of enforcing deportation.[29] Therefore, the House of Lords could have ordered the release of the detainees because they were detained to prevent a risk to national security rather than to facilitate deportation, which is an improper and unlawful purpose for immigration detention.

The 1st *Hardial Singh* principle may rarely be applied in practice, but it provides an important limitation on the use of immigration detention for extraneous purposes.

Second Hardial Singh principle – reasonable period of detention

The second *Hardial Singh* principle is rarely applied because any breach of the second *Hardial Singh* principle will also involve a prior breach of the third *Hardial Singh* principle. The breach of the third *Hardial Singh* principle might only occur very shortly before the reasonable period of detention expires, but it ensures that the second *Hardial Singh* principle cannot be breached without a breach of the third *Hardial Singh* principle.

The second *Hardial Singh* principle exists as a shortcut; it allows the decision-maker to avoid some of the complexities involved in applying the third *Hardial Singh* principle.[30] In some cases, the reasonable period will have expired already and therefore the detainee should be released without the decision-maker undertaking an assessment of the prospect of removal. The preservation of the second *Hardial Singh* principle reminds decision-makers of the possibility of making a quick, straightforward decision on the basis of detention to date, rather than engaging in the complicated process of estimating when removal is likely to take place.

The law on what is a 'reasonable period of detention' is also important because it is used in the application of the third *Hardial Singh* principle. In *Lumba*, Lord Dyson provided a non-exhaustive list of relevant considerations when deciding whether the period of detention is reasonable, which are:

- the length of the period of detention;
- the nature of the obstacles preventing deportation;
- the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles;
- the conditions of detention;

28 John Finnis makes a similar argument about the interpretation of s 23 Anti-terrorism, Crime and Security Act 2001, although he concludes that the derogation itself was unnecessary and that art 5 ECHR and the *Hardial Singh* principles, properly understood, do not prevent the detention of suspected terrorists even if there are indefinite obstacles to removal. See John Finnis, 'Nationality, alienage and constitutional principle' (2007) LQR, 123(Jul), 417–445. His conclusion is difficult to sustain in light of the decision of the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 29 that art 5 ECHR was violated by the detention of the Belmarsh detainees.

29 When the European Court of Human Rights considered the Belmarsh case it made similar remarks regarding the permitted detention exceptions under art 5(1)(f). See *A v United Kingdom* (2009) 49 EHRR 29 at [171].

30 For examples of a breach of the 2nd *Hardial Singh* principle see *In Re Mahmod* [1995] Imm.R 311 and numerous decisions at first instance to release on the day judgment is handed down eg *R (H) v Secretary of State for the Home Department* [2005] EWHC 1702 (Admin) at [40].

- the effect of detention on the detainee and his family;
- the risk of absconding;
- the risk of offending.[31]

Lord Dyson rejected an argument made by the Secretary of State that delay caused by the detainee pursuing legal challenges to deportation should be discounted from the length of detention in favour of placing more weight on a period during which a meritorious legal challenge is being pursued than a hopeless one.[32] Lord Phillips dissented, arguing that the reasonable period of detention should simply mean the period which is reasonably required to enforce removal, with the result that it is only exceeded when the Secretary of State for the Home Department has failed to diligently pursue removal, effectively reducing the third *Hardial Singh* principle to the fourth *Hardial Singh* principle.[33]

The courts have repeatedly refused to set guidelines on what period of detention is reasonable and criticised advocates who seek to rely on authorities as evidence of what is reasonable.[34] The justification offered for this approach is that the use of guidelines might lead courts to accept that shorter periods of detention were reasonable even though, on proper consideration, they are unreasonable and that it might incentivise detainees to refuse to cooperate and wait for the reasonable period to expire.[35] Neither of those justifications is compelling; the first indicates a lack of trust in first instance judges and the second could be addressed by using a flexible guideline rather than a strict rule. The US Supreme Court has taken the opposite approach and imposed a presumption that detention pending deportation is unreasonable if deportation has not occurred nine months after the decision was taken.[36]

Moreover, the rejection of guidelines fails to take account of the practical context in which the *Hardial Singh* principles are applied. It may be that after a full judicial review hearing, judges will make better decisions if they are unconstrained by adherence to guidelines, but in practice the majority of judicial decisions concerning the *Hardial Singh* principles are made on paper or after short hearings following an application for interim relief. The same principles should be applied by immigration judges at bail hearings in the First Tier Tribunal with even less time than is available in the Administrative Court.[37] The position is even more difficult for Home Office officials whose decisions are then reviewed by the courts using full merits review, which led Underhill LJ to state: 'I must confess to some sympathy with the wish of the Secretary of State for guidance from the Courts as to the periods beyond which detention is liable to be regarded as unreasonable for the purpose of the application of the Hardial Singh principles.'[38] The use of guidelines would improve consistency in decision-making while retaining flexibility to respond to the facts of individual cases.

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31 *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 at [104].
32 ibid [121].
33 ibid [337].
34 *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931 at [37]–[41] approved by the Supreme Court in *R (Nouazli) v Secretary of State for the Home Department* [2016] 1 WLR 1565 at [66].
35 *Saleh v The Secretary of State for the Home Department* [2013] EWCA Civ 1378 at [50]–[51], *R (NAB) v Secretary of State for the Home Department* [2010] EWHC 3137 (Admin) at [80].
36 *Zadvydas v Davis*, 533 US 678 (2001), 701. The 9-month period was calculated by adding 6 months to the 90 days explicitly authorised by Congress.
37 Guidance on Immigration Bail for Judges of the First-tier Tribunal (Immigration and Asylum Chamber), Presidential Guidance Note No 1 of 2018. I have a forthcoming article in *Legal Action* (October 2020) which discusses the relationship between immigration bail and unlawful detention.
38 *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931 at [57].

There are a number of different ways in which guidelines could be developed. Firstly, there is the approach taken in the United States of imposing a time limit beyond which detention is presumptively unlawful. The main advantage of this approach is clarity; it would make clear to all decision-makers that beyond a certain point detention requires a very strong justification. However, there would be difficulties in defining the appropriate time limit and the risk that officials view the time limit as the general rule rather than a backstop to prevent excessive detention. Secondly, there could be a sliding scale guideline, with detention steadily requiring greater justification at discrete intervals as the time period increases. This would reduce the risk of any particular time period becoming the 'normal' period of detention, although it would be more difficult to define the level of justification. The guidance provided by the President of the First Tier Tribunal for use in bail hearings before the First Tier Tribunal is an example which could be adopted. It defines three months as a 'substantial period' and six months as a 'long period' for which a very high level of justification is required.[39] Finally, the least radical change would be for the Court of Appeal to recommend that its decisions be used as guidelines in a similar way to judgments of the Court of Appeal (Criminal Division) in sentencing appeals. This would allow guidance to build up gradually in a way familiar to the judiciary from other contexts, although it would not immediately fix the lack of clarity in the law and might risk making the problem worse if the Court of Appeal makes inconsistent determinations of the 'reasonable period'.

The use of a sliding scale guideline, as used in immigration bail proceedings, seems to offer the best balance of improving clarity about the reasonable period while retaining flexibility to respond to the facts of particular cases. Adopting a similar guideline, perhaps elaborated to differentiate between deportation and administrative removal cases, would simplify and hopefully improve the quality of decision-making.

Third Hardial Singh principle – prospect of removal within a reasonable time

The third *Hardial Singh* principle is generally considered to be the most important of the four principles.[40] It requires the court to assess the likelihood of the Secretary of State for the Home Department achieving removal within the reasonable period for which he is permitted to detain the individual. If removal is not achieved within that period, then the Secretary of State for the Home Department will have to release the detainee anyway. Therefore, the third *Hardial Singh* principle prohibits detention where it is likely to be futile. The key issue for the court is how to assess the likelihood, or prospect of, removal during that period. Of course, if there is no prospect of removal over any period of time, then detention will automatically breach the 3rd *Hardial Singh* principle.

There is a lack of clarity in the authorities regarding the appropriate threshold for the likelihood of removal. In *Lumba*, Lord Dyson immediately followed his statement of the four principles with an explanation that the starting point for their application is to identify whether there is a realistic prospect of removal and that detention will be unlawful unless there is a 'realistic prospect of removal within a reasonable time'.[41] This passage in *Lumba* appeared to have

39 Guidance on Immigration Bail for Judges of the First-tier Tribunal (Immigration and Asylum Chamber), Presidential Guidance Note No 1 of 2018 at [7].

40 For example, *R (O) v Secretary of State for the Home Department* [2016] UKSC 19; [2016] 1 WLR 1717 at [48].

41 *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 at [103].

resolved the application of the third *Hardial Singh* principle around a fixed threshold concerning the likelihood of removal. Previously, the Court of Appeal in *A (Somalia)* had adopted a different test requiring a sufficient prospect of removal, which can vary depending on the circumstances.[42] In contrast with the fixed threshold of the realistic prospect test, the sufficient prospect test involves a balancing exercise between the likelihood of removal and other factors such as the risk of offending.

However, the sufficient prospect test was revived by the Court of Appeal in *Muqtaar*.[43] The appellant argued that he should have been released because the Secretary of State could not state on what date removal would take place after the European Court of Human Rights issued a Rule 39 indication requiring the Secretary of State to refrain from deporting him while it considered his application. The Court of Appeal found that there remained a sufficient prospect of removal because it was not apparent that the ECtHR proceedings would take such a long time.[44] Richards LJ ruled that there was no need for the Secretary of State to be able to state when removal will take place and that 'it is important not to water it [the 3rd *Hardial Singh* principle] down so as to cover situations where the prospect of removal within a reasonable period is merely uncertain.'[45] Having cited *A (Somalia)* and his own judgment in *MH*,[46] Richards LJ went on to state that *Lumba* had not laid down a requirement that the Secretary of State be able to specify a date on which removal would take place.[47] Confusingly, in the final paragraph of this passage, Richards LJ reverts back to the realistic prospects test.[48]

The conclusion reached in *Muqtaar* is not controversial; there is nothing in *Lumba* to indicate that obstacles to removal which may last indefinitely should lead to a finding that there is no realistic prospect of removal. Mr Lumba had an outstanding appeal during his period in detention, which prevented removal indefinitely, but it did not, by itself, make his detention unlawful. However, in *Muqtaar*, the Court of Appeal confused the distinct questions of whether the Secretary of State is required to specify a particular date by which removal will have taken place and whether there should be a fixed or variable test for the prospect of removal. This has obfuscated the conflict between earlier authorities which rely on the sufficient prospects test and *Lumba*. Several other constitutions of the Court of Appeal have referred to the sufficient prospect test without consideration of the possible conflict with *Lumba*.[49]

The confusion at Court of Appeal level is reflected in the High Court, where it is common for judges to cite an authority for the sufficient prospect test which pre-dates *Lumba* immediately after citing *Lumba* itself.[50] This suggests that judges regard the sufficient prospect test as an elucidation of the approach required by *Lumba*. That is an error because the sufficient prospect test is fundamentally different to the realistic prospect test as it allows other factors, which have already been considered when assessing the reasonable period of detention,

42 *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804.
43 *R (Muqtaar) v Secretary of State for the Home Department* [2012] EWCA Civ 1270; [2013] 1 W.L.R. 649.
44 ibid [36].
45 ibid [36].
46 ibid [37] citing *R (MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112.
47 ibid [38].
48 ibid [41].
49 *R (Adbollahi) v Secretary of State for the Home Department* [2013] EWCA Civ 366 at [28], *BJ (Gambia) v Secretary of State for the Home Department* [2016] EWCA Civ 1035 at [35], *R (Z (Eritrea)) v Secretary of State for the Home Department* [2017] EWCA Civ 14 at [34], *R (Kajuga) v Secretary of State for the Home Department* [2017] EWCA Civ 240 at [50].
50 Recent examples include *R (AC (Algeria)) v Secretary of State for the Home Department* [2019] EWHC 188 (Admin), *R (Sheikh) v Secretary of State for the Home Department* [2019] EWHC 147 (Admin) and *R (Mohamed) v Secretary of State for the Home Department* [2018] EWHC 3547 (Admin).

to reduce or increase the burden on the Secretary of State when trying justify her estimate of when removal will take place.[51] This is not merely an academic issue; in many cases the detainee has previously committed a serious criminal offence, which may lead decision-makers to believe that a less than realistic prospect of removal is sufficient.

It should be noted that there are benefits to using the sufficient prospects test instead. It allows the court to require a greater likelihood of removal as the period of detention increases, thereby permitting detention in cases where the Secretary of State for the Home Department is taking effective steps towards enforcing removal (ie action which increases the likelihood of removal like obtaining a travel document) but not permitting detention where action taken towards enforcing removal has been fruitless. The sufficient prospects test may be preferable, so long as there is an explicit statement that a less than realistic prospect of removal will never be sufficient.

Regardless of the precise test used, the third *Hardial Singh* principle is a severe limitation on the power to detain. An exhaustive review of its application would require more space than is available here, but its potency can be illustrated by considering how it has been applied to the detention of detainees, who do not cooperate with the travel document process. Non-cooperation has been chosen because it is a factor which, at first glance, should favour the Secretary of State for the Home Department. It is not her fault that removal cannot be enforced in these cases, therefore it demonstrates how the third *Hardial Singh* principle has imposed a significant limitation on the power to detain. Of course, the third *Hardial Singh* principle also helps detainees who fully cooperate with the travel document process suffer prolonged detention because of delays in issuing a travel document by their country of origin.[52] Delays in issuing travel documents are a common feature of detention litigation and the Home Office publish a helpful spreadsheet detailing the process and likely timescale for each country.[53]

The law on non-cooperation was developed in the case of *Sino*, which was decided shortly after *Lumba*. The High Court held that there would be a breach of the third *Hardial Singh* principle if cooperation was necessary to deport the detainee and it became clear that the detainee would not cooperate.[54] The claimant was an Algerian man who had provided the Secretary of State with a series of aliases and false dates of birth. The court held that the Secretary of State should have been aware from the outset that he was not cooperating and could not be induced to cooperate by the threat of prosecution.[55] In *Kajuga*, the Court of Appeal adopted the same approach as *Sino*.[56] Additionally, in a recent case the Court of Appeal confirmed this approach but emphasised that careful consideration must be given to the possibility of overcoming non-cooperative behaviour before it renders detention unlawful.[57]

The 3rd *Hardial Singh* principle therefore requires the Secretary of State for the Home Department to release the detainee even when the only reason that removal cannot be achieved within a reasonable time is the detainee's refusal to cooperate.

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51 See the discussion above about the relevant factors used to define the 'reasonable period' identified in *Lumba*.

52 For example, see *R v Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704, in which the delay in enforcing deportation was a result of the failure of the Indian government to issue a travel document.

53 Home Office, "Country Returns Guide", February 2020. Available at: https://www.gov.uk/government/publications/country-returns-guide [accessed 23 June 2020].

54 *R (Sino) v Secretary of State for the Home Department* [2011] EWHC 2249 (Admin).

55 Ibid [199]. Section 35 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 made it an offence to fail to comply with a requirement to take an action requested by the Secretary of State to obtain a travel document.

56 *R (Kajuga) v Secretary of State for the Home Department* [2017] EWCA Civ 240 at [49].

57 *R (Antonio) v Secretary of State for the Home Department* [2017] EWCA Civ 48; [2017] 1 W.L.R. 3431 at [80].

Fourth Hardial Singh principle – delay

There is no decided case in which an on-going breach of the fourth *Hardial Singh* has led to the release of a detainee.[58] This is probably for two reasons. First, delay by the Secretary of State is a relevant consideration when determining the reasonable period of detention, so in a case of gross delay the court may order release on the basis that detention has become unreasonable or that there is no realistic prospect of removal before detention becomes unreasonable. Secondly, in practice the Secretary of State is likely to respond to a well-founded allegation of delay by taking action, which will resolve any on-going breach of the fourth *Hardial Singh* principle. Nonetheless, the 4th *Hardial Singh* principle is still important for identifying earlier periods of unlawful detention.

Only delay which is manifestly unreasonable will make detention unlawful. The Court of Appeal has said: 'To found a claim in damages for wrongful detention, it is not enough that, in retrospect, some part of the statutory process is shown to have taken longer than it should have done. There is a dividing-line between mere administrative failing and unreasonableness amounting to illegality.'[59] This statement of law has been used to justify detention prolonged by serious administrative failings; in the instant case the Secretary of State for the Home Department had failed to initiate proceedings to revoke the detainee's refugee status in order to make a deportation order against him and the court agreed that he should have taken action earlier, but found no unlawful detention.[60]

In a later case, the Court of Appeal held that there would be a breach of the fourth *Hardial Singh* principle when 'a significant proportion of the total period of detention is marked by an apparent absence of any administrative activity, and no explanation for that state of affairs is proffered'.[61] The court also stated that there was no requirement to account for each day or week and instead courts should look at everything in the round.[62] The Court of Appeal identified a twelve month period of detention in which no activity had taken place, but only eight months of that period was unlawful.[63]

In the absence of a clear statement about how the fourth *Hardial Singh* principle should be applied in *Lumba*, the Court of Appeal has directed judges at first instance to take a relatively relaxed approach to identifying when delay renders detention unreasonable and unlawful. This approach is incongruous with the rigorous approach used when applying the third *Hardial Singh* principle and, as will be explained in the next section, delay is the most common reason for the European Court of Human Rights finding a breach of art 5 ECHR against the UK.

Core elements of the Hardial Singh principles

The core elements of the *Hardial Singh* principles are, first, that the *Hardial Singh* principles are applied using full merits review rather than the familiar tests of rationality or proportionality. Secondly, detention can only be for a period which is reasonable in all the circumstances of the case, rather than what is reasonably necessary to enforce removal. Thirdly, the *Hardial Singh* principles go beyond protecting detainees from unreasonable detention by prohibiting

58 Graham Denholm and Rory Dunlop, *Detention under the Immigration Acts: Law and Practice* (Oxford 2015) Chapter 8.
59 *R (Krasniqi) v Secretary of State for the Home Department* [2011] EWCA Civ 1549 at [12] per Carnwath LJ.
60 ibid [14].
61 *R (Saleh) v Secretary of State for the Home Department* [2013] EWCA Civ 1378 at [60] per McFarlane LJ.
62 ibid [60].
63 ibid [66].

detention which is likely to be futile because removal will not be achieved before the reasonable period expires, even when the futility is caused by the detainee's refusal to cooperate. Finally, administrative delay by the Secretary of State must be manifest before it will make detention unlawful.

The *Hardial Singh* principles compared with art 5(1)(f) ECHR

This section identifies the requirements of art 5(1)(f) ECHR, analyses how the Strasbourg court has reviewed domestic judgments decided using the *Hardial Singh* principles and draws a comparison using the account of the *Hardial Singh* principles in the previous section.

Requirements of art 5 ECHR

Article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms states that no one shall be detained and then provides a series of exceptions to that rule. Sub-section (f) provides an exception for immigration detention:

> '(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'[64]

This provision has been understood as having two limbs; the first covers detention upon arrival and the second concerns detention pending deportation.[65] The explanation presented here focuses on the second limb.

Article 5 ECHR does not require the court to conduct a full merits review of administrative detention. The procedural requirements for challenging the lawfulness of detention are defined in art 5(1)(4): 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'[66] The ECtHR has interpreted this as requiring the possibility of review by a judicial body, but stated that it does not require the court to act as a primary decision-maker.[67] In the context of immigration detention, this was confirmed in *Chahal v United Kingdom*.[68]

The ECHR does not require that detention pending deportation be necessary and proportionate to effect deportation. The Strasbourg court has held that other types of administrative detention must be subject to a proportionality assessment: detention for non-compliance with a court order (art 5(1)(b) ECHR),[69] detention on remand (art 5(1)(c) ECHR),[70] detention of minors (art(1)(d) ECHR)[71] and detention of those of unsound mind (art 5(1)(e) ECHR).[72] Detention following conviction by a competent court (art 5(1)(a) ECHR) is not

64 Convention for the Protection of Human Rights and Fundamental Freedoms, art 5.
65 *Saadi v United Kingdom* (2008) 47 EHRR 17.
66 Convention for the Protection of Human Rights and Fundamental Freedoms, art 5.
67 *Winterwerp vNetherlands* (1979) 2 EHRR 387, *X v United Kingdom* (1981) 4 EHRR 188.
68 (1997) 23 EHRR 413 at [127].
69 *Gatt v Malta* (2014) 58 EHRR 32 at [40].
70 *Ladent v Poland* (App no 11036/03) at [55]–[56].
71 *D v Bulgaria* (App no 7472/14) at [74].
72 *Enhorn v Sweden* (2005) 41 EHRR 30 at [36].

subject to a proportionality assessment, but it concerns imprisonment pursuant to a court order rather than administrative detention. Therefore, detention pending deportation is the only type of administrative detention which is not subject to a proportionality assessment.

In *Chahal*, the European Court of Human Rights ruled that the only substantive requirement is that detention be with a view to deportation and not arbitrary.[73] The requirement against arbitrariness requires the domestic authorities to prosecute deportation proceedings with 'due diligence'[74]. The due diligence test is the main restriction on detention imposed by art 5(1)(f) ECHR. In *Chahal* the court held that a period of detention of six years did not breach art 5 ECHR because the delays in making decisions about the detainee's asylum and human rights claims were not excessive bearing in mind the applicant's interest in having them determined properly.[75] Six judges dissented in that decision, but *Chahal* remains an accurate statement of the requirements of art 5 ECHR and is still cited by the court.[76] The due diligence test permits detention so long as the state can demonstrate progress towards deportation, even if that progress is very slow.

Further elaboration of what is meant by non-arbitrary detention and acting with due diligence in this context was provided by the ECtHR in *A and Others v UK*.[77] The court stated:

> 'To avoid being branded as arbitrary, detention under Article 5 (1)(f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued'.[78]

This elaboration of the due diligence test only limits the length of detention to what is reasonably required to effect deportation or removal. It is a requirement that the state does not unreasonably delay in enforcing removal, rather than a limitation to what is reasonable in all the circumstances which could be breached even when the state has acted with due diligence. It is the same as Lord Phillips dissenting view of the *Hardial Singh* principles in *Lumba*.[79]

In *Mikolenko v Estonia*,[80] the Strasbourg court developed its interpretation of art 5(1)(f) ECHR further by ruling that the attempt at deportation must be feasible to justify detention. The court held that removal was not a realistic prospect because of the lack of a travel document, even though this was partly due to the non-cooperation of the applicant.[81] This ruling was re-stated in a subsequent case, but the court emphasised that it was for the domestic authorities to consider whether there was a realistic prospect of deportation and referred to the need for procedural safeguards to ensure they do so.[82] This suggests that the Strasbourg court will apply the margin of appreciation doctrine and defer to national authorities' view of the likelihood of deportation. Moreover, these cases concerned individuals who had been citizens of the Soviet Union and had failed to acquire nationality from any other state following its collapse, therefore

73 *Chahal v UK* (1997) 23 EHRR 413 at [112].
74 ibid [113].
75 ibid [117].
76 For example, in *VM v United Kingdom* (2017) 64 EHRR 7.
77 (2009) 49 EHRR 29.
78 ibid [164].
79 *Lumba* [2011] UKSC 12; [2012] 1 AC 245 at [283].
80 (App no 10664/05), Judgment of 8 October 2009.
81 ibid [68].
82 *Kim v Russia* (App no 44260/13) judgment of 17 July 2014.

the possibility of finding a country to accept them was very low from the outset regardless of any non-cooperation by the detainee.

The Strasbourg court has therefore interpreted art 5 ECHR as requiring that detention pending deportation avoid arbitrariness but has refrained from imposing a proportionality test or a requirement that detention must be only for a reasonable period.

Consideration of the Hardial Singh principles by the European Court of Human Rights

As noted above, the ECtHR regards the *Hardial Singh* principles as equivalent to and inspired by art 5 ECHR. In *JN v United Kingdom*, it was argued that the domestic system of judicial review of detention using the *Hardial Singh* principles was in breach of art 5 ECHR because there is no time limit to detention pending deportation and no automatic judicial review.[83] The court rejected the claim, ruling that art 5 ECHR does not require a time limit and even if there were a time limit it would not be sufficient to guarantee compliance with art 5 ECHR.[84] The court ruled that the use of a time limit was not the only way to meet the quality of law requirement imposed by art 5(1) ECHR.[85] The court came to the same conclusion on the issue of automatic judicial review.[86] Overall, the Strasbourg court found the *Hardial Singh* principles to be sufficient to safeguard against arbitrariness.[87] The UK Supreme Court reached the same conclusion when it was asked to consider time limits and automatic judicial review in a separate case.[88]

Emboldened by this success, in a recent case before the ECtHR the UK government argued that the *Hardial Singh* principles provide a higher level of protection for detainees than the non-arbitrariness requirement applied in Strasbourg. The court declined to engage with that submission beyond noting that in *JN v United Kingdom* it had found them to be almost identical, but in the following paragraph it lavished praise on the domestic court for applying the *Hardial Singh* principles in a particularly rigorous manner and therefore they 'afforded the applicant robust protection against arbitrary detention'.[89]

The only aspect of the *Hardial Singh* principles which has consistently caused trouble for the UK government in Strasbourg is the approach to delay under the fourth *Hardial Singh* principle. Since *Chahal v United Kingdom*, the need to demonstrate progress towards deportation or removal has been central to the lawfulness of detention under art 5(1)(f), although the Strasbourg court has taken a relaxed view of the time taken to make immigration decisions, particularly if they concern other rights protected by the ECHR. By contrast, under domestic law delay only renders detention unlawful if it goes beyond mere administrative failings be so unreasonable as to be unlawful.[90]

The European Court of Human Rights has differed from domestic courts on several occasions but has awarded much lower damages than would have been available under domestic law for a breach of the fourth *Hardial Singh* principle. In *JN v United Kingdom* it found an extra fifteen months of unlawful detention in addition to that identified by the domestic court, but

83 *JN v United Kingdom* (App no 37289/12) judgment of 19 May 2016 at [46].
84 ibid [83].
85 ibid [92].
86 ibid [96].
87 ibid [98].
88 *R (Nouazli) v Secretary of State for the Home Department* [2016] 1 WLR 1565 at [70]–[74].
89 *Ahmed v United Kingdom* (App no 59727/13) at [39]–[40].
90 See above in sub-section entitled *The fourth Hardial Singh principle – delay*.

awarded only 7,500 Euros compensation.[91] The Strasbourg court has taken a similar approach in other recent cases, finding a six month decision-making delay to be unlawful but only awarding 3,500 Euros.[92] In *SMM v United Kingdom*, the court found a seven month period to be unlawful because the Secretary of State should have been more diligent in chasing the applicant and his representatives for further evidence about his asylum claim, but then declined to award any compensation because the delay was the applicant's fault for not providing the evidence sooner.[93] These decisions suggest that the Strasbourg court is sensitive to the same considerations that have led domestic courts to circumscribe the scope of the fourth *Hardial Singh* principle, but has chosen to account for them at the remedial stage rather than when declaring the law.

The danger with Strasbourg's approach is that it may incentivise states to make immigration decisions with excessive haste to effect deportation and avoid being found to be in breach of art 5 ECHR due to delay, even though the court itself does not consider such breaches to be sufficiently serious to merit significant compensation. As the Strasbourg court itself identified in *Chahal*, the person with the greatest interest in ensuring that immigration decisions are correct is the detainee himself, particularly when it is alleged that removal would lead to the violation of a fundamental right.[94] The decision of the court in *SMM v UK* effectively penalised the UK government for accepting a detainee's request for extra time to obtain evidence for his asylum claim, rather than removing him immediately. Declarations of the law can have serious consequences and it might be better for the Strasbourg court to refrain from declaring detention to be in breach of art 5 ECHR in situations where there are good reasons for the delay, rather than recognising the force of those reasons at the remedial stage instead.

Nonetheless, the Strasbourg court's strict approach to finding unlawful detention because of delay caused by a lack of due diligence demonstrates a disparity between art 5 ECHR and the *Hardial Singh* principles. In all other respects the Strasbourg court has approved the *Hardial Singh* principles and considers them to be equivalent to its own jurisprudence on art 5 ECHR.

Differences between art 5 ECHR and the Hardial Singh principles

The ECHR provides a lower level of protection of the right to liberty to individuals who are detained pending deportation and removal than domestic law. The significant differences are clear from comparing the analysis of art 5 ECHR in this section with the analysis of the *Hardial Singh* principles in the preceding section: first, unlike domestic law, the ECHR does not require the reviewing national court to act as a primary decision-maker. Secondly, the requirement that detention is not arbitrary contains no reasonable time requirement, only that the time taken is reasonably necessary to effect deportation; the key issue is whether the domestic authorities have pursued deportation with due diligence. Finally, the requirement that there be a realistic prospect of removal is not related to any time period and therefore is only breached by extreme factual situations like statelessness, whereas in domestic law the requirement that there is a realistic prospect of removal within a reasonable period can be breached by common, temporary barriers to removal such as appeals and judicial review claims. The only exception is the Strasbourg court's approach to delay, which is stricter than the 4th *Hardial Singh* principle.

91 *JN* at [112].

92 *VM v United Kingdom* (App no 49734) at [99] and [110]. To put those amounts in context, the starting point for a domestic court considering the appropriate damages for unlawful detention is £500 for the first hour and £3,000 for the first day. See *Thompson v Commissioner of Police of The Metropolis* [1998] QB 498 per Lord Woolf MR at 515E.

93 *SMM v United Kingdom* (App no 77450/12) at [86] and [91].

94 *Chahal v UK* (1997) 23 EHRR.

It is difficult to understand why the ECtHR has not held that detention under art 5(1)(f) ECHR must be necessary and proportionate to effect deportation, as it has done for all other forms of administrative detention. In its initial decision interpreting the second limb of art 5(1)(f) ECHR, *Chahal v United Kingdom*, the European Court of Human Rights provided no reasons for deciding that proportionality should be not be applied. It did not cite any authority or explain why detention under art 5(1)(f) is different to the other types of administrative detention permitted by the same article. None of the later cases of the European Court of Human Rights provide any explanation for the distinction drawn between detention pending deportation and the other detention exceptions in art 5 ECHR regarding the application of proportionality. In the text of the Convention itself, there is no indication that detention pending deportation should be treated differently. The major textbooks note the difference, but do not provide an explanation for it.[95]

It is possible that the court was concerned about the political reaction if it had imposed a proportionality requirement. The political implications of adopting particular interpretations of the ECHR have been identified as an important factor in the development of the jurisprudence of the European Court of Human Rights.[96] In *Chahal*, the court had already ruled that art 3 ECHR is an absolute right and therefore the United Kingdom could not deport the applicant to India despite deportation being pursued on national security grounds.[97] By the time the court considered the case, the applicant had been detained for six years, and, during the final two and half years, the only barrier to removal had been his application to the Council of Europe Commission and its referral of his case to the court. The applicant had no convictions and the UK government had refused to provide evidence about the threat he posed to national security to either the domestic courts or the European Court of Human Rights. Therefore, if the court had imposed a proportionality test it would probably have had to identify a breach by the UK, even though a substantial portion of the period of detention had occurred as a result of delay caused by Council of Europe institutions. The political implications of simultaneously ordering the UK not to deport Mr Chahal, finding that he had been unlawfully detained and potentially ordering the UK to pay him compensation on that basis may have deterred the court from imposing a requirement that detention be proportionate.

The ECtHR missed an opportunity to resolve the application by Mr Chahal without adopting this restrictive interpretation of art 5(1)(f) ECHR. In the only domestic decision concerning the lawfulness of Mr Chahal's detention, the High Court failed to consider and apply the decision in *Ex parte Hardial Singh*.[98] Although by that point the *Hardial Singh* principles had yet to be re-formulated and approved by the appellate courts, they had been followed and applied in other first instance decisions.[99] Therefore, the court could have held that detention was not in accordance with national law and was thus in breach of art 5 ECHR without having to commit itself to a particular view on the substantive requirements for lawful detention under art 5(1)(f) ECHR. The law on art 5(1)(f) ECHR might be more consistent with the other exceptions to the right to liberty if the ECtHR had waited for a less political case.

95 Clare Ovey, Bernadette Rainey, Elizabeth Wicks, *Jacobs, White, and Overy: The European Convention on Human Rights* (OUP 2017) 264, David Harris, Michael O'Boyle, Ed Bates, Carla Buckley, *Harris, O.Boyle and Warbrick: Law of the European Convention on Human Rights* (OUP 2018) 308 and Alastair Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (OUP 2012), 294.

96 Ed Bates, *The Evolution of the European Convention on Human Rights* (OUP 2010).

97 *Chahal v UK* (1997) 23 EHRR 413 at [107].

98 *R v Secretary of State for the Home Department ex p Chahal* [1996] Imm AR 205.

99 Such as *In Re Mahmod* [1995] Imm. AR 311.

Relationship between the Hardial Singh Principles and the Human Rights Act 1998

The *Hardial Singh* principles provide a much higher standard of protection of the right to liberty than art 5 ECHR This section considers how the difference in the standard of protection relates to the requirement to take account of the decisions of the Strasbourg court in s 2 of the Human Rights Act 1998.The jurisprudence in both domestic law and under the ECHR on detention pending deportation and removal managed to mature without any major interaction with the other legal regime. From the domestic perspective this is unusual; even before the Human Rights Act 1998 came into force it was common for domestic courts to consider the view of the European Court of Human Rights when developing the common law and this interaction has increased tremendously since the Act came into force.

The lack of interaction is partially explained by the failure of the Divisional Court to consider or apply *Ex p Hardial Singh* when reviewing the detention of Mr Chahal, which meant that an early opportunity was lost for the European Court of Human Rights to consider the *Hardial Singh* principles in *Chahal v UK*.[100] On the only important occasion when a domestic court did consider art 5 ECHR, in *A (Somalia)*, the Court of Appeal mistakenly identified art 5 ECHR as requiring that the court act as a primary decision-maker.[101]

At first glance, the divergence between domestic law and the ECHR on how to review the legality of detention pending deportation and removal might be thought to breach the mirror principle, which is a shorthand description of how s 2 of the Human Rights Act 1998 has been interpreted. The Supreme Court has held that it will usually follow a clear and consistent line of authority from the European Court of Human Rights but it reserves its discretion to ignore anomalous Strasbourg decisions, both those that are clearly mistaken and those that misunderstand a point of domestic law.[102] The mirror principle is generally invoked when the court is considering a European Court of Human Rights decision which has adopted a more generous interpretation of a Convention right than domestic law, but it has also been said to preclude domestic courts from adopting an approach more generous than the Strasbourg court.[103]

The better view is that the mirror principle has no application in this context because the *Hardial Singh* principles are a development of the common law rather than a domestic interpretation of the ECHR. Section 2 of the Human Rights Act 1998 concerns the domestic interpretation of the ECHR; it is even labelled 'Interpretation of Convention rights'.[104] Lord Mance identified this distinction in *Kennedy v Charity Commission*, in which he stated that 'in some areas, the common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence (the protection of privacy being a notable example). And in time, of course, a synthesis may emerge.'[105] The *Hardial Singh* principles are an instance of the common law going further than the ECHR. Mark Elliot has identified *Kennedy* as part of a recent trend for the Supreme Court to decide cases by relying on common law fundamental rights rather than ECHR rights and the development of the *Hardial*

100 *R v Secretary of State for the Home Department ex p Chahal* [1996] Imm AR 205.
101 *R (A (Somalia)) v Secretary of State for the Home Department* [2007] EWCA Civ 804.
102 *Pinnock v Manchester City Council* [2011] 2 AC 104 at [48].
103 *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 at [90].
104 Human Rights Act 1998, s 2.
105 *Kennedy v Charity Commission* [2015] AC 455 at [46].

Singh principles could be understood as an early example of that trend.[106] The ECHR typically provides a higher standard of protection of fundamental rights than is available in domestic law, but the Human Rights Act 1998 does not prevent domestic law overtaking the ECHR, either through statute or further development of the common law. The Supreme Court has held that it would be a mistake for the legal analysis of an issue which falls within the ambit of an ECHR right to 'begin and end with the Strasbourg case law'.[107] This view reflects the purpose of the Human Rights Act 1998 to 'bring rights home' by providing for domestic enforcement of claims based on the ECHR, rather than to displace existing common law protection of fundamental rights.[108]

Moreover, the preservation of the *Hardial Singh* principles is also required by s 11 of the Human Rights Act 1998, which protects rights and freedoms pre-dating the Act. There is a distinction between the underlying value which justifies the principles and the principles themselves, so s11 would only protect the right to liberty. However, the content of the principles could be included within the underlying value by arguing that there is a common law right not to be detained unreasonably, in which case the *Hardial Singh* principles are protected by s 11.[109]

This view of the role of the Human Rights Act 1998 in domestic law is reinforced by considering the difference between the UK's legal obligations arising from Council of Europe membership and the obligations which arise from being a member of the European Union. Unlike membership of the European Union, neither membership of the Council of Europe nor direct incorporation of ECHR rights into domestic law amounts to accepting the competence of a different legal order on issues previously governed by domestic law. Other Council of Europe members have chosen to limit the power to detain pending deportation and administrative removal by imposing strict time limits.[110] Although the European Court of Human Rights does not consider time limits to be necessary for compliance with art 5 ECHR, it has not suggested that the use of strict time limitations infringes on the competence of the ECHR. The stricter standards required by the *Hardial Singh* principles are acceptable for the same reason.

Conclusion

The *Hardial Singh* principles are more generous to immigration detainees than art 5 ECHR. This is compatible with the Human Rights Act 1998 and the relationship between domestic law and Strasbourg jurisprudence that has developed since that Act came into force. The ECtHR has taken a disappointingly relaxed approach to protecting the right to liberty enjoyed by immigration detainees. Lawyers and academics should be conscious of this when assessing the performance of the court. My conclusion is also a helpful counter-example when seeking to rebut the claim that the development of human rights protection since the Human Rights Act 1998 has been entirely driven by the ECtHR. The *Hardial Singh* principles are a 'homegrown' body of law providing a high level of human rights protection.

106 Elliot, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68 Current Legal Problems 85–117.
107 *Osborn v Parole Board* [2014] 1 AC 1115 at [63].
108 *Rights Brought Home: The Human Rights Bill*, Command Paper No Cm 3782, 4.
109 The final section of this paper discusses whether the *Hardial Singh* principles can be derived from a right to not be unreasonably detained.
110 For example, all of the Council of Europe members who are also members of the European Union are bound by the Returns Directive (Directive 2008/115/EC), which imposes time limits on detention pending removal.

That is not to say that the *Hardial Singh* principles are beyond reproach. This article has identified that the fourth *Hardial Singh* principle could be applied more robustly, guidelines could be issued to help decision-makers be more consistent and there could be greater clarity about how the third *Hardial Singh* principle is applied. More fundamentally, there also needs to be further analysis of how the full merits review approach used when applying the *Hardial Singh* principles can be justified within the existing body of domestic administrative law.

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MS (Pakistan) v Secretary of State for the Home Department

[2020] UKSC 9

Facts

MS, a Pakistani national, had been subjected to forced labour and physical abuse by relatives in the four years before he arrived in the UK, on a visit visa, in 2011, at the age of 16. On arrival, he was forced to work for no pay, as arranged by his step-grandmother for her own financial gain. In 2012, the police referred him to his local authority, and his local authority referred him to the National Referral Mechanism ('NRM') due to concerns regarding his vulnerability and the possibility that he had been trafficked. The NRM is the mechanism by which victims of trafficking are officially identified in the UK.

In February 2013, the Home Office, acting as the competent authority in the NRM, decided, without meeting or interviewing MS, that there were no reasonable grounds to believe he was a victim of trafficking. MS sought judicial review of this decision in April 2013.

In August 2013, the asylum claim MS had made in September 2012 was refused and the Secretary of State decided to remove MS from the UK. This was appealed to the First-tier Tribunal ('FTT') which found that, though he had been under compulsion and control, MS's appeal should be dismissed.

The Upper Tribunal ('UT') re-made the decision in view of errors of law by the FTT, finding in favour of MS.[1] The UT found the NRM decision was not an immigration decision, and could only be challenged by judicial review proceedings, not through the statutory appeal. However, the UT also found that a negative trafficking decision could be reviewed and the Tribunal could make its own decision as to whether an appellant was a victim of trafficking if the NRM decision was perverse, in breach of the Secretary of State's guidance, or included other public law misdemeanours. The UT held MS was a victim of trafficking and the competent authority's decision to be perverse. As a victim, he was entitled to the protection of the European Convention Against Trafficking ('ECAT'), and the decision to remove him was not in accordance with the law and breached his rights under art 4 of the European Convention on Human Rights ('ECHR').

On appeal by the Secretary of State, the Court of Appeal held, in accordance with *AS (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1469, that the tribunal could only go behind the trafficking decision and re-determine the factual issues if the decision was perverse or irrational or one which was not open to it.[2] This meant the tribunal could consider only the evidence before the NRM competent authority at the time of its decision. The Court of Appeal found the UT had incorrectly treated the NRM decision as

1 *MS (Trafficking – Tribunal's Powers – Art. 4 ECHR) Pakistan* [2016] UKUT 00226 (IAC).

2 The Court of Appeal's decision (*The Secretary of State for the Home Department v MS (Pakistan)* [2018] EWCA Civ 594) was considered in issue 32(3) of this journal by Julian Bild, a solicitor at ATLEU who represented the appellant.

an immigration decision, and erred in treating obligations under ECAT as positive obligations under art 4 ECHR, contrary to *Secretary of State for the Home Department v Hoang Anh Minh* [2016] EWCA Civ 565.

After the Supreme Court gave permission to appeal, MS's immigration status was resolved by other means and he applied to withdraw his appeal. However, the Equality and Human Rights Commission ('EHRC') applied to intervene and wished to take over the appeal. Although the Rules of the Supreme Court do not expressly state that it may permit an intervener in effect to stand in the shoes of an appellant, as this was a procedural question not dealt with in the Rules, the Court may adopt a procedure consistent with the overriding objective. As *MS (Pakistan)* involved an 'important question of law, which may well have been wrongly decided by the Court of Appeal', the Supreme Court considered at [10] that the question should be decided even if one of the parties no longer wished to pursue it. The EHRC was therefore given permission to intervene, along with the AIRE Centre and ECPAT UK.

Held

Lady Hale gave a unanimous judgment covering the two substantive issues before the Supreme Court. First, to what extent a tribunal is bound by an NRM decision, that a person has or has not been trafficked when determining whether a removal decision breaches the person's human rights. Second, in what circumstances could removal from the UK give rise to a breach of art 4 ECHR, with reference to ECAT.

First issue

Before the hearing took place, the Secretary of State conceded that 'the tribunal is required to determine the relevant factual issues for itself on the basis of the evidence before it, albeit giving proper consideration and weight to any previous decision of the defendant authority'.[3] Lady Hale therefore noted at [11] that it was common ground that 'the tribunal is in no way bound by the decision reached under the NRM, nor does it have to look for public law reasons why that decision was flawed'. The Supreme Court held at [15] that the 'proper consideration and weight' owed to a decision of the competent authority would depend on the 'nature of the previous decision in question and its relevance to the issue before the tribunal'.

This was for the following reasons, relating to the tribunal's function. First, the tribunal does not have jurisdiction to judicially review the competent authority's decisions under the NRM. Second, the tribunal is to hear evidence and make factual findings on matters in dispute in an appeal. Third, the role of the tribunal in appeals is not to review the decision of another decision-maker but to actually decide for itself whether the impugned decision is lawful. This requires it to establish for itself the relevant facts. The Supreme Court at [14] quoted approvingly the UT decision in this case at [46]: 'The decisions of the Authority were the product of a paper exercise, entailing no live evidence. In contrast, we have the distinct advantage of having heard the appellant's *viva voce* evidence and, further, we have received evidence not available to the Authority'. In other words, the tribunal is better placed than the Competent Authority.

3 *MS (Pakistan)* at [11].

Second issue

The basic proposition is that ECAT has not been incorporated into UK law, although some of its obligations have been implemented by a variety of measures. The NRM is itself designed to fulfil several ECAT obligations. The only remedy against a negative NRM decision is to request a reconsideration or judicial review. The Supreme Court at [20] made clear that the Secretary of State has consistently accepted that the NRM should comply with ECAT.

The Secretary of State argued that ECAT was only relevant to art 4 ECHR in defining human trafficking. It did not affect the state's ECHR obligations in relation to trafficking properly defined.

However, for a victim of trafficking, it would be of greater assistance if a failure to observe the requirements of ECAT was a violation of art 4 ECHR such that removal would be unlawful under s 6 of the Human Rights Act 1998. It could then be raised on appeal, pursuant to s 84(1)(c) of the Nationality, Immigration and Asylum Act 2002.[4] The thrust of the EHRC's intervention was thus to bolster the requirements in art 4 ECHR.

Lady Hale at [22]–[33] undertook a detailed treatment of the decisions of the European Court of Human Rights on art 4 ECHR, before reaching two main findings on whether MS's removal would breach the positive obligations in art 4. While there was potential for operational protective duties under art 4 ECHR to be engaged, on the facts of this case, once MS had come to the attention of the police, he was removed from the risk of further exploitation and the UT decided he would not be at further risk if returned to Pakistan. However, there had been no effective investigation of the breach of art 4 (ie the fact of his being trafficked). The police took no further action after passing him on to the social services department. The authorities are under a positive obligation to rectify that failure, which cannot happen if MS is removed.

As a result, the appeal was allowed and the decision of the UT was restored on this ground.

Comment

The circumstances surrounding the determination of this case are rather unusual: the Secretary of State conceded before the Supreme Court that the Court of Appeal's decision, relying on submissions made to it by the Secretary of State, could not be defended. This is not the first time the Secretary of State has done so: in *R (Hysaj) v Secretary of State for the Home Department* [2017] UKSC 82 an appeal was similarly conceded. It is regrettable that these matters are not conceded at an earlier opportunity, avoiding a great loss of time, money and energy for those involved (including the public). In this particular case, that loss of time could very well have had drastic consequences for other victims of trafficking who may have been adversely affected by a negative NRM decision and who may not have been able to dispute it in the tribunal following the decision of the Court of Appeal in *MS (Pakistan)*.

Until this judgment was handed down, representatives agonised over whether their clients should be referred to the NRM, the risk being that a negative decision could lead to a cascade of further negative decisions. This case now makes clear that a negative NRM decision is not fatal and can be effectively overturned in the tribunal, although the tribunal must still give the

4 The appeal in this case commenced before the restriction of grounds of appeal as from 20 October 2014. As a result, the UT had also found because it followed on from a flawed NRM decision, the removal decision was 'not in accordance with the law'. The Supreme Court decided it was unnecessary to consider this issue in light of its decision on the art 4 ECHR point given this will affect only a small number of cases.

NRM decision 'proper consideration and weight'. The exact parameters of this direction will inevitably be the subject of further judicial treatment in future cases given its ambiguity.

The Supreme Court decided not to provide general judicial guidance over the relationship between art 4 ECHR and ECAT. Lady Hale stated at [27] that it was 'not necessary for us to decide whether all the obligations in ECAT are incorporated into the state's positive obligations under art 4 in order to decide this appeal'. However, this means that their relationship remains to be decided on a case by case basis. A number of authorities of lower courts have resisted the suggestion that a failure to meet the obligations in ECAT *necessarily* leads to a breach of art 4 ECHR.[5] This is not to say, however, that there is not some cross-over: as the Supreme Court explained at [20], *PK (Ghana) v Secretary of State for the Home Department* [2018] EWCA Civ 98 establishes that 'it would be a justiciable error of law if the NRM Guidance did not accurately reflect the requirements of ECAT and a decision based on that error would accordingly be unlawful'.

Lady Hale's analysis of the Strasbourg jurisprudence will no doubt feature prominently in future litigation, for it judiciously avoids reaching any firm conclusions on this issue. However, arguably the following general points can be discerned:

- It is beyond doubt that ECAT informs the ambit of art 4 ECHR in respect of its definition of trafficking: *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1.
- Article 4 ECHR entails positive obligations to (a) put in place a legislative and administrative framework not only to punish traffickers but also to prevent trafficking and protect the victims; (b) take operational measures to protect an individual where the authorities are aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an individual had been or was at real and immediate risk of being trafficked or exploited; and (c) to investigate situations of potential trafficking (the procedural obligation). While these positive obligations are formulated by the Strasbourg court by reference to its jurisprudence on arts 2 and 3 ECHR, the Strasbourg court also made clear the extent of these obligations must be informed by the broader context which included ECAT (*Rantsev* at [285]). What is left in doubt by Lady Hale's judgment, and in particular by her acceptance at [27] of the Secretary of State's contention that 'the general structure of those obligations was modelled on the general structure of the state's obligations under articles 2 and 3', is the extent to which ECAT can meaningfully enlarge the content of the art 4 duties. Her remark at [31] that the jurisprudence moves towards a position more closely aligned to ECAT should, however, dispel any suggestion that the positive obligations may not be informed by ECAT at all.
- The failure to provide a 'recovery and reflection period' in contravention of the obligation in art 13 ECAT was explicitly linked to a breach of the procedural obligation to conduct an effective investigation into the situation of human trafficking and forced labour (*Chowdury v Greece* (App No 2184/15) Judgment of 30 March 2017 at [122]).[6]

5 See, in particular, *R (TDT) v Secretary of State for the Home Department* [2018] EWCA Civ 1395 at [31] and also *Secretary of State for the Home Department v Hoang (Anh Minh)* [2016] EWCA Civ 565, relied on by the Secretary of State in *MS (Pakistan)*.

6 Lady Hale curiously does not highlight that the Strasbourg court also, at [126], appeared to find a violation of art 15 ECAT in relation to providing compensation to victims, which appeared to inform its finding at [127] that there had been a further violation of the procedural obligation. This finding has been contentious in the domestic courts: *R (A and B) v Criminal Injuries Compensation Authority & the Lord Chancellor* [2018] EWCA Civ 1534, citing with approval *R (Tirkey) v Director of Legal Aid Casework and Anor* [2017] EWHC 3403 (Admin), rejected the notion that *Chowdury* established that art 4 ECHR gave victims of trafficking the right to compensation.

As a result of Brexit, it is highly likely that victims of trafficking will rely on ECAT to an even greater extent. The European Union (Withdrawal) Act 2018 ('Withdrawal Act'), s 4(2)(b) limits the extent to which the EU Anti-trafficking Directive 2011/36/EC can be relied on directly in the UK only to those rights, powers, liabilities, obligations, restrictions, remedies or procedures arising under the Directive so far as they are of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before the end of the transition period, whether or not as an essential part of the decision in the case. ILPA and others are concerned that paragraph 6 of Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Bill could be read so as to effectively disapply even those aspects of the Anti-trafficking Directive which are retained by section 4 of the Withdrawal Act. The role of the ECAT and its incorporation through art 4 ECHR will therefore take on increasing importance.

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R (on the application of DN (Rwanda)) v Secretary of State for the Home Department

[2020] UKSC 7

Facts

DN was a refugee who had been sentenced to 18 months' imprisonment for several offences, the most serious of which involved helping his niece enter the UK to seek asylum. As a result of his convictions, DN was found to have lost his protection against *refoulement* under art 33(2) of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention), which applies where a refugee has 'been convicted by a final judgment of a particularly serious crime [and] constitutes a danger to the community.'

The operation of art 33(2) in UK law is governed by s 72 of the Nationality, Immigration and Asylum Act 2002, which provides that people convicted of specified crimes are presumed to fall within its terms. At the relevant time, these crimes were set out in the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 (the 2004 Order). The list was a long one, and included facilitating a breach of immigration law by a non-EU citizen – the offence of which DN was convicted. Had it not been for the 2004 Order, it is very unlikely that this would have been considered a 'particularly serious crime' or that DN would have been seen as a 'danger to the community'.

Because DN was no longer protected against *refoulement*, the Secretary of State for the Home Department (the Secretary of State) decided to make a deportation order against him. This in turn gave her the power to detain DN pending deportation – a power she exercised in July 2007.[1] Again, neither the decision to deport nor the decision to detain would have been made without the 2004 Order.

1 Under para 2 of Sch 3 to the Immigration Act 1971.

DN appealed his deportation to the Asylum and Immigration Tribunal, which upheld the Secretary of State's decision. At the time, he did not challenge the lawfulness of the 2004 Order. He remained in detention for 242 days before being released on bail.

Nearly a year and a half later, however, the Court of Appeal held in *EN (Serbia) v Secretary of State for the Home Department; Secretary of State for the Home Department v KC (South Africa)*[2] that the 2004 Order was *ultra vires*. The Court concluded that it specified a number of offences which were *not* 'particularly serious crimes', rendering it incompatible with the UK's obligations under the Refugee Convention. The decision raised the question of whether DN's detention had been unlawful. The answer depended primarily on whether and to what extent the Supreme Court's judgment in *R (Lumba) v Secretary of State for the Home Department*[3] applies to a case in which a decision to detain flows from a *sequence* of acts or decisions by the Secretary of State, the first of which is later identified as unlawful. The test most frequently extracted from *Lumba* – drawn from the judgment of Lord Dyson – is whether the identified public law error 'bore on and was relevant to' the decision to detain.

In *R (Draga) v Secretary of State for the Home Department*,[4] the Court of Appeal had considered this issue in the context of a case very similar to DN's. The Court had concluded that, although 'as a matter of first impression' it was 'obvious' that the error in the 2004 Order bore on and was relevant to a subsequent decision to detain pending deportation, this conclusion was effectively displaced by the statutory scheme for determining appeals against deportation. The Court considered that, to avoid 'frustrating' the purpose of that scheme and to preserve finality in litigation, it was necessary to treat the outcome of the appeal process as decisive of the lawfulness of the decision to deport including in the context of any subsequent challenge to detention.[5]

In February 2018, the Court of Appeal dismissed DN's appeal on the basis that it was bound by *Draga*.

Against this background, the issue for the Supreme Court was whether *Draga* had been wrongly decided, and hence whether DN could pursue his claim for false imprisonment.

Held

The Supreme Court found unanimously in favour of DN. The leading judgment was given by Lord Kerr, with whom Lord Wilson, Lady Black and Lord Kitchin agreed. Lord Carnwath gave a concurring judgment.

Lord Kerr reasoned that Lord Dyson's remarks in *Lumba* (as set out above) needed to be read in light of his 'more important' observation that there is *no difference* between detention which is unlawful because there is no statutory power to detain, and detention which is unlawful because the decision to effect it was made in breach of a rule of public law.[6] DN's detention fell into the former category: he could be detained only pending deportation, and the 2004 Order which was the statutory basis for the decision to deport him had been found to be invalid. His detention was therefore 'inevitably "tainted"' by public law error.[7]

Lord Kerr noted that, although these general principles could be displaced by a 'specific rule of law', no such rule existed in this case.[8] The goal of preserving finality in litigation was

2 [2009] EWCA Civ 630; [2010] QB 633.
3 [2011] UKSC 12; [2012] 1 AC 245.
4 [2012] EWCA Civ 842.
5 *Draga* at [57]–[58].
6 *DN (Rwanda)* at [17].
7 ibid [18].
8 ibid [19].

not enough to extinguish a 'clear legal right' to pursue a claim for false imprisonment.[9] Nor did the refusal of DN's appeal against deportation serve (as the Secretary of State had submitted) as a 'break in the chain of causation' leading from the error in the 2004 Order to the decision to detain: rather, the connection between deportation and detention was such that a successful challenge to the former meant 'the edifice on which the detention is founded crumbles'.[10] In consequence, the Court held that *Draga* was wrongly decided.[11]

Lord Carnwath, while largely agreeing with the plurality, devoted considerable attention to the potential relevance of the principles of *res judicata* and issue estoppel. His Lordship's view was that, contrary to both parties' submissions, those principles were applicable in public law proceedings – meaning the Secretary of State could answer DN's claim for false imprisonment by arguing that the lawfulness of the 2004 Order could and should have been raised in the context of his appeal against deportation. However, both Lord Carnwath and Lord Kerr noted that this argument had not been made before them and so did not fall for determination.

Comment

The Supreme Court's judgment provides welcome confirmation of the scope and continued relevance of the principles articulated in *Lumba*. Before *DN (Rwanda)*, these had been applied in a number of cases involving sequential decisions by the Secretary of State – indeed, arguably *Lumba* itself was such a case[12] – meaning that any exclusion or limitation on this basis would effectively have diluted the protections afforded to detainees. Equally welcome is the Court's clarification of the narrow circumstances in which these principles can be displaced. This is a conclusion amply warranted by the importance of the constitutional protection against unlawful detention.

The judgment in *DN (Rwanda)* will inevitably affect the outcome of many future cases, as sequential decision-making is common in the detention context. To take just a few examples, a decision to detain may be based on the application of a Home Office policy; a prior decision that a person is not a victim of human trafficking; or a refusal to accept further representations as a fresh claim – any of which may subsequently prove to have been unlawful. In all such cases, it is now clear that a claim for false imprisonment is likely to be available.

Perhaps the most significant residual uncertainty is the extent to which defendants in public law proceedings will seek to expand their reliance on *res judicata* or issue estoppel by reference to Lord Carnwath's judgment. If and when they do, it will be important to consider the note of caution sounded by Lord Kerr: namely, that the area is 'distinctly … not free from controversy' and is 'one where much further diligent thought may be needed'.[13]

Eleanor Mitchell
Matrix Chambers

9 ibid [20].
10 ibid [19].
11 ibid [21]. For similar reasons, the Court also considered that the much earlier case of *Ullah v Secretary of State for the Home Department* [1995] Imm AR 166 had been wrongly decided.
12 As it involved (i) the adoption of an unlawful policy, and (ii) the decision to detain the appellant in accordance with that policy.
13 *DN (Rwanda)* at [27].

AM (Zimbabwe) v Secretary of State for the Home Department

[2020] UKSC 17

Facts

The appellant, AM, is a citizen of Zimbabwe. He joined his mother in the United Kingdom in 2000, at the age of 13. He and his mother were granted indefinite leave to remain four years later, in 2004.

On 18 May 2009, AM was convicted of possession of a firearm and supply of heroin. He was sentenced to nine years' imprisonment. AM was notified that he was liable to automatic deportation.

As his sentence was for more than four years, the public interest required his deportation unless there were very compelling circumstances. AM made submissions on the family life he had with his British partner and son, but he also drew the Secretary of State's attention the fact that he was HIV positive and that his condition was controlled by an anti-retroviral ('ART') treatment, Eviplera. AM was placed on Eviplera in 2012, after other ART drugs produced intolerable side-effects. As a result of Eviplera, AM's CD4 blood count had increased and his HIV viral load was undetectable. Although other ARTs were available in Zimbabwe, Eviplera was not. Without his ART, in Zimbabwe, AM's CD4 blood count would fall again, and he would be prey to opportunistic infections which, if untreated, would lead to his death.

Initially, submissions were only made to the Secretary of State, First-tier Tribunal and Upper Tribunal pursuant to art 8 of the ECHR, as AM's ill-health did not engage art 3 of the ECHR per the settled domestic case law in *N v Secretary of State for the Home Department* ('*N*').[1] The threshold set out in *N* at [50] (endorsed by the Grand Chamber of the European Court of Human Rights in *N v UK*),[2] was that 'it would need to be shown that the applicant's medical condition had reached such a critical stage that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services which he would need to prevent acute suffering while he is dying'. It would then be inhuman treatment to deprive him of care, and send him to an early death, where he could not 'meet that fate with dignity' [69]. The exceptional situation permitting stay on art 3 medical grounds was 'confined to deathbed cases'[3] and focused on a patient's present medical condition.

After the Upper Tribunal found no error of law in the dismissal of AM's appeal by the First-tier Tribunal, the Grand Chamber of the European Court of Human Rights gave judgment in *Paposhvili v Belgium*[4] where it was suggested that the stringent test in *N* had been broadened. On this basis, AM appealed to the Court of Appeal on the basis of his ill-health pursuant to art 3. Permission was granted, but his appeal was dismissed.[5] The Court of Appeal considered *Paposhvili* to be only a 'very modest' extension to *N*.

AM appealed to the Supreme Court, on the basis that the approach set out in *N* is in conflict with *Paposhvili*.

1 [2005] UKHL 31, [2005] 2 AC 296.
2 [2008] ECHR 453.
3 *GS (India) & Ors v Secretary of State for the Home Department* [2015] EWCA Civ 40, [2015] 1 WLR 3312 at [66].
4 [2016] ECHR 1113.
5 *AM (Zimbabwe) & Anor v The Secretary of State for the Home Department* [2018] EWCA Civ 64.

Held

The Supreme Court unanimously allowed the appeal. It departed from the high threshold in *N* and endorsed the approach at [183] of *Paposhvili*, where art 3 extends to situations:

> 'involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy'.

It is clear that irreversible decline in health resulting in intense suffering is a separate and distinct criterion to significant reduction in life expectancy.

Further, the Supreme Court at [30] in *AM (Zimbabwe)* held that the phrase 'significant reduction in life expectancy' should not be interpreted as 'death within a short time'. The Court held that 'significant' must be read as 'substantial' to obtain the severity of what art 3 requires. In short if a person who was 74 years old, had their life reduced by to two years, it might not be significant. However, if a person aged 24 with an expectancy of normal life was reduced to two years, 'the reduction might well be significant'.[6]

Comment

This is a remarkable judgment; it changes the very stringent test outlined in *N* and it also provides guidance on the conditions to satisfy ill-health under art 3, bringing *Paposhvili* into domestic law. The Supreme Court at [32] noted that the Grand Chamber may shed further light on the requirements when giving judgment in the case of *Savran v Denmark*.[7]

This new expanded test notably lowers the threshold on which a person can succeed in a claim based on ill-health, pursuant art 3 of the ECHR. It further suggests that there can be various ways in which a claim for ill-health can succeed.

Detailed instructions are imperative because there are now multiple possibilities to satisfy a claim for ill-health under art 3. Previous claims should be reviewed. For example, the appellants in *GS (India)*[8] may have a different outcome on the basis of the Supreme Court's two-stage test set out in *AM (Zimbabwe)*.

To make such a claim, the first stage is to make a prima facie case by adducing evidence, on the balance of probabilities, 'capable of demonstrating that there are substantial grounds for believing' that art 3 would be violated. The evidence should demonstrate 'substantial' grounds for believing that it is a 'very exceptional' case because of a 'real' risk of subjection to 'inhuman' treatment.[9] If the applicant can adduce evidence to this standard, 'about his or her medical condition, current treatment (including the likely suitability of any other treatment), and the effect on him or her of the inability to access treatment',[10] the claim moves to the second stage.

6 ibid [31].
7 The Fourth Section of the ECtHR gave its decision in *Savran v Denmark* [2019] ECHR 65 on 1 October 2019. The Grand Chamber accepted a request by Denmark for referral in that case on 27 January 2020.
8 *GS (India & Ors v Secretary of State for the Home Department* [2015] EWCA Civ 40, [2015] 1 WLR 3312.
9 *AM (Zimbabwe)* at [32].
10 ibid [33].

The second stage is for the Secretary of State, who is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state, to dispel any serious doubts raised by an applicant's evidence, as detailed at [189]–[191] in *Paposhvili*, and by the Supreme Court at [23(b)–(e)] in *AM (Zimbabwe)*.

The correct test had never been applied to AM, and his medical evidence was out of date and directed to art 8 rather than art 3. In light of this, the appeal was remitted to the Upper Tribunal for up-to-date evidence properly directed to the 'new' substantive and procedural requirements.

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The Windrush Betrayal: Exposing the Hostile Environment
Amelia Gentleman
London: Faber, 2019
ISBN 9781783351848
336 pp
£18.99 (hb)

Windrush Lessons Learned Review
Wendy Williams
HC 30, March 2020
ISBN 9781528617796
https://www.gov.uk/government/publications/windrush-lessons-learned-review

Everyone now knows that many 'Windrush generation' people were denied health treatment, became impoverished, were placed in immigration detention and deported, with many more being refused re-entry to the UK following a trip abroad. Theresa May's infamous 'hostile environment' measures, designed to drive irregular migrants to 'go home', also caught long-resident citizens and migrants who had never before needed to 'prove' their status. When those affected attempted to get the Home Office to understand their position, they were faced with impossible demands for original documents proving their residence for each year of forty or fifty years of residence in the UK.

Immigration lawyers and others will have closely followed *Guardian* journalist Amelia Gentleman's persistent pursuit of the Home Office for over two years to get to the bottom of the 'Windrush' debacle and bring it to public attention. She is to be congratulated for the best kind of public interest reporting, combining evident passion with a clear presentation of the complex legal position in which the 'Windrush generation' found themselves. Her book *The Windrush Betrayal* provides a readable and even exciting account of how the story unfolded from concerns about a small number of individuals who seemed to have fallen into some legal black hole, to an understanding that the fate of those individuals and many others was an entirely foreseeable result of specific aspects of UK immigration law and policy. In the *Windrush Lessons Learned Review*, published just prior to the coronavirus lockdown, Wendy Williams presents a cogent, comprehensive and no-holds-barred criticism of how 1960's race-based immigration laws were transformed over years of intense political pressure into a tottering, labyrinthine structure so complex that the Home Office itself was incapable of understanding the effects of its own legislation.

Although some will be familiar with the law and the political background, I will summarise it briefly for a wider readership. Until the British Nationality Act 1948 the broad rule (with some exceptions) held that those born anywhere in the British Empire had the status, and all the rights, of a 'British subject'. Those rights included entering and remaining in the UK. Broadly, the 1948 Act designated people born in the UK and Colonies as Citizens of the UK and Colonies (CUKCs). Both CUKCs and citizens of Commonwealth countries which had by that time already become independent were designated 'Commonwealth citizens'. All retained the status of 'British subject'. The terms Commonwealth citizens and British subject were synonymous. As the remaining colonies of the Empire gained independence, most of their residents became nationals of their newly independent states, most of which remained part of the Commonwealth. Both CUKCs from the colonies and citizens of independent Commonwealth countries

could enter the UK freely. However, once black and Asian people began arriving in significant numbers, restrictions were demanded. As the government saw it, the task was to exclude as many of those as possible, but using a measure ostensibly not based on race. The Commonwealth Immigrants Act 1962 required citizens of independent Commonwealth countries to obtain labour vouchers, whose requirements were calibrated precisely to limit immigration from the so-called 'new' Commonwealth while favouring people from the old white 'Dominions'. Then the infamous Commonwealth Immigrants Act 1968 was passed in a few days to prevent the entry of those 'East African Asians' targeted by the 'Africanisation' policies of the Kenyan government, but who had kept their CUKC status. This Act again used an ostensibly non-racist algorithm to achieve a racist result, excluding those whose passports were not issued in London, and who did not have a parent or grandparent born in the UK. This effectively withdrew the rights attached to their citizenship and confined thousands to living in penury in east Africa and elsewhere for years, until they could obtain a voucher to enter the UK. And finally, the Immigration Act 1971 described those with a British-born parent or grandparent by an invented word 'patrial', and the rules made thereunder began to impose restrictions on further 'primary immigration'. This measure treated most citizens of independent Commonwealth countries on a par with 'aliens', restricting entry to only those who met the immigration rules then in force.

By 1971, significant numbers of CUKCs and citizens of independent Commonwealth countries had arrived in the UK to work and settle, joined by their families. Having been *entitled* to enter, they were not required to possess or retain any evidence of this once they had arrived. For citizens of independent Commonwealth countries, the Immigration Act 1971 deemed those already in the UK at the time of the commencement of the Act to be 'settled': and the British Nationality Act (BNA) 1981 provided a simple and cheap process for those citizens of independent Commonwealth countries who were 'settled' to register as British citizens, a process which remained open for 5 years after the commencement of that Act. But many who had arrived before BNA 1948 with British passports showing them as British subjects, or after the Act with passports showing them as CUKCs, did not retain their documents showing this – many had arrived as children on a parent's passport. Similarly, many citizens of independent Commonwealth countries who had been deemed 'settled' by the Immigration Act 1971 had not taken the further step of registering as British citizens under the BNA 1981.

So it was that the increasingly hostile immigration policies of successive governments, from the Thatcher-Major Tories through the Blair-Brown Labour years, gradually created a situation where people without specific documents to prove their legal status in the UK found it difficult to get work, access social assistance, use the NHS, go to university, or protect themselves from deportation. These difficulties emerged slowly at first. Under Thatcher, 'migrants' were denied access to welfare benefits and social housing, and practitioners began to meet the occasional elderly West Indian client receiving a state pension but refused social housing as 'not eligible'. Generally, common sense led to favourable decisions without the need for legal action.

In 2008, the Labour government introduced measures to prevent 'illegal working', but again common sense was applied and relatively few long-resident (former) CUKCs and citizens of independent Commonwealth countries faced difficulties. The difficulties began in earnest with the introduction of strict requirements on employers to see and check specific documents before employing 'a migrant'. From 1 December 2012, all non-EU nationals and non-British citizens applying for further

leave to remain were required to obtain a biometric residence permit (BRP) showing immigration status, and by 2015 all non-EU and non-British nationals were required to possess a BRP. For thousands of people this was inconvenient and even insulting. For example it required US and Australian academics who had worked at the same UK university for 30 years to apply for a BRP and face being suspended from work until they obtained it even though their status was already stamped in an old passport which had been long ago seen by their HR department. For many thousands more, this requirement was catastrophic. Gentleman eloquently describes a descent into destitution. At first in small numbers, middle-aged and older people from the Caribbean who had arrived as citizens and lived in the UK since childhood found themselves dismissed from jobs they had worked in for decades, and found themselves unable to access any social benefits or services once they were out of work.

In describing this process as if from the point of view of the first few people coming to her attention, Gentleman's book has great narrative force. We read first about Paulette Wilson, Anthony Bryan, 'Albert Thomas' and others whose plights she had reported on in *The Guardian*. These accounts are followed by Gentleman's increasing suspicion that these could not be isolated cases, and we experience her increasing curiosity about what laws or policies could be behind them. Thus, even for experienced practitioners, her accounts of Home Office incompetence, unwillingness to listen, and repetitions of clichés such as 'We value the contribution of our Commonwealth citizens …' read freshly, as for her they are new discoveries. The book reaches a conscious climax when in April 2018 Prime Minister Theresa May refused to meet Commonwealth leaders to discuss the issue, and readers will be fascinated to read Gentleman's accounts of her discussions with soon-to-be ex Home Secretary Amber Rudd, and soon-to-be moved-on Hugh Ind of the Home Office.

As we know, there is no happy ending. Later in the book, Gentleman recounts her attempts to find some of the people who were deported to Jamaica, and her discovery of the larger numbers of people not deported but who had simply not been allowed to return to the UK after a long-awaited visit to Jamaica. She also closely analyses the 'apologies' given by Ministers and Home Office and High Commission officials and the lack of any political energy behind the task of providing restitution. They are not really sorry, she concludes, and do not have any real commitment to restore the 'victims' back to their original legal entitlements. Of course, we know this now, as at the time of writing the Windrush compensation scheme has dealt with very few cases, and paid out very little, and Gentleman reports in *The Guardian* on 10 March 2020[1] on those still homeless and destitute two years after the 'debacle' first became generally understood.

Importantly, Gentleman does not confine her presentation of causes to the recent and specific 'hostile environment' measures introduced by Theresa May in 2014 and 2016 but shows how the Windrush debacle has its roots in the decades-old immigration and nationality measures whose form and content was permeated by racial thinking. She shows also how the subsequent introduction of internal controls was bound eventually to have an impact on second- and third-generation family members of those who arrived in the UK in the 1950's and 1960's, who acted just like those born in the UK at the time, in not seeing the need to retain or obtain documents to 'prove' their right to be in Britain. In a country where a British citizen does not need to possess a passport or indeed any form of formal ID, that is hardly surprising. Gentleman points out that EU nationals currently resident

1 https://www.theguardian.com/uk-news/2020/mar/10/it-felt-like-intentional-torture-the-windrush-victims-who-are-still-homeless-two-years-on.

in the UK by right may well face similar problems in the future.

Wendy Williams' report entirely supports and develops this broader analysis. She makes it clear that the Windrush debacle arose from 'successive rounds of legislation and policy' since the 1960s which '*effectively set traps*' for them. Those people had come to the UK in the 1940s and 1950s to work. They had been invited in large numbers and were recruited by the NHS, London Transport and many private employers to meet the devastating post-war shortage of workers. Williams is frank about the racial basis for the restrictive immigration legislation of the 1960s. Although all those people were and remained entitled to remain in the UK without any formalities, the Home Office held no 'institutional memory' of those people's rights, and thus was incapable *as an organisation* of recognising or dealing with any risks to them, even when warning signs appeared. She also concludes that the introduction and administration of increasingly restrictive internal immigration controls from the 1980's, through the Thatcher, Blair and Coalition governments to the present Conservative administration, showed several elements of 'institutional racism' as identified by the Macpherson report following the murder of Stephen Lawrence.

Williams refers to the 'politically contentious' nature of immigration, forcing the Home Office under great ministerial pressure to introduce new legislation at speed, and implement policy 'relentlessly without proper consideration of the impact of the proposals'. She quotes Amber Rudd, Home Secretary at the time the scandal broke: 'she could not understand why people would make a decision to treat people the way they had, knowing they'd been here 30 or 40 years'.

Williams strongly criticises Home Office culture from the top down, as defensive, internally focused, and supremely reluctant to listen to any sort of criticism, whether from migrants' representatives, stakeholders, or adverse legal decisions. A large part of the report, and a number of the recommendations, are thus directed at how the Home Office considers, makes and evaluates policy at the highest level. She tries to separate this analysis from any critique of substantive immigration policy (which, as she notes, is decided by Parliament), but it is hard to see how the significant management and policymaking changes she recommends could take place without some relaxation of the political pressure facing the department ie some protection from the 'fear of the tabloids'.

Williams gives significant space to examining how the Home Office has not taken seriously any obligations under the Public Sector Equality Duty, the Equality Act or the Human Rights Act, to ensure that its policy and implementation do not indirectly discriminate against black and ethnic minority individuals affected by immigration control. Clearly, and she accepts this, the fact of immigration control itself directly discriminates between people of different nationalities, and indirectly discriminates principally against non-white people. However, she suggests that if the Home Office directed its internal 'inclusive by instinct' programme to consider the external impact when making immigration and nationality policy, then egregious harm to specific minority groups resident in the UK might be avoided. Again, to achieve this, the Home Office would need stalwart political protection from tabloid-style rhetoric referring to 'bogus' asylum-seekers, 'invasions' of migrants storming Kent beaches, etc.

Importantly, Williams also notes both cultural and legal problems in how individual cases are dealt with. In a target-driven environment, demotivated staff operate tick-box decision-making, with little or no questioning or curiosity. As the burden of proof in immigration matters lies wholly on the applicant, this type of decision-making has led to a standard of proof amounting to the criminal law standard of 'beyond all reasonable doubt' rather than the balance of probabilities as it should be. She recommends that the burden of proof should be clearly explained to applicants, and Home Office staff must

be trained to operate the correct standard of proof. However, in my experience, this recommendation even if implemented would not be enough to change a Home Office 'culture of disbelief' going back decades, which permeates the entire immigration operation, and which has been the subject of scores of critical reports. In the light of the seriousness of her other recommendations, I am surprised that she did not recommend a formal legal move to a shared burden of proof, as operates in social security law and in civil law generally.

Finally, Williams strongly criticises the increasing complexity of immigration law, rules and policy, which are not just difficult for applicants, lawyers and judges to understand, but, she states, are too complex for the Home Office itself to maintain a clear grasp of its own legal framework. Without addressing this, there can be no guarantee that another 'Windrush' will not happen. She notes two separate cohorts which may be suffering. First, there are people from elsewhere in the Commonwealth who arrived as CUKCs or 'freely landed' citizens of independent Commonwealth countries, whose cases she did not include in her report. There are people from non-Commonwealth countries who may have acquired similar rights from over 30 or 40 years ago but would be unable to prove this 'beyond all reasonable doubt'. And soon there will be three million EU nationals granted EU settled status under the new scheme – but not provided with any document to prove this. Like the Windrush generation, they are expected to trust the Home Office.

Both this report and Gentleman's book are strongly recommended to anyone interested in UK immigration control but sceptical of practitioners' complaints about Home Office incompetence and lack of legal conscientiousness. Gentleman's account exposes it all in powerful journalism, and Wendy Williams' comprehensive report should be hard for the Home Office to duck.

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Cheshire, North & Fawcett: Private International Law

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This is a very welcome edition as the 14th edition, from 2008, was now considerably out of date. The 15th edition deals with the changes made by the Brussels Recast Regulation in relation to the common jurisdictional rules in the European Union, and the recognition and enforcement of foreign judgments in European Union Member States. Recent case law such as *Gazprom OAO v Lithuania* (C-536/13) [2015] 1 WLR 4937 is discussed. However, the reason for the CJEU deciding that arbitral anti-suit awards are enforceable, whereas anti-suit injunctions issued by English courts are not recognised by other EU courts, could have been explained in more detail.

The Brussels Recast Regulation rules on jurisdiction are discussed first, and then the traditional rules on jurisdiction, whereas in the foreign judgments section the common law rules are dealt with before the Brussels Recast Regulation. It would have been preferable for the common law jurisdictional rules to be dealt with before the Brussels Recast Regulation rules, as the common law rules obviously predate the others.

In the choice of law rules for transnational contracts, although the common law rules have been set out briefly, no case law for the common law rules on express and implied choice of law rules has been cited. However, cases have been cited in support of the common law rules in the absence of choice, which is good. It was also good thing to have set out the Rome Convention rules

as to applicable law in the absence of choice. The section is up to date as the Rome I Regulation is set out in detail. It is a positive that the book deals with the point on what the law to be applied is if the parties fail to plead or prove the foreign applicable law to the satisfaction of the English court. A comment should have been made, however, on how the English approach is different from other EU countries where the onus is on judges to research the foreign applicable law, rather than relying on the parties to plead and prove it. This is significant, as the same result may not be achieved in an English court because of this difference.

On choice of law rules on transnational torts, the common law rules are set out, and they still govern defamation, Part III of the Private International Law (Miscellaneous Provisions) Act 1995 which govern invasion of privacy, and rights relating to personality. Again, the non-contractual obligations section is up to date by setting out the Rome II Regulation rules. The point about proof of foreign law rules and the difference in approach in other EU countries is made as regards choice of law rules in torts.

The book makes no criticism of the rules as to domicile of origin (ie that if the child is legitimate the child's domicile of origin is that of the father). A child may have two females as parents who are lawfully married, but no father (eg where the sperm donor is unknown).

In the Family Law section, chapter 21 is headed Marriage and Other Adult Relationships and the Marriage (Same Sex Couples) Act 2013 is mentioned, which is a good thing. Section 6 sets out an account of the conflict of law rules relating to Same Sex Relationships: Civil Partnership and Same Sex Marriage. Section 7 discusses the lack of remedies for couples who are living together without getting married or entering into a civil partnership i.e. *De Facto* Cohabitation.

The Matrimonial and Related Causes chapter mentions the Rome III Regulation governing divorce and judicial separation. The Presumption of Death Act 2013 is also mentioned. The chapter also mentions the attempt to reform the Brussels II *bis* Regulation. The authors are of the view that European Commission Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) published in 2016 departed entirely from the 2014 Report as regards matrimonial matters. The Report had recognised shortcomings in Brussels II *bis* such as the alternative grounds of jurisdiction encouraging "rush to court" behaviour and lacking provision for party autonomy. The authors are of the view that the failure to accept the findings of the report is a missed opportunity to reform Brussels II *bis*. The chapter on Financial Relief mentions the Maintenance Regulation and Sch 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011. There is an interesting discussion of cross-border surrogacy in the context of private international law, mentioning the Human Fertilisation and Embryology Act 2008 and the Human Fertilisation and Embryology (Parental Order) Regulations 2010.

The chapter on children discusses the important Supreme Court decision in *In the Matter of A (Children)* [2013] UKSC 60, which laid down a new approach to habitual residence. Lady Hale stated that the test of habitual residence derived from *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309 should be abandoned in the context of habitual residence of children.

The Administration of Estates chapter within the section on the Law of Property mentions Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Succession Regulation).

This is an excellent book for postgraduate students and for legal practitioners dealing

with private international law, which many immigration practitioners will have to do on a regular basis. However, some undergraduate students would struggle with the depth of the book. It may be difficult for a newcomer to grasp the main essentials of the subject, and it will be easy to lose oneself in the depth of material.

It was a pity that the authors ignored the implications of Brexit completely. Possibly, it was simply too late to rewrite prior to publication, or some may have secretly hoped for a reversal of Brexit. Notwithstanding the lack of clarity on important questions, it would have been useful for the readers to know the possible avenues for changes to areas which are currently governed by EU Council Regulations, and the implications of, for example, adopting the common law, whether we could resurrect the Rome Convention, whether as an individual state we could accede to the Lugano Convention, or whether the existing EU Council Regulations could be incorporated into English Law. As a result, this book will soon be out of date when we do leave the EU, and a new edition will then be needed before long.

Suriyakumari Lane
Birkbeck College, University of London

About ILPA

ILPA is a professional association established in 1984 by leading UK practitioners in immigration, asylum and nationality law. It exists to promote excellence in the provision of advice and representation in this field and to contribute to a just and equitable system of immigration, refugee and nationality law practice that does not discriminate against individuals on the grounds of race, gender or otherwise.

Our Association

ILPA is a company limited by guarantee, company registration number 2350422. In January 2014 ILPA also became a charity, registered charity number 1155286.

Adrian Berry of Garden Court Chambers is the Chair. ILPA's Secretariat headed by Nicole Francis, provides support and services to the membership.

ILPA's expertise is a resource not only for practitioners but for a wide range of organisations, both official and non-governmental, whose work touches on matters relating to immigration, asylum and nationality law.

ILPA's website

In April 2020 ILPA launched a refreshed website www.ilpa.org.uk where our large archive of resources is now more easily searched and presented. In addition to our legal policy, briefings, analysis and updates we now also offer specific resource areas for Coronavirus information, UKVI resources, a new google group for member practitioners to share experience and post queries, and a busy calendar of online training and meetings based around our thematic working groups.

'If one is an immigration lawyer I firmly believe it's crucial to be a member of ILPA. It is an invaluable tool. (Immigration Solicitor)'. Have you visited ILPA's website recently?

Our members

ILPA's membership includes lawyers, advice workers, academics and others with a substantial interest in the law, in the UK and beyond. Members include not only immigration lawyers, but also lawyers whose work touches on immigration, immigration advisers and others with an interest in immigration, asylum and nationality law. Leading practitioners in this field deliver training for ILPA, represent the association and speak on its behalf, and contribute to the work of its working groups, its lobbying, responses to enquiries and consultations and specialist research and publications. Membership of ILPA provides an opportunity to get information unavailable elsewhere and to be involved in this work. If you are working on immigration, asylum or nationality law and you are not a member of ILPA then you are missing out.

Why join ILPA?

Joining ILPA is your chance to get involved, alongside leading practitioners, in improving the quality of immigration advice and representation and in influencing the development of law in this area. ILPA works across all areas of immigration, asylum and nationality law and its work is widely recognized. By joining and maintaining your membership, training for ILPA, hosting training sessions or attending them, attending the working groups and writing for the mailing or for the Journal of Immigration, Asylum and Nationality Law you help to support practitioners and, through them, their clients.

As a member, you will benefit from:

- reduced rates for all ILPA training and conferences
- a listing in ILPA's online Directory of Members
- ILPA's monthly mailing updating you on new developments and providing you with information not available elsewhere
- access to the members' only area of ILPA's website and 24 hour access to ILPA's rich archive of documents not (or no longer) available elsewhere
- email alerts on developments of importance
- opportunities to participate in specialist members-only working groups, through e-groups and meetings
- free copies of ILPA publications including best practice guides
- an opportunity to attend free seminars and networking events
- discounts on selected publications and conferences negotiated by ILPA.
- opportunities to become involved in the work of the Association, working alongside leading practitioners in the field including on responding to consultations, representing ILPA at official meetings and in work with parliamentarians
- access to ILPA's library by appointment
- a say in how ILPA is run.

Membership

Membership of ILPA is open to individuals who are lawyers, barristers, OISC regulated advisers, legal workers, teachers or law students, trainee lawyers, or to other individuals substantially engaged or interested in the law to organizations substantially engaged or interested in the law.

Applications for membership must be supported by two referees and approved by ILPA's Committee of Trustees at their monthly meeting following application.

A membership application pack, complete with an application form, details of eligibility criteria and all categories of membership can be found at www.ilpa.org.uk or get in touch with info@ilpa.org.uk

There are two categories of membership: individual membership and membership for organisations. Individual members who provide immigration advice must be regulated by, or employed by a person who is regulated by, a professional body (for example the Bar Standards, the Solicitors Regulation Authority, their equivalents in Scotland and Northern Ireland and overseas, the Chartered Institute of Legal Executives (CILEx), or regulated by the Office of the Immigration Services Commissioner (OISC).

There are similar provisions for member organisations. Full details are set out in Articles 3 and 4 of ILPA's Articles of Association, which form part of the information on www.ilpa.org.uk.

Fees are as follows:

Individuals

S	Full-time Students, unwaged & retired	£90
P	Pupil barristers and trainee solicitors	£120
F	Other individuals	£150
E	Barristers/solicitors/0ISC accredited/CILEX registered advisors of: (5+ years call/enrolment/ accreditation)	£170
G	(10+ years call/ enrolment/accreditation)	£240

Organisations

A	Law Centres, local CABx & Not for profits – (turnover under £500,000)	£150
B	Firms/Barristers Chambers/ ABS of 1–5 fee-earners & all other organisations	£240/

C	Firms/Barristers Chambers/ABS of 6-25 fee-earners & not for profits - (turnover of £500,000+)	£320
D	Finns/Barristers Chambers/ ABS of 25+ fee earners	£450

Full details on how to apply and are available on www.ilpa.org.uk. Overseas members pay a postage supplement.

Specialist working groups

ILPA's working groups bring together practitioners specializing in particular areas of immigration law to undertake influencing work and training to exchange information. Groups are open to all members.

They hold meetings and disseminate information through email lists. Current working groups are:

- Case Space
- Children
- Courts and Tribunals
- Economic Migration
- European
- Family & Personal Migration
- Immigration Professional Support Lawyers (PSL) Network
- Legal aid
- New York
- North West
- Refugee
- Removals, Detention and Offences
- Scotland
- Southern
- South West
- Training
- Well-being
- Yorkshire and the North East

Influencing

ILPA is represented on advisory and consultative groups run by the Immigration and Asylum Chambers of the Tribunals, the Home Office, and the Administrative Court sand Court of Appeal and on advisory and other groups convened by public bodies and NGOs.

Since it was founded, ILPA has provided advice to members of the UK parliament on legislation, and has excellent links with institutions and organisations working at a European level. Our comments on proposed legislation and our responses to consultations influence law and policy in the UK and beyond.

Publications and research

The journal is the official journal of the Association. ILPA publications include best practice guides on immigration and asylum appeals, bail and detention and working with children subject to immigration control.

Training

ILPA has launched a brand new webinar programme. As we've transitioned into home and lone working the delivery of live webinars to ensure practitioners stay informed of the latest developments in immigration, asylum and nationality law is ever more important.

ILPA is dedicated to providing the highest quality training to our members and the wider legal community, and will continue to deliver this throughout this testing time.

Our tutors are known for their experience, for keeping up to date with the continuing developments in immigration legislation and case law, and for their involvement in landmark cases. You can meet our tutors here. With the support of our tutors we hope to make our webinars interactive, engaging and a vital tool for practitioners to remain connected with their peers.

ILPA is a charity and all profits from ILPA training go towards supporting work to fulfil ILPA's objectives.

September 2020

ILPA Sponsor Licence Conference
Wednesday 9 September 2020,
10:00 – 16:30
Chairs: Nichola Carter, Carter Thomas Solicitors
Joe Middleton, Doughty Street Chambers.
Keynote Speakers: George Shirley, Head of PBS, Citizenship and the Windrush Taskforce
Panel: Jonathan Kingham, Lexis Nexis, Natasha Chell and Nicolette Bostock, Laura Devine Immigration, Tom Brett Young, Veale Wasbrough Vizard, Natasha Gya Williams, Gya Williams Immigration, Simon Kenny, Eversheds Sutherland

CPD	5.5 hours
Fee	ILPA members £180 non-members £360 concessionary rate £90
Code	WEB 1045

What does the future hold for sponsorship? The next couple of years may very well bring about bigger changes to the UK's work-related immigration routes than we witnessed in 2008, when the Points Based System was introduced.

UKVI's George Shirley, Head of PBS, Citizenship and the Windrush Taskforce, has agreed to be our guest speaker.

In addition, we have an excellent array of speakers from a number of leading UK immigration law firms and the conference is being chaired by Nichola Carter of Carter Thomas and Joe Middleton of Doughty Street Chambers.

Topics will range from practical tips on sponsor licence law to in-depth analysis of complex legal issues. There will be a detailed examination of the current system of sponsorship for businesses, primarily relating to Tier 2 (General and ICT) and Tier 5, and a look at what the future may hold. The speakers will provide highly practical insight and tips from their extensive experience.

This annual conference provides a space for immigration experts across the UK to share experiences and tips on dealing with this complex area of law.

How to prepare fresh asylum and human rights claims
Wednesday 16 September, 15:00 – 18:15
Tutors: Gabriella Bettiga, MGBe Legal
Bojana Asanovic, Lamb Building

CPD	3 hours
Fee	ILPA members £100 non-members £180 concessionary rate £50
Code	WEB 1024

This course will focus on the legal framework, procedure and practical steps in preparing further representations.
Topics:

- Legal framework
- Standard of proof
- Advice to clients
- Pitfalls and common errors
- Procedure
- Overview of post-refusal remedies

The Phenomenon of Transnational Marriage Abandonment (Bitesize Webinar)
Thursday 17 September 2020, 14:00 – 16:00
Tutors: Pragna Patel, Southall Black Sisters
Nath Gbikpi, Wesley Gryk Solicitors LLP

CPD	2 hours
Fee	ILPA members £60 non-members £100 concessionary rate £30
Code	WEB 1039

The webinar will look at the phenomenon of transnational marriage abandonment, a form of domestic abuse which involves migrant women being deliberately stranded abroad, and how immigration lawyers can assist stranded spouses to return to the UK.
Topics:

- The phenomenon of transnational marriage abandonment: what is it and what common experiences are reported by stranded spouses
- Litigation relating to the phenomenon of transnational marriage abandonment: what has been done in family law and what needs to be done in immigration law
- Assisting victims of transnational marriage abandonment to return to the UK: theory and practice

Arguing Insurmountable Obstacles under Appendix FM (Bitesize Webinar)
Thursday 24 September 2020, 16:00 – 17:30
Tutor: Priya Solanki, One Pump Court Chambers

CPD	5 hours
Fee	ILPA members £50 non-members £80 concessionary rate £25
Code	WEB 1050

In this webinar, we will look at the harsh test that applies to foreign nationals who are here as overstayers and make applications as partners under Appendix FM EX.1(b) and EX.2 of the Immigration Rules. We will consider recent authorities and how these have clarified the test. There will be a detailed look at policy guidance, practical tips and examples. This webinar will allow more effective applications to be submitted and for better challenges to adverse decisions.

In this webinar, we will cover the following:

- The test of insurmountable obstacles under EX.1(b) and EX.2
- A detailed look at UKVI Policy Guidance and how this can best be used to assist applications under EX.1(b)
- The current authorities, how these have explained this test further, with examples of the circumstances the courts and Tribunals have found unconvincing
- A discussion on useful evidence and arguments to advance in applications and appeals
- Challenges to clearly unfounded certificates, under s.94 of the Nationality Immigration and Asylum Act 2002, in EX1(b) decisions by way of judicial review proceedings
- Case Activity / Group DiscussionsILPA non-members £80.00

October 2020

Immigration Judicial Reviews for OISC practitioners
Tuesday 6 October 2020, 10:00 – 13:00
Tutors: Samina Iqbal and Kezia Tobin, Goldsmith Chambers

CPD	3 hours
Fee	ILPA members £100 non-members £180 concessionary rate £50
Code	WEB 1042

The 2017 Guidance on Competence permits OISC advisers authorised at "Level 3" to apply for an additional category of authorisation: Judicial Review Case Management (JRCM).

This course intends to guide OISC advisers through how to undertake Judicial Review claims from pre-action conduct through to seeking costs when a case is 'won'.
Topics:

- Assessing merits of pursuing a Judicial review application and alternative remedies
- Complying with pre-action protocol
- Lodging claims
- 'Ins' and 'outs' of conducting judicial review claims
- Outcomes in the Upper Tribunal
- Consent orders and Costs
- Remedies
- Urgent applications and injunctions

Immigration and Asylum Judicial Review in the Upper Tribunal (Bitesize Webinar)
Tuesday 13 October 2020, 14:00 – 16:00
Tutors: Tim Buley QC and Ben Fullbrook, Landmark Chambers

CPD	2 hours
Fee	ILPA members £80 non-members £160 concessionary rate £40
Code	WEB 1047

The Upper Tribunal has had a judicial review jurisdiction since its creation.

'Fresh claim' judicial reviews have been required to be brought in the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC) since late 2011, and age dispute judicial review claims are now also routinely dealt with by the UTIAC. Since November 2013, the majority of all immigration related judicial reviews are required to be heard in the Upper Tribunal. This session will consider practice and procedure on judicial review in the UTIAC, including the transfer process, what claims should or should not be brought in UTIAC, and what kind of arguments can be made for claimants in such cases, as well as addressing issues on the cutting edge of legal developments in this area. It will also provide practical insights into tactics and presentation of claims to maximise chances of success.

- Jurisdiction of the Upper Tribunal in relation to judicial review
- Practice and procedure in the Upper Tribunal when hearing judicial review claims
- Practicalities of JR in the Upper Tribunal

The tutors are barristers at Landmark Chambers specialising in public law an immigration, who have been involved with many significant developments in immigration judicial review, and with very extensive experience of bringing successful judicial review claims against the Home Office.

Applications and appeals under paragraph 276ADE(1) (iv) of the Immigration Rules ('7 Year Applications')
Thursday 15 October 2020,
14:00 – 18:15
Tutors: Lucy Mair, Garden Court North Chambers
Sumita Gupta, Islington Law Centre

CPD	4 hours
Fee	ILPA members £120 non-members £200 concessionary rate £70
Code	WEB 1036

This course is a practical guide to preparing successful applications for leave to remain for children (and their families) who have lived in the UK for 7 years or more, and challenging negative decisions on these applications.

The course will provide an overview of law and practice in relation to these applications, and will also address fee waivers and No Recourse to Public Funds Conditions and their relevance in applications. The course will also address the benefits of taking a Child Rights based approach to evidence and legal argument when preparing applications and appeals.

Access to legal aid for these applications will also be addressed in brief.
Topics:

- Paragraph 276ADE(1) (iv) of the Immigration Rules
- Policy in relation to Private Life Applications
- Fee Waivers
- Taking a Child Rights based approach to evidence and legal argument
- Preparing appeals
- Legal Aid (including Exceptional Case Funding)

FMG Claims
Thursday 29 November 2020,
15:00 – 18:15
Tutor: Priya Solanki, One Pump Court Chambers

CPD	3 hours
Fee	ILPA members £100 non-members £180 concessionary rate £50
Code	WEB 1051

In this webinar, we will look at how to successfully argue claims based on Female Genital Mutilation (FGM). We will discuss the need for expert medical and country evidence and what this should address. We will have a detailed look at various country guidance decisions and useful Policy Guidance documents. There will also be a consideration of the link between asylum and immigration law and FGM protection orders.

In this webinar, we will aim to cover the following:

- An understanding of what FGM is, including the types of FGM, the

prevalence of the practice globally, cultural underpinnings and motives, consequences of FGM, issues relevant to risk

- A quick overview of the Female Genital Mutilation Act 2003 and the mandatory reporting duties
- FGM Protection Orders (FGMPO) and the link between these and asylum law
- A look at relevant UKVI Policy Guidance
- Useful country guidance decisions to discuss risk factors, how to address arguments on credibility, state protection and internal relocation
- Dealing with practical issues such as anonymity and vulnerable applicants
- Expert evidence
- Practical tips and examples
- Case Activity / Group Discussions

November 2020

Domestic Violence in Immigration Law
Wednesday 4 November 2020, 15:00 – 18:15
Tutor: Priya Solanki, Barrister at One Pump Court Chambers

CPD	3 hours
Fee	ILPA members £100 non-members £180 concessionary rate £50
Code	WEB 1048

In this webinar, we will consider the difficulties that can arise with the requirements for indefinite leave to remain for victims of domestic violence, how clients who do not meet the Appendix FM DV immigration rules can be assisted, we will discuss challenging adverse decisions for these Applicants and also making applications for victims under the EEA Regulations.

In this webinar, we will cover the following:

- The destitution domestic violence concession application process, the authorities on this and how this concession might be used to assist credibility
- Appendix FM DV-ILR, including the finer requirements on the relevant date of violence, domestic violence being the causative force of the breakdown, the evidential requirement and the suitability requirements
- Challenging adverse decisions by appeal (with a detailed look at the case law on rights of appeals against these decisions), administrative review and judicial review
- Detailed consideration of UKVI Policy Guidance on Domestic Violence
- Assisting Applicants who do not meet the requirements of DV-ILR
- Applications for victims under EEA law, with a consideration of case law and making applications for unmarried partners
- Funding in domestic violence cases