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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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Editorial

This editorial is being written on election day, 6 May, when we of course do not know how the chips will fall with respect to which party or parties will come out ahead and form the next British government. The immigration issue constantly hovered in the background of the election campaign, sometimes coming to the fore, not least in the third of the three party leaders' debates. Clearly, however, it is an issue about which voters feel strongly although it is impossible to determine how much it will ultimately influence their decisions.

Unlike the last election in May 2005, however, no major party made negative capital out of the election question. One of them, somewhat bravely, even made public its intention to regularise those in the UK irregularly for 10 years, and could have lost some votes as a result. As previous editorials in this journal have argued, it seems wise from several perspectives to institute regularisation programmes and it is a pity that the other main parties chose to project the image that the consequence of such a move would be more people coming to Britain, either as family members, or in the hope that they too would one day achieve the same result. That stance will not solve the problem of irregular migration, and its logical implication is that one should continue to hide from the facts and accept potential losses in tax revenue and reliance on removals, which option also costs a lot of money. Of course, such posturing seems wise when the prospect of losing votes looms large but it may not be realistic in the longer run. Regardless of who enters government after the election therefore, the question will still have to be confronted, as the London Mayor already realises. Another interesting outcome from a study of the election sections of the various manifestoes is the softer, more pluralistic line adopted by the Celtic nationalist parties. There is a demand that immigration be made a competence of the Scottish government which will be important constitutionally and for the migrants concerned, as would the right of work for asylum seekers advocated by both those parties. Things should become clearer once we know how the chips have fallen.

Prakash Shah

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News

Transfer of AIT to new unified Tribunals structure

On 15 February 2010, the functions of the Asylum and Immigration Tribunal (AIT) were transferred into the new unified Tribunals structure set up under the Tribunals, Courts and Enforcement Act 2007 ('the 2007 Act'). While those practising in what is now the First-tier Tribunal (Immigration and Asylum Chamber) ('FTT') may feel that not much has changed in practice, there are some significant changes to onward appeal rights and procedure in the Upper Tribunal ('UT').

There is no change to the statutory basis for the right of appeal to what is now the FTT, or the grounds of appeal, and the former AIT (Procedure) Rules 2005 continue apply, with some fairly minor amendments as far as the initial appeal is concerned. The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) govern procedure for appeals to the Upper Tribunal, and have been amended to reflect some of the specific provisions applicable to asylum and immigration appeals, including the provision that the Secretary of State serves decisions in asylum cases. Consolidated versions of both sets of Rules are available on the Tribunal Service website, along with Practice Directions and Practice Statements issued on 15 February 2010 (again, largely reflecting the terms of the AIT's previous practice directions), and a series of guidance notes for adjudicators dating from 2001 to 2007 on such issues as unrepresented appellants, unaccompanied minors, and the withdrawal of decisions. Immigration Judges have for the most part become First-Tier Tribunal Judges, and Senior Immigration Judges have become Upper Tribunal Judges.

The main change at the Tribunal level is that there is no longer a 'reconsideration' procedure and ss 103A–103D of the Nationality, Immigration and Asylum Act 2002 have been repealed. Rather, there is now formally a two-tier structure, consisting of an initial appeal before the FTT and a right of appeal under s 11 of the 2007 Act to the UT on a point of law, and with permission to appeal from either the FTT or the UT. Transitional provisions are set out in Sch 4 of the Transfer of Functions of the Asylum and Immigration Tribunal Order (SI 2010/21) and for the most part seek to ensure that applications and appeals which are pending before the AIT continue as applications and appeals to the FTT or UT, as appropriate.

An application for permission to appeal to the UT must first be made to the FTT and the time limits are the same as for an application for reconsideration. However, the test for an extension of time is now whether 'by reason of special circumstances it would be unjust not to' extend time (FTT r 24(4(a)), which is arguably a broader test than that under s 103A(4)(b) of the 2002 Act, whether the application 'could not reasonably practicably have been made' within the time frame, and will allow the Tribunal to grant permission to appeal out of time where the merits of the case are particularly strong.

The application will normally be considered by an FTT Judge, who in addition to granting or refusing permission to appeal also has the power to review the decision under s 9 of the 2007 Act, if satisfied that an error of law is established. Paragraph 4 of the Senior President's Practice Statements indicates that such a review is likely to be rare, and to occur only where 'the effect of any error of law has been to deprive a party before the First-Tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-Tier Tribunal; or … there are highly compelling reasons why the matter should be re-decided by the First-Tier Tribunal'. As the Practice Statement makes clear, this power is distinct from the power of the President of the Chamber to set aside a decision on the ground of a procedural

error (r 60 of the AIT Procedure Rules), and practitioners may wish in appropriate cases to request a review when giving notice of appeal (r 24(5)(c) of the AIT Procedure Rules requires an application for permission to appeal to state 'the result the party making the application is seeking').

If permission is refused by the FTT, the application can be renewed to the UT; in either case, once permission is granted the case will proceed in the UT, and the UT Procedure Rules will apply. Although the UT has the power to remit the appeal to the FTT if it finds an error of law, the Practice Statements indicate that in asylum and immigration cases it will normally proceed to remake the decision under s 12(2)(b)(ii) of the 2007 Act, and will only remit in circumstances identical to those where the FTT might conduct a s 9 review (see above). The Practice Directions and experience suggest that there is now greater pressure to proceed to re-determine the appeal at a single hearing before the UT, without considering further evidence unless it is necessary to do so, than was the case under the previous reconsideration procedure. However, where further findings of fact are necessary before a decision can be reached, the UT remains able and willing to adjourn for a fuller fact-finding hearing where these require oral evidence.

There are some subtle differences in the UT Procedure Rules, not least the wording of the overriding objective, to deal with cases 'fairly and justly', arguably an improvement on r 4 of the AIT Procedure Rules ('fairly, quickly and efficiently'). Other key differences of interest include:

- There is provision for an application for permission to appeal to the UT to be dealt with at an oral hearing, and the notice of appeal must state if the appellant wants a hearing (r 24(4)(f)). However, it is in the discretion of the Tribunal whether to grant such a request, although it is bound to take account of the views of the parties (r 34).
- The respondent to the appeal before the UT (who may of course have been the appellant in the FTT) may file a response to the notice of appeal after permission has been granted (r 24(1A)), stating the grounds on which the respondent relies, which may include 'any grounds on which the respondent was unsuccessful [in the FTT], but intends to rely in the appeal' (r 24(3)(e)). This is closer to the 'old' r 30 reply in the AIT than the more limited provision introduced by the 2008 amendments to the AIT Procedure Rules and should, for instance, allow appellants who lose in the FTT on asylum grounds but whose appeals are allowed under the ECHR to revive their asylum grounds if the respondent appeals to the UT against the ECHR decision. Any response under r 24 must be filed within a month of the respondent being notified that permission to appeal has been granted. The appellant may then provide a reply to the response under r 25.
- There is no equivalent to r 17(2) of the AIT Procedure Rules which requires the Tribunal to treat an appeal as withdrawn where the respondent withdraws the decision which is the subject of appeal. While this provision still exists in the FTT Rules, arguably once an appeal has reached the UT, the respondent cannot force the withdrawal of the appeal by simply withdrawing the immigration decision (although a grant of leave will still normally cause the appeal to be statutorily abandoned – subject to s 104(4B) of the 2002 Act).
- The UT has the power to set aside a decision which disposes of the proceedings and re-make it provided it is in the interests of justice to do so and one or more conditions in r 43(2) are met. These include that a party or his representative was not present at a hearing (43(2)(c)), or that 'there has been some other procedural irregularity in the proceedings' (43(2)(d)). A party seeking to set aside a decision on this basis must apply within 12 days of the date the decision was sent out (38 days if the appellant is abroad, and

ten working days if the decision was served electronically or in person – see below). In addition, the UT has as a power (in r 45) to review a decision when considering an application for permission to appeal from the UT where the UT has overlooked a legislative provision or binding authority, or where a new, binding decision of a court has been made since the UT's decision and may have a material impact on the decision.

- The UT Procedure Rules generally make provision as to time limits by reference to a period running from the date a decision is sent to a party, whether by the SSHD or by the Tribunal, and including two days for receipt of the decision where it is sent by post. While this may be welcomed for its potential to reduce the scope for disputes about deemed and actual dates of receipt (instead requiring an application for an extension of time to be made where there is any potential for the application to be out of time), it has however produced some apparent anomalies. For example, the time limit for an application for permission to appeal to the Court of Appeal against a decision of the UT is ten working days where the UT decision is sent electronically or served in person (r 44(3C)(a)), but 12 *days* (not working days) where the UT decision is sent by post (r 44(3B)(a)(i)). Given the exclusion of the whole period between Christmas and New Year from the definition of working days under the Rules for asylum and immigration purposes, this could create a serious anomaly, depending whether UKBA serve the decision by post or in person. There is a similar discrepancy in relation to the time limits for appellants who are outside the United Kingdom (compare rr 44(3B)(b) and 44(3C)(c)). It is understood that the Tribunal is aware of this anomaly and that there is likely to be an amendment to the Procedure Rules; in the meantime the President of the IAC has issued a Presidential Guidance Note (no 1 of 2010) instructing UT Judges to treat applications for permission to appeal made within 12 *working* days as in time.

As previously, there is a right of appeal on a point of law to the Court of Appeal (CA) from a decision of the UT, with permission of either the UT or the CA under s 13(1) of the 2007 Act; however, by virtue of s 13(6) and the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008/ 2834), permission will only be granted where the Tribunal or the CA considers that:

(a) The proposed appeal would raise some important point of principle or practice, or
(b) That there is some other compelling reason for the relevant appellate court to hear the appeal.

This is a significant change and one which may result in a reduction in the number of immigration cases being granted permission to appeal to the CA. It may however be said that in asylum cases there is *always* a compelling reason for the appeal to be heard if it can be shown that the UT has erred in law so the impact may be felt more in relation to non-asylum appeals.

As a final note, while s 53 of the Borders, Citizenship and Immigration Act 2009 allows for fresh claim judicial reviews to be transferred from the High Court to the UT, it has not yet been brought into force, and the UT does not as yet have jurisdiction under s 15 of the 2007 Act to consider applications for judicial review in asylum and immigration matters.

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The Borders, Citizenship and Immigration Act 2009

Alison Harvey

At a glance

The Borders Citizenship and Immigration Act 2009 was passed on 20 July 2009. Large parts of it are in force. It was announced as an interim bill to deal with priority matters pending the introduction of consolidating legislation. This paper examines the substantive provisions of the Act and identifies why they were considered to be matters of priority. It deals with changes to the Bill in its passage through parliament and considers the implications of the Act.

Introduction

It seemed too good to be true and it was. The publication of the Draft (Partial) Immigration and Citizenship Bill[1] in July 2008 tempted us to believe that another act would not be added to the sprawling corpus of immigration legislation without prior consolidation of all existing legislation since 1971. But, as commentators had suggested,[2] the timescale for a project that would not only consolidate but also 'simplify' immigration, asylum and nationality law proved over-ambitious. Meanwhile, the urge to legislate again proved impossible to resist. The Lord West of Spitfield, introducing the Bill in the House of Lords, described the 'simplification bill' as *'a complex and serious Bill on which people are working very hard all the time, so it cannot be rushed forward'*[3] and the Borders, Citizenship and Immigration Bill as making *'a number of priority changes to the law'*.[4] The notion of 'priority' brings together a miscellany of provisions, which were considered priorities for different reasons. Academic and political commentators will search in vain for a unifying theme in the Act.[5]

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1 Command 7373. See also *Simplifying Immigration Law: an initial consultation* UK Border Agency, 6 June 2007; *Simplifying Immigration Law: responses to the initial consultation paper*, 6 December 2007; *Making Change Stick: an introduction to the immigration and citizenship bill* UK Border Agency, 14 July 2008; *Draft illustrative impact assessment* UK Border Agency, 25 June 2008*; Draft illustrative rules on protection* UK Border Agency, August 2008.

2 See eg ILPA *Response to Consultation on Simplifying Immigration Law*, August 2007 available at www.ilpa.org.uk/Responses/SimplificationConsultation.pdf

3 *Hansard* HL 11 February 2009, vol 707, col 1207.

4 *Hansard* HL 11 February 2009, vol 707, col 1128.

5 See the Joint Committee on Human Rights, Ninth Report of Session 2008–09, *Legislative Scrutiny: Borders, Citizenship and Immigration Bill,* HL Paper 62, HC 375, 25 March 2009; the Joint Committee on Statutory Instruments Ninth Report of Session 2008–2008 *Legislative Scrutiny, Borders, Citizenship and Immigration Bill* HL Paper 52, HC 375, 24 March 2009; the Home Affairs Committee Fifth Report of session 2008–9, *Borders, Citizenship and Immigration Bill*, HC 425, 29 April 2009; House of Lords Committee on Delegated Powers, Third report of session 2008–2009, *Legislative Scrutiny*, HL Paper 29, 5 February 2009; House of Lords Committee on the Constitution Fifth report of session 2008–2009 *Part 1 of the Borders, Citizenship and Immigration Bill*, HL Paper 41, 26 February 2009, Seventh Report of session 2008–2009 *Part 3 of the Borders Citizenship and Immigration Bill* HL Paper 54, 12 March 2009.

Unlike the UK Borders Act 2007 and the immigration provisions of the Criminal Justice and Immigration Act 2008, the 2009 Act was considerably modified during its passage through parliament. Pressure on parliamentary time and the desire to see the Bill pass before the summer recess appear, from comments in the debates, to have been reasons for accepting changes, with the prospect of further legislation also a factor. The many readers of this journal who are members of the Immigration Law Practitioners' Association (ILPA) will be aware of the significant role that ILPA, informed by articles written in this journal over the years, played in these changes.[6]

New provisions of nationality law were added as a result of parliamentary scrutiny,[7] as was a section that amends the definition of trafficking in s 4 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004.[8] A section that would have allowed all immigration, asylum and nationality judicial reviews to be transferred to the new Upper Tier Tribunal established under the Tribunal, Courts and Enforcement Act 2007,[9] was emasculated, so that only judicial reviews of 'fresh claims' can be transferred.[10] Clauses that would have allowed the imposition of controls in the Common Travel Area[11] were removed from the Bill and replaced by an Opposition amendment in the House of Lords with provisions to strengthen the Common Travel Area.[12] While the Government initially reinstated the provisions,[13] at House of Commons Report stage it accepted the Opposition's amendment to remove them,[14] while making clear that they remained Government policy.[15]

The Act might have provided a vehicle for more changes had not a number of amendments, for example that would have imposed a time limit on the length of detention or addressed the plight of those whose claims for asylum have failed and who, unable to leave the country, live on low levels of in-kind support, been rejected as outwith the scope of the Bill at the point at which it was sought to table them. The only amendment originally challenged on this ground that made it onto the Order paper was the amendment to the definition of trafficking, the precursor of what is now s 54. Unfortunately for students of parliamentary procedure, no challenges to the rejection of amendments were brought on the floor of the House.[16]

The Borders, Citizenship and Immigration Act 2009 was passed on 21 July 2009. By the standards of immigration legislation it is a small Act, containing 59 clauses and only one Schedule, dealing with repeals. In the course of its short span it amends some twelve other Acts and draws on definitions from some 28, but nonetheless adds manages to add some 39 new sections to the corpus of immigration and asylum law. Those sections, like all the provisions of the Act other than those on nationality were intended to be short-lived in the form in which

6 See the Briefings section of www.ilpa.org.uk for ILPA's briefings on Bill.
7 Borders, Citizenship and Immigration Act 2009, ss 43 and 44.
8 Borders, Citizenship and Immigration Act 2009, s 54.
9 The Asylum and Immigration Tribunal was a separate, single tier tribunal when Borders, Citizenship and Immigration Act 2009 was passed but see now SI 2010/21 and SI 2010/40.
10 Borders, Citizenship and Immigration Act 2009, s 53.
11 HL Bill 15, cl 46. For the definition of the Common Travel Area see the Immigration Act 1971 ss 1(3), 11(4). See also the *Strengthening the Common Travel Area*, Government consultation 24 July 2008 and response to the consultation 15 July 2009 (published with an impact assessment).
12 HL Bill 56, cl 51. *Hansard* HL 1 April 2010, col 1116.
13 HC Bill 115, cl 50. Public Bill Committee, 18 June 2009 (First Sitting), col 207.
14 *Hansard* HC 14 July 2009, vol 496, cols 328–329.
15 *Hansard* HC 14 July 2009, vol 496, col 329 and HL 20 July 2009, vol 712, col 1395.
16 For the rules on amendments see in particular *Companion to the Standing Orders an Guide to the Proceedings of the House of Lords*, House of Lords, 19 February 2007, at 7.52.

they were enacted and to be replaced by the successor to the Draft (Partial) Immigration and Citizenship Bill. In November 2009, after the Borders Citizenship and Immigration Act 2009 was on the statute book, the Government published a Draft Immigration Bill,[17] keeping the flickering flame of the larger project alive. This draft is also 'partial'; it is not complete and the intervention of a General Election means that, despite acknowledgment by all parties that consolidation is a necessity,[18] its future is uncertain. It did not form part of the Queen's speech for the first session of the new Parliament. The Draft Immigration Bill does not include provisions on the Common Travel Area. The Explanatory Note to that Bill states "*There are a number of further topics for inclusion in the full Bill which are not yet drafted: the most relevant of which are the Common Travel Area*; …"[19] Meanwhile work progressed on including the islands within the e-borders scheme through instruments such as the draft Immigration (Isle of Man) Amendment Order 2010 and a new Government opposed to the imposition of these controls, came to power.[20]

Part 1 Border Functions: A Border Police Force in all but name?

Part 1 is concerned with giving a legislative imprimatur to the joining of the work of customs officials and immigration officials, into the UK Border Agency, which now includes a division known as the 'Border Force'. This process had been announced by the then Prime Minister in July 2007[21] and in operation since April 2008.[22] Management and operational reasons thus provided the impetus behind treating these changes as a priority, although the need for primary legislation does not appear to have been recognised at the time of publication of the Draft (Partial) Immigration and Citizenship Bill for neither that Bill nor the documents accompanying it[23] make any reference to provisions such as those contained in Part 1. Part 1 came into force on the passage of the Act.[24]

Under the Act, the Chief Executive of the UK Border Agency is at one and the same time the Director of Border Revenue.[25] In the former role she is accountable to the Home Secretary; in the latter independent – a complexity/contradiction criticised by the House of Lords Select Committee on the Constitution, which concluded that the provisions brought revenue matters too close to Ministers.[26]

17 Command 7666, November 2009.
18 *Hansard* HL, 11 February 2009, vol 707, cols 1128 & 1133; HC, 14 July 2009, vol 496, col 256.
19 Draft Immigration Bill, Explanatory Note, para 4.
20 See Isle of Man Chief Minister's Office Oik yn Ard-shirveishagh *Moves to Include Island inside UK e-border* 6 April 2010 published with the draft order and an Explanatory Note for consultation.
21 *Hansard* HC, 25 July 2007, vol 463, col 842 per the Rt Hon Gordon Brown MP, the Prime Minister. See *Security in a Global Hub: Establishing the UK's new Border Arrangements,* Cabinet Office 14 November 2007. See also *Border Controls* Home Affairs Select Committee, 1st Report of Session 2001–02 recommending a '*single frontier force*' (para 107) and see the Committee's 4th Special Report of Session 2001–2002, HC 375 for the Government response.
22 *Partnership Agreement between the Commissioner of HM Revenue and Customs and the Home Office on interim arrangements and frontier delivery requirements for the UK Border Agency in 2008–2009*, Home Office and HMRC, 1 April 2008 and *Framework Agreement,* UK Border Agency 1 April 2009. See also *Impact assessment of legal powers to support the creation of the UK Border Agency,* UK Border Agency 15 January 2009.
23 *Op. cit.*
24 Section 58(1).
25 Borders, Citizenship and Immigration Act 2009, s 7.
26 *Part 1 of the Borders, Immigration and Citizenship Bill*, House of Lords Select Committee on the Constitution, 5th report of session 2008–2009, HL Paper 41, 26 February 2009, para 2.

During the debates, opposition parties made clear that they favoured the inclusion of the police in 'Border Force', although they had different ideas on what it should look like. The Liberal Democrats envisaged a border force that would function only at ports, while the Conservative Party envisaged a border force as dealing with matters of immigration control throughout the United Kingdom.[27] The new Government's Coalition Agreement states:

> 'We will create a dedicated Border Police Force, as part of a refocused Serious Organised Crime Agency, to enhance national security, improve immigration controls and crack down on the trafficking of people, weapons and drugs.'[27a]

How much difference does it make that the police are not currently included in the UK Border Agency? While the range of functions to be carried out is not extended, Part 1 will allow immigration officials to carry out customs functions, and *vice versa*.[28] There is considerable scope with Part 1 for the further extension of these powers, including powers to amend primary legislation.[29] The unified force has powers of investigation and detention,[30] and extensive information-sharing powers.[31] Officials are subject to the oversight of HM Inspectors of Constabulary[32] and the Independent Police Complaints Commission and now the Police Complaints Commissioner for Scotland.[33] Even without the inclusion of the police, the UK Border Agency has considerable power to function as a police force, within the UK and at posts overseas.

The information-sharing powers in Part 1 command particular attention. They build not only on provisions in the UK Borders Act 2007[34] but on powers, including powers of entry and search, conferred by the Customs and Excise Management Act 1979. The latter are extended to UK Border Agency officials. The 2009 Act contains powers for the Treasury and Secretary of State for the Home Office to pass secondary legislation to permit disclosures of information that would otherwise be prohibited.[35] Information can be shared with private contractors.[36] The 2009 Act includes restrictions upon the entitlements of individuals under the Freedom of Information Act 2000 to obtain access to information that the Agency holds about them.[37]

These extensive powers, like Part 1 of the Immigration Act 1999, the 'Information' provisions of the Immigration, Asylum and Nationality Act 2006 and the whole of the 'e-borders' programme[38] are directed not only at persons under immigration control, but at anyone (or anything) crossing a border. Everyone passes through customs; everyone shows

27 *Hansard* HL, 25 February 2009, cols 205–208 and 25 March 2009, cols 661–672. For Government responses see *Hansard* HL, 11 February 2009, col 1207 and 25 February 2009, col 214.

27a *The Coalition: Our programme for Government*, Cabinet Office, May 2010.

28 See eg Borders, Citizenship and Immigration Act 2009, ss 1, 3, 7, 11.

29 Borders, Citizenship and Immigration Act 2009, ss 2, 8, 35 and 36.

30 Borders, Citizenship and Immigration Act 2009, ss 22–25.

31 Borders, Citizenship and Immigration Act 2009, ss 14–21.

32 Borders, Citizenship and Immigration Act 2009, s 29.

33 Borders, Citizenship and Immigration Act 2009 s 30. See also s 28. See Police Complaints Commissioner for Scotland press release *PCCS and UK Border Agency agree new independent complaints review system*, 22 March 2010, http://www.pcc-scotland.org/news/315_pccs_uk_border_agency_agree_new_independent_complaints_review_system, accessed 4 May 2010.

34 Borders, Citizenship and Immigration Act 2009, s 20 and UK Borders Act 2007, ss 41A and 41B as inserted by that section.

35 Borders, Citizenship and Immigration Act 2009, ss 16(1), (8).

36 Borders, Citizenship and Immigration Act 2009, ss 14(2), see *Hansard* HL 25 February 2009 col 258.

37 Borders, Citizenship and Immigration Act 2009, s 19(2).

38 See *Security in a Global Hub, op. cit.*

their passport at immigration control. It is important to view the provisions in the context of the introduction not only of biometric identity documents for foreign nationals.[39] The future of such documents is uncertain; at the time of writing there is no indication of whether they will be encompassed with the abolition of identity cards. Under the previous Government, the provisions should have been viewed in the context[40] of identity cards more broadly.[40a]

In 2007–2008 the Home Office piloted the sharing of data with CIFAS,[41] the fraud prevention agency used by, amongst others, private financial services, telecommunications and utilities companies. In June 2008 Home Office Ministers indicated that the Government intended the UK Border Agency to join CIFAS, subject to parliamentary approval. As of April 2010 it was planned that this would happen in June 2010.[42] Joining CIFAS would see the Agency sharing its data with private companies who could then factor a person's immigration status into decisions on whether to provide them with services. It would appear that the Agency would also have access to information held on individuals by those private companies.

The vehicle is legislation concerning immigration control, the result is increased control over all persons travelling to residing within or having another connection with the State. The detailed study of the extent of current and proposed powers is a subject worthy of further exposition by academic lawyers and others.

Part 2: Citizenship

> 'The point of human rights is that all humans have them. The point of nationality is that all humans do not. So nationality integrates to the extent that it compromises rights available to all human beings.'[43]

Different imperatives made different provisions of Part 2 priorities for the Government. The desire to achieve some consolidation, and perhaps more particularly to ensure that nationality law could be left out of the consolidation and 'simplification' of immigration and asylum legislation, led to ss 47 and 48 of the 2009 Act moving stray provisions from the Nationality, Immigration and Asylum Act 2002 and the Immigration Asylum and Nationality Act 2006 into the British Nationality Act 1981. The changes to nationality law made by the 2009 Act are all effected by amendments to the British Nationality Act 1981. The intention, as is clear when one examines the Draft Immigration Bill and the accompanying Command Paper,[44] was that nationality law would be left untouched by that project. Consolidation, if not 'simplification', is intended to have been achieved by the 2009 Act. Whether this aspiration will become reality is likely to depend on whether the changes to nationality law, and in particular to naturalisation, set out in ss 39 and 40 of the 2009 Act stand the test of time and are still considered helpful in July 2011, the earliest date at which they can be implemented.[45] On 25 May 2010 the UK

39 See the Immigration (Biometric Registration) Regulations 2008, SI 2008/3048 as amended.
40 *Coalition Agreement*, *op cit*.
40a See the Identity Cards Act 2006.
41 *Enforcing the deal: our plans for enforcing the immigration laws in the United Kingdom's communities,* UK Border Agency, 2009.
42 Letter of Jonathan Sedgwick, Deputy Director UK Border Agency to members of the Agency's Corporate Stakeholder Group, April 2010. Source: the Immigration Law Practitioners' Association.
43 *How does nationality integrate?* Professor Robin White, paper for the Council of Europe 2nd European Conference on Nationality, Strasbourg, 8 and 9 October 2001, CONF/NAT (2001) PRO
44 *Simplifying Immigration Law: the draft bill,* November 2009, Cm 7730.
45 See Phil Woolas MP, Minister for Borders and Immigration, *Hansard* HC, 14 July 2009, vol 496, col 244.

Border Agency suspended meetings of its Earned Citizenship Strategic Advisory Group 'until we have established the new administration's position on citizenship policy.'[45a]

Viewing the 2009 Act as the last opportunity to change nationality law for some time, the Government took the opportunity to give effect to the promised extension of section 4C of the British Nationality Act 1981.[46] The rights of children born overseas to British mothers, at a time when those mothers could not pass on their nationality to register as British, was extended to those born before February 1961.[47] At the same time the restrictive interpretation of the existing provisions[48] that had hitherto been a matter of policy[49] was incorporated into new section. By s 47(1) of the 2009 Act, inserting s 41A(1) into the British Nationality Act 1981, a good character test was also applied to registration under s 4C by a Government still smarting from the ability of the Guantánamo Bay detainee David Hicks to register by entitlement as a British citizen.[50]

Others also saw the 2009 Act as the last chance for some while to amend nationality law and strenuous efforts were made by, in particular, the Immigration Law Practitioners' Association,[51] Tameen Ebrahim, an expert on nationality laws pertaining to Hong Kong, and the Chagos Refugees Group (working together), to address long-standing concerns about acquisition of British nationality law by birth and registration. This work built on submissions made to the Lord Goldsmith's review of UK citizenship laws and the report of that review *Citizenship: our common bond*.[52] The Lord Goldsmith's review got many mentions in the House of Lords second reading debate but he spoke only briefly and in very general terms in that debate, focusing on the 'earned citizenship' provisions of the Bill.[53] However, the Lord Avebury, an acknowledged expert in the House of Lords on British nationality law, put forward a wide range of amendments at Committee stage in that House.[54]

Sections 43 and 44 are the fruits of these efforts.[55] Section 44 amends s 3 of the British Nationality Act 1981, extending the period during which a child can be registered under that s 3(2) from 12 months from birth (by entitlement), six years from birth (by discretion) to 18 years from birth. This is registration by entitlement for the under-10s, but by s 47 of the 2009 Act, inserting a new s 41A(1) into the British Nationality Act 21981, the over-10s are made subject to a good character test.[56] Stateless children are among those benefiting from the change, but are also made subject to the good character test.

Under s 43, British Nationals (Overseas) with no other nationality or citizenship, and not having lost such a nationality or citizenship since 19 March 2009 (the date the changes were announced) are brought within s 4B of the British Nationality Act 1981 and are thus entitled to register as British Citizens by entitlement, and without any test of good character. Those

45a E-mail from the UK Border Agency to members of the Group, including ILPA.
46 *Hansard* HC, 31 March 2008, vol 474, cols 601–606 per Liam Byrne MP, Minister of State. See also *Hansard* HL, 8 July 2007, col GC103 per The Lord Bassam of Brighton.
47 Borders, Citizenship and Immigration Act 2009, s 45 substituting a new s 4C into the British Nationality Act 1981.
48 British Nationality Act 1981, s 4C.
49 UK Border Agency, Nationality Instructions, Chapter 7.
50 See *R(Hicks) v SSHD* [2005] EWHC 2818 (Admin) and *SSHD v Hicks* [2006] EWCA Civ 400.
51 See ILPA's Briefings, *op. cit*.
52 March 2008. For ILPA's submission to the review, see the Submissions page of www.ilpa.org.uk
53 Hansard HL, 11 February 2009, vol 707, cols 1144–1146.
54 *Hansard*, HL, 2 March 2009, cols 734ff. For detailed background to the amendments tabled, see the Briefings page of www.ilpa.org.uk
55 *Hansard* HL, vol 709, cols 1082ff and see also the letters of The Lord West of Spitfield to The Baroness Hanham of 14 March 2009 and of The Lord Brett to The Lord Avebury of 20 March 2009 available at http://deposits.parliament.uk/
56 See s 47 inserting a new s 41A(A) into the British Nationality Act 1981.

who stand to benefit from its provisions are persons with a connection to Hong Kong who are not of Chinese ethnic origin and for that reason are not treated as Chinese nationals by China. The Government had declined to include them in s 4B as originally enacted[57] and Lord Goldsmith had stated in his review:

> 'I am advised that this would be a breach of the commitments made between China and the UK in the 1984 Joint Declaration on the future of Hong Kong, an international treaty between the two countries; and that to secure Chinese agreement to vary the terms of that treaty would not be possible.'[58]

The change is very significant. It can be doubted whether any of the forms of British nationality other than British citizenship are true nationalities in the sense envisaged by the Universal Declaration of Human Rights, art 15, the International Covenant on Civil and Political Rights, art 12 and art 3 of Protocol 4 to the European Convention on Human Rights,[59] in that holders have no right to enter or to remain in the country of their nationality. Those holding such a nationality and no other are stateless. The contrast between their plight and the focus on 'citizenship' and the rights and entitlements of nationals in other parts of the 2009 Act could not be starker. With the inclusion of British Nationals (Overseas) in s 4B the UK has taken a significant step in eradicating statelessness from British nationality law. Problems remain however; the requirement under s 4B is phrased as a negative, that one has no other nationality or citizenship, and attempts to place the burden of proof on applicants[60] mean that many remain unable to establish their entitlement to British citizenship.

The provisions on nationality by birth and registration for children born to serving members of the armed forces who would not otherwise be born British citizens were a priority because they were required to give effect to undertakings given by the Ministry of Defence in July 2008, in *The Nation's Commitment: Cross-Government Support to our Armed Forces, their Families and Veterans*.[61]

All the provisions of Part 2 that were not concerned with the new requirements for naturalisation came into force on 13 January 2010.[62]

The focus of attention during the debates on Part 2 was acquisition of British citizenship by naturalisation and the concept of 'earned citizenship'. Why were these provisions, many parts of which had featured in the Draft (Partial) Immigration and Citizenship bill, and which might have been expected to await consolidating legislation, a priority? Why did they necessitate legislation without delay? The imperative appears to have been a political one with 'earned citizenship' the latest way of Government's being seen to be doing something about immigration, although the nature of what it thought it was doing had changed over time. From its inception the project was presented as closely linked to the then Prime Minister, the Rt Hon Gordon Brown MP. First, the July 2007 Green Paper, *The Governance of Britain*,[63] made reference to a 'better sense' of 'British identity', and the need for British citizenship to be

57 And resisted subsequent attempts at amendment of the law to this effect, see *Hansard* HL, 14 March 2006, cols 1197–1201, per the Baroness Ashdown of Upholland.
58 *Op. cit.* para 12.
59 The UK has neither signed nor ratified Protocol 4.
60 UK Border Agency Nationality Instructions, Vol 1, Chapter 12, at 12.3.8.
61 Cm 7424, July 2008.
62 SI 2009/2731 (C.119).
63 Command 7170, Secretary of State for Justice and Lord Chancellor, July 2007.

'valued and meaningful' and accompanied by 'an easily understood set of rights and responsibilities' not just by those naturalising, but by all British citizens.[64]

Subsequently the then Prime Minister launched *The Path to Citizenship: next steps in reforming the immigration system*[65] which re-described the criteria for naturalisation, existing and proposed, using the rhetoric of 'earned citizenship.' By this time links with the rights and responsibilities and sense of identity of existing British citizens had vanished from view.[66] Memorably described in this journal pages by Ann Dummett as '*pretentious and bossy*' in tone[67] the consultation paper played on fears of crime and threats to national security to suggest that all in the UK would lead safer lives if those who make the country their home opt for citizenship. Quite how this sits with the notion of giving people no practical option but to naturalise is a contradiction ably explored by Ann Dummett. During the debates on the Bill[68] and subsequent to the passage of the Act, with the publication of another consultation, *Earning the right to stay: a new points test for citizenship*,[69] a new theme emerged: the desire to sever the link between migration to the UK and settlement here, regardless of the skill-set of the migrant.[70]

Were the statutory provisions clear and easy to understand, which they are not, they would nonetheless need to be read with the consultation papers as much of the apparatus of 'earned citizenship' is not a matter for primary legislation.[71] The existing requirements for naturalisation, including knowledge of a relevant language and of life in the UK and the need to be of good character[72] are re-branded as 'earned citizenship' and augmented with provisions to extend the time that it takes to be eligible for naturalisation unless one fulfils an 'activity condition',[73] a form of certified good works that was but sketchily developed at the time of the passage of the Act[74] and remains unclear.

At the heart of the proposals, is the replacement of the current status of 'indefinite leave' or 'settlement' as a stage between limited leave in a particular category and British citizenship. Instead a person passes from limited leave in a particular category (spouse, partner, worker, refugee) to a new form of limited leave, called 'probationary citizenship'.[75] Because a 'probationary citizen' remains a person with limited leave, his or her rights and entitlements remain that of a migrant until she or he becomes a British citizen, or acquires 'Permanent Residence'.[76] Thus for all save refugees and persons with humanitarian protection this results in

64 *Op. cit.,* paras 185–186.

65 UK Border Agency, 20 February 2008. The response to the consultation was published on 14 July 2008.

66 Planned to be taken forward separately in *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, Ministry of Justice, 23 March 2009.

67 A Dummett *'Changes to Citizenship'* (2008) Vol 22, No 3 *IANL* 213.

68 See eg *Hansard* HL, 11 February 2009, col 1208.

69 3 August 2008.

70 Contrast this with *Selective Admission: making migration work for Britain*, Immigration and Nationality Directorate, Home Office, July 2005 at 1.10 and *The Path to Citizenship: next steps in reforming the immigration system*, February 2008, para 60, p 28.

71 See also 15 January 2009: *Impact Assessment of the earned citizenship proposals* UK Border Agency, 15 January 2009.

72 British Nationality Act 1981, Sch 1.

73 Borders, Citizenship and Immigration Act 2009, s 41(1) inserting new para 4B(5) into Sch 1 to the British Nationality Act 1981.

74 See *The Path to Citizenship, op. cit*,. at page 30; Joint Committee on Human Rights, 9th Report of session 2008–2009, *op. cit*., for Government letters and evidence to the Committee and see for example, *Hansard* Public Bill Committee 4th Sitting, 11 June 2009. An Active Citizenship Design Group made up of UK Border Agency officials and others was created to try to put some flesh on the bones of this notion.

75 References in the 2009 Act to 'probationary citizenship' are few, see eg s 39 inserting new sub-para 1(2)(c) and (d) into Sch 1 to the British Nationality Act 1981 and s 40 inserting new sub-para 3(4)(d)(i) into that Schedule. For more detail, see *The Path to Citizenship, op.cit*.

76 See *The Path to Citizenship, op.cit*. There are only passing references to 'Permanent Residence Leave' in the 2009 Act, see eg s 39(2) inserting a new sub-para 1(2)(d) into Sch 1 to the British Nationality Act 1981.

a loss of many entitlements to services such as welfare benefits, homelessness assistance and entitlement to higher education at home student rates. Against this backdrop the potentially longer qualifying period for naturalisation and the more onerous requirements take on a more sinister hue: those who fail their 'probation' may be starved out of the country.

The scope for failing one's 'probation' is increased by requirements for naturalisation that are more difficult to meet. Only certain types of limited leave, together with the right of abode and residence in exercise of EEA Treaty rights, will count toward the qualifying period for naturalisation.[77] The maximum period of permitted absences per year is reduced.[78] A person naturalising as a person with a 'relevant family association'[79] (potentially a welcome extension of the limitation of the current accelerated route to naturalisation to spouses and partners but not defined on the face of the Act) must demonstrate that the relationship is still subsisting at the time of naturalising. A person naturalising on the 'work' route may be required to demonstrate that she or he is still a worker.[80] Although not stated on the face of the Act, a refugee or person with humanitarian protection could be required to demonstrate that she or he still stands in need of such protection. A person with, for example, excess absences, may have to start qualifying for British citizenship all over again. Existing discretions to waive requirements are preserved and applied to the new requirements.[81]

Permanent Residence may have all the characteristics of Indefinite Leave but the two should not be confused. Permanent Residence is intended to take longer to acquire than British citizenship[82] and the requirements are no less onerous than those for British citizenship. It is necessary first to pass through being a 'probationary citizen' to become either a British citizen or a Permanent Resident. Permanent Residence is primarily there for those whose country of origin prohibits dual nationality and who do not wish to give up their nationality of origin, although it will also serve for those who have an ideological objection to taking British citizenship. It is not, however, an option for existing British citizens; there is a route from Permanent Residence to British citizenship[83] but not the other way (save perhaps going via renunciation of one's nationality).

What will be the result of these changes if implemented? Indubitably injustice or, for those fortunate enough to be able to challenge the system, challenges on human rights grounds by persons unable to naturalise or gain 'Permanent Residence' but unable to survive as probationary citizens who can make a case that removal would breach their human rights. Challenges by persons, without lawful leave already succeed on human rights grounds and in many of the potential cases brought by probationary citizens the Secretary of State will not be able to point to any contravention of immigration law nor that the person had been able to anticipate that his or her stay would be temporary or precarious; save insofar as probationary citizenship makes any stay precarious. More broadly larger numbers of people would

77 Borders Citizenship and Immigration Act 2009, s 39 inserting a new para 1(2)(d) into Sch 1 to the British Nationality Act 1981 and s 40 inserting a new para 3(2)(c)(ii) into that Schedule.

78 Borders Citizenship and Immigration Act 2009, s 39 inserting a new para 1(2)(b) into Sch 1 to the British Nationality Act 1981 and s 40 inserting a new para 3(2)(b) into that Schedule.

79 Borders Citizenship and Immigration Act 2009, s 40(1) amending the British Nationality Act 1981, s 6.

80 Borders Citizenship and Immigration Act 2009, s 39 inserting a new para 1(2)(e) of Sch 1 to the British Nationality Act 1981.

81 Borders, Citizenship and Immigration Act 2009, s 39 amending and renumbering what becomes para 2(1) of Sch 1 to the British Nationality Act 1981.

82 See *The Path to Citizenship, op.cit.* paras 149–150.

83 Borders, Citizenship and Immigration Act 2009, s 39(11) inserting new para 2A into Sch 2 to the British Nationality Act 1981.

experience their lives in the UK as temporary and contingent, and would become fearful or cowed.[84] This appears have been the intention; when an interviewer put to Phil Woolas MP, then Minister for Borders and Immigration, that the proposals in the *Earning the right to stay: a new points test for citizenship* amounted to '*'when you've got citizenship you can demonstrate as much as you like, but until then, don't*?', the Minister's answer was *'Yes'*.[85]

Following repeated expressions of concern in parliament at the lack of transitional provisions,[86] the Government gave an undertaking that the 'earned citizenship' provisions would not come into force before July 2011.[87] Section 58 of the Act provides that persons with indefinite leave to remain or a pending application for such leave will be able to naturalise under the old system for a further 24 months following commencement of those provisions.[88] The Earned Citizenship Advisory Group set up by the UK Border Agency met infrequently, and less frequently than intended, between the passage of the Act and its suspension. The presentation of information to the group was more than once been delayed by the need to do further work,[89] all confirming the impression that 'priority' was a matter of having 'reforms' of which to speak, rather than a matter of rapid implementation.[90]

Just as the provisions of Part 1 affect everyone who crosses the UK Border, and not only persons under immigration control, so the naturalisation provisions of Part 2 would, if implemented, increase the frequency with which persons in the UK are required to assert and evidence their immigration status.

As Elspeth Guild and Didier Bigo have written:

> 'In principle the whole of the territory could become a site of control … identity checks are … conducted at sites not directly connected to immigration control (such as the gateways to welfare benefits) and are indeed often more systematic in such cases…'[91]

Part 3 Immigration

The proposals pertaining to the Common Travel Area previously formed the meat of this part of the Bill. The fate of that section, as described above, gives the lie to the notion that it was a matter of urgency.

The other provisions in this section are not related to the Common Travel Area proposals, or to each other. Sections 50 came into force upon the passage of the Act,[92] s 51 on 10 November 2009,[93] and s 52 is not yet in force. All the provisions increase the powers of the UK Border Agency and all have the effect of extending the range of circumstances in which an individual, for failure to comply with the immigration laws, may be subject to criminal charges.[94]

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84 Predicted by Ann Dummett, *op. cit*.
85 BBC Radio 4, The Today Programme, 3 August 2009.
86 See eg Joint Committee on Human Rights HL Paper 62, HC 375 of session 2008–2009, *op.cit*,. at para 1.52; Public Bill Committee 3rd Sitting and 4th sittings, 11 June 2009, cols 76–92 and 95–103.
87 *Hansard* HC, 14 July 2009, vol 496, col 244, per Phil Woolas MP, Minister of State for Borders and Immigration.
88 Borders, Citizenship and Immigration Act 2009, s 58(9).
89 Information from the Immigration Law Practitioners' Association, which was represented on the Group.
90 For further detail on the Act and on the citizenship proposals in particular see *Acquisition of British citizenship by naturalisation*, in *Blackstone's Guide to The Borders, Citizenship and Immigration Act 2009,* I Macdonald, L Fransman, A Berry, A Harvey, H Majid, H and R Toal, (OUP, 2010).
91 *Controlling Frontiers, Free movement into and within Europe* Didier Bigo and Elspeth Guild, Ashgate, 2005 p 144–145.
92 Borders, Citizenship and Immigration Act 2009, s 58(3).
93 SI 2009/2731.
94 See The Immigration Act 1971, s.24, s.26 and the UK Borders Act 2007, s 3.

The Court of Appeal held in *G O O et ors v SSHD* [2008] EWCA Civ 747 that the Secretary of State could not make it a requirement of a student's leave that s/he study on a particular course. Section 50 of the 2009 Act amends s 3(1)(c) of the Immigration Act 1971 to allow such a condition to be imposed, not only upon students, but upon anyone in the UK with limited leave, although the Government stated that such wider application was not its current intention.[95] The section has retrospective effect, so that such a condition could be added to existing leave, not merely imposed when leave is granted subsequent to its coming into force. The Statement of Changes in Immigration Rules Cm 7701 was made, coming into force on 1 October 2009, and restricting study by Tier 4 students other than at institution sponsoring the student, as had been envisaged during the debates.[96]

Section 51 appears to correct an oversight although this is not directly acknowledged in the Explanatory Notes to the Act. The UK Borders Act 2007 Act introduced the 'automatic deportation' regime, and in doing so created a new type of immigration decision – the making of an automatic deportation order. Section 141 of the Immigration and Asylum Act 1999 was not amended at the time, so no provision was made for the fingerprinting of those subject to the new orders. Section 51 addresses the lacuna.

Section 52 addresses not an oversight but a deliberate omission from the UK Borders Act 2007. That Act provided new powers of detention at ports and related measures.[97] The Scots authorities declined to consent to the extension of these provisions for Scotland, considering that existing powers of the police to detain persons at ports were sufficient.[98] Subsequently the UK Border Agency and the Association of Chief Police Officers in Scotland convinced the Scots Government that there was a lacuna: an immigration officer could not hold a person arriving into Scotland at the port of arrival until a police officer could be present. While reiterating that no general power was needed, in the Legislative Consent Memorandum it was agreed it was that this lacuna be addressed.[99]

Part 4 A miscellany within a miscellany

The wide range of the 2009 Act and the title of Part 4, 'Miscellaneous and General' leads one to wonder how any amendments could have been ruled outwith the scope of the Act.

The provision that commanded particular attention during the passage of the Bill was that proposing the transfer of immigration, asylum and nationality judicial reviews in England, Wales and Northern Ireland from the Administrative Court to the Upper Tribunal.[100] This was a case of the Government attempting to persuade parliament to give it powers that it been when denied when the Tribunals, Courts and Enforcement Act 2007 amended s 31A of the Supreme Courts Act 1981 (England and Wales: transfer from the High Court to the Upper Tribunal) to make provision for the transfer of certain judicial reviews to the Upper Tribunal. The agreement reached at the time was that immigration, asylum and nationality judicial

95 *Hansard* HL 4 March 2009, vol 708, col 777.
96 *Hansard* HL 4 March 2009, vol 708, col 779.
97 UK Borders Act 2007, s 1–4.
98 See Scottish Parliament, Legislative Consent Memorandum S3 15.1, Session 3 2009 and *Hansard* HL, 4 March 2009, vol 708, col 790.
99 *Ibid*., para 6. See also Scottish Parliament, SP Paper 224, 2009, Justice Committee, 5th Report of 2009, Session 3, J1/S3/09/R5, Report on the legislative consent memorandum on the Borders, Citizenship and Immigration Bill (LCM(S3) 15.1).
100 HL Bill 15 of session 2008–2009, cl 50.

reviews should not be transferred until the transfer of judicial reviews in less contentious areas had been reviewed and evaluated, and until the transfer of the functions of the Asylum and Immigration Tribunal to the Upper Tier and First Tier Tribunals, itself by no means a certainty at that stage, had taken place successfully.[101] The reaction in the House of Lords to the provisions proposing the transfer was that they were an attempt to go back on the promises made during the passage of the 2007 Act.[102]

One reason for the transfer, as set out in the Home Office *Immigration Appeals: fair decisions, faster justice* consultation paper (August 2008) and in a letter of the Lord Chief Justice to the Lord Lloyd of Berwick, who was one of those leading the parliamentary opposition,[103] was to relieve pressure on the Administrative Court. It did not assist the Government's case that the consultation only reported while the 2009 Act was going through parliament.[104] Consultations in Scotland[105] had not reported at the time of the passage of the 2009 Act and s 53 of the Act as passed makes no provision for transfers of judicial review in Scotland.[106]

The Government proposals were defeated in a vote in the House of Lords.[107] The House of Lords amendment[108] would also have prevented the new more onerous test for an application for permission to the Court of Appeal from the Upper Tribunal under s 13(6) of the Tribunals, Courts and Enforcement Act 2007 from applying in immigration, asylum and nationality cases. This test requires that the proposed appeal raise some important point of principle or practice or that there is some other compelling reason for the relevant appellate court to hear the appeal.

As with the provisions on the Common Travel Area, the Government reintroduced its original clauses at Committee stage in the House of Commons[109] and then backed down at Report stage in the House of Commons.[110] This time, however, the Government opted for a compromise position. The provisions exempting immigration, asylum and nationality cases from the higher test for permission to appeal to the Court of Appeal were lost.[111] The judicial reviews that could be transferred, by order of the Lord Chief Justice with the consent of the Lord Chancellor, were restricted to judicial reviews of 'fresh claims' for asylum, those judicial reviews highlighted by the Lord Chief Justice in his letter to the Lord Lloyd. Such an order having been made, these judicial reviews would be required to be transferred.[112] Fresh claims are currently defined in the Immigration Rules[113] but s 53 of the 2009 Act uses a freestanding definition.[114]

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101 See *Hansard* HL,13 December 2006, cols GC68–70, 20 February 2007, cols 100ff and 1 Apr 2009, col 1125.
102 *Hansard,* HL, 1 April 2009, vol 709, col 1125.
103 9 March 2009.
104 *Immigration Appeals: fairer decision, faster justice, Government response to consultation,* Home Office, May 2009. Published with responses to the consultation, including from the judiciary and immigration judiciary.
105 *The Scottish Civil Court Review, a consultation paper,* Scottish Executive, November 2007 (the 'Gill' review) and *Options for the future administration and supervision of tribunals in Scotland*, Administrative Justice Steering Group, Scottish Consumer Council, September 2008.
106 See Justice Committee, 5th Report of 2009, Session 3, J1/S3/09/R5, *op.cit.*
107 *Hansard* HL, 1 April 2009, vol 709, col 136.
108 HC Bill 86 of session 2008–2009, cl 54(5). See also the Joint Committee on Human Rights, 9th Report of Session 2008–2009, *op. cit.,* at para 132.
109 HC Bill 115 of session 2008–2009, cl 54 see Public Bill Committee 16 June 2009 col 190.
110 *Hansard* HC, 14 July 2009, vol 496, col 209.
111 See *Hansard* Public Bill Committee, 16 June 2009, col 182 and *Hansard* 14 July 2009 vol 496, col 210.
112 Borders, Citizenship and Immigration Act 2009, s 53(1)(a) inserting new subs 31A(2A) into the Supreme Court Act 1981 (c.54) and s 53(2) inserting new subs 25A(2A) into the Judicature (Northern Ireland) Act 1978 (c.23).
113 HC 395 as amended, para 353.
114 Section 53(1)(b) inserting a new subs 31A(8) into the Supreme Court Act 1981 and s 53(2) inserting a new subs 25A(8) into the Judicature (Northern Ireland) Act 1978 (c.23).

When a person has made a claim for asylum that has finally been determined, remains on the territory and makes further submissions as to why s/he should be granted leave to remain in the UK, the UK Border Agency will determine whether these submissions amount to a 'fresh claim for asylum.' If so, the application will be determined and, absent the case being certified under s 94(2) or 96 of the Nationality Immigration and Asylum 2002, there will be an in-country right of appeal against refusal. If not, no provision is made in s 82 of the Nationality, Immigration and Asylum Act 2002 for a right of appeal against the decision and the only challenge to a refusal is by way of judicial review.[115]

Had such decisions been made decisions that can be appealed under s 82 of the Nationality, Immigration and Asylum Act 2002 the Tribunal would have been dealing with them in any event. It is increasingly the case that the Tribunal is dealing with public law grounds in addressing applications for permission to appeal (previously, in the Asylum and Immigration Tribunal, applications for reconsideration). The big questions around the transfer are thus rather about who in the Upper Tribunal will hear these cases[116] and who will plead them and represent applicants, including the Secretary of State: solicitors and counsel, as in the High Court in England, Wales and Northern Ireland, or those able to represent appellants before the Upper Tribunal? The latter group includes certain representatives regulated by the Office of the Immigration Services Commissioner and, for the Secretary of State, Home Office Presenting Officers. Will the procedural standards and safeguards of the High Court survive transfer to the Upper Tribunal? Which cases will be reported – a question that also has implications for judging what will be lost when the High Court and Court of Session no longer have oversight of these decisions by the Secretary of State? The section is not yet in force and thus no order has been made under it.

Once an amendment to s 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 to address the trafficking of babies and small children made it on to the Order Paper, not even the most pessimistic commentator could have doubted that an amendment to s 4 would be part of the 2009 Act. Sticking to the theme of the Bill as a vehicle for matters of priority, the Government suggested that the matter was not urgent.[117] They were rapidly disabused of that notion by the Baroness Hanham, the Conservative Party Front-Bench spokeswoman who had moved the amendment:

> 'We will not walk away from this; we will come back to it on Report. … we will divide the House, and I think that we will win.'[118]

The amendment, significant in itself, may also have had a wider effect on the Act as a whole. Baroness Hanham's comments arguably marked the point at which the House and those outside realised that, in the debates on this Bill, not only would they have all the good songs, but they would win some of the battles.

When s 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was enacted, it was argued by the Refugee Children's Consortium that the definition of trafficking therein,[119] with its reference to a 'request or inducement' failed to encompass the trafficking of

115 See *ZA (Nigeria) v SSHD* [2010] EWHC 718 (Admin).
116 See the Joint Committee on Human Rights 9th Report of session 2008–2009, *op.cit.,* para 1.28 and the Home Affairs Committee 5th Report of session 2008–2009, *op.cit.*, at para 78.
117 *Hansard* HL, 4 March 2009, vol 708, cols 823ff.
118 *Hansard* HL, 4 March 2009, vol 708, col 828.
119 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s 4(4)(d).

babies or small children for, for example, benefit fraud.[120] It thus failed to give effect to the reference in the 'Palermo Protocol'[121] to 'abuse of power or of a position of vulnerability'.[122] The Baroness Scotland, representing the Government, asserted that the definition not only should, but did, cover such trafficking.[123] That she was wrong, at least in the view of the Crown Prosecution Service, was highlighted by the case of Peace Sandberg who was alleged to have bought a baby in Nigeria to qualify for priority housing. While she was prosecuted and convicted,[124] the Crown Prosecution Service did not prosecute for trafficking and subsequent discussions made clear that this was because the offence of trafficking was considered to be too narrowly drafted.[125] The Government agreed at House of Lords Report stage to amend the 2004 Act.[126] The section came into force on 10 November 2009,[127] suggesting that it passed the test of urgency after all.

Section 55, which imposes a duty upon the UK Border Agency to have regard to the need to safeguard and promote the welfare of children, although only those in the UK, was regarded by parliament as a matter of urgency. It had taken some five years to achieve. The first attempt was during the passage of the Children Act 2004 when the general duty to safeguard and promote the welfare of children was imposed on a range of agencies, but not upon the Immigration and Nationality Directorate, predecessor to the UK Border Agency. An amendment was laid by the Conservative back-bench peer, Earl Howe, to include the Directorate within the section.[128] At each subsequent attempt to press the amendment, it gathered support.[129] The compromise position adopted in UK Borders Act 2007 was s 21 of that Act, which provided for a Code of Practice to apply to the Border and Immigration Agency, another predecessor of the UK Border Agency.[130] Before that section had come into force, parliament had returned to the issue, this time in the context of children's legislation, and the Government was defeated on an amendment to make the Border and Immigration Agency subject to the section 11 duty.[131] The Government argued against the amendment on technical grounds, most notably that section 11 of the Children Act 2004 applies only to England and Wales. It succeeded in brokering a compromise: the amendment would be dropped but an equivalent duty imposed on the Agency in the final version of the Bill that would 'simplify' immigration law.[132] This was done.[133]

120 *Hansard* HL, 6 April 2004, col 1642ff and 6 July 2004, cols 669–670.

121 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, United Nations 2000.

122 Palermo Protocol, *op.cit.*, art 3(a).

123 *Hansard* HL 6 April 2004, col 1645. Her assurances were reiterated by the Lord Rooker at Report stage of the Bill, *Hansard,* HL 6 July 2004, cols 671ff.

124 16 May 2008, Isleworth Crown Court.

125 Conference presentation on 16 July 2008 by Detective Inspector Gordon Valentine, subsequently confirmed by the Crown Prosecution Service in a number of meetings on human trafficking at which the author was present.

126 *Hansard* HL, 1 April 2009, vol 709, cols 1138ff.

127 SI 2009/2731 (C. 119).

128 *Hansard* HL, 15 July 2004, cols 1460–5. A vote on the amendment was lost by only nine votes.

129 See *eg* Joint Committee on Human Rights 17th report of session 2004–2005 23 March 2005 *Review of international human rights instruments,* HL Paper 99/HC 264 , at para 47, *Hansard* HC 7 May 2007 cols 233ff and the House of Commons Library Research paper 09/47 Borders Citizenship and Immigration Bill.

130 *UK Border Agency Code of Practice for Keeping Children Safe from Harm,* December 2008. Into force on 6 January 2009, see SI 2008/3258.

131 *Hansard* HL, 17 March 2008, vol 700, col 40. 'Contents 173, Not-Contents 119'. See also *Hansard* HL, 13 Nov 2008, col 791.

132 *Home Office and DCSF signal duty on the UK Border Agency to protect children*, Home Office and Department for Children, Schools and Families press release 24 June 2008.

133 For debate see eg *Hansard* HL, 4 March 2009, vol 708, cols 832–4, April 2009 Cols 1142–3, *Hansard* HC Public Bill Committee, 3rd Sitting, 16 June 2009, col 192.

The debates on the s 11 duty and the Government arguments made against it,[134] resemble those it made when opposing the decision to withdraw the reservation to the United Nations Convention on the Rights of the Child in respect of children under immigration control,[135] a reservation finally recorded as notified as withdrawn by the Secretary General of the United Nations on 4 December 2008.[136] The battles for the 'section 11' duty, for section 55 of the 2009 Act and for the removal of the reservation supported each other and one may question whether, without the 'section 11' defeat, the withdrawal of the reservation, announced on 22 September 2008,[137] would have happened.

There was a limited consultation on the draft guidance[138] and it was substantially revised as a result. Section 55 came into force on 2 November 2009[139] and the guidance *Section 55 Guidance Every Child Matters Change for Children* was published on that date. Since that time, work has been ongoing to make reference to the duty in UK Border Agency policy instructions although this has often taken the form of a standard paragraph rather than wholesale revision of the guidance in question.

The duty and the guidance on children look like a success story. However, there are many weaknesses. It does not extend to children outside the United Kingdom, although limited Ministerial assurances that it will be followed by UK Border Agency staff outside the United Kingdom have been given.[140] It must be viewed against the backdrop of the frequency with which the UK Border Agency disputes age.[141] Because it is a separate duty, constant vigilance will be needed to ensure that it keeps pace with the guidance published under s 11 of the Children Act 2004 and the duties imposed on other agencies. Most worryingly of all, it can be argued that it has given an impetus to the use of the rhetoric of child protection by the UK Border to justify increasingly repressive measures, of which the UK Border Agency Asylum Process Guidance on Family Relationship Testing (DNA) and the revised Chapter 60 of the Agency's Enforcement Guidance and Instructions are just two examples.

The unabated enthusiasm for fresh legislation on immigration, asylum and nationality law has one advantage for those working to influence the Government and parliament, which is that debates on previous pieces of legislation can be prayed in aid when a new Bill emerges. It is possible, provided that one has kept sufficiently accurate records, to revisit past promises and predictions and to demonstrate whether promises have been kept and whether predictions have

134 See eg *Hansard* HL 7 February 2006, col 646; 14 March 2006, col 1206 both per the Baroness Ashton of Upholland.

135 See eg Joint Committee on Human Rights 17th report of session 2004–2005 23 March 2005 *Review of international human rights instruments,* HL Paper 99/HC 264, at para 47. See also the Committee's Tenth Report of 2002–03, HL Paper 117, HC 81, para 49 and Seventeenth Report of Session 2001–02, *Nationality, Immigration and Asylum Bill*, HL Paper 132, HC 961.HL 99/HC 265. See also eg *Hansard* HL, 7 February 2006, col 646, 14 March 2006, col 1206; 24 Oct 2006, col 1079; 2 July 2008, cols GC69ff; and *Hansard* HC, 29 Oct 2007, col 546ff and see the UK's *Consolidated 3rds and 4th periodic report to the UN Committee on the Rights of the Child*, 2009, paragraphs 6–8, see http://www.everychildmatters.gov.uk/resources-and-practice/IG00249/

136 CN 980-2008 Treaties- 7 (Depositary notification) United Kingdom, Partial Withdrawal of Reservation. The notification was made on 18 November 2008. The reference to a 'partial withdrawal' is because the reservation in respect of children under immigration control was embedded within a wider reservation.

137 *UK lifts reservations on the UN Convention on the Rights of the Child*, Department for Children, Schools and Families Press Release, 22 September 2008. The announcement was made on the date when the UK gave evidence to the UN Committee on the Rights of the Child, but the withdrawal of the reservation did not happen on that date.

138 Communication from the UK Border Agency to the Immigration Law Practitioners' Association (ILPA), *Arrangements to safeguard and promote the welfare of children for those exercising UK Border Agency Functions and Director of Border Revenue Functions*, 11 June 2009, version 1.6. For ILPA's comments, see the Submissions page of www.ilpa.org.uk

139 SI 2009/2731.

140 See *Hansard* HL 1 April 2009, vol 709, col 1144.

141 See *When is a child not a child: Asylum, Age Disputes and the Process of Age Assessment?* H Crawley for ILPA, 2007.

come true. It is often possible to say 'We told you so.' Arguments that were brushed aside the first time parliament considers a measure may command more attention once evidence to support them is available. Consolidating legislation, if and when it is brought before Parliament, will offer an unparalleled opportunity to audit the performance of legislation passed since 1971. However, the diversity of issues arising within this short Act serves to demonstrate the enormity of the task of influencing a larger piece of legislation. Academic and scholarly commentaries, focusing on particular provisions or themes and drawing together provisions of primary legislation on immigration, asylum and nationality, Ministerial statements made during debates, secondary legislation, guidance and case law on implementation have an important role to play in marshalling the available evidence and informing the debate. There is a need for such studies to take into account what is happening in the devolved administrations and in the Islands. The new provisions on naturalisation are receiving considerable attention but there is an equal need for studies of the UK Border Agency's information sharing-powers and powers of search, arrest and detention; onward appeals to the Court of Appeal from the Upper Tribunal and consideration of the duty on the UK Border Agency to safeguard and promote the welfare of children.

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The views expressed are those of the author, and do not necessarily represent the views of the Association. The author is grateful to Steve Symonds, Legal Officer, ILPA and to ILPA members for their work on the Bill which has informed this analysis.

Victims of Human Trafficking in Ireland – Caught in a Legal Quagmire

Hilkka Becker

At a glance

This article sets out concerns regarding the situation of victims of human trafficking in Ireland. The issues highlighted include the long-term situation of victims and the risk that they might not be adequately protected against being prosecuted for offences committed by them in the context of their own trafficking. Concerns raised also include the lack of adequate provisions ensuring the compensation of victims of trafficking in line with the requirements of the relevant provisions in international law.

Introduction

The efforts of the Irish Government, as set out in its National Action Plan to Prevent and Combat Trafficking in Human Beings in Ireland (2009–2012),[1] to develop a fully effective system of supports for victims of trafficking have been widely recognised. However, some ongoing concerns remain regarding the long-term situation of victims of trafficking within the State, the risk that they might not be adequately protected against being prosecuted for offences committed by them in the context of their own trafficking, and concerns that the provisions in relation to the compensation of victims of trafficking may not be adequate and in line with the requirements of the relevant provisions in international law.

Residency

When looking at the issue of residency for victims of trafficking in Ireland, it is necessary to distinguish between permits that may ultimately be granted for the purpose of the victim assisting the Irish police or other relevant authorities in relation to an investigation or prosecution arising in relation to the trafficking offences committed against her and permits that may be granted to a victim of trafficking on the basis of her protection or humanitarian needs.

Recovery and reflection permits

In accordance with the Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking, first introduced in June 2008, a recovery and reflection permit

1 As published on 10 June 2009: http://www.inis.gov.ie/en/JELR/Final%20National%20Action%20Plan2.pdf/Files/Final%20National%20Action%20Plan2.pdf

shall be granted to a person who has been identified by a member of the Irish police force not below the rank of superintendent in the immigration police – the Garda National Immigration Bureau (GNIB) – as a suspected victim of human trafficking. This provision is seeking to implement art 13 of the Council of Europe Convention on Action against Trafficking in Human Beings,[2] which requires that States shall provide in their internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. In accordance with the Convention, such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities.

In practice however, these permits are generally granted after many lengthy 'informal interviews' with members of An Garda Síochána and, on occasion, victims of trafficking have already progressed to giving full and detailed witness statements by the time they are granted a recovery and reflection permit.

While it is widely understood that there may be a pressing need to gather evidence in certain cases, serious concern has been expressed by organisations such as the Immigrant Council of Ireland[3] that, in practice, victims of trafficking often do not seem to get the 'breathing space' allowing them to recover, escape the influence of the alleged perpetrators of trafficking and to make an informed decision as to whether to assist the police or other relevant authorities.

It must be borne in mind also, that during the recovery and reflection period, victims of trafficking will merely be granted a Stamp 3 residence permit, which will be valid for 60 days only and can be terminated in a situation where the victim has actively, voluntarily and on her own initiative renewed contact with the alleged perpetrators of the trafficking, where it is in the interest of national security or public policy to do so, or where victim status is being claimed improperly.[4] During this period, victims will not be entitled to access the labour market or social welfare payments other than accommodation, psychological and material assistance which, in Ireland, are provided through the Reception and Integration Agency (RIA) which is also responsible for the reception and accommodation of persons seeking international protection. In light of the limited rights granted to victims of trafficking during this period, it would be reasonable to expect that the Garda National Immigration Bureau and the Department of Justice and Law Reform should take a more liberal approach to the granting of such permits so as to ensure that recovery and reflection periods are in fact just that.

Temporary residence permits

In line with the Irish Administrative Immigration Arrangements, a 6-month temporary residence permit on Stamp 4 conditions, allowing access to the labour market, vocational training, education as well as to the social welfare system, will be granted only where the Minister for Justice and Law Reform is satisfied that the person has severed all relations with the alleged perpetrators of the trafficking and that it is necessary for the purpose of allowing the

2 Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16 May 2005.

3 The Immigrant Council of Ireland (ICI) – an Independent Law Centre – is a non-governmental organisation which promotes the rights of migrants and their families by providing information and support, advocacy and strategic litigation as well as policy and campaign work and training to other service providers.

4 Paragraph 8 of the Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking (8 November 2008) – see: http://www.inis.gov.ie/en/INIS/Victim%20of%20Human%20Trafficking%20-%20notice%20Nov%2008.pdf/Files/Victim%20of%20Human%20Trafficking%20-%20notice%20Nov%2008.pdf

suspected victim to continue to assist the police or other relevant authorities in relation to an investigation or prosecution arising in relation to the trafficking.[5]

However, the National Action Plan to Prevent and Combat Trafficking in Human Beings in Ireland (2009–2012), published by the Irish Government in 2009, seeks to exclude victims of trafficking who 'allege trafficking as part of an asylum claim' from access to the labour market.[6] This appears to be contrary to the State's obligations under art 14(5) of the Council of Europe Convention on Action Against Trafficking in Human Beings, which provides that '(…) each Party shall ensure that granting of a permit according to this provision [in other words a renewable residence permit] shall be without prejudice to the right to seek and enjoy asylum'. It has been argued that art 12(4) of the Convention, which provides that '(e)ach Party shall adopt the rules under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and education', allows the exclusion of victims of trafficking with pending asylum claims from the labour market. However, where a pending asylum application is the ground for the exclusion from the labour market, victims might find themselves in a situation where their ability to pursue an application for the protection of the State is impaired by the disadvantage suffered as a result.

Furthermore, the current system fails to provide an avenue to residence on humanitarian grounds, in other words grounds relating to the victim's safety, state of health, family situation and other factors relating to her humanitarian or medical needs. Currently, this only occurs once a victim has been issued with a notification of the Minister's intention to deport her pursuant to Section 3(3) of the Immigration Act, 1999 and has successfully made representations setting out the reasons why she should not be deported to her country of origin or former habitual residence.

Longer term residence permits

The process under which a victim of trafficking can currently apply for permission to remain in the State on 'humanitarian grounds' is set out in s 3 of the Immigration Act 1999 as amended. However, this provision is set to be abolished with the coming into force of the Immigration, Residence and Protection Bill 2008.[7] And if the new legislation is enacted as now drafted, the only avenue through which a victim of trafficking will be able to pursue a 'humanitarian claim' would be an application for international protection.

In this regard, it can only be hoped that the Government will follow the Concluding Observations of the UN Human Rights Committee resulting from its examination of Ireland's compliance with the International Convention on Civil and Political Rights (ICCPR) in July 2008:

> 'While the Committee takes note of the positive measures adopted concerning trafficking in human beings, such as the establishment of an Anti-Human Trafficking Unit and the provision of training to border guards, immigration officers, and trainees in these fields, the Committee is concerned about the lack of recognition of the rights and interests of trafficking victims. It is particularly concerned about lesser protection for victims not willing to cooperate with authorities under the Criminal Law (Human Trafficking) Bill

5 Paragraph 11 of the Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking.
6 Page 116.
7 No. 2a of 2008.

2007. (Articles 3, 8, 24, 26). The State party should continue to reinforce its measures to combat trafficking of human beings, in particular by reducing the demand for trafficking. It should also ensure the protection and rehabilitation of victims of trafficking. Moreover, the State party should ensure that permission to remain in the State party is not dependent on the cooperation of victims in the prosecution of alleged traffickers. The State party is also invited to consider ratifying the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime'.[8]

Applications for international protection

Applications for refugee status under the Refugee Act 1996 (as amended) or for subsidiary protection pursuant to the European Communities (Eligibility for Protection) Regulations 2006 are a viable option to obtain long-term safety for victims of trafficking. However, the criteria that are to be met in order to qualify for 'international protection' in Ireland are very strict and are applied in a forward-looking way. Furthermore, the Immigration, Residence and Protection Bill 2008 specifies that 'the Minister shall not be obliged to take into account factors in the case that do not relate to reasons for the applicant's departure from his or her country of origin or that have arisen since that departure', when considering whether compelling reasons exist to grant permission to remain in the State, the 'protection route' will not provide adequate protection for many victims of trafficking.

In relation to an application for refugee status, the questions to be asked are whether the victim of trafficking concerned has a 'well-founded fear' of future persecution based on a convention ground, in this case her membership of a particular social group, and whether the State of her country of origin or former habitual residence is unable or unwilling to protect her.

The biggest challenge that victims of trafficking are faced with when trying to meet the refugee definition is the question of availability of State protection in their country of origin or former habitual residence. This is illustrated by the case of *A v The Minister for Justice, Equality and Law Reform* in which Hedigan J held in the High Court that although it had been accepted that the young Nigerian girl at the centre of this case was a victim of trafficking, '(S)tate protection – albeit imperfect – would be available to the applicant if she were to be returned to Nigeria. The judge found "(T)he opinions cited in the relevant report as to the availability of protection for victims of trafficking (…) relatively cohesive" and concluded as follows:

> 'It does not seem to me that there is a conflict of any significance as to the availability of protection; rather, different opinions are expressed as to the quality and duration of the protection that is available to victims of trafficking.
>
> In my judgment, therefore, it was open for the Tribunal Member to reach the conclusion that he did based on the information that was before him, and he did so with due regard to natural and constitutional justice.'[9]

In some cases, appeals against recommendations of the Office of the Refugee Applications Commissioner (ORAC) to the Refugee Appeals Tribunal (RAT) have been successful and

8 CCPR/C/GBR/CO/6, 30 July 2008.
9 *A v MJELR* [2008] IEHC 336, 29 October 2008.

determinations by the ORAC have been set aside. Generally, these cases have involved very young and vulnerable persons, for example in a case where the Tribunal Member held that internal relocation in Nigeria was not a viable alternative:

> 'The internal relocation theory is one that must be reasonable in all the circumstances and I do not accept that it would be reasonable in the applicant's case. The applicant is a single mother, alone, with no family ties and no visible means of support. Her family have never been any support to her in her life.
>
> (…) it would be unduly harsh to expect [the Appellant] to relocate given the importance of family ties and social networks in Nigeria. I further find that it would be unduly harsh given the past experiences of the applicant'.

In another case, involving a minor appellant from Nigeria, the Tribunal held that:

> 'While the State does offer protection to victims of trafficking, the applicant's position is distinguished by the fact that it was family members who trafficked her, and considering the fact that the applicant's father appears to have an extensive network of connections within Nigeria, the Tribunal therefore cannot be sure that the State could protect the Applicant were she to return.'

The above cases certainly provide some cause for optimism in relation to applications for international protection from victims of human trafficking and despite the less hopeful judgments coming from the High Court so far, victims of trafficking clearly still have a chance of succeeding with their applications for protection, particularly where they belong to particularly vulnerable categories of persons.

And it is certainly positive that human trafficking has, in principle, been accepted as a ground for granting refugee status. However, it is important to bear in mind that many victims of trafficking will not qualify for refugee status and that other avenues, allowing victims of trafficking to obtain long-term security in relation to their immigration status, for example by way of introducing a residence permit granted to victims of trafficking on the basis of their safety needs, state of health, family situation and other factors relating to their humanitarian or medical needs, must be established.

Risk of prosecution

Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings obliges Member States to 'provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so'. However, there is concern that victims of trafficking in Ireland may not be adequately protected against being prosecuted for offences which they committed as a direct consequence of their situation as trafficked persons, or where they were compelled to commit such unlawful acts.

The majority of immigration related offences are contained in the Immigration Act 2003 and the Immigration Act 2004 and the failure to comply with a duty prescribed by either act generally involves the commission of a criminal offence under the relevant act. A person guilty of an offence is liable on summary conviction to a fine not exceeding €3,000 or to

imprisonment for a term not exceeding 12 months or both.[10] However, victims of trafficking for the purpose of sexual exploitation could also find themselves being charged with breaches of the Employment Permit Acts 2003 and 2006 as well as with prostitution related offences.

So far, the Government has failed to include a non-prosecution clause in the Criminal Law (Human Trafficking) Act 2008. And while there is a commitment in the National Action Plan to Prevent and Combat Trafficking of Human Beings 2009–2012 to ensure that 'a person who is a suspected victim of an offence under the Criminal Law (Human Trafficking) Act 2008 shall not be prosecuted for entry into, or presence in the State for carrying out labour or sexual acts where those acts were a consequence of the trafficking of that person', real certainty around this issue has not been provided to victims of trafficking in Ireland.

By way of comparison, the Crown Prosecution Service (CPS) in the UK has issued publicly accessible guidelines on non-prosecution of victims of trafficking which provide that where investigating officers in the UK have reason to believe that the person has been trafficked, 'prosecutors must consider whether the public interest is best served in continuing the prosecution in respect of the immigration offence'.

According to the CPS guidelines, the following factors are relevant when deciding where the public interest lies:

- is the person a 'credible' trafficked victim;
- the role that the suspect has in the immigration offence;
- was the immigration offence a direct consequence of their trafficked situation;
- were violence, threats or coercion used on the trafficked victim to procure the commission of the offence;
- was the victim vulnerable or put in considerable fear.

And, where information has come to light from other sources that a suspect might be the victim of trafficking, for example from a Non-Government Organisation (NGO), the prosecutor should:

- contact the police officer or immigration officer investigating the immigration offences;
- ask the investigating officer to make enquiries and obtain information in connection with the claim that the suspect has been trafficked (this should be done by contacting the UK Human Trafficking Centre (UKHTC))[11]
- re-review the immigration case in light of any fresh information or evidence;
- if new evidence obtained supports the claim that the suspect has been trafficked and committed the immigration offences whilst they were coerced, give consideration to discontinuing the prosecution. Where there is clear evidence that the defendant has a credible defence of duress, the case should be discontinued on evidential grounds.

Other countries, for example the United States, have introduced legislation ensuring that trafficked persons are not to be held liable for offences that are directly connected or related to the trafficking. In accordance with the US Victims of Trafficking and Violence Protection Act of 2000, '(P)enalties for the crime of unlawful conduct with respect to documents in

10 Section 13(1), Immigration Act 2004.
11 See: www.ukhtc.org

furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labour do "not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, […] if that conduct is caused by, or incident to, that trafficking."'[12] Similarly, the relevant legislation of the Philippines provides that '(T)rafficked persons shall be recognized as victims of the act or acts of trafficking and as such shall not be penalized for crimes directly related to the acts of trafficking […] or in obedience to the order made by the trafficker in relation thereto. In this regard, the consent of a trafficked person to the intended exploitation set forth in this Act shall be irrelevant.'[13]

It is of grave concern that victims of trafficking in Ireland may be reprimanded by members of the Irish police force – An Garda Síochána – for offences committed in the context of their trafficking situation, particularly where they have not yet been identified as victims of trafficking. One concrete example of this involved a victim of trafficking represented by the Immigrant Council of Ireland (ICI). This woman, having previously escaped her traffickers, was apprehended in a shopping centre by one of them. A fracas ensued and the police were called on her request. Subsequently, the woman and the trafficker were taken to the police station where they were questioned and then released. However, some weeks later, the victim of trafficking received a request to attend at the relevant police station to be cautioned in relation to Public Order Offences.

Furthermore, victims of trafficking may feel compelled to give exhaustive information about their experience of trafficking and potentially about any offences committed by them in that context, in advance of having had the benefit of legal advice, particularly in a situation where the services of the Legal Aid Board's dedicated service for victims of trafficking will only be offered upon referral from the Garda National Immigration Bureau following their assessment of the person's status as a 'potential victim'.

The only way in which non-prosecution can be guaranteed at present is through a letter from the Director of Public Prosecutions (DPP) giving immunity in relation to specific offences. This was done in the recent case of two women allegedly trafficked into Ireland who were granted immunity from prosecution, having agreed to give full statements about how they came to Ireland and the work in which they were engaged in a criminal trial against a Carlow man and his daughter who are living in Wales.[14] However, in order to obtain such a letter, it is necessary to list every single offence that the person concerned is afraid of being prosecuted for, including all immigration, employment and public order related offences. This seems far too uncertain to guarantee adequate protection of the victims of this most heinous crime.

In this context, it is important to note the recent judgment of the Court of Appeal of England and Wales in the case of *Regina v O*, a case involving a minor victim of trafficking who, having been apprehended while attempting to leave the UK for France, pleaded guilty to an offence of possessing a false identity card with the intention of using it as her own and was sentenced to eight months imprisonment less 16 days spent on remand by a Crown Court. In this case, the Court of Appeal found that:

> '(…) There was in this case material before the defence which should plainly have raised at least the apprehension that this appellant had been trafficked to the United Kingdom for the purposes of prostitution. The defence had information from her suggesting that

12 Section 112.
13 Section 17, Anti-Trafficking in Persons Act (RA No. 9208) of 2003.
14 See: http://www.carlowpeople.ie/news/two-give-statements-in-trafficking-investigation-1868448.html

> she was at most 17, as counsel indeed submitted to the court, and perhaps only 16. From the custody record the Crown should have appreciated that she might have been a very young person.'

No steps were taken by the defence to investigate the history. No consideration was given by the defence as to whether she might have a defence of duress. The possibility that she might have been trafficked was ignored. There is nothing in the transcript to suggest that any thought had been given to the State's possible duty to protect her as a young victim. Nobody considered that if she was 17 or less, she should not have been in the Crown Court at all. Counsel for the defence thought it right to refer to 'an inevitable prison sentence'. The judge passed what she described as an 'inevitable prison sentence' of 8 months. If the appellant was 17 or less, a sentence of imprisonment as such was unlawful. For good measure the judge sentenced her without a report.

The Court came to the conclusion that:

> 'This appeal against conviction must obviously be allowed. We would put it most simply on the footing that the common law and Article 6 of the European Convention on Human Rights alike require far higher standards of procedural protection than were given here. There was no fair trial. We hope that such a shameful set of circumstances never occur again. Prosecutors must be aware of the protocols which, although not in the text books are enshrined in their Code. Defence lawyers must respond by making enquiries, if there is before them credible material showing that they have a client who might have been the victim of trafficking, especially a young client. Where there is doubt about the age of a defendant who is a possible victim of trafficking, proper inquiries must be made, indeed statute so required.
>
> All this is obvious. It marches with what was said by the report of a joint Committee in the House of Lords and House of Commons on human trafficking published in October 2006 (see in particular paragraphs 134 and 159). We hope that this case serves as a lesson to drive these messages home.'[15]

The judgment confirms the duty of prosecutors to make full and proper enquiries in criminal prosecutions involving individuals who may be victims of trafficking and to be proactive in establishing if a suspect is a potential victim of trafficking. It is to be hoped that this judgment will have at least some persuasive value in the Irish courts and that it will contribute to both prosecution and defence lawyers being more aware of their obligations in this regard.

Lack of compensation

Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings requires national legal provisions for 'the right of victims to compensation from the perpetrators'.

In accordance with art 15(4), 'each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation

15 [2008] EWCA Crim 2835, 2 September 2008.

or measures or programmes aimed at social assistance and social integration of victims', which could be funded by the assets resulting from the application of measures against the perpetrators such as monetary sanctions and the confiscation of assets.

The compensation victims of trafficking are entitled to is pecuniary and covers both material injury, for example the cost of medical treatment, and non-material damage for the suffering experienced.

Ordinarily, victims' right to compensation consists of a claim against the perpetrators of the trafficking – it is and it should be the traffickers who bear the burden of compensating the victims. And if, in proceedings against traffickers, the criminal courts are not empowered to determine civil liability towards the victims, it must be possible for the victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest.

However, even though it is the trafficker who is liable to compensate the victim, by order of a civil court or – in some countries – a criminal court, or under a judicial or extra-judicial transaction between the victim and the trafficker, in practice there is rarely full compensation whether because the trafficker has not been found, has disappeared or has declared himself bankrupt.

Article 15 of the Council of Europe Convention therefore requires that Parties take steps to guarantee compensation of victims. The means of guaranteeing compensation are left to the Parties, which are responsible for establishing the legal basis of compensation, the administrative framework and the operational arrangements for compensation schemes. In this regard, art 15(4) suggests setting up a compensation fund or introducing measures or programmes for social assistance to and social integration of victims that could be funded by assets of criminal origin.

In deciding the compensation arrangements, Parties may use as a model the principles contained in the European Convention on the Compensation of Victims of Violent Crimes, which is concerned with European-level harmonisation of the guiding principles on compensating victims of violent crime and with giving them binding force. Moreover, EU Member States must also have regard to the Council Directive of 29 April 2004 on compensation of crime victims.

The only avenues for victims of trafficking being granted compensation in Ireland seems to be through the awarding of compensation by a civil court or a court of criminal law, pursuant to the provisions of the Criminal Justice Act 1993, or through the Criminal Injuries Compensation Tribunal. As the Tribunal only covers 'out of pocket expenses' and does not compensate for pain and suffering, the provisions clearly fall short of the level of compensation required by the Council of Europe Convention, at least in situations where the perpetrator cannot be found or has been declared bankrupt.

It is of course important not to forget that victims of trafficking may potentially also be able to pursue a claim against a trafficker through employment legislation. However, this can only be done in so far as national law recognises the activity of the person as legal employment. Access to such compensation will therefore depend on a person's immigration status, the basis and nature of the employment contract, and whether the work is 'legal' – something that is unlikely in the case of persons who have been trafficked for the purpose of sexual exploitation.

A report from the OSCE, published in May 2008,[16] found that for the trafficked person to actively participate in legal proceedings including giving oral and documentary evidence in relation to the wrongdoing and the damages and losses they have suffered can be 'an

16 OSCE/ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region, 2008.

intimidating experience, and that free legal assistance and representation is necessary to improve the individual's chances of successfully navigating the procedures and receiving an award'. According to the report, '(H)aving to prove damage by evidence of past and ongoing victimisation, and the titles and definitions of some of the damages categories such as "loss of dignity" can have a re-traumatising effect on the trafficked person'.

Recommendations from the OSCE therefore include the establishment of quick, streamlined and accessible procedures with an independent appeal process, the provision of legal advice and representation in relation to compensation claims and the examination of the relative merits of establishing a scheme specifically for trafficked persons, ensuring that the criminal assets seized from traffickers contribute to fund it.

States' obligations pursuant to Article 4 of the ECHR

There remains a lot to do to ensure that Ireland has legislative and administrative structures to address the very serious crime of human trafficking and to fully guarantee the protection of the human rights of victims of trafficking. In this regard, the government should be mindful of the judgments of the European Court of Human Rights in the cases of *Siliadin v France*[17] and *Rantsev v Cyprus and Russia*,[18] both regarding States' obligations under art 4 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), the prohibition of slavery and forced labour.

In the earlier *Siliadin* case, a case concerning a young Togolese national who arrived in France when she was fifteen and a half years old and, having her passport confiscated, effectively became an unpaid servant, the European Court of Human Rights held that:

> 'Article 4 enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols 1 and 4, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15(2) even in the event of a public emergency threatening the life of the nation. In those circumstances, the Court considers that, in accordance with contemporary norms and trends in this field, the Member States' positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation'.

Having previously concluded that the treatment of the Applicant in the *Siliadin* case amounted to servitude and forced and compulsory labour, the Court concluded in *Rantsev v. Cyprus and Russia*, a case concerning a young Russian woman who had come to Cyprus on an 'artiste' visa and who had died in an attempt to escape from an apartment where she was being held by her employer who had threatened to have her expelled from Cyprus following her abandonment of place of work and residence after only two weeks in Cyprus, that 'it is unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour"'. Instead, the Court held that: 'trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.'[19]

In further defining States' obligations, the Court confirmed that:

17 Application 73316/01, Judgment of 26 July 2005.
18 Application 25965/04, Judgment of 7 January 2010.
19 Paragraph 282.

> '(A)s with Articles 2 and 3 of the Convention, Article 4 may, in certain circumstances, require a State to take operational measures to protect victims, or potential victims, of trafficking. In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.'[20]

Following the long awaited inclusion of all forms of human trafficking in Irish criminal law through the enactment of the Criminal Law (Human Trafficking) Act 2008 the Irish authorities must now ensure that its implementation will guarantee freedom from slavery and forced labour. In particular, pro-active measures must be taken to protect victims and potential victims of trafficking. In the words of the European Court of Human Rights in the *Rantsev* case: 'Article 4 also entails a procedural obligation to investigate situations of potential trafficking. The requirement to investigate does not depend on a complaint from the victim or next-of-kin: once the matter has come to the attention of the authorities they must act of their own motion. (…). A requirement of promptness and reasonable expedition is implicit in all cases but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency. (…).'[21]

Conclusion

Ongoing cooperation between Government and other stakeholders, including the NGO sector and international humanitarian organisations has lead to a significant improvement of the situation of victims of trafficking in Ireland. However, the ratification by Ireland of the Council of Europe Convention remains outstanding and several gaps – set out above – in its implementation will need to be closed in advance of ratification. Furthermore, the Irish Government will have to decide whether to participate in the new Proposal for a Directive on preventing and combating trafficking in human beings and protecting victims, repealing Framework Decision 2002/629/JHA[22] and in the Proposal for a Directive on combating sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA.[23] These Directives will be adopted under the new rules of the Treaty of Lisbon, the co-decision procedure involving both the Council and the European Parliament. Ireland's participation in the Directives would allow EU monitoring of government practices as well as the sanctioning of poor implementation and they are therefore best placed to ensure full protection of victims of trafficking – with Ireland's participation – throughout the EU.

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20 Paragraph 286.
21 Paragraph 288.
22 Published on 29 March 2010 (see: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/108).
23 Published on 29 March 2010 (see: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/107).

Come and Go? How Temporary Visa Works Under US Bilateral Trade Agreements with Arab Countries

*Bashar H. Malkawi**

At a glance

Free trade applies not only for trade in goods and services but also extends to include other factors of production such as labor. Little attention has been paid to liberalizing the movement of persons who trade in these goods and services. Article 8 of the US-JO FTA permits entry of nationals of one party into the territory of the other. Despite that, nationals are not able to benefit from the visa commitments of the US-JO FTA.

The US-JO FTA permits entry for narrowly defined investment-related and trade-related purposes. Jordanian businesspeople face difficulties in meeting the threshold of 'substantial trade', 'investment', and 'substantial amount of capital'. Moreover, the US couples the movement of key business personnel with local presence requirements. The US-JO FTA, as for all other FTAs, prioritises the cross-border movement of corporate executives, researchers, and professionals with advanced degrees.

The US-JO FTA, as other US-Arab FTAs, is a trade agreement concerned with the movement of goods and services but not with the movement of persons. There can be no free trade without people to facilitate it. The issue of trade and temporary visas should be of immediate relevance to negotiators when crafting the broader US-Middle East FTA.

Introduction

The United States (US) and Jordan launched negotiations for a free trade agreement in 2000.[1] Several reasons explain the US desire to negotiate a free trade agreement with Jordan. The failed WTO Ministerial Conference in 1999 led US trade officials to analyze the possibilities for a free trade agreement that would include certain provisions that are resisted at the multilateral

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1 See G Yerkey *US, Jordan Make 'Substantial' Progress in Talks on Free Trade Agreement, USTR Says*, 17 Intl Trade Rep (BNA) 1224 (3 August 2000) (stating agreement to initiate negotiations was announced by US officials following a meeting between President Clinton and King Abdullah on June 6 in Washington, DC).

trading level.[2] Moreover, the US and Jordan had already signed a trade and investment framework in 1999, which is usually a precursor for a FTA.[3] Economically, US exports to Jordan would increase as a result of the FTA while Jordanian imports to the US would not threaten US industries.[4] The FTA could also spur Jordan's economic growth, allowing for the possibility that it would become less dependant on foreign aid. Moreover, the US needed to negotiate a FTA because it was losing ground to the EC which, which had concluded association agreements with several Mediterranean countries.[5] By signing the FTA, the US could catch up to the EC with respect to economic dominance in Arab countries.

On 24 October 2000, the United States-Jordan Free Trade Agreement (US-JO FTA) was signed in a record time.[6] The US-JO FTA was the first FTA to be concluded with an Arab country. It was also the first FTA to be concluded in the absence of fast track authority, which had lapsed since 1994.[7] Without fast track authority, Congress could have made amendments to the FTA, voted it down, delayed its passage, and added amendment.

The US-JO FTA includes a preamble, nineteen articles, three annexes, joint statements, memorandums of understanding, and side letters. In addition to the interesting articles on labor and environment, the US-JO FTA provides the opportunity for Jordanian nationals to come to the US to make investments and participate in trade.[8] Under certain conditions, Jordanian nationals can enter the US to render professional services.

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2 In the wake of protests by environmentalists and human rights activists at the WTO summit in Seattle in late 1999, then president Clinton promised to link future trade accords to labor, environmental, and human rights issues. See E Uslaner, *The Democratic Party and Free Trade: An Old Romance Restored*, 6 NAFTA: L & Bus Rev Am 347, 359 (2000).

3 See G Yerkey, *US, Jordan Sign Framework For Trade and Investment Pact*, 16 Intl. Trade Rep (BNA) 468 (17 March 1999) (then USTR Charlene Barshefsky stated that the agreement would put in place institutional foundation for trade relationship. The agreement opened dialogue on issues such as agriculture, intellectual property, services, investment, and trade-related aspects of labor and environmental policy).

4 A study conducted by the Office of Economics and the Office of Industries of the USITC, found that Jordan's exports to the US would not have a measurable impact on US industries, US employment, and production. Based on 1999 trade figures, US imports from Jordan totaled $31 million as compared to total US imports of $1 trillion. See US International Trade Commission, Economic Impact on the United States of a US-Jordan Free Trade Agreement, 5-1 Pub No 3340 (September 2000) (an FTA with Jordan is not expected to have a measurable impact on US imports from Jordan for the 15 sectors reviewed).

5 The official movement towards a closer relationship between the EC and its Mediterranean neighbors was launched at a meeting of the European Council in Lisbon in 1992. It takes place between the EC and 12 countries to the east and south of the Mediterranean. The major premise of the partnership is to create an enormous zone of free trade between Europe and several countries of the Middle East by the year 2010. The Euro-Mediterranean Partnership was created in 1995 in Barcelona with the signing of the Barcelona Declaration by the EC and 12 Mediterranean Countries. The 12 Mediterranean countries are as follows: Morocco, Algeria, Tunisia, Egypt, Jordan, Israel, The Palestinian Authority, Lebanon, Syria, Cyprus, Malta, and Turkey. This partnership will lead to a series of Euro-Mediterranean association agreements. See J Klosek *The Euro-Mediterranean Partnership*, 8 Intl Leg Persp 173 (1996).

6 This record time of approximately four months can be compared with the 15 months of intensive debate between the US and Israel which resulted in the conclusion of the US-Israel FTA. See A James Samet & M Goldberg, *The US-Israel Free Trade Area Agreement* 1.02 (Bus L 1989). NAFTA parties completed negotiations in 1992 after 14 months of negotiations. Along the lines of the US-JO FTA, the US-Bahrain FTA of 2004 was concluded within four months starting January 2004 and ending in May of the same year.

7 The fast track authority is a procedure, delegated by the US Congress, gives the US executive the authority to enter into trade negotiations under certain procedural requirements. It was used to conclude the Tokyo Round of 1979, the US-Israel FTA of 1985 whereby a specific section (s 401) of the US Trade and Tariff Act of 1984 was designed as 'trade with Israel', the US-Canada FTA of 1988, NAFTA of 1993, and the Uruguay Multilateral Trade Round of 1994. Since then, the fast track authority was not revived, despite various attempts, until the year 2002. For more on fast track authority see I Destler *Renewing Fast-Track Legislation* 8 (Inst Intl Econ 1997).

8 See Agreement between The United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, 24 October 2000, 41 I L M 63, art 8.

The purpose of this article is to examine in detail art 8 of the US-JO FTA which relates to entry of nationals of one party into the territory of the other. The article starts by providing a brief background of the negotiation and conclusion of the US-JO FTA. Then, the article analyses in detail the specific provision related to temporary entry of nationals. The article draws a comparison between US-JO FTA with the North American Free Trade Agreement (NAFTA) and the more recent trade agreements between the US, Oman, Bahrain, and Morocco. Finally, the article observes that although the US-JO FTA, like all US FTAs, is designed to permit temporary entry, without intent to establish permanent residence, of persons, the US should have provided Jordan with special and differential treatment for entry of its nationals. Taking into account the special circumstances of Jordan as a developing country with low-income status, high unemployment rate, and lack of resources, movement of business visitors, investors, intra-company transferees, and professionals should have been dealt with leniency so that the FTA could generate effective and real market access.

Treaty-Trader and Treaty-Investor Visas under the US-Jordan FTA

The US-JO FTA permits entry of nationals of one party in the territory of the other.[9] From the outset, it is necessary to distinguish between migration and the ability of Jordanians to enter into the US temporarily to make investments and participate in trade. Like all persons seeking to come to the US on treaty-trader or treaty investor visas, Jordanian nationals are not allowed permanent resident status, but are only given the opportunity to acquire a visa on a 'temporary' basis or 'non-immigrant' status.[10] While treaty trader and treaty investor visas are formally classified as temporary non-immigrant visas, these visas can be renewed on an indefinite basis. In this aspect, Jordanians are treated no different from other nationalities under other US FTAs.[11] In sum, the US-JO FTA does not set limits on the number of renewals for trader and investor visas.

The US-JO FTA allows nationals of Jordan to enter into the US to carry solely 'substantial trade', including trade in services and technology. The yardstick in the FTA is 'substantial trade.' Article 8 does not specify what constitutes 'substantial trade.'[12] For example, should a Jordanian trader be major exporter to the US to be eligible for entry? Or the US is obliged, subject to its laws on entry, to allow Jordan's traders entry into its territory for attending a trade fair or partnering with US firms.

In effect, the language of art 8 of the US-JO FTA is drawn from the Immigration and Naturalization Service (INS), now known as US Citizenship and Immigration Services within the Department of Homeland Security,[13] and the US Department of State regulations. The Department of State regulations define a treaty trader as an alien, classifiable as a nonimmigrant

9 *Ibid* art 8.

10 There is a US immigrant investor's status for those who commit to invest in the US in the amount of $1million generally. For more see 8 USCA §1153 (b) (5) (c) (2003).

11 See C Rugaber *Senate Judiciary Committee Members Criticize USTR on Temporary Entry Provision*, 20 Int'l Trade Rep (BNA) 1216 (17 July 2003) (The texts of the Chile and Singapore FTAs create new visa categories in the United States for the temporary entry of professionals that would workers from Chile and Singapore to enter the United States each year. The visas could be renewed annually for an indefinite period).

12 However, the term is defined in regulations of the US State Department and Department of Homeland Security.

13 Many of the functions of the Department of State related to visa have been transferred to the Department of Homeland Security. See Homeland Security Act, Pub L No 107–296, 116 Stat 2135, 451–456 (2002).

treaty trader (E-1), who will be in the US solely to carry on trade of a 'substantial nature' either on the alien's behalf or as an employee of a foreign person or organization engaged in trade, 'principally' between the US and the foreign state of which the alien is a national.[14] This language is identical to the language of art 8.1 of the US-JO FTA. The regulations of the Department of State reads that consideration being given to any conditions in the country of which the alien is a national which may affect the alien's ability to carry on such substantial trade. Moreover, the alien must prove that he intends to depart the US after the termination of E-1 status.[15]

Although US-JO FTA does not define the term 'substantial trade', the Department of State regulations define it as the quantum of trade 'sufficient' to ensure a continuous flow of trade items between the US and the treaty country.[16] Continuous flow contemplates numerous exchanges over time rather than a single transaction, regardless of the monetary value.[17] The US regulation considers monetary value as an important factor. However, greater weight is given to more numerous exchanges of larger value.[18] Therefore, Department of State regulations do not specify an exact monetary value of substantial trade as a benchmark that would qualify a Jordanian trader as eligible for E-1 visa. Rather, Department of State regulations leave it to the US Consular Office in Jordan, as the case for other US Consular Offices in other countries, the flexibility of determining 'substantial trade' that would qualify Jordanian nationals of for E-1 visa. This conclusion is supported by the fact that the regulations of the Department of State itself read that consideration being given to any conditions in the country of which the alien is a national which may affect the alien's ability to carry on such substantial trade. In other words, the US Consular Office will have to take into account the conditions prevalent in Jordan when evaluating a petition for E-1 visa. Thus, the term 'substantial trade' will be evaluated on a case-by-case basis.

Additionally, the term 'trade' is not defined in the US-JO FTA. The negotiators of the US-JO FTA perhaps wanted to give a non-exhaustive list of trade activities that could be conducted in the territory of the other party such as trade in services and technology. Other items of trade may include trade in monies, international banking, insurance, transportation, tourism, communications, and some news gathering activities.[19]

The US-JO FTA also allows nationals of one party to enter into the territory of the other party to establish, develop, administer, or advise on the operation of an 'investment.'[20] However, investment is qualified by the requirement that the nationals or the company that employs them 'have committed' or 'in the process of committing' a substantial amount of capital or other resources. In other words, the language of 'have committed' or 'in the process of committing' seems to require a significant amount of upfront investment such as transferring money before a national of Jordan can obtain the visa. The purpose such language could be interpreted so as to prevent maneuvering and fraud. Again, in the investment provision of the

14 See 22 CFR § 41.51(a) (2003).
15 *Ibid* § 41.51 (a) (2).
16 *Ibid* § 41.51 (j).
17 *Ibid*.
18 In the case of smaller businesses, an income derived from the value of numerous transactions which is sufficient to support the treaty trader and his or her family constitutes a favorable factor in assessing the existence of substantial trade. *Ibid*.
19 These non-exhaustive items are incorporated in the definition of items of trade in the Department of State regulations. *Ibid* § 41.51(i).
20 See Agreement between the United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* note 8, art 8.2.

FTA, the yardstick is commitment to a 'substantial amount of capital or other resources'. The Department of State regulations define a treaty investor as an alien, classifiable as a nonimmigrant treaty investor (E-2), that has invested or is actively in the process of investing a substantial amount of capital, as distinct from a relatively small amount of capital solely for the purpose of earning a living, and he seeks entry solely to develop and direct the enterprise.[21] Moreover, the treaty investor must intend to depart from the US upon the termination of E-2 status. Thus, subparagraph 8.2 of the US-JO FTA is drawn directly from the US regulations.

The US-JO FTA is silent as to the definition of 'investment' and 'substantial amount of capital.' However, the Department of State regulation defines investment as the treaty investor's placing of capital, including funds and other assets, at risk in the commercial sense with the objective of generating a profit. The treaty investor must be 'in possession' of and 'have control' over the capital invested or being invested.[22] Furthermore, the US regulations require that capital in the process of being invested must be 'irrevocably' committed to the enterprise.[23] In other words, the treaty investor must commit capital in an unalterable way or commit beyond recall. The treaty investor must have the burden of establishing such irrevocable commitment given to the particular circumstances of each case. Moreover, according to the US regulations, the treaty investor may use any legal mechanism available that would not only irrevocably commit funds to the enterprise but also extend some personal liability protection to the treaty investor. Even if all other conditions are met, the investment must not be passive or virtual but rather a 'real' and 'active' commercial or entrepreneurial undertaking, producing some service or commodity for profit and must meet applicable legal requirements for doing business in the particular jurisdiction in the US.[24] This language intends to prevent visa fraud.

As to the definition of 'substantial amount of capital', art 8 of the US-JO FTA is silent on this matter. However, the US Department of State regulations define 'substantial capital' as the amount that is 1) substantial in the proportional sense for example in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration; 2) sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and 3) of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise.[25] The US regulations define whether an amount of capital is substantial in the proportionality sense in terms of an inverted sliding scale. For example, the lower the total cost of the enterprise, the higher, proportionately, the investment must be to meet the criteria. Moreover, the Department of State regulations require that projected future capacity of the enterprise should generally be realizable within five years from the date the alien commences normal business activity of the enterprise.[26] In summation, US regulations do not specify an exact amount of capital that would serve as a yardstick to evaluate whether an investment could qualify its holder for E-2 visa. Rather, the regulations leave 'substantial amount of capital' test to be evaluated on a case-by-case basis.

21 See 22 C.R, *supra* note 14, § 41.51(b).
22 *Ibid* § 41.51(l).
23 *Ibid*.
24 *Ibid* § 41.51(m).
25 *Ibid* § 41.51(n).
26 *Ibid* § 41.51(o).

Article 8.2 of the US-JO FTA allows nationals of either party to enter the territory of the other party to 'establish', 'develop', 'administer', or 'advise' of an investment. These four terms are not defined in art 8 of the US-JO FTA. Again, US Department of State regulations define some of these terms. For example, the regulations define 'develop and direct' as what the business or individual treaty investor does or will develop and direct the enterprise by controlling the enterprise through ownership of at least 50% of the business, by possessing operational control through a managerial position or other corporate device, or by other means.[27] Therefore, an investor under the US-JO FTA, as would an investor of any other nationality under other US FTAs, must play a key role in the investment whether through establishment, development, administration, or advice in order to be eligible for E-2 visa.

Similar to other FTAs and Bilateral Investment Treaties between the US and other countries, the US-JO FTA did not exempt nationals of Jordan from acquiring US visa for entry.[28] Jordanian nationals must appear at the US embassy in Jordan and be inspected by a consular officer and acquire a visa stamp before entering the US for inspection by an immigration officer.[29] In other words, Jordanian nationals will be subjected to the normal visa processing/screening proceedings.

Two-way trade between the US and Jordan is up substantially since the free trade agreement between the two countries took effect, but a provision enabling temporary entry of Jordanian nationals into the US has seen little use.[30] For the period 2002–2010, there were no trader or investor visas issued to Jordanian nationals under the visa provisions of the FTA.[31] Indeed, according to the American Chamber of Commerce in Jordan, no Jordanian has ever applied for such visas.[32] The reason why no one is seeking the E visas under the US-JO FTA is lack of awareness on the part of Jordanian nationals as to E category of visas.[33] Further, Jordanian traders or investors face difficulties in meeting the thresholds of 'substantial trade' or

27 *Ibid* § 41.51(p). In *United States v Matsumaru* the UC Court of Appeals for the Ninth Circuit ruled that it is not enough for an investor to hold majority ownership in the investment, but he must 'develop and direct' the investment. Thus, an investor loses his E-2 status if he cedes to exercise managerial control over his investment by delegating his managerial control to another person. The defendant in this case, Matsumaru, a lawyer in Hawaii of Japanese origin on behalf of Japanese investors, argued that the disjunctive 'or' in the Department of State regulations means that it is enough for the investor to hold ownership in the investment. Thus, management of the investment is one way to satisfy the US regulations. However, the Court rejected this argument by stating that if an investor has no managerial control over the investment, the investor's physical presence in the US is unnecessary and thus there would be no reason to award him E-2 visa. Thus, there is no need for an investor to live temporarily in the US. For more see *United States v Matsumaru* 244 F.3d 1092, 1099-1100 (9th Cir 2001).

28 There is no FTA or Bilateral Investment Treaty between the US and another country that exempts nationals of the latter from obtaining entry visa to the US. See C Rugaber *House Approves Chile, Singapore Pacts; Senate Sets Time for Debate, Likely Vote*, 20 Int'l Trade Rep (BNA) 1292 (31 July 2003) (the Chile and Singapore FTAs allow professionals workers from Chile and Singapore to enter the US provided they secure the necessary visas).

29 Indeed, the US-JO FTA itself explicitly states that Jordanian nationals are eligible for the E-1 and E-2 visas 'subject to the applicable provisions of US laws and corresponding regulations governing entry, sojourn, and employment of aliens.' See Agreement between the United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* note 8, art 8.2, footnote 12.

30 Annually, two-way trade between the US and Jordan exceeds a US $1 billion compared a little over US $150 million in 1999. See US Foreign Trade Statistics, Imports and Exports, available at http://www.census.gov/foreign-trade/statistics/product/atp/2009/01/ctryatp/atp5110.html (last visited 15 July 2009).

31 See Visa Statistics, US Department of State, available at http://travel.state.gov/visa/frvi/statistics/statistics_1476.html (last visited 6 October 2009). Letter from Ms. Cher Young, Consular Associate, The US Embassy in Amman, Jordan (5 January 2010) (on file with author).

32 Telephone Interview with Ahmad Tawfiq, Trade Officer, The American Chamber of Commerce in Jordan (29 September 2009).

33 Although the American Chamber of Commerce in Jordan has done a lot of work in organizing workshop to introduce its members to the E visas under the FTA. *Ibid*.

'substantial amount of capital' for investment, or difficulties of proving intent to return back to Jordan. Few Jordanian traders or investors can meet these thresholds.[34]

Jordanian nationals are alarmed about being subjected to tighter screening procedures due to security concerns in the US.[35] In response to the 11 September 2001 terrorist attacks, the US Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act of 2001).[36] The purpose of the Patriot Act, among others, is to deter and punish terrorist acts in the US and around the world.[37] Under the Patriot Act of 2001, the INS has begun detailed visa applications through name-matching databases in National Crime Information Center to access criminal history.[38] The necessity of such national security crackdown procedures is well understood. However, national security could have created a chilling effect on Jordanian nationals entering the US to conduct trade and investment. In addition, national security procedures could have added more time and cost for traders which impaired the essence of free trade.[39] Significant delays in processing visas for business travelers, a trend that is necessary of security, might affect a trade opportunity that will be foregone.[40] To ease the visa approval process, the US could institute a 'gold card' program for frequent business travelers.[41]

Besides national security, immigration has been a hotly debated issue in the US.[42] US trade negotiators feared backlash from Congress especially that the US-JO FTA is an agreement with a low-income country. The power over immigration rests in Congress.[43] US trade negotiators

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34 *Ibid*.

35 Letter from Ms. Cher Young, Consular Associate, The US Embassy in Amman, *supra* note 31.

36 See USA Patriot Act, Pub. L N. 107–56, 115 Stat. § 272 (2001). Part of this overall act is the integration of the US Immigration and Naturalization Service into the newly established Department of Homeland Security.

37 *Ibid*.

38 *Ibid* § 403. Visa applications involving high-tech work are increasingly referred from overseas consulates to Washington D.C., for a security advisory opinion (SAO) which requires an interagency review. Moreover, the act requires report on the feasibility of enhancing the Integrated Automated Fingerprint Identification in order to identify a person who holds a foreign passport or a visa and may be wanted for a criminal investigation in the US or abroad. *Ibid* § 405. The US authorities shall fully implement the integrated entry and exit data system for airports, seaports, and land border ports of entry. *Ibid* § 414.

39 See R Walters *Managing Global Mobility Free Trade in Services in the Age of Terror* 6 UC Davis Bus LJ 92, 109-111 (2006) (US business visa policies became more stringent after the 11 September terrorist attacks. The system also became less transparent as applicants were rejected without explanation, even in cases where they had been approved before).

40 See The National US-Arab Chamber of Commerce, the Impact of US Visa Policies: Implications for America's Economy (2004) (A survey of US companies sponsored by the eight groups found that 73 percent of the respondents have experienced 'unexpected delays and/or seemingly arbitrary denials' in seeking business travel visas for their foreign customers, employees, or other associates. The restrictive US approach to granting visas is costing the US economy an estimated $5 billion a year in lost commercial opportunities with the Arab world alone. The report puts the direct economic impact of the policies at $1.5 billion a year and up to $5 billion if lost services and indirect revenues resulting from reduced contact with the Arab world were included. Annual revenues from the Arab world being lost because of the visa policies include $400 million in business in general, 50 million in academia, $500 million in culture and the arts, medicine, and health care, and $500 million in travel and tourism).

41 See C Rugaber *Delays in Visa Processing Cost US Exporters $30 Billion, Business Study Finds*, 21 Int'l Trade Rep (BNA) 973 (10 June 2004) (other suggestions-made by a coalition of eight US international business groups- include offering multiple-entry, longer duration visas to additional countries, integrating government databases to prevent duplicative security checks, and processing visas within 48 hours with a maximum limit of 30 days).

42 See W Ewing *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 Stan L & Pol'y Rev 445, 453–458 (2005). See also J Bhandari *Migration and Trade Policies: Symmetry or Paradox?* 6 J. Int'l Bus & L 17 (2007) (immigration touches upon deeply controversial questions concerning race, class, ethnicity, culture, language, local employment, and national identity).

43 See US Const. art I, δ 8, cl. 4. See also *Chy Lung v Freeman* 92 US 275, 280 (1875) (The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress. It has the power to regulate commerce with foreign nations).

may neither add nor take that power from Congress. However, the issue in the US-JO FTA is not one of immigration because temporary entry provisions do not address issues of citizenship, permanent residence, or permanent employment. The temporary entry provisions are intended to enable business people to temporarily enter the US to conduct meetings, negotiate contracts, make sales, establish offices, and provide services

All these reasons-lack of awareness, thresholds of 'substantial trade' or 'substantial amount of capital', and proof of intent, combined result in significant damage to Jordanian nationals in the form of lost business deals and lost productivity. National security and immigration concerns are issues that need to be addressed, but the US must rationally weigh the costs and benefits of limiting movement of individuals. Increasing temporary worker mobility, and for that matter trade in general, has greater potential to benefit trade development, mutual understanding, peace, and tolerance.[44] Failure to consider movement for individuals as a vital component of economic infrastructure and foreign policy will seriously affect economic growth and stability.

US-Jordan FTA cross-border provision of services

Historically, most trade agreements focused on reducing tariffs and non-tariff barriers on goods as they cross international borders.[45] However, the services sector now accounts for about seventy five percent of employment activity in industrialized countries like the US. Therefore, current trade agreements deal with trade in services.

While WTO achieved major progress in liberalizing the trade in goods, it later has begun to liberalize trade in services. The WTO's General Agreement on Trade in Services (GATS) recognizes several modes of supplying services with 'Mode 4' addressing the temporary cross-border movement of business and professional workers.[46] The US-JO FTA goes beyond the primary focus on goods and it deals with a new frontier, liberalization of trade in services.[47] Such liberalisation is important for freer flow of labor over national borders.

The US-JO FTA sets out several service obligations. The FTA requires each party to accord to service providers of another party treatment no less favorable than that it accords, in like circumstances, to its own service providers.[48] The idea of this provision is nondiscrimination whereby Jordan must treat service provider from the US the same way that Jordan treats service provider from Jordan. The other key US-JO FTA obligation is the most-favored nation obligation whereby each party is to accord to service providers of another party

44 See H Chang *The Economic Impact of International Labor Migration: Recent Estimates and Policy Implications* 16 Temp Pol & Civ Rts. L. Rev 321 (2007) (The movement of people between countries links national economies. The free flow of resources in response to market signals promotes efficiency and produces economic gains for both producers and consumers. The movement of human resources, both domestically and internationally, represents such a flow of productive resources). See J Bhandari, *International Migration and Trade: A Multi-Disciplinary Synthesis* 6 Rich J Global L & Bus 113, 164 (2006). See also G Gallegos, *Border Matters: Redefining the National Interest in US-Mexico Immigration and Trade Policy Border Matters* 92 Calif L Rev 1729, 1378 (2004).

45 See E Ray *The Political Economy of International Trade Law and Policy: Changing Patterns of Protectionism: The Fall in Tariffs and the Rise in Non-Tariffs Barriers*, 8 Nw J Intl & Bus 285, 294–298, 303-305 (1987).

46 See R Leal-Arcas *Resumption of the Doha Round and the Future of Services Trade* 29 Loy LA Int'l & Comp L Rev 339, 343 (2007).

47 See Agreement between the United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* note 8, art 3.

48 *Ibid* art 3.2.b.

treatment no less favorable than that it accords, in like circumstances, to service providers of any other Party or of a non-Party.[49] For example, if Jordan treats a service provider from Iraq more favorably than it treats a service provider from the US, the treatment provided to the Iraqi must be accorded to an American service provider.

Jordanian professional service providers, like other service providers of other nationalities who wish to provide their services in the US, need permission to enter the jurisdiction from the US immigration authorities. Movement of natural persons, professionals, is of particular importance to Jordan. However, temporary entry into the US is limited to executives, managers, or specialists of a Jordanian company that has a physical presence in the US in the form of branch, subsidiary, or affiliate.[50] Such entry is limited to three years with a one-time two years extension.

The US commitment, while covering the intra-corporate movement of senior personnel, does not extend to other categories of workers. Low-skilled workers seeking entry into the US will not be admitted under the US-JO FTA. This state of affair applies across the board for all US FTAs and even NAFTA does not permit low skilled workers to enter the US from Mexico or Canada.[51] Both the US and Jordan would benefit more from relaxed restrictions on unskilled labor rather than on skilled labor. Jordan has primarily unskilled labor to supply while the US has primarily unskilled jobs to offer.

Under the US-JO FTA, a corporate employee cannot move to the US unless his company already maintains commercial presence in the US. In other words, the FTA requires a Jordanian service providers to establish or maintain a representative office or any form of enterprise in the US as a condition for the cross-border provision of a service. The 'commercial presence' requirement prohibited if not stopped stop temporary movement of workers between the US and Jordan. The US-JO FTA should have prohibited the parties from imposing local presence requirements on cross-border service providers.

The US opted for skilled workers and commercial presence requirement in the FTA perhaps out of concerns over education, professional accreditation, and licensing in Jordan. This suggests that Jordanian nationals, as for all other nationalities, must acquire US professional credentials before working in the US. For example, an engineer who wants to build a bridge in the US is going to need two pieces of paper; in addition to a temporary visa permit, they also need to be licensed by the US professional regulatory body.

In order to increase worker mobility, the US and Jordan could have concluded mutual recognition agreements and harmonized professional standards in certain sectors. Additionally, the US and Jordan could have placed more emphasis on education and experience rather on passing exams or interviews. For example, a Jordanian engineer can obtain a temporary license to practice in the US if he has a minimum of twelve years of acceptable engineering experience.

49 *Ibid*.

50 See US Service Schedule, Annex 3.1, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/jordan/asset_upload_file558_8459.pdf (last visited February 2010).

51 See E Yost, *NAFTA – Temporary Entry Provisions – Immigration Dimensions*, 22 Can.-US L.J. 211, 219 (1996). See also A Umberger *Free Trade Visas: Exploring the Constitutional Boundaries of Trade Promotion Authority* 22 Geo Immigr LJ 319, 333-334 (2008) (Visas are available to highly skilled workers coming from Mexico, Canada, Chile, and Singapore).

Labour mobility in the North American Free Trade Agreement

Compared with the modest language of art 8 of the US-JO FTA, NAFTA dedicates a whole chapter-chapter 16- dedicated to temporary entry for business persons.[52] The purpose of chapter 16 of NAFTA is to facilitate temporary entry of business persons.[53] NAFTA parties endeavor to develop and adopt common criteria and definitions for the implementation of chapter 16.[54]

Moreover, each NAFTA party is committed to furnish the other parties with materials that enable them to be acquainted with chapter 16.[55] To facilitate the movement of persons across the borders, each NAFTA party is committed to provide explanatory material regarding the requirements for temporary entry under chapter 16 in such a manner as will enable business persons of the other parties to become acquainted with them. According to NAFTA, any dispute regarding refusal to grant temporary entry of business persons is subject to the dispute settlement mechanism.[56]

Chapter 16 of NAFTA created four categories of business persons who are citizens of a member country to be granted temporary entry. These four basic categories are: business visitors, intra-company transferees, professionals, and traders and investors. Business visitors who are engaged in international business activities may enter a NAFTA member country in B-1 status for the purposes of conducting research and design, growth, manufacture and production, marketing.[57] In addition, NAFTA created L-1 visa category for business persons employed by an enterprise who seek to render services to that enterprise or a subsidiary or affiliate thereof, in a capacity that is managerial, executive or involves specialized knowledge.[58] NAFTA established a new non-immigrant visa category, the TN visa, to accommodate business visitors from Canada and Mexico.[59] This kind of visa is unique for NAFTA nationals and is not available for other nationals such as Jordanians under the US-JO FTA. The TNA visa category accommodates an alien, along with their spouse and children, entering the US to engage in business activities at a professional level described in NAFTA.[60] For example, a lawyer

52 See North American Free Trade Agreement, 32 ILM 289, art 1601 (1993). Chapter 16 of NAFTA consists of eight Articles and supplemented by annexes. Chapter 16 of NAFTA was modeled on chapter 15 of the US-Canada FTA of 1989 titled 'Temporary Entry for Business Persons'. However, with the implementation of NAFTA, chapter 15 of the US-Canada FTA was suspended. See K Schultz *The North American Free Trade Agreement: The Provisions for the Temporary Entry of Canadian and Mexican Business Persons into the United States*, 15 SPG INT'l L. PRACTICUM 50 (2002).

53 See P Fernandez-Kelly and D Massey *Political and Economic Dimensions of Free Trade: Borders for Whom? The Role of NAFTA in Mexico-US Migration*, 610 Annals 98 (2007). 103, 109

54 See NAFTA, *supra* note 52, art 1602.2.

55 *Ibid* art 1604.1.

56 *Ibid* art 1606.1.

57 For a description of the four categories of temporary entry of business persons see W Benos *The Movement of Professionals, Technicians, and other Workers across NAFTA Borders* 8 US-Mex L J 25, 26 (2000).

58 In this category, no NAFTA party may impose numerical restrictions on temporary entry. See North American Free Trade Agreement, *supra* note 52, appendix 1603.C.1.

59 See Benos, *supra* note 56, at 27. H-1B status, which also provides for the entry of professionals, should not be confused with TN category under NAFTA. The preamble to the INS interim rule specifically stated that admission pursuant to NAFTA to engage in professional level activities does not imply qualification as a 'professional' under the Immigrant and Nationality Act § 101(a)(15)(H)(i), or § 203(a)(3). The H-1B category is for 'specialty occupations', namely, those in occupations for which an entry level requirement is customarily a university degree at the American baccalaureate level. On the other hand, NAFTA seeks to simplify the admission process for a select and 'precisely' defined group of Canadian and Mexican professionals. See Schultz, *supra* note 43, at 52.

60 Appendix 1603.D.1 of NAFTA lists 63 professions whom its holder may be eligible for TN visa after meeting the minimum requirements. See NAFTA, *supra* note 52, appendix 1603.D.1.

has to posses LL.B (for example Canadian common law degree), J.D., LL.L., B.C.L. (for example Canadian civil law degree) or Licenciatura degree (Mexican law degree consists of studying for five years) or membership in a state/provincial bar.

NAFTA also provided E-1 and E-2 visas for traders and investors. The conditions for granting visa under this category are similar to those under art 8 of the US-JO FTA. NAFTA mandates that no NAFTA party may impose or maintain any numerical restriction relating to temporary entry for traders or investors.[61] Also, the US may not impose numerical limits on the number of visa traders or investors under the US-JO FTA. However, the distinction between NAFTA and the US-JO FTA under the treaty trader and investor provisions is that a Canadian or Mexican business person may be denied E visa if there is a labor dispute in the Canadian or Mexican's occupational classification in progress where the Canadian or Mexican will be employed and their entry may adversely affect the settlement of the labor dispute or the employment of any person involved in the dispute.[62] This provision is only triggered when the Department of Labor certifies the existence of a strike or work stoppage, and does not apply to E visa holders already in the US. This language is absent from the US-JO FTA which means in effect that even if there is a labor dispute in the Jordanian's occupational classification, still a Jordanian national can enter the US as trader or investor.

Since NAFTA took effect in 1995, traders and investors visas spiked substantially. For example, between 2000–2010, more than 12632 E-1 and E-2 visas were granted to Mexican nationals and 13135 E-1 and E-2 visas for Canadian nationals.[63] Those numbers are indicative of the interests of Mexicans and Canadians to enter the US in order to conduct trade and take full advantage of the opportunities offered by NAFTA.

Mapping the temporary labour mobility provisions in bilateral trade agreements between the US and other Arab countries

The post – Jordan US FTAs with Morocco, Bahrain and Oman represent a key element in a broader US political and economic strategy to encourage economic development and democracy in the Middle East and North Africa, with most of the same political and security considerations that were material in the conclusion of the Jordan FTA. In 2003, President Bush proposed the establishment of a US-Middle East Free Trade Area within a decade, so as 'to re-ignite economic growth and expanded opportunity in the Middle East.'[64] Among the elements of the Bush initiative were the completion of FTA negotiations with Morocco and the initiation of new FTA negotiations with governments committed to high standards and comprehensive trade liberalization.

Bahrain, Morocco, and Oman were obvious candidates for FTAs with the US, in part, because both had acceded to the WTO.[65] The result to date has been the Morocco, Bahrain and

61 See NAFTA, *supra* note 52, annex 1603.B.2.

62 *Ibid* art 1603.2.

63 See Nonimmigrant Visas Issued by Classification and Nationality (Including Border Crossing Cards), available at http://www.travel.state.gov/visa/frvi/statistics/statistics_1476.html (last visited Sep. 24, 2009).

64 See White House Fact Sheet, Proposed Middle East Initiatives, 9 May 2003, at 1, available at http://www.whitehouse.gov/news/releases/2003/05/print/20030509-12.html

65 Bahrain and Morocco are original members of the WTO. In 2000, Oman acceded to the WTO. See WTO, Members and Observers, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited 28 August 2009).

Oman FTAs.[66] The US-Morocco FTA, US-Bahrain FTA, and US-Oman FTA were not particularly controversial FTAs in the US, apart from the usual non–country – specific concerns over textiles, agriculture, intellectual property, investment, labor and environment. These three FTAs, while sharing some similarities with the US-JO FTA in some aspects, vary in terms of visa and temporary mobility provisions.

The US-Morocco FTA does not include any specific provision concerning treaty-trader (E-1) and treaty-investor (E-2) visas. As to cross-border movement of professionals, the FTA includes an important provision which prohibits either party from requiring of a service provider to maintain a representative office or any form of enterprise, or to be resident, in the territory of a party as a condition for the cross-border supply of a service.[67] In other words, the FTA with Morocco does not impose local presence requirement.

The US-Bahrain and US-Oman FTAs mimic the US-Morocco FTA in its lack of coverage for trader and investor visas. Additionally, the US-Bahrain and US-Oman FTAs closely resemble the US-Morocco FTA by including provisions prohibiting any local presence requirements as a condition for the supply of cross-border services.[68] Under a side letter on immigration with Oman, the US has retained its ability to protect its domestic labor force and employment.[69] The validity of this side letter is in question. Based on the experience of the NAFTA sugar side letter, the US and Oman should have included the language of the letter into the main text of the FTA so as to form a binding and legal commitment.[70]

Although US-Morocco, US-Bahrain, and US-Oman FTAs exclude from their coverage trader and investor visas, these countries have bilateral investment treaties (BITs) with the US which predates their FTAs. These BITs are negotiated to protect US investment abroad.[71] In addition, US-Morocco, US-Bahrain, and US-Oman BITs qualify theirs citizens for admission into the US under the E-2 treaty investor visa category.

A Moroccan, Bahraini, or Omani national can enter the US so as to establish, develop, direct, or administer the operations of an investment in which he has invested or is in the process of investing a substantial amount of capital.[72] One of the significant aspects of this

66 See United States-Morocco Free Trade Agreement, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file680_3841.pdf (15 June 2004); United States-Bahrain Free Trade Agreement, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file418_6280.pdf (14 September 2004); and United States-Oman FTA, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset_upload_file987_8839.pdf (19 January 2006).

67 See United States-Morocco Free Trade Agreement, *supra* note 66, art 11.5.

68 See United States-Bahrain Free Trade Agreement, *supra* note 66, art 10.5; and United States-Oman Free Trade Agreement, *supra* note 66, art 11.5.

69 See United States-Oman Free Trade Agreement, *supra* note 667, Side Letter on Immigration.

70 During the NAFTA debate, the US and Mexico agreed to a sugar deal that was attached as a side letter to the text of NAFTA. However, the US and Mexico are still litigating the validity of the letter.

71 These BITs require Morocco, Bahrain, and Oman to investment protection standards which would guarantee a US citizen in these countries the same investment protection as a citizen of these countries would enjoy. Generally, such protections include most favored nation treatment to covered investments, free and prompt monetary transfers relating to the investment, and specified dispute resolution alternatives. Additionally, there must be fair compensation if investments are expropriated for public purpose. See Trade Compliance Center, Treaty between the United States of American and the Kingdom of Morocco Concerning the Encouragement of Reciprocal Protection of Investments (1985), available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005864.asp; Treaty between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment (2001), available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002777.asp ; and United States-Oman Amity, Economic Relations And Consular Rights Treaty (1960), available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005876.asp.

72 See Treaty between the United States of American and the Kingdom of Morocco Concerning the Encouragement of Reciprocal Protection of Investments, art II.4 (a); Treaty between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, art 7.1; United States-Oman Amity, Economic Relations and Consular Rights Treaty, art II.1, *supra* note 71.

language is that it expands the number of persons who are potentially eligible for E-2 visas by permitting not only those persons who develop and direct a business, but also those who establish, administer, or advise an enterprise to apply for E-2 visas. Additionally, US-Morocco, US-Bahrain, US-Oman BITs permit key employees to enter the US.[73]

The E-2 visa category in the US-Morocco, US-Bahrain, US-Oman BITs has essentially three basic requirements. First, a bilateral investment treaty must exist, as it is the current case, between the US and Morocco, Bahrain, and Oman respectively. Second, the person or corporation making the investment is a national of Morocco, Bahrain or Oman. Third, the Moroccan, Bahraini or Omani is entering to invest a substantial amount of capital in the US. Thus, according these BITs, E-2 treaty investment individuals or entities must prove that an individual or entity possessing treaty nationality has invested or is in the active process of investing a substantial amount of capital in a US-based enterprise or project. Further, qualified individuals or entities must submit a satisfactory evidence of the required investment activity and proof of the individual visa applicant's qualifications for employment in the US as an executive or supervisor. The US, Morocco, Bahrain, and Oman also agreed that they will not require a labor certification test or apply any numerical restriction to entrants under their BITs. Once nationals of Morocco, Bahrain, and Oman enter the US, there is no maximum duration of stay.[74]

The US-Morocco, US-Bahrain, and US-Oman BITs are similar to their FTAs because they are bilateral agreement that provides for reciprocal rights these countries. However, the subject matter of the agreement is the distinguishing factor between them. The FTAs extend to trade while these BITs concern the protection of investments.[75] Because BITs involves treaties whose subject is foreign investment and not foreign trade, nationals of Morocco, Bahrain and Oman qualify for treaty investor (E-2) but not for the treaty trader (E-1) designation.

Conclusion

Freer trade applies not only for trade in goods but also extends to include other factors of production such as labor and capital. Production is not just a function of capital and natural resources, but also of labor. Little attention has been paid to liberalizing the movement of persons who trade in these goods and services. In the formulation of all trade agreements, the flow of goods between the member countries should be discussed in connection with the flow of people.

The US-JO FTA is designed to permit temporary entry, without intent to establish permanent residence, of traders and key business personnel. Despite that, the FTA does not provide 'truly temporary entry.' As of this date, Jordanian nationals are not able to benefit from

73 See Treaty between the United States of American and the Kingdom of Morocco Concerning the Encouragement of Reciprocal Protection of Investments, art. II.4 (b); Treaty between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, art 7.2, *supra* note 71.

74 Statistically, between 2000–2010, 58 nationals of Morocco were granted an E-2 treaty investor visa. During the same period, no national of Bahrain or Oman applied for E-2 visa. See Nonimmigrant Visas Issued by Classification and Nationality (Including Border Crossing Cards), available at http://www.travel.state.gov/visa/frvi/statistics/statistics_1476.html (last visited 25 September 2009).

75 See Treaty between the United States of American and the Kingdom of Morocco Concerning the Encouragement of Reciprocal Protection of Investments; Treaty between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment; United States-Oman Amity, Economic Relations and Consular Rights Treaty, *supra* note 71.

the visa commitments of the US-JO FTA. The US-JO FTA permits entry for narrowly defined investment-related and trade-related purposes. Jordanian businesspeople face difficulties in meeting the threshold of 'substantial trade', 'investment', and 'substantial amount of capital'. The difficult aspect of this is the requisite dollar volume, which could stand at US $250000 or above, and the requisite number of transactions. Not all Jordanian businesspeople can meet these thresholds so as to obtain E-visas.

Moreover, the US couples the movement of key business personnel with local presence requirements. Only Jordanian nationals with money and extensive professional skills can gain entry to the US. The US-JO FTA prioritized workers with advanced educational training and capital to invest. The US-JO FTA, as for all other FTAs, prioritizes the cross-border movement of corporate executives, researchers, and professionals with advanced degrees. In effect, in the US-JO FTA, and for that matter other FTAs, wealth buys mobility and these FTAs are designed to export goods, not people.

The US should have adopted a lenient approach in drafting the temporary visa provisions taking into account the conditions in Jordan and the purpose of the FTA to promote employment. The US could have permitted entry of Jordanian traders or investors as long as they submit a declaration of a good business plan or extend the length of temporary business visas from three months to one year with multiple entries. In addition, the US should have created new visa category for temporary entry of professionals that would allow certain number of Jordanians to enter the US each year. Those visas would not be counted against the H1B numerical caps each year and fees will not be required of US companies that employ temporary workers under the FTA provisions. The US and Jordan could have concluded mutual recognition agreements and harmonized professional standards in certain sectors. Additionally, the US and Jordan should have placed more emphasis on education and experience rather on passing exams or interviews. Also, the US should ensure more transparent and objective implementation of their rules for issuing temporary visas and work permits. Furthermore, disputes over temporary entry provisions should subject to dispute panel.

Trade and temporary labor mobility should be coupled together as is a clear correlation between trade and labor mobility in countries that allows the exchange of people.[76] Temporary labor mobility could have contributed to more trade flow between the US and Jordan whereby businesspeople would acquire skills and contacts, negotiate contracts, and enter into sales.

The US-JO FTA, as other US-Arab FTAs, is a trade agreement concerned with the movement of goods and services but not with the movement of persons. The US has chosen to actively pursue a free trade agenda in the Middle East while simultaneously restricting inbound temporary labor mobility. Jordanian nationals are human beings and they have a baccalaureate degree. They are part of the free trade agreement. There can be no free trade without people to facilitate it. The issue of trade and temporary visas should be of immediate relevance to negotiators when crafting the broader US-Middle East FTA. Unless the inter-relationship between trade and temporary visas is properly understood, trade liberalization and market access may be easily undone.

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76 See M Trebilcock *The Law and Economics of Immigration Policy* 5 AM & Econ Rev 271, 272, 284 (2003) (elimination of restrictions on movement of people could double worldwide annual GNP).

Italy's Treatment of Immigrants and the European Convention on Human Rights: Some Recent Developments

Serena Sileoni

At a glance

Since its inception, the ECHR and the Strasbourg human rights organs have been little used in immigration cases emerging in Italy. This article attempts to explain why there has been such little use historically of those mechanisms and discusses how and why new cases from Italy have indeed begun to emerge in Strasbourg. The cases are basically of two types: cases concerning extradition and those involving the mass confinement and expulsion of immigrants. These two lines of recently-emerging cases are reviewed here with a focus on how organisations concerned with human rights protection within Italy have started to identify the ECHR as an appropriate and relevant mechanism for the protection of migrants' and minorities' rights resulting in the increasing recourse to Strasbourg.

Introduction: the emerging European case law against Italy concerning immigrants

Italy is considered, broadly speaking, a Western democracy where human rights have been protected and guaranteed since its foundation. Already in the Fundamental Law prior to the Constitution (*Statuto Albertino*)[1] there was a catalogue of rights, albeit based only on a liberal and not a welfare foundation. The Constitution, approved in 1948 after the Second World War, provides for both a catalogue of rights and for the system necessary for their recognition and enforcement.[2]

Rights recognised by the Constitution, even when they pertain expressly to 'citizens', are extended to everyone, thanks to an undisputed interpretation of the constitutional text.[3] This interpretation is based on art 2, which does not distinguish between citizens and non-citizens,

1 G Rebuffa *Lo Statuto Albertino* (Bologna, Il Mulino, 2003).

2 The two parts interact and must be read as a complete and unique text, cfr. M Luciani *La Costituzione dei diritti e la Costituzione dei poteri. Noterelle brevi su un modello interpretativo ricorrente* in AA.VV, *Scritti in onore di Vezio Crisafulli*, vol 2, (Padova, Cedam), 1985.

3 T Martines *Diritto costituzionale* (Giuffrè, Milano, 1992) at p 706; R. Bin, G Pitruzzella *Diritto costituzionale*, (Giappichelli, Torino, 2004) at p 467.

and proclaims that 'The republic recognizes and guarantees inviolable human rights'; and on art 10.2, which represents the 'door' for the entry into the Italian legal system of international law, stating that 'Legal regulation of the status of foreigners conforms to international rules and treaties'.

Moreover, people living in Italy, whatever their citizenship, may claim the protection of their rights before the judiciary, which has to be independent from other institutional actors and is subject only to law (arts 101 and 104 Const.). Only the so-called 'political rights', especially the right to vote, are ascribed to Italian citizens, although there is a lively political debate currently taking place regarding the extension of such a right to non-nationals.

The scarcity and the recent emergence of Strasbourg case law against Italy regarding immigrants may be explained by a number of factors. It may be because of the extension of nearly all constitutional rights to non-citizens, or because of little knowledge of the European Convention on Human Rights' mechanism. In this article we examine the emerging case law before the European Court of Human Rights (hereinafter ECtHR or simply the Court) in protecting individual immigrants against some Italian administrative practices.

One possible reason for the ambiguous role of the European Convention on Human Rights (hereinafter ECHR) in Italy is its overlap with the established and reasonably efficient system of protection of human rights. An influential doctrine underlines that fundamental rights are provided for in some detail in the Italian Constitution, while they are more generally addressed in the ECHR.[4] In general, legal professionals take the view that Italy already has a high level of protection of human rights. On this subject, the Constitutional Court recently noted regarding proceedings in *absentia* that 'the European Convention on Human Rights does not recognize higher guarantees than Art. 111 Const.'[5] Such a view must be read in conjunction with the subsidiary role of the ECtHR since individuals have to appeal to national judges prior to applying to the ECtHR. To some extent this is confirmed by an analysis of the types of legal issues which reach the ECtHR for scrutiny. It so happens that Italian cases before the ECtHR concern areas where there are gaps in the Italian system and there is a chronic violation of rights that are not provided for in the Italian Constitution (eg length of proceedings, expropriations, administration of justice and now individual or mass expulsions).

There are other factors which explain the little knowledge about the ECHR as an instrument for promoting the rights of non-citizens: the strong cultural identity and homogeneity of the Italian society that derives from a common language, a pre-eminent religion and a common *Weltanschauung*; the basic protection of human rights, both for citizens and foreigners; the society's automatism in considering the ECtHR as an ulterior judge for essentially the same questions.

In fact, immigrants constitute a relatively new social group within Italian society, until now characterised only by the presence of historical minorities, that is, minorities living in border areas of the country having a strong link with the local territory (mainly French-German- and Slovenian-speaking communities). Historical minorities concentrated along border regions are acknowledged and protected by art 6 of the Constitution, and by special regional laws, which have constitutional force.[6] Measures for the integration and protection of such minorities include: the possibility to use their mother tongue in legal proceedings and before public authorities; bilingual education; and quotas in public institutions. A specific language regime had been in place for many years for these territorial minorities in the border

4 See A Pace *La Limitata incidenza della C.e.d.u. sulle libertà politiche in Italia* in *Diritto pubblico*, 1/2001.

5 Constitutional Court n. 89/2008.

6 Regions with special Statutes are Valle d'Aosta, Trentino Alto Adige, Friuli Venezia Giulia, Sardegna, Sicilia.

areas and was complemented in 1999 by a general law on the protection of 'historical linguistic minorities' in Italy.[7]

Besides the presence of these historical minorities, the population of Italy was for decades by and large homogeneous in terms of culture, language, religion and national identity. Therefore, the rising number of immigrants over the past fifteen to twenty years has raised a whole set of new issues for national authorities. In the 1980s 'new' immigrant minorities began to settle and live in Italy. They were mainly immigrants from the poorest countries of North Africa and the Mediterranean. In 2008, there were more than 4,000,000 immigrants in Italy, with an annual increase of 458,644 persons (plus 13.4% with respect to the previous year). If in 2005 legal immigrants numbered 2,670,514, this figure doubled during the last three years to some 4,330,000. For the first time, in 2008, Italy rose above the European average regarding the impact of foreign residents on the total population.[8]

The presence of these new minorities has ushered in far-reaching changes from a sociological point of view. For the first time since the creation of the Italian state, the society has become more pluralistic, and values and lifestyles have begun to diversify considerably. As noted, from a legal point of view, resident aliens enjoy the fundamental rights enshrined in the national Constitution, with the exception of those few rights and freedoms reserved for citizens, such as the right to vote. In general, their integration in social and political life seems to be far from established, but this is more a sociological and economic problem than a legal one.[9] In fact, theoretically, foreigners have the same access to justice as every other citizen, and are also entitled to legal aid if on grounds of economic need. So, the same system of internal remedies prior to recourse to the ECtHR applies to aliens and immigrants. Aliens seek justice from the ECtHR in those few cases where sufficient internal administrative or jurisdictional remedies are lacking, such as in matters concerning expulsions which we focus on here.

The 'novelty' of the presence of immigrant minorities, on the one hand, and the existence of a basic protection of human rights extended to them, on the other hand, are possible reasons for the notable (quasi) absence of cases concerning immigrant minorities. But some recent decisions on the expulsion of immigrants represent a starting point for ECtHR jurisprudence on minorities and vulnerable people in Italy. This article examines the role of the ECHR and the ECtHR in promoting a culture of human rights in Italy, with reference to minorities and vulnerable immigrants groups. We examine in detail claims regarding extradition and mass expulsions committed by the Italian State.

Although Italian public opinion and media seem still interested in the traditional case law, this case on the rights of aliens, considered as vulnerable persons, demand greater attention in the field of asylum and immigration. In support of this opinion, even the reports on the execution of the ECtHR judgments for the year 2007 and 2008, under the so called *Azzolini* Law,[10] carry a specific paragraph on extradition applications.

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7 Law No. 482/1999.

8 Data extracted from the XIX Report on immigration elaborated by the Caritas/Migrantes, *Immigrazione, Dossier Statistico 2009*.

9 The United Nations Committee for the Elimination of Racial Discrimination referred in March 2008 to the 'factual segregation' of Rome (CERD7ITA/CO/15). Further evidence of the lack of integration is given by the high rate of aliens in prison. They represent 30.1% of detainees. FIDH, *Right of Asylum in Italy: Access to procedures and treatment of asylum-seekers* report no 419/2, June 2005, p 5.

10 Since the entry into force of Law No. 12/2006 (*Disposizioni in materia di esecuzione delle pronunce della Corte Europea dei Diritti dell'Uomo*, the so called *Azzolini* Law) and its executive order of 1 February 2007, the Office of the Prime Minister must present a report every year on the state of implementation of judgments. For a positive comment on the law see: G Raimondi, *Nuove disposizioni in materia di esecuzione delle sentenze della Corte Europea: una buona legge*, in *Diritti dell'Uomo. Cronache e Battaglie*, 2006, vol. I. The first report was presented in 2006.

There are two categories of applications relating to aliens: applications by convicted persons expelled to States that do not protect against the risk of torture and applications by irregular immigrants who are victims of collective expulsions. These categories represent a newly developing European case law against Italy concerning the protection of non-citizens, which has also engaged NGOs which have until recently rarely been involved in proceedings against Italy before the Strasbourg Court. Therefore, these applications mark the beginning of a new strategic approach to the ECHR in the Italian context, aimed at focusing the attention of the media and politics on these issues.

Until now, in fact, there was a general inertia among non-institutional actors such as activists, interest groups and religious, cultural or other associations in dealing with Italian cases before Strasbourg. Although we are seeing the rise of lawyers' associations specialised in the protection of human rights and, in general, NGOs who work to improve the promotion of the defence of disadvantaged people, such efforts are only now beginning to be noted.

Prior to the above-mentioned two categories of cases, one could say that a culture of ECHR rights did not exist, and persons making claims in Strasbourg did so only in a few areas that lawyers are able to deal with (for example, length and fairness of process and expropriation proceedings). Since 1973, when Italy made declarations under arts 25 and 46 acknowledging the right to individual petition to the European Court of Human Rights, an impressive number of applications against Italy have been deposited in the Court, the majority of which have focused on the administration of justice. But the real impact of the ECHR seemed, until now, to be confined to a limited number of matters. Only sporadically and in relatively new cases does it deal with other issues.

In fact, Italian case law at Strasbourg focused on violations which reflect structural deficiencies of the domestic legal system – such as length or fairness of proceedings, conditions in prisons, property rights – which are difficult for local courts to address. The above-mentioned cases can be explained from a 'rights approach' perspective, more than as strategic claims in order to change the legal *status quo*. Plaintiffs were more interested in demanding an individual measure, than in changing laws or political attitudes.

This situation has partially changed mainly because of three factors. Firstly, legislative reforms have been passed, aimed at recognising Strasbourg case law and procedure. Above all, the already mentioned *Azzolini* Law, that imposed responsibility for the execution of ECtHR judgments directly to the Prime Minister, although the Department of legal and legislative affairs of the Presidency of the Council is responsible for the practical execution of judgments. Such a choice has, above all, a strong symbolic meaning. The principle behind the law is the direct responsibility of the Prime Minister and his Office to comply with the ECHR, giving importance and priority to compliance with the Convention, even if, in practice, there is no higher level of compliance.

Secondly, the efforts of the Constitutional Court and the Court of Cassation giving a 'constitutional' value to the ECHR can be cited. Two Constitutional Court judgments on the role of the ECHR in the Italian system (Nos. 348 and 349/2007) have definitely clarified that the ECHR is a quasi-constitutional norm and, in consequence, ordinary laws must respect its principles and articles.[11]

11 Judgements Nos. 348 and 349/2007 have definitely settled the hierarchical position of the Convention. With highly controversial reasoning, the Constitutional Court established that, since the entry into force of revised art 117 Const, any international agreement occupies a median position between the Constitution and ordinary legislation. Referring to the ECHR, the Constitutional Court also said that the ECtHR is the only subject legitimated to interpret its articles, but the Constitutional Court remains the guardian of the supreme principles of the national system. For a comment, see D Tega, 'Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la CEDU da fonte ordinaria a fonte 'sub-costituzionale' del diritto', in *Quaderni costituzionali*, 1 (2008).

Thirdly, the commitment of leading lawyers and scholars can be mentioned. Jurists' associations (among which one can include the *Unione Forense per la Tutela dei Diritti dell'Uomo*) have promoted strategic litigation with the aim of calling the attention of Strasbourg institutions and the Italian government to the dysfunctions of the domestic judicial system. Jurists' human rights associations have multiplied over the years: a Consultative Organ for European Justice (*Consulta per la giustizia europea dei diritti dell'uomo*) uniting 29 different associations (including the *Unione Forense*) was constituted in 1986 with the aim of bringing instruments for the protection of human rights to the attention of lawyers' and magistrates' associations.

The prohibition of torture and the prohibition of mass expulsion: a new era for integrating the ECHR into the national system?

a. Cases concerning the prohibition of torture as a consequence of extradition

The *Saadi* case is the first judgment on asylum matters against Italy. This pivotal case has been followed by other eight identical judgements issued in just one year.[12] All the cases involve Tunisian citizens living in Italy, convicted by an Italian or a Tunisian (military, in the most cases) court and therefore expelled to their country in order to serve punishment for crimes (mostly related to terrorism activities) and in order to remove persons considered dangerous from Italian territory. In light of the risk of being detained in a country that, on the basis of the reports of governmental and non governmental institutions (Human Rights Section, US Department of State, International Red Cross, Amnesty International, Human Rights Watch), does not guarantee the protection of prisoners from torture, the applicants in most cases demanded asylum from the Italian authorities. The latter not only rejected the demand or ignored the interim measures taken by the Court *ex* art 39, but also continued to expel them. As in these eight cases, the Court's opinion was inspired by the *Saadi* judgment and referred to it.

Nassim Saadi, a Tunisian living in Italy on the basis of a residence permit, was arrested on suspicion of involvement in international terrorism (art 270 *bis* of the Criminal Code), among other offences, and was placed in pre-trial detention. In a judgment of 9 May 2005, the Milan Assize Court took the view that the acts of which he stood accused did not constitute international terrorism but criminal conspiracy. It sentenced the applicant to four years and six months' imprisonment for that offence, and for the offences of forgery and receiving. The applicant and the prosecution appealed. The applicant asked to be acquitted of all the charges, while the prosecution wanted him to be convicted of international terrorism as well as aiding and abetting illegal immigration.

In the meantime, on 11 May 2005, two days after the delivery of the Milan Assize Court's judgment, a military court in Tunis sentenced the applicant in his absence to twenty years' imprisonment for membership of a terrorist organisation operating abroad in time of peace and for incitement to terrorism. On 8 August 2006, the Minister of the Interior ordered his

12 *Ben Khemais v Italy* application No. 246/07, judgment emitted on 24 February 2009, *Abdelhedi v Italy*, application No. 2638/07, *Ben Salah v Italy*, application No. 38128/06, *Bouyahia v Italy*, application No. 46792/06, *C.B.Z. v Italy*, application No. 44006/06, *Hamraoui v Italy*, application No. 16201/07, *O. v Italy*, application No. 37257/06, *Soltana v Italy*, application No. 37336/06, all of them emitted on 24 March 2009.

deportation to Tunisia, applying the provisions of decree No. 144 of 27 July 2005 (titled 'Urgent measures to combat international terrorism', and later converted to Law No. 155 of 31 July 2005). He observed that 'it was apparent from the documents in the file' that the applicant had played an 'active role' in an organisation responsible for providing logistic and financial support to persons belonging to fundamentalist Islamist cells in Italy and abroad. Consequently, his conduct was a threat to public order and to national security.

On 11 August 2006, the deportation order was confirmed by the Milan justice of the peace. On the same day, the applicant requested political asylum. He alleged that he had been sentenced in his absence in Tunisia for political reasons and that he feared he would be subjected to torture and 'political and religious reprisals'. In a decision of 16 August 2006 the head of the Milan police authority (*questore*) declared the request inadmissible on the ground that the applicant was a danger to national security.

On 6 September 2006, the director of a non-governmental organisation, the World Organisation Against Torture (OMCT), wrote to the Italian Prime Minister stating that the OMCT was 'extremely concerned' about the applicant's situation, and that it feared that, if deported to Tunisia, he would be tried again for the same offences he stood accused of in Italy. The OMCT also pointed out that, under the terms of art 3 of the United Nations Convention against Torture, 'No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

On 12 September 2006 the president of another non-governmental organisation, the Collective of the Tunisian Community in Europe, appealed to the Italian Government to 'end its policy of mass deportation of Tunisian immigrants [who were] practising adherents of religious faiths'. It alleged that the Italian authorities were using inhuman methods and had based a number of decisions against Tunisians upon their religious convictions. It went on to say that it was 'obvious' that on arrival in Tunisia the persons concerned would be 'tortured and sentenced to lengthy terms of imprisonment, on account of the fact that the Italian authorities falsely suspected them of terrorism'.

On 15 September 2006, the Milan police authority informed the applicant orally that, as his asylum request had been refused, the documents in question could not be taken into consideration. One day earlier, the applicant asked the Court to suspend or annul the decision to deport him to Tunisia. The applicant alleged that enforcement of a decision to deport him to Tunisia would expose him to the risk of being subjected to treatment contrary to art 3 of the ECHR and to a flagrant denial of justice (art 6, ECHR). In addition, the measure concerned would infringe his right to respect for his family life (art 8, ECHR) and had disregarded the procedural safeguards laid down in art 1 of Protocol No 7.

The Italian government denied the 'substantiality' of the risk of torture in Tunisia, stressing the international treaties that this country had entered into and the diplomatic assurances by the Tunisian authorities that the rights of the accused would be respected upon his return. In fact, the prohibition of non-refoulment in art 3 ECHR has been interpreted to ban the extradition of individuals to States where there is a real risk of torture, and inhuman or degrading treatment. From the *Soering*[13] and *Chahal*[14] cases, the concept of 'real risk' has become the criterion to permit or prohibit the transfer of an individual to a country. Especially the

13 *Soering v United Kingdom* Application No. 14038/88.
14 *Chahal v United Kingdom* Application No. 70/1995/576/662.

Chahal case represents the cornerstone of protection in such matters. That case concerned a Sikh activist who had entered the UK illegally but subsequently benefited from a general amnesty for illegal immigrants. After having been charged with conspiracy to kill the Prime Minister of India, a deportation order was issued. But he claimed the deportation would violate art 3 ECHR because of the lack of guarantees against the risk of torture in India. The Court expressly affirmed the 'real risk' doctrine in *Chahal*, stating that:

> 'whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion […]. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided for by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees' (para 80).

This doctrine was used also in the *Saadi* proceedings by the UK as an intervening third party in order to back the claim of the non-existence of a real risk to the applicant.

In fact, unlike the traditional Italian cases before the ECtHR, in *Saadi* there was a third party involved in the proceedings. The UK chose to intervene in order to defend a relative value of the prohibition of torture, as it had done in *Chahal* and in *Ramzy v. Netherlands*. In line with Italy, it claimed that the climate of international terrorism called into question the appropriateness of the ECtHR's jurisprudence on States' non-refoulement obligation under art 3 of the ECHR. The UK opinion was highly controversial, because it argued that the prohibition on torture must be balanced against the right to life of innocent civilians in an age of increasing international terrorism and, consequently, an absolute prohibition on torture is something different from an absolute prohibition on refoulment and, when national security is implicated, the standard of evidence should be raised from a substantial risk to a more-likely-than-not test (para 122).

In substance, while the Italian government insisted on the 'diplomatic assurances' provided by the Tunisian authorities, the UK government asked the Court to overturn the *Chahal* judgment, in part because of the new international threat of terrorism, and in part because of the rigidity of the standard imposed in *Chahal*, which, in its opinion, 'had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures' (para 117).

The ECtHR rejected the entire set of arguments from the two governments. Firstly, it rejected the contention based upon the 'diplomatic assurances', saying that they may not be sufficient if there is evidence of cruel treatment. The Court referred to reports from Amnesty International and Human Rights Watch for such evidence. In the opinion of the Court, in fact, diplomatic assurances are not *per se* a sufficient guarantee against torture, and any such assurances would have to be proved by their practical application, while the reports from NGOs affirmed the practice of torture in Tunisia.

Secondly, the Court reaffirmed its *Chahal* judgment and insisted on the absolute nature of the prohibition on torture and, consequently, the absolute nature of the prohibition on refoulement. In its words:

> 'Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country,

> would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule […] It must therefore reaffirm the principle stated in the *Chahal* judgement […] that is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State' (para 138).

While the Court acknowledged the challenge in protecting societies from terrorism, it reaffirmed the absolute concept of the prohibition of inhuman or degrading treatment or punishment, that 'enshrines one of the fundamental values of democratic societies' (para 127) and had to be maintained even in times of emergency, war or terrorism.

Therefore, on 28 February 2008, it concluded that there was strong evidence that Saadi, after his expulsion to Tunisia, would be tortured and it reaffirmed its existing jurisprudence concerning art 3 on the absolute value of prohibition of torture, noting that the serious threat represented by the non-extradition of the convicted 'does not reduce in any way the degree of risk of ill treatment':

> 'the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of 'risk' and 'dangerousness' in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not […] For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test' (para. 139).

In spite of this judgment, Italy seems to be proceeding with the refoulement of persons convicted for terrorist crimes in countries where they will probably suffer cruel and unusual punishment. This means that from the perspective of implementation, *Saadi* does not seem a good example of a challenge to national practices and legislation. But it is very relevant in the Italian context because, for the first time, NGOs followed the development of the proceedings, which they also did in the cases of mass expulsions to Libya, as we will see below.

Contrary to the opinion of the United Kingdom and the Italian governments, a wide mobilization of NGOs arose to defend Mr. Saadi. Amnesty international, the AIRE Centre, the International Commission of Jurists, Interights and Redress were engaged in a strong press campaign,[15] although the Court did not agree to include their written submissions in the hearing. From the perspective of political and societal activism, such engagement of NGOs represents a step forward for a growth of a culture on international human rights in Italy.

15 Amnesty International, Italian Division, press releases No. 81/2007 (11 July 2007); No. 29/2008 (28 February 2008); Amnesty International; Human Rights Watch, *European Court of Human Rights Reaffirms the Absolute Prohibition on Return to Torture*, 28 August 2008; Human Rights Watch, *Letter to Italian Government*, 20 September 2007. News on this case was displayed on their web sites by, besides the NGOs already mentioned, the Association for the Prevention of Torture, the AIRE Centre, Justice, The Medical Foundation for the Care of the Victims of Torture, Opens Society Justice Initiative, the World Organization Against Torture.

b. The cases of mass expulsions

The other relevant cases on immigrants were, as noted, those concerning mass expulsions. Italian Law No. 189/2002 states that illegal immigrants should be kept in centres pending their identification with a view to being granted asylum – whenever the conditions are met – or to being expelled from the country. Asylum seekers and immigrants are deprived of their personal liberty and held for weeks in centres pending their identification or waiting for their expulsion. The centres are generally overcrowded and do not offer appropriate sanitary and hygienic conditions. In spite of some efforts by the Italian institutions,[16] conditions in the Centres for temporary stay and assistance (hereafter CTSA) have been criticized by the United Nations Committee against Torture,[17] the International Federation of the League of Human Rights, Amnesty International, and the European Human Rights Commissioner. Cases of serious mistreatment of people staying in these centres by the police and social workers have been reported.[18] After such pressure from international organizations, the former government decided to establish an independent commission with a mandate to find solutions on the issue.

One of the violations of fundamental rights that international institutions, NGOs and some politicians denounced in the CTSA came before the ECtHR. Several immigrants who landed in Lampedusa were detained in the CTSA and then were expelled to Libya, pursuant to confidential agreements between the Italian and Libyan governments and without any guarantee for the individuals affected. A confidential report by the European Commission obtained by an Italian journalist, Fabrizio Gatti,[19] stressed that, between August 2003 and December 2004, the Italian government sent back to Libya 5,688 Libyan immigrants. After the inspection by the UN delegate appointed for migrant affairs in June 2004 of the Lampedusa CTSA, in October two Italian MEPs submitted a question in Parliament on expulsions from Lampedusa. The Parliamentary Assembly of the Council of Europe approved a declaration in June 2005 where it expressed a strong concerned about the respect for asylum proceedings in Lampedusa. While the European Parliament passed a resolution against the mass expulsions from Lampedusa,[20] the Strasbourg Court passed an interim resolution on 10 May 2005 to stop the expulsions of 11 out of 79 plaintiffs, represented by the lawyer Anton Giulio Lana of the *Unione forense per la tutela dei diritti dell'uomo* and, three days later, it demanded that the expulsion of the remaining immigrants also be stopped.

One year later, with a decision given on 11 May 2006, the Court declared as partially admissible four applications by a group of 85 aliens who had arrived in Lampedusa in March 2005, were detained for some weeks in the island's CTSA and were finally expelled to Libya.[21] The Court will examine these applications on the merits claims under art 3 ECHR[22], art 4 of

16 Order of the Ministry of the Interior *Linee guida per la gestione dei centri di permanenza temporanea e assistenza (CPT) e dei centri di identificazione (CID)* 27 November 2002; establishment of the Committee for the protection of foreign minors *ex* art 33, legislative decree No. 286/1998; establishment of the UNAR (National office against racial discrimination) under the Presidency of the Council of Ministers, *ex* legislative decree No. 215/03.

17 CAT/C/SR/777 and CAT/C/SR/778.

18 For a complete overview of the issue see *FIDH, Rapporto sull'Immigrazione*, cit, p 8.

19 The news was done in the review *Espresso* on 7 October 2005, *Io clandestino a Lampedusa*.

20 Resolution No. P6_TA (2005)0138.

21 *Hussun and others v Italy* No. 10171/05*; Mohamed v Italy* No. 10601/05*; Salem and Others v Italy* No. 11593/05*; Midawi v Italy* No. 17165/05. Decision of 11 May 2006.

22 For having been expelled to Libya, a country which is not party to the Geneva Convention on refugees and which does not offer sufficient guarantees for the protection of fundamental freedoms.

Protocol 4 (prohibition of collective expulsions of aliens)[23], art 13 (right to an effective remedy)[24], and art 34 (right to individual recourse to the Court).[25]

While the applications were pending hearings before the Court, the Italian government inaugurated in May 2009 a new strategy of expulsions, stopping the immigrants' boats before their arrival onto Italian territory, on the high seas. According to the Human Rights Watch report, on 6 May 2009 for the first time since the Second World War, a European State gave the order to its Navy to intercept and refoule boats of immigrants on the high seas, without any identification or evaluation as to the need for humanitarian intervention. The State in question was Italy, whose Navy carried out the boats of immigrants towards Libya,[26] in accordance with a treaty signed by the Libyan and Italian governments on August 2008.[27] The treaty was highly controversial. For the Italian government, the State is faced with a serious problem of illegal immigration from North Africa and need to fight it[28]; on the other side, there is strong criticism due to the lack of any guarantees from the Libyan authorities regarding the treatment of immigrants.

On 14 July 2009, the UNHCR spokesperson intervened at the press briefing at the Palais des Nations in Geneva, stating that UNHCR staff in Libya had been carrying out interviews with 82 people who were intercepted by the Italian Navy on high seas on 1 July about 30 nautical miles from the Italian island of Lampedusa. They were transferred to a Libyan ship and later transported to Libya. Based on subsequent interviews, it does not appear that the Italian Navy made an attempt to establish the persons' nationalities or their reasons for fleeing their countries. From interviews conducted by the UNHCR, it emerged that 76 persons had come from Eritrea. Based on UNHCR's assessment of the situation in Eritrea, it was clear that a significant number of these persons were in need of international protection. In view of the seriousness of these allegations, UNHCR sent a letter to the Italian government requesting information on the treatment of people returned to Libya and asking that international norms be respected.

In the meantime, the already mentioned *Unione forense per i diritti dell'uomo* submitted a new application[29] for violation of the prohibition of torture, fair proceedings and the prohibition on collective expulsion on behalf of 24 immigrants stopped at sea before arriving to Sicily. This new application, deposited at Strasbourg by the same lawyer who previously submitted the *Lampedusa* application, demonstrates that the use of the Convention in order to protect vulnerable groups is no more exceptional but, since the *Saadi* case and the case of

23 The Italian authorities have undertaken the expulsion without considering personal conditions of the applicants.

24 The applicants were denied contact with lawyers and to seek asylum. Furthermore, they had no remedy at their disposal to stay the order of expulsion.

25 The applicants were expelled while the request for temporary suspension of the expulsion was pending at the Court.

26 See the Human Rights Watch report *Scacciati e schiacciati, l'Italia e il respoingimento di migranti e richiedenti asilo, la Libia e il maltrattamento di migranti e richiedenti asilo*, 2009, p 4.

27 *Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista*, signed on 30 August 2008.

28 In the opinion of the UNHCR, the number of illegal immigrants arriving in Italy from North Africa has rose from 19,900 in 2007 to 36,000 in 2008 (89.4%); the number of asylum claims rose from 14,053 in 2007 to 31,164 in 2008 (122%) (see www.unhcr/org/pages/412d406060.html and www.unhcr.org/49c796572.html).

29 Application No. 27765/09.

expulsions from Lampedusa, a new stage in the protection of fundamental rights in Italy has begun, in which NGOs and lawyers' associations use international instruments to promote them.

The claim of immigrants returned to Libya will likely be based on the violation of the due process provision, in its widest concept, and on the violation of the principle of non-refoulement. Regarding the first principle in art 4, Protocol 4, in the cases under scrutiny, there unlikely to have been any guarantee of identification of immigrants. As the Italian Supreme Court stated, 'the guideline of the European Court on the concept of prohibition of collective expulsion of aliens *ex* art 4 Prot. IV of the ECHR, is aimed to comprehend expulsion adopted against a group of aliens when a reasonable and objective examination of their cases is not present and claims before a competent authority [… art 4] are intended to avoid that prospect that the reasons of expulsion of a "group" absorb the examination of individual positions, with regard to the objectivity and legitimacy of the motivation of the expulsion'.[30]

Regarding the prohibition of non-refoulment, as already noted, art 3 ECHR bans extradition to States where there is a real risk of torture, in its widest definition. But this principle is also a cornerstone of international law. It is part of the international law on refugees and, in this sense, it is provided for by the Refugees Convention of 1951.[31] It is also part of EU law, as it is provided for by the directive 2004/83/CE, art 21.1 of which establishes that Member States respect the principle of non-refoulement in accordance with international obligations.[32] But the principle of non-refoulement is also part of the broader international law on human rights, meaning that no one should be sent to a country where he will likely suffer torture or inhuman and cruel treatment. This position regarding the principle is envisaged by art 3 of the Convention against torture[33] and by art 7.1 of the International Covenant on Civil and Political rights.[34]

The practice of intercepting immigrants' boats on the high seas is a sort of *escamotage* (subterfuge) attempted by the Italian government. It likely derives from the opinion of the Italian government that the non-refoulement obligation must not be applied outside the sovereign territory, but this is a quite isolated interpretation.[35] The opposite opinion is expressed by many other institutions. Firstly, by the UN bodies, who have confirmed the

30 Cass. Civ., Sez. I, No. 16571/2005.

31 Convention relating to the Status of Refugees, 189, U.N.T.S. 150, entered in force on 22 April 1954, ratified by the Italian State on 15 November 1954. See art 33.

32 Such a provision was introduced in the Italian system by the legislative decree No. 251/2007.

33 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No 51) at 197, U.N. Doc. A/39/51(1984), entered in force on 26 June 1987, ratified by the Italian State on 12 January 1989.

34 International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December 1966, G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered in force on 23 March 1976, ratified by the Italian State on 15 September 1978. The Human Rights Committee, i.e. the Office responsible on the ICCPR execution, clarified that States must respect and guarantee the rights provided in the Covenant to any person subjected to their jurisdiction, also when he is outside the national territory (General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, 29 March 2004). See also the European Convention on Extradition, the European Convention on Terrorism. Some writers say that this principle can be considered as international customary law (see IHF, *Anti-terrorism Measures, Security and Human Rights – Developments in Europe, Central Asia and North America in the Aftermath of September 11* (2003)).

35 See on that respect the US Supreme Court opinion in *Sale v Haitian Centres Council*, 509 US 155, 156 (USSC 1993).

opposite interpretation in several cases.[36] Secondly, even the ECtHR has already stated that the ECHR can be applied also to governmental actions taken on high seas.[37]

Hence, the proceedings before the Strasbourg Court will most likely be based on the basis of the violation of the principles of non-refoulement and of due process, because immigrants have been rejected without any previous identification toward a country where there are no guarantees on the respect of human rights.

Toward a strategic litigation in Italy on matters of immigration and asylum

Until the middle of first decade of 2000, there were no relevant ECtHR judgments relating to immigrants in Italy, as well as to vulnerable groups and minorities. But the *Saadi* case and the case of mass expulsions to Libya appear to mark the starting point for strategic litigation aimed at challenging policies and legislation. Academics and scholars also seem to be paying more attention to substantive issues relating to the ECHR rather than merely to procedural ones.

Interest in the Convention, ironically, signed in Rome in 1950, has begun to extend beyond highly specialised experts only in the last ten to fifteen years. Legal literature on the subject has become more and more systematic and conspicuous. While thousands of articles and notes are dedicated in the academic reviews to the ECHR and its Court, the number of monographs on the issue has been growing in the last few years, although they focus on traditional infringements of the Convention or procedural aspects of integration between the national system and the ECHR.[38]

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36 UNHCR *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para 24; *UNHCR Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea*, 18 March 2002, para 18; UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1944, par. 33; UNHCR, *UN High Commissioner for Refugees responds to US Supreme Court Decision in Sale v Haitian Centers Council* International Legal Materials, 32, 1993, p 1215. UNHCR, *Comments on the Communication from the Commission to the Council and the European Parliament on the Common Policy on Illegal Immigration COM (2001) 672 Final*, 15 November 2001, para 12; UNHCR Amicus Curiae Brief in Sale, 21 December 1992. See also: Executive Committee of the High Commissioner's Programme, 18th Meeting of the Standing Committee *Interception of Asylum Seekers and Refugees: The International Framework and recommendations for a Comprehensive Approach*, EC/50/SC/CRP.17, 9 June 2000, par. 23; EXCOM Conclusion No. 82 (XLVIII) (1997); EXCOM Conclusion No. 85 (XLIX) (1988), EXCOM Conclusion No. 53 (XXXIX) (1981); EXCOM Conclusion No. 22 (XXXII), (1981).

37 *Women on Waves and Other v Portugal* (application No. 31276/05), judgment emitted on 3 February 2009.

38 AA.VV, *Atti del Convegno in occasione del cinquantenario della Convenzione del Consiglio d'Europa per la protezione dei diritti umani e delle libertà fondamentali in onore di Paolo Barile,* Roma, (Accademia Nazionale dei Lincei, 2001); AA.VV., *L'equa riparazione nei più recenti orientamenti della Corte di Cassazione e della Corte europea: la Convenzione europea dei diritti dell'uomo e l'ordinamento italiano dopo l'intervento delle sezioni unite*, (Milano, Giuffrè, 2005); S Bartole, Conforti, G Raimondi, *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, (Padova,CEDAM, 2001); P. Bilancia, *I diritti fondamentali come conquiste sovrastatali di cività; il diritto di proprietà nella CEDU*, (Torino, Giappichelli, 2002); G Brunelli, A Pugiotto, R. Bin, P Veronesi, *All'incrocio tra Costituzione e CEDU*, (Torino, Giappichelli, 2007); F. Buonomo, *La tutela della proprietà dinanzi alla Corte europea dei diritti dell'uomo* (Milano, Giuffrè, 2005); M. Cartabia, *I diritti in azione: universalità e pluralismo dei diritti fondamentali nelle Corti europee* (Bologna, Il Mulino, 2007); B. Nascimene (ed), *La Convenzione europea dei diritti dell'uomo. Profili ed effetti nell'ordinamento italiano*, (Milano, Giuffrè, 2002); P. Pittaro, *La Convenzione europea dei diritti dell'uomo* (Milano, Giuffrè, 2000); C Russo, PM Quaini, *La Convenzione europea dei diriti dell'uomo e la giurisprudenza della Corte di Strasburgo* (Milano, Giuffrè, 2006); D Tega, *L'emergere dei nuovi diritti e il fenomeno della tutela multilivello dei diritti tra ordinamenti nazionali e Corte dei diritti di Strasburgo* (Bologna, Bonomo, 2004), V Zagrebelsky, *I giudici nazionali, la Convenzione e la Corte europea dei diritti dell'uomo*, in P. Bilancia, E. De Marco (eds.), *La tutela multilivello dei diritti: punti di crisi, problemi aperti, momenti di stabilizzazione* (Milano, Giuffrè, 2004); N.Zanon (ed.), *Le Corti dell'integrazione europea e la Corte costituzionale italiana: avvicinamenti, dialoghi, dissonanze* (Napoli, ESI, 2006).

The Italian State's delay in considering the substantive issues related to the ECHR is due to the several factors that have already been mentioned. From a legal point of view, Italy faced the problem of determining the ECHR's place in its internal legal system and hierarchy of legal norms. After decades of ambiguity, in November 2007, the Constitutional Court brought an end to it and clarified the relationship between the ECHR and national norms. Moreover, the quite high level of protection of human rights in the national system is likely another reason for the absence of Strasbourg Court judgments regarding vulnerable groups.

In any case, as we have seen, an evolution in the awareness of ECHR rights is evident in recent years, thanks also to the most recent judgments by the Constitutional Court and the Court of Cassation. A pattern of strategic litigation on behalf of marginalised individuals and minorities appears to be emerging, as the cases of expulsions here analyzed show. NGOs, politicians and further international organisations have become important players in challenging state legislation and practice when an infringement of fundamental rights is alleged.

Hence, the *Saadi* case and the cases on mass expulsions of immigrants represent a starting point for a new perception of the ECHR's instruments in Italian legal culture. For the first time, claims were not simply lodged as a further stage in the legal process or in order to obtain individual monetary compensation. Instead, they were submitted as a step within a broader campaign for changing legislation and practices on matters where Italy still does have reasonable legislation. For this reason, NGOs, lawyers engaged in protecting human rights, Italian politicians as well as international organizations have become involved.

But it is too early to speak about an evolution/revolution in the perception of the Convention system in Italy. So far, the Court's case law has not promoted more inclusive national policies towards the rights of individuals in minority positions. On the contrary, recent policies on matters of security and public order, demanded by Italian citizens, have entailed greater repression of aliens and immigrants.

It is clear, however, that since the late 1990s there has been a growth in the knowledge of the ECHR system and the sensitiveness towards international judicial review. The case-law here analyzed is evidence of that. Moreover, more and more projects on such matters are being addressed in universities. It is significant, for example, that in 2006 the project of national interest (*PRIN*) that won the greatest financial aid from the government dealt with the dialogue between the Courts and multilevel protection of rights.[39] Other evidence comes from the most important web sites of constitutional law scholars, which dedicate a web page to questions related to ECHR.[40]

Apart from the question of whether the case law discussed here will have an impact on the Italian political agenda, and apart from the question whether the Strasbourg Court will accept the claims concerning mass expulsions, the mere existence of this case law suggests an improved knowledge of the ECHR as an essential instrument for the protection of fundamental rights. The Italian cases on expulsion confirm this renewed interaction between the Italian legal and political system and the ECHR. Much still remains to be done in this regard at the institutional and societal level, for example, among ordinary judges and lawyers, who barely speak English or French. But the recent cases mentioned here signal a new stage in

39 PRIN 2006: Dalla circolazione dei modelli al dialogo tra sistemi giuridici: le vie di comunicazione del costituzionalismo contemporaneo.

40 *Euroscopio Osservatorio sulla Corte di Strasburgo* in www.forumcostituzionale.it, that monitors case-law from November 2004; *Giurisprudenza Segnalazioni Corti europee Corte europea dei diritti dell'uomo* in www.associazionedeicostituzionalisti.it, that monitors case-law from the beginning of 2007.

the relationship between the ECHR and the Italian system, and a new perception among the Italian agencies regarding the possible judicial remedies available in the ECtHR. Thanks to the involvement of NGOs and jurists' associations, for the first time, claims were not simply lodged as another stage in legal proceedings or in order to obtain individual monetary compensation.[41] On the contrary, they were submitted as a step ahead for broader mobilization to change laws and practices on matters where the Italian legal system fails to fully address the protection of fundamental rights.

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41 During the writing of this article the ECtHR delivered a judgment on the display of the crucifix in classrooms of public schools. This represents another 'political' case attracting strong public opinion. In that case, there was a third party intervener, the Greek Helsinki Monitor (see *Lautsi v Italy*, application No 30814/06).

An Introduction to the Forced Marriage (Civil Protection) Act 2007

Mehvish Chaudhry

At a glance

This article aims to provide a basic guide to the Forced Marriage (Civil Protection) Act 2007 for immigration practitioners. It has been over a year since the Act came into force and it has become an important tool for many individuals seeking protection from forced marriage. Due to the international dimension to many forced marriage cases there are some relevant immigration issues which may also arise during the course of proceedings. The author describes some of the background to the passing of the Act, the position before the Act came into force and some of the Act's main provisions. The article aims to offer analysis where it is most likely that the Act will have immigration implications and offers some discussion on the interplay between the family and immigration jurisdictions.

Introduction

This article aims to provide an introduction to the Forced Marriage (Civil Protection) Act 2007 (herewith referred to as the Act) and some of the immigration issues that may arise during the course of forced marriage proceedings. The Act came into force on 25 November 2008 and inserts a new Pt 4A into the Family Law Act 1996. The Act aims to promote access to justice and flexible solutions for victims of forced marriage across the country. In its first year 86 Forced Marriage Protection Orders (FMPOs) were issued and the Act has contributed towards an increasing awareness of forced marriage as a pressing social problem. Last year the Forced Marriage Unit, a joint initiative of the UK's Foreign and Commonwealth Office and the Home Office, received 1600 referrals although the scale of the problem in the UK is estimated to be far greater.[1]

Forced marriage before the Act

Before the passing of the Act the Family Division of the High Court had already begun to develop the use of its inherent jurisdiction in order to offer protection to victims of forced marriage. In *Re SA* [2006] EWHC 2942 (Fam), Mr Justice Munby (as he then was) summarised the evolution of the inherent jurisdiction thus:

1 Ministry of Justice, *One year on: The initial impact of the Forced Marriage (Civil Protection) Act 2007 in its first year of operation*, November 2009.

'44. As is well known the jurisdiction was first exercised in relation to issues of surgical, medical and nursing treatment, but it is now clear that it is exercisable not merely in relation to matters of that nature but also in relation to a wide range of other questions:

'i) It was soon recognised that the jurisdiction is exercisable in relation to the question of where an incompetent adult should live, who he should see, and the circumstances of such contact: see *Re C (Mental Patient: Contact)* [1993] 1 FLR 940, *In re S (Hospital Patient: Court's Jurisdiction)* [1995] Fam 26, [1996] Fam 1, *Re D-R (Adult: Contact)* [1999] 1 FLR 1161, *In re F (Adult: Court's Jurisdiction)* [2001] Fam 38, *A v A Health Authority*, *In Re J (A Child), R (S) v Secretary of State for the Home Department* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213, *Re S (Adult Patient) (Inherent jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, *Re S (Adult's Lack of Capacity: Carer and Residence)* [2003] EWHC 1909 (Fam), [2003] 2 FLR 1235, and *Re G (an adult) (mental capacity: court's jurisdiction)* [2004] EWHC 2222 (Fam), [2004] All ER (D) 33 (Oct).

'ii) It has also been exercised to restrain the publication of matter damaging to a vulnerable adult: see *In re A Local Authority (Inquiry: Restraint on Publication)* [2003] EWHC 2746 (Fam), [2004] Fam 96, and *E (By her Litigation Friend the Official Solicitor) v Channel Four, News International Ltd and St Helens Borough Council* [2005] EWHC 1144 (Fam), [2005] 2 FLR 913.

'iii) More recently it has been exercised in cases involving marriage, including forced marriages: see *Sheffield City Council v E* [2004] EWHC 2808 (Fam), [2005] Fam 326, *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230, and *M v B, A and S (By the Official Solicitor)* [2005] EWHC 1681 (Fam), [2006] 1 FLR 117.

'45. This is far from being an exhaustive description of the potential reach of the jurisdiction. New problems will generate new demands and produce new remedies. As Singer J put it, the jurisdiction must evolve in accordance with social needs and social values. I agree. Indeed, there is probably no theoretical limit to the jurisdiction. As has been said, the court can regulate everything that conduces to the incompetent adult's welfare and happiness, including companionship and his domestic and social environment: see *A v A Health Authority, In Re J (A Child), R (S) v Secretary of State for the Home Department* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213, at paras [39]–[40].'

Whilst the passing of the Act has established a statutory framework for forced marriage proceedings, it has by no means replaced the inherent jurisdiction of the High Court. In many forced marriage cases the inherent jurisdiction is still employed. For example, if there is a risk that a child may be taken abroad in order to be forced into marriage the Court may consider it appropriate to make the child a Ward of Court. The Court may also make 'Tipstaff orders' which can include ordering a 'port alert' which operates to alert the authorities when a child is entering or exiting at a UK border.

How the Act works

The Act provides civil remedies for victims and potential victims of forced marriage by empowering Courts to make Forced Marriage Protection Orders (FMPOs) containing any

prohibitions, restrictions or requirements or other terms considered appropriate. A Court may make orders on an application being made or, alternatively, during the course of family proceedings when the Court deems it appropriate to do so. The Applicant may seek the Court's permission to withhold his or her address from the proceedings and any other information which if disclosed may place her at risk.

Fifteen County Courts have been designated to deal with forced marriage applications and cases may also be issued in the High Court. The designated courts were selected on the basis of information from the Forced Marriage Unit on which communities were most likely to make applications under the Act. However there is a notable concentration regarding where applications under the Act are issued; last year two thirds of applications were issued at only three out of the fifteen designated courts.[2]

Proceedings under the Act are usually brought by the victim/potential victim of a forced marriage although the Act also makes provision for applications by relevant third parties and any other person with leave of the Court. A recent addition to the Act allows Local Authorities to apply for orders without leave.[3] This demonstrates a recognition that in many cases victims of forced marriage will be children and there will often be a pressing need for social services involvement.

Many forced marriage cases begin as without notice applications.[4] This is due to the nature of proceedings and Applicants potentially being subjected to risk of significant harm if orders are not made immediately. Orders can be made for a limited amount of time or until further order. The Court must also give the Respondent an opportunity to respond to the proceedings as soon as it is just and convenient to do so. In some cases the Respondent may wish to oppose the proceedings and apply to the Court to vary or discharge the orders made. This may then lead to a contested hearing on the issue of whether the Applicant consented to the marriage.

The Act can be used very flexibly to obtain orders that are necessary in the particular circumstances of the case. FMPOs commonly include orders preventing removal of the Applicant from the jurisdiction, forcing/attempting to the force the Applicant into marriage and using threatening or intimidating behaviour towards the Applicant.[5] Orders can also make provision for the return of the Applicant to the jurisdiction, confiscation of passports and orders for the disclosure of the Applicant's whereabouts. Courts have a wide discretion in deciding whether or not to exercise powers under the Act and must have regard to all the circumstances including the need to secure the health, safety and well being of the person to be protected.[6] The Act also has extra-territorial effect as FMPOs can cover conduct that takes place abroad.[7]

Breaches of FMPOs are dealt with by way of contempt proceedings and perpetrators can be jailed for up to two years for breaching the terms of an order.[8] The Act also makes provision for the attachment of a power of arrest to FMPOs. When a power of arrest is attached, a constable may arrest a person who they have reasonable cause to suspect is in breach of the order.[9]

2 Ministry of Justice, *One year On*.
3 The Family Law Act 1996 (Forced Marriage) (Relevant Third Party) Order 2009.
4 See Forced Marriage (Civil Protection) Act 2007, s 63D.
5 *Ibid* s 63B.
6 *Ibid* s 63A(2).
7 *Ibid* s 63B(2)(a).
8 *Ibid* s 63O.
9 *Ibid* ss 63H and 63I.

Can non-nationals make applications for FMPOs under the Act?

The first case to be brought under the Act was that of Dr Abedin (unreported), a Bangladeshi doctor who was not a British citizen but had leave to remain in the UK. Although Dr Abedin was in Bangladesh at the time proceedings were brought in the UK the Judge found that he had jurisdiction to make the orders. 'Habitual residence' is the test which has traditionally been used to determine the court's jurisdiction under the inherent jurisdiction.[10] Habitual residence is a question of fact and should be determined having regard to all the circumstances of a case. On the other hand, there is authority to suggest that the Court's jurisdiction can be based solely on possession of a British passport, even if the individual has never set foot in the UK.[11]

The interplay between the family and immigration jurisdictions

There is a general duty on family practitioners to keep informed about concurrent immigration proceedings.[12] A procedure often employed by the Family Courts in order to gather information about any outstanding immigration issues is to fill in the 'Court Request for Information to the Home Office' which is also often referred to as the 'EX660 form.' This is a protocol used by the Family Courts to obtain information from the Home Office and requests should normally be dealt with within six weeks. The form allows for disclosure of any immigration applications or decisions that have been made for the family proceedings and also provides a section where questions can be asked of the UK Border Agency.

Whilst immigration issues often arise during the course of forced marriage proceedings, the Act does not, in any way, alter the well-established principle that the immigration jurisdiction has priority over the family jurisdiction.[13] This principle was summarised *R v Secretary of State for the Home Department ex p T* [1995] 1 FLR 293 by Lord Justice Hoffman (as he then was) thus:

> 'In the last 25 years there have been a number of cases in which the courts jurisdiction in respect of children has been invoked in an attempt to inhibit or influence the exercise by immigration officers or the Secretary of State of the powers conferred by the Immigration Act 1971 or its predecessors. We were referred to *Re Mohamed Arif (An Infant)* [1968] Ch 643, *Re F (A Minor) (Immigration: Wardship)* [1990] Fam 125, [1989] 1 FLR 233, *Re A (A Minor) (Wardship: Immigration,)*. [1992] 1 FLR 427, *Re K and S (Minors,) (Wardship: Immigration)* [1992] 1 FLR 432 and *Findlay v Matondo* [1993] 1 AC 541. From these and other cases I think that the following propositions can be extracted:
>
> '(1) The court may entertain an application to invoke its wardship jurisdiction or powers under the Children Act 1989 made by or in respect of a person liable to removal or deportation.
>
> '(2) The jurisdiction will be exercised very sparingly because

10 See *Al-Habtoor v Fotheringham* (2001) 1 FLR 951.
11 *RE B; RB v FB and MA* [2008] EWHC 1436 (Fam).
12 *Re N and M (parallel family and immigration proceedings)* (2008) 2 FLR 2030.
13 *R (Anton) v Secretary of State for the Home Department* [2004] EWHC 27030/2731 and *Re A (Care Proceedings: Asylum Seekers)* [2003] EWHC 1086 (Fam).

> '(a) a wardship or Children Act order cannot deprive the Secretary of State of the power conferred by the Immigration Act 1971 to remove or deport the child or any other party to the proceedings, although it may be something to which the Secretary of State should have regard in deciding whether to exercise the power; and
>
> '(b) in cases in which there is, apart from immigration questions, no genuine dispute concerning the child, the court will not allow itself to be used as a means of influencing the decision of the Secretary of State.
>
> 'Proposition (1) follows from the general principle that every person within the jurisdiction is entitled to the equal protection of the law: see Lord Scarman in *R v Home Secretary ex parte Khawaja* [1984] 1 AC 74 at p 111, applied by Bracewell J in *Findlay v Matondo* (above) at p 545. Proposition (2) is stated in all the cases but the two reasons require further analysis. Reason (a) is contained in the judgment of Russell LJ in *Re Mohamed Arif* (above) at p 662.'

The strict division between the family and immigration jurisdictions means that if a FMPO is granted in favour of an Applicant who has no leave in the UK and the Applicant is subsequently removed, there is very little that the Family Courts can do in order to interfere with the exercise of immigration powers. This will be a matter to be dealt with during the course of immigration proceedings.

What immigration issues can arise during a forced marriage case?

Many Forced Marriage cases involve an international element and therefore also often contain an immigration dimension. It may be that the victim has been taken abroad in order to enter into a ceremony of marriage, that the victim and/or her family have outstanding immigration applications, or that part of the motivation for forcing the victim into marriage is in order to secure a marriage visa.

The validity of foreign marriages

In order to obtain admission as a spouse, an applicant must satisfy the entry clearance officer that the marriage is lawful and that it also complies with the immigration rules. The validity of foreign marriages may be cast into doubt during the course of forced marriage proceedings, although these are not matters specifically dealt with in the Act. Victims of forced marriage should be able to obtain a nullity in respect of their alleged marriage if it is found by the court to have been a forced marriage. This approach was summarised in *P v R (Forced Marriage: Annulment: Procedure)* [2003] 1 FLR 661 by Mr Justice Coleridge who stated:

> 'There is a real stigma attached to a woman in the petitioner's situation if merely a divorce decree is pronounced and it is desirable from all points of view that where a genuine case of forced marriage exists, the Courts should, where appropriate, grant a decree of nullity and as far as possible, remove any stigma that would otherwise attach to the fact that a person in the petitioner's situation has been married.'

However, due to the manner in which the law on nullity is governed, a victim of forced marriage is not able to obtain a nullity on grounds of duress if the marriage took place more

than three years ago unless the Applicant has sometime during that period suffered from a mental disorder (the three year time bar is contained in the Matrimonial Causes Act 1973). However the recently reported decision of *B v I* (Case No: FD09F05012) demonstrates how the inherent jurisdiction can be utilised in order to provide appropriate remedies in forced marriage cases. In that case, the Applicant wished to apply for a nullity on the ground of duress but as over three years had passed since the alleged marriage she was time barred from doing so. Mrs Justice Baron found that the appropriate remedy for victims of forced marriage who are time barred from applying for a nullity is declaratory relief under the inherent jurisdiction that the marriage is not entitled to recognition in England and Wales. In that judgment the learned Judge stated:

> 'A number of Authorities have been placed before me which persuade me that judges at First Instance and, more importantly, the Court of Appeal regard the inherent jurisdiction as a flexible tool which enables the Court to assist parties where statute fails. It has been held in a number of cases that the judges of this Division have to take note of reality. It is a matter of judicial knowledge that a number of women within the Bangladeshi community are subjected to forced marriage. In order to prevent that from occurring, parliament recently passed the Forced Marriages Act. Of course, I accept that forced marriage has a number of consequences, which go beyond the ceremony itself and I am satisfied that the plaintiff in this case is but an example of what can happen to a young woman who is forced into marriage against her will.'

It is of note that, in this decision, Mrs Justice Baron did not consider the issue of whether the marriage was valid in accordance with the laws of Bangladesh (where the alleged marriage had taken place) and instead confined herself to the issue of consent and whether the marriage could be recognised as valid in this jurisdiction.

If an Applicant obtains a nullity during forced marriage proceedings, it could have potential implications for the spouse's immigration status. If he applied to enter or remain the UK as a spouse, the Home Office could potentially curtail this leave. Although there are no reported decisions on this point yet, as the case law in this area develops this will almost certainly be an area subject to further analysis.

The domestic violence concession

An individual may be able to use the fact that she has applied for an FMPO as evidence to support a claim that she is entitled to be considered by the Home Office as a victim of domestic violence.[14]

The increase in the spouse visa age

The problem of forced marriage has also been used as a justification to change the immigration rules. On 27 November 2008, the minimum age for those applying for spouse and partner visas increased from 18 to 21.[15] This reform was justified on the basis that it would help to prevent forced marriage. However this reasoning has been seriously called into question following the

14 Immigration Rules, para 289A.

15 See Colin Yeo 'Raising the spouse visa age' (2009) Vol 23, No 4 *IANL* 365, for a detailed analysis.

disclosure of a Home Office commissioned report by the University of Bristol. The report concluded that the age of sponsorship/entry should not be raised and that there was no evidence to suggest the increase would assist to prevent forced marriages.[16]

The proportionality and rationality of this policy was recently challenged in *Quila v Secretary of State for the Home Department* [2009] EWHC 3189 (Admin) although Mr Justice Burnett dismissed the appeal finding (at paras 35–36) that:

> 'Different people confronted by the information touching forced marriage might well react in a variety of ways in making judgements about the need to raise the qualifying age given its undoubted impact on some whose marriages are entirely regular. At the heart of that judgement is an assessment of how pernicious the practice of forced marriage is, and thus the policy imperative to try to deal with it. For those whose marriages are regular, the effect of the rule for many who wish to live together will be to require the parties to live abroad for a period of up to three years. There is no question of the policy preventing regular marriages. Its impact is limited to preventing the enjoyment of married life in this country, as opposed to elsewhere. The impact of the policy is softened by the availability of leave outside the rules in compelling compassionate circumstances.
>
> It was not, in my view, irrational to increase the age limit. The policy judgment was that the adverse impact on marriages that are not forced was justified to meet the overall objective. That was a reasonable view.'

Whether it is rational or proportionate for the Secretary of State to use the problem of forced marriage as a justification to raise the minimum spouse visa age, whilst also suspiciously curtailing the number of individuals able to enter the country as spouses, is yet to be finally decided as there is to be an appeal against Justice Burnett's decision.

Conclusion

One year on from it implementation the Act has made an impact, individuals are applying for injunctions, and the Courts have been accorded wide discretion in the remedies that they are able to offer victims. Accessibility and flexibility are key aspects; forced marriage is a sensitive issue and must be dealt with accordingly by the legal system. It is disappointing that the change to the Immigration Rules, implemented allegedly to tackle the problem of forced marriage, cannot also be commended for offering victims either flexible or fact sensitive solutions.

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Renaissance Chambers

16 See *ibid.*

Practice Notes

Case law

The run of Supreme Court decisions on immigration issues continued. Judgment was handed down in *JS (Sri Lanka) v Secretary of State for the Home Department* [2010] UKSC 15 and in *ZN (Afghanistan) v ECO (Karachi)* [2010] UKSC 21. The first of these was on the scope of the Refugee Convention exclusion clauses, in which the Court rowed back slightly from the Court of Appeal's strict criminal liability approach. The second overturned the Court of Appeal judgment preventing a refugee who had naturalised as a British citizen from acting as a sponsor for the purposes of the refugee family reunion rules. Judgment is still awaited in the appeal to the Supreme Court against the case of *SK (Zimbabwe) v Secretary of State for the Home Department* [2008] EWCA Civ 1204 on detention policy, causation and damages and in the Home Office appeal against *ZO (Somalia)* [2009] EWCA Civ 442 on whether fresh asylum claimants kept waiting for over a year for a decision enjoy a right to work under the Reception Directive.

Detention and damages have been one of the overarching recent themes in litigation, and judgment in a test case in the Court of Appeal on quantum and the pleading of damages is awaited at the time of writing. On a similar note, in a case involving detention of a Dutch national the Secretary of State successfully appealed a finding of misfeasance in public office, but lost on the award of exemplary damages for what was held to be 'outrageous and arbitrary exercise of executive power': *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453. In *Ibrahim & Anor v Secretary of State for the Home Department* [2010] EWHC 764 (Admin) Mr Justice Burnett rejected the more novel submissions put forward by Counsel but held as unlawful detention in the hope of eventual removal to Iraq at a time when removals were simply not taking place.

Another major theme has been children and families. *A v Croydon* [2009] UKSC 6 in the Supreme Court was reported in the last edition. More recently, *SS (India) v Secretary of State for the Home Department* [2010] EWCA Civ 388 stands out on art 8, in which the tribunal is criticised for failure to give proper consideration to dislocation and hardship associated with expecting a family to relocate to a strange country. In *R (on the application of Stephenson) v Secretary of State for the Home Department* [2010] EWHC 704 (Admin) Mr Justice Foskett rejected the Home Office submission that the birth of a child could not give rise to a realistic prospect of success in even a serious deportation case. The same-day no-notice removal of two children to Italy with no regard to their welfare was very strongly condemned by Mr Justice Collins in *R (on the application of T) v Secretary of State for the Home Department* [2010] EWHC 435 (Admin). Meanwhile, a new policy emerged via a Freedom of Information request that puts some meat on the bones of the duty to safeguard and promote the welfare of children in deportation cases. It requires UKBA to have proper regard to the need of children to have contact with their parents and requires UKBA to contact social services and CAFCASS to ascertain what the welfare of a child might be.

The new jurisprudence on art 15(c) took another step forward with *HH (Somalia) v Secretary of State for the Home Department* [2010] EWCA Civ 426, in which the Court also strongly suggested *obiter* that route of return must be considered by the tribunal, which should not simply throw up its hands in despair when the Home Office fails to come equipped with the relevant information. The Court also confirms that the right to asylum or humanitarian protection is now a European law right, which has implications for issues such as the timeliness of decision making.

Legislation

The Immigration and Asylum Chamber: plus ça change.

Yet more changes to the Points Based System were announced in Statement of Changes HC 439. The points allocations for Tiers 1 and 2 were overhauled, with the minimum salary required to start scoring points increased to £25,000 for Tier 1 and £20,000 for Tier 2. Very high earners do better under the new Tier 1 guidance, with earnings of £150,000 scoring 75 points. Something of a crack down on Intra-Company Transfers was also announced, and many future such transferees will no longer be eligible for future settlement. In an earlier change, the minimum language requirements for some students in Tier 4 were increased, with across-the-board increases to follow in the summer, and those studying below degree level will in future only be permitted to work for 10 hours per week.

Whether any of this matters remains to be seen, given that at the time of writing the Court of Appeal was hearing a three day test case involving a comprehensive challenge to the lawfulness of the Points Based Scheme. Perhaps the most interesting argument is that the so-called 'guidance' documents of the PBS represent an unlawful derogation from the requirements of s 3(2) of the Immigration Act 1991.

The procedure for satisfying the knowledge of language and life in the UK test has been tightened up at Immigration Rules 33B to 33G.

Practical matters

An expected increase in the number of no-notice removals was reported in the last issue. At the time of writing Medical Justice had just been granted an injunction suspending no-notice removals pending a full legal challenge on 15 June 2010. This follows in the wake of highly critical comments by Mr Justice Collins in the *T* case above.

An increasing number of colleges specialising in educating foreign students have started to experience problems with UKBA. Sponsorship licences are being suspended and withdrawn. The crackdown extends far beyond what many might think of as a typical dodgy college, though, and serious amounts of money are at stake in some such cases. UKBA may find that faulty decision making and processes will cost them dear and a number of legal challenges have being brought. The first reported case emerged with *Leeds Unique Education Ltd v Secretary of State for the Home Department* [2010] EWHC 1030 (Admin). Permission to apply for judicial review was granted in two linked cases and interim relief (restoration to the suspended list) was also granted.

Reaccreditation by the Law Society has caused enormous anger in the publicly funded advice sector. The timetable has been amended to be slightly less outrageous and compulsory exam dates have been scrapped, but many find that the principle of being the only solicitors (or professionals of any kind?) to have to sit examinations to prove ongoing competence sticks in the craw.

Lastly, the decline in the number of appeal hearings at which the Secretary of State elects to be represented attracted some recent media attention. It later emerged that the issue is dealt with very differently in different regions. Representation rates are close to 100% in the Midlands, where representation at appeals is prioritised by UKBA locally.

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Feedback and suggestions are welcome at cy@renaissancechambers.co.uk.

Case Notes and Comments

Janko Rottman v Freistaat Bayern

Case C-135/08, 20 March 2010

The end of nationality legislation as we know it?

For the first time since the introduction of European Union citizenship in 1992 by the Treaty of Maastricht, the European Court of Justice has been asked directly to rule on the limits imposed by European Community law on the power of the Member States to regulate issues of nationality attribution. The ECJ, in its *Rottman* judgment of 20 March 2010, has confirmed that while exercising their still-sovereign powers in the field of nationality, Member States must have due regard to Community law. Thus, loss of national citizenship because of fraudulent acquisition of nationality, leading to statelessness and loss of European Union citizenship, in order to be in accordance with Community law must be proportionate.

Facts

Mr Janko Rottmann was born in 1956 in Graz, Austria. He acquired Austrian citizenship at birth. Since 1 January 1995, the date of Austria's accession to the European Union, he is also a European Union citizen. In 1995, Mr. Rottmann was suspected of serious fraud in the exercise of his profession and stood as accused before the Regional Criminal Court of Graz. After these events, he left Austria and established residence in Munich, Germany. The criminal case before the Graz Court continued and a national arrest warrant was issued on his name in February 1997. In February 1998, Mr Rottmann applied to the city of Munich for naturalization but failed to disclose that he was the subject of criminal proceedings in Austria. In February 1999, he became a German citizen, at the same time losing his Austrian nationality, in accordance with Austrian nationality law. In August 1999, the Austrian authorities informed the German authorities that Mr Rottmann was the subject of a national arrest warrant and that he had appeared before the Graz criminal court. On the basis of this information, on 4 July 2000, the authorities of the Freistaat Bayern withdrew the naturalization certificate issued previously. The certificate was considered void since Mr. Rottmann had obtained German nationality fraudulently.

Mr Rottmann challenged the decision of the administrative authorities arguing that as a consequence of the withdrawal decision he became stateless contrary to public international law and that the status of statelessness would also entail, in breach of Community law, loss of Union citizenship. The case reached the Federal Administrative Court, which referred two questions to the ECJ:

> '(1) Is it contrary to Community law for Union citizenship (and the rights and fundamental freedom attaching thereto) to be lost as the legal consequence of the fact that the withdrawal in one Member State (the Federal Republic of Germany), lawful as such under national (German) law, of a naturalisation acquired by intentional deception, has the effect of causing the person concerned to become stateless because, as in the case of

the applicant [in the main proceedings], he does not recover the nationality of another Member State (the Republic of Austria) which he originally possessed, by reason of the applicable provisions of the law of that other Member State?

(2) [If so,] must the Member State … which has naturalised a citizen of the Union and now intends to withdraw the naturalisation obtained by deception, having due regard to Community law, refrain altogether or temporarily from withdrawing the naturalisation if or so long as that withdrawal would have the legal consequence of loss of citizenship of the Union (and of the associated rights and fundamental freedoms) …, or is the Member State … of the former nationality obliged, having due regard to Community law, to interpret and apply, or even adjust, its national law so as to avoid that legal consequence?'

The opinion of Advocate General Poiares Maduro

The first issue that the AG had tackled, in his Opinion of 30 September 2009, was whether or not nationality attribution is a purely internal issue and if not, under what circumstances it falls within the ambit of Community law. Drawing on the ECJ's case law on topics such as taxation, war pensions and rules governing a person's name, the Advocate General argued that even matters that are regulated exclusively by national law may come within the ambit of Community law, if there is a cross-border dimension (paras 10–11). The rule that Union citizenship is not intended to extend the scope *ratio materiae* of the Treaty is still good law, as nationality will not automatically come under the ambit of Community law only because it has an impact on the acquisition or loss of European citizenship. Thus, a cross-border dimension in the form of the exercise of a Treaty freedom had to be identified. AG Maduro found this to be the freedom of movement and residence associated with EU citizenship that demands a different understanding of the traditional view of sovereignty in nationality issues. He argued (at para. 11) that:

'It was by making use of the freedom of movement and residence associated with Union citizenship which he enjoyed as an Austrian national that Mr Rottmann went to Germany and established his residence there in 1995, in order to initiate a naturalisation procedure. Although it was in accordance with the conditions laid down by national law that he acquired the status of German national and lost that of Austrian national, it was therefore only after exercising a fundamental freedom conferred on him by Community law.'

The Advocate General admitted that the link between the fundamental freedom exercised by Mr Rottmann and his loss of nationality was '*less direct'* (the exercise of the freedom was not the reason for the loss of nationality). Yet, it remained the case that the exercise of the fundamental freedom had an *impact* on the change of his status, thus bringing the power of the German state to deprive him of citizenship under the scope of EU law (para 13). The main consequence of such a finding is that the exercise of Member State power cannot be discretionary and, moreover, as the ECJ had already stated in *Micheletti,* while exercising their nationality powers, they must have due regard to Community law.[1]

1 *Micheletti* Case C–369/90 [7 July1992] ECR I – 04239.

The answer to what is implied by having due respect to community law while exercising nationality powers is, according to the AG, related to the sound understanding of the relationship between nationality of a Member State and Union citizenship as concepts that are both inextricably linked and independent (para 23). Yet, the image presented is at times confusing. AG Maduro argues that while Union citizenship assumes nationality of a Member State it is also a legal and political concept independent of that of nationality. Moreover, '… it is based on their (the Member States) mutual commitment to open their respective bodies politic to other European citizens and to construct a new form of civic and political allegiance on a European scale' and 'In so far as it does not imply the existence of European people, citizenship is conceptually the product of a decoupling from nationality' (para 23). Yet, by making European citizenship conditional on having the nationality of one of the Member States, the intention was to assure the Member States that our first allegiance is to our national body politic. Thus, the "miracle of Union citizenship" according to Maduro consists in simultaneously strengthening our ties with our own states (whose nationality we must poses in order to be Union citizens) and emancipating us from the same states (since we are also citizens beyond the state). The problem with this relatively traditional and national understanding of the relationship between the citizen and the state as premised on allegiance is that it fails to recognise one important consequence of 'citizenship beyond the state'. The decoupling of rights from nationality, of which the EU is a champion via its free movement regime, supposedly undermines traditional understandings of the state-citizen relationship and, at least, sketches the possibility of more diverse forms of belonging.[2]

According to the AG, the complex relationship between national citizenship and EU citizenship has two consequences. Firstly, one must accept that deprivation of national citizenship is possible; otherwise one would exclude the competence of the Member States to regulate the conditions of nationality of their own State and affect the fundamental nature of their autonomy in this sphere as enshrined by art 20 TFEU (former art 17 EC). Secondly, the conditions under which acquisition and loss take place must be compatible with Community rules and respect the rights of the European citizen (para 23). This obligation is therefore bound to place some restriction on the State's act of depriving a person of nationality, when such an act entails the loss of Union citizenship; otherwise the competence of the Union to determine the rights and duties of its citizens would be affected (para 26).

As to the limitations that Community law can impose on the competence of the Member States in nationality attribution, the AG discussed several such possibilities:

- International law – in this case no rule on international law has been disrespected as international standards on nationality allow for statelessness in case of naturalisations obtained by fraud. For example, this solution is envisaged by art 7 of the 1961 Convention on the Reduction of Statelessness and art 7 of the European Convention on Nationality (which has been ratified by both Austria and Germany).
- Provisions of primary Community legislation and general principles of Community law – the Community principle of sincere cooperation could be affected if a unjustified mass naturalization of nationals of non-Member State. Presumably, mass denaturalization would also be covered.

2 Y N Soysal *Limits of citizenship: migrants and post-national membership in Europe* (1994); S Sassen 'Towards Post-National and Denationalized Citizenship', in E Isin and B Turner (eds) *Handbook of Citizenship Studies* (2000).

- The principle of the protection of the legitimate expectations as to maintenance of the status of citizen of the EU – the AG argued that it is difficult to find any expectation that merits protection in case of a citizen who has fraudulently acquired nationality; moreover, international law allows for loss of nationality in such a situation and EU citizenship is linked to national citizenship
- State rules on nationality cannot restrict the enjoyment and exercise of the rights and freedoms constituting the status of Union citizenship without justification.

AG Maduro argued that loss of nationality because of the exercise of a fundamental freedom (for example moving to a different Member State) would not be justified. However, in the case of Mr Rottmann the loss of nationality is not linked to the exercise of the freedom established by the Treaty but to the applicant's own conduct. Therefore there is no unjustified interference with free movement. This conclusion sits rather unhappily with his previous argument that the issue is within the ambit of EU law because the exercise of free movement connected with European citizenship has impacted on Mr Rottmann's status. The same exercise of free movement is at the same time enough to bring the matter within the ambit of EU law but not enough to have any bearing on the loss of the acquired status.

The AG's conclusion is that it is the state's legitimate interest to divest itself of nationals who have obtained that nationality by fraud and have thus failed to show their duty of allegiance/ loyalty to their state. Again this is why international law allows for this solution even if it leads to statelessness. On the second question asked, he considers that Community law does not require the restoration of the nationality originally held. It remains at Austria's latitude whether it decides to consider that since Mr. Rottmann has never been a German national he has also not lost Austrian nationality.

The ECJ's judgment

Is the ECJ competent to scrutinize issues of attribution of nationality? Does the matter fall within the ambit of Community law?

Unlike the Advocate General, the ECJ did not have too much trouble in finding that the issue falls within the ambit of EU law. Without attempting to establish any sort of a link between the exercise of a fundamental freedom and the loss of nationality, it simply stated (at para 42) that:

> 'It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, *by reason of its nature and its consequences*, within the ambit of European Union law.'

Moreover, we are reminded that citizenship of the Union is intended to be the fundamental status of nationals of the Member States (para 43) and 'thus, the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law' (para 45). The Court then reasserts its authority over EU citizenship; it is not for the Member

States to rule on issues of loss of EU citizenship but for the Court as the repository of legitimate authority over the interpretation of the status.[3]

Having due regard to Community law

The ECJ's next step was to elucidate what it means to have due regard to Community law in the exercise of nationality powers and the consequences that might follow. Similar to the position of the Advocate General, the Court also assures the Member States that it does acknowledge the established principle of international law according to which states have the power to lay down the conditions for the acquisition and loss of nationality. However, in respect of Union citizens, acts of the Member States affecting the rights conferred and protected by the legal order of the Union are amendable to judicial review carried out in the light of European Union law (para 48). A national decision withdrawing a naturalization decree that causes the loss of national citizenship and therefore Union citizenship is considered by the Court to be such an act.

However, having found that loss of nationality comes within the ambit of Community law and that it must take place in accordance with Community law, does not *per se* mean that loss is prohibited. The Court reassures the Member States (at para 51) that:

> 'A decision withdrawing naturalisation because of deception corresponds to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality.'

In addition, withdrawal of naturalisation on grounds of deception is legitimate under international law, thus in theory this remains the case even when the consequences of such decision is loss of European citizenship together with national citizenship (para 54). Drawing on the *in theory* part, the ECJ goes on find that it is for the national court to find whether or not the principle of proportionality is respected bearing in mind the importance attached by the Treaty to the status of European citizenship. The Court sets some guidelines as to whether proportionality is observed from the perspective of Community law. These include:

- The consequences of the decision of withdrawal for the person concerned and if relevant for the members of its family with regard to the loss of rights enjoyed by every citizen of the Union;
- Is loss justified in relation to the gravity of the offence committed by that person;
- Is loss justified in relation to the lapse of time between the naturalisation decision and the withdrawal one;
- Is it possible for the person to recover his original nationality? However, non-recovery of the original nationality alone is not enough to prohibit the state from withdrawing the fraudulently acquired nationality. The ECJ does suggest to the national court that it make sure that the person concerned has enough time to try to recover his/her initial nationality.

3 At para 46 the ECJ states: 'In those circumstances, it is for the Court to rule on the questions referred by the national court which concern the conditions in which a citizen of the Union may, because he loses his nationality, lose his status of citizen of the Union and thereby be deprived of the rights attaching to that status.'

Thus, the answer to the first question is that a Member State is allowed to withdraw a naturalisation decision obtained by deception if it respects the principle of proportionality. The Court did not consider it necessary to reply to the second question, whether Austria must interpret its nationality legislation in such a manner as to avoid a person in the applicant's situation to avoid statelessness by recovering his original nationality. The Court limited itself to reminding the Member States (para 62) that:

> 'It is to be borne in mind, in these proceedings for a preliminary ruling, that the principles stemming from this judgment with regard to the powers of the Member States in the sphere of nationality, and also their duty to exercise those powers having due regard to European Union law, apply both to the Member State of naturalisation and to the Member State of the original nationality.'

Comments

Nationality and the scope of Community law

Even before the introduction of European Union citizenship, the European Court of Justice has scrutinized issues relating to the field of nationality, albeit in relation to the interpretation of rules on free movement and because the personal scope of the Treaty covers the nationals of the Member States. Although this aspect of European Union law has not generated a vast amount of case law, it can be safely argued that issues regarding the effectiveness of a grant of nationality by one of the Member States have come under the loupe of the Court. Already in cases such as *Airola, Auer, Knoors* and *Gullung*[4] the ECJ has suggested that in the context of the Community legal order, the protection of the main principles upon which the Community is based may require that certain principles of international law in the field of nationality be interpreted differently. Thus, the sovereignty enjoyed by the Member States in nationality issues as a matter of international law has been occasionally overruled in order to ensure compatibility with Community law and its organising principles.

What remained unexplored was whether or not the Court could actually engage with issues of nationality attribution (the rules and principles governing the acquisition and loss of nationality).[5] The issue seemed quite clearly settled by the content of the Treaty provisions on citizenship of the Union which make the status dependent on holding the nationality of one of the Member States. Moreover, it is clearly spelled out that Union citizenship does not replace national citizenship, it only complements it. Declaration no 2 on nationality of a Member State annexed to the final act of the Treaty on European Union together with the decision of the Heads of State and Government, meeting within the European Council at Edinburgh on 11 and 12 December 1992 confirmed that the Member States saw issues of nationality as within their reserved domain and wished to formalise their position.

The story of EU citizenship, with its modest beginnings as a symbolic status and its subsequent transformation in the hands of the ECJ, is well known. We are familiar with how, what has been seen by some as a public relations stunt meant to cure the democratic deficit that

4 *Airola* Case 21–74 [1975] ECR I– 00221, *Auer* Case 136/78 [1979]ECR I – 00437, *Gullung* Case 292/86 [1998] ECR I– 0011, *Knoors* Case 115/78 [1979]ECR I– 00399.

5 S Mantu *Deprivation of citizenship from the perspective of international and European legal standards* (2009) retrievable from http://www.enacting-citizenship.eu/index.php/sections/deliverables_item/285/.

the Union was experiencing, ended up being declared by the Court as destined to be the fundamental status of the nationals of the Member States.[6] Yet, it is worth repeating that Union citizenship has been used by the Court, not without criticism[7], as a means to expand the material and personal scopes of the Treaty. It is no secret that the ECJ has used Union citizenship to bring within the scope of application of the Treaty situations where the exercise of free movement seemed artificial or wrongly distended.[8] This is the logic that has brought direct taxation issues, rules on name attribution, war pensions or social assistance for students within the ambit of Community law.[9] The transformation of EU citizenship, from purely economic to a more social one, has also meant that the nationals of the Member States were no longer exclusively coming within the scope of the Treaty as workers or persons exercising free movement rights but also as European citizens.

AG's Maduro attempt to link loss of nationality with the exercise of the right to free movement is, thus, the orthodox way in which it is usually established whether or not an issue falls within the scope of EU law. His rather inconsistent conclusion that the same exercise of free movement had an impact on Mr Rottmann's civil status and was enough to bring the matter within the ambit of EU law but ultimately had nothing to do with the loss of status will be interpreted as further evidence of the dilemmas of interpreting the material scope of the Treaty after the introduction of Union citizenship. The Court preferred a more sincere and direct approach which raises some interesting question as to what is left of the Member States' sovereign powers in the field of nationality. The Court was quite clear that the AG's approach was faulted; the exercise of free movement could not be seen as the cross-border element that linked loss of status with the scope of Community law.

It remains to be clarified by future case-law how much one can actually read into the Court's statement that the applicant's situation was brought within the ambit of EU law *by the reasons of its nature and its consequences*. Is the cross-border dimension that the AG was trying so hard to establish still necessary? Is it enough to have a measure of nationality attribution (be it acquisition or loss) without any connection with the exercise of a right conferred and protected by the EU legal order, in order to have judicial review in light of EU law? Acquisition or loss of national citizenship of one of the EU Member States can be said to have an impact on the rights conferred by the EU legal order, in the sense that they make those rights exist or not. Yet, such an interpretation would mean that the EU can interfere with the acquisition of nationality of the Members States. It may be that the Court's observation holds valid only if there has been an initial conferral of nationality by a Member State, which would be in keeping with its position in the *Kaur* case.[10] This solution is also suggested by the Court's eagerness in differentiating the present case from *Kaur*. The Court insisted (at para 49) that:

> 'Unlike the applicant in the case giving rise to the judgment in *Kaur* who, not meeting the definition of a national of the United Kingdom of Great Britain and Northern

6 *Grzelczyk* Case C-184/99 [2001] ECR I-6193.

7 R Bellamy 'Evaluating Union citizenship: belonging, rights and participation within the EU', in *Citizenship Studies* (2008) Vol 12, No 6, 597–611.

8 Niamh Nic Shuibhne 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights' in C Barnard and O Odudu (eds) *The Outer Limits of European Union Law* (2009).

9 See for example, *Garcia Avello* Case C-148/02 [2003] ECR I-11613, *D'Hoop* Case C-224/98 [2002] ECR I-6191, *Bidar* Case C-209/03 [2005] ECR I- 2119, *Schempp* Case C-403/03 [2005] ECR I-6421, *Tas-Hagen and Tas* Case C-192/05 [2006] ECR I-10541.

10 *Kaur* Case C-192/99 [2001] ECR I-1237.

> Ireland, could not be deprived of the rights deriving from the status of citizen of the Union, Dr Rottmann has unquestionably held Austrian and then German nationality and has, in consequence, enjoyed that status and the rights attaching thereto.'

The question is not without relevance for non-mobile EU citizens who have naturalized in one of the EU Member States and previously did not hold the nationality of another Member State. In such a case and in the absence of the exercise of any related freedom would loss of national citizenship because of fraud during naturalization or because of behaviour castigated by the state come under the scrutiny of Community law via proportionality? For example, it is worth mentioning that several Member States have changed their nationality legislation in the sense of making it easier to lose citizenship on the ground of engaging in terrorist related activities. Bearing in mind that the same states have had troubles in identifying any EU or European dimension of the said changes, it might come as a shock to them to find out that they might need to operate a further proportionality check on a nationality deprivation measure based on Community law.[11]

For the time being, it would appear that rules on acquisition remain within the domain of the Member States and are possibly more immune to the Court's scrutiny[12] but as long as a person has held the status of EU citizen, the manner in which it loses the status will be scrutinized by the Court in order to make sure that it is in accordance with Community law.

EU nationality standards in the making?

In *Rottmann* the national court asked for a clarification of the Court's dicta in *Micheletti:* what exactly does it mean to have due regard to Community law while exercising nationality powers? AG Maduro argued that not only fundamental human rights should be considered while trying to elucidate the *Micheletti* guidelines. Potentially, any provision of EU law could be applicable. All the possible principles that he tried to apply seemed to be neutralized and their effects negated by the fact that international law allows for nationality to be lost in case of fraud, even if it leads to statelessness. This suggests that the issue in *Rottmann* can be re-read as what happens, in the context of the Community legal order, when the limits of the protection that international law can offer via fundamental rights protected by the EU legal order are reached? Can EU law bring extra protection in the sense of finding an original European Union solution that could prevent statelessness to occur? It was quite obvious that international law and standards on nationality were of little help to Mr Rottmann since every international convention in this field allows for statelessness to occur in his circumstances. The Court's observation that the principles stemming from this decision apply to both states involved suggests, as Jo Shaw pointed out, that some cooperation between the Member States is necessary in order to avoid statelessness[13]. It seems equally obvious that allowing for statelessness to occur within the Community legal order is not an easily acceptable consequence.

11 The evidence gathered in the cases of France and United Kingdom suggests that the only dual nationals affected by such measures held the nationality of a third country and that of the UK or France. For more details see S Mantu *Deprivation of citizenship in France* (2010) retrievable from http://www.enacting-citizenship.eu/index.php/sections/deliverables_item/387; S Mantu *Deprivation of citizenship in the United Kingdom* (2009) retrievable from http://www.enacting-citizenship.eu/index.php/sections/deliverables_item/363/

12 Cases such as *Kaur (supra)* or *Chen* (*Zhu and Chen* Case C-200/02 [2004] ECR I-9925) seem to confirm that the Court is not very willing to interfere with the criteria used by the Member States for acquisition of national citizenship.

13 Jo Shaw, Forum entry, retrievable from http://eudo-citizenship.eu/cit-forum/viewtopic.php?f=2&t=11

The underlying question is whether or not EU citizenship has fulfilled its destiny as a fundamental status so as to require a reinterpretation of the relationship between national citizens, their state of origin and the Union that goes beyond thinking in terms of ranking allegiances. The Court suggests proportionality as the boundary of acceptable decisions involving loss of national and, therefore, European citizenship. Thinking, for example, of other principles identified by the Court in this field (in *Micheletti* that Member States cannot add additional requirements to recognising the nationality attribution operated by another Member State or as suggested in *Hadadi*[14] that effective nationality does not play a part as far as dual nationals are concerned) it would seem that the ECJ is on its way to develop EU standards on nationality.

The manner in which these standards will interact with the fundamental human rights narrative that the EU has been developing and standards developed by other international bodies will play a part in the Union's efforts to present and legitimize itself as more than a purely economic union. In this particular case, the ECJ's interpretation of the requirements of proportionality is very similar to what the Council of Europe recommends as well. Up to now, the main European body developing nationality standards has been the Council of Europe. The European Convention on Nationality (ECN) lays down a set of mandatory principles which state parties must respect when enacting national legislation on the topic. These rules include that everyone has the right to nationality; statelessness shall be avoided; no one shall be arbitrarily deprived of his or her nationality and neither marriage nor the dissolution of marriage between a national of a State party and an alien, nor the change of nationality by one of the spouses during marriage shall automatically affect the nationality of the other spouse.[15]

Although art 7 of the ECN allows for loss of nationality in case of fraud even if it leads to statelessness, the Council of Europe seems troubled with the protection offered against statelessness. It has recommended to state parties:

> 'in order to avoid, as far as possible, situations of statelessness, a state should not necessarily deprive of its nationality persons who have acquired its nationality by fraudulent conduct, false information or concealment of any relevant fact. To this effect, the gravity of the facts, as well as other relevant circumstances, such as the genuine and effective link of these persons with the state concerned, should be taken into account.'[16]

It will be interesting to see if, at the European level, the judicialisation of nationality conflicts will take place via the European Union and not the UN or the Council of Europe, the traditional actors in the field of nationality, but whose records on the topic leave plenty of space for improvements.

Without having touched on all the implications that the Court's decision in *Rottmann* brings for Union citizenship and the Union's constitutional ambitions, it is nevertheless clear that we are facing something of a turning point. It might be argued that the Court's reasoning for bringing national rules on loss of citizenship, in the absence of the exercise of relevant free movement, within the scope of review of EU law is rather shaky. This will again raise question as to who is the rightful institutional owner of Union citizenship[17] and as to how far the Court

14 *Hadadi* Case C-168/08 [2009], http://curia.europa.eu

15 Article 4 of the European Convention on Nationality adopted under the auspices of the Council of Europe.

16 Recommendation R (1999) 18 of the Committee of Ministers to Member States on the Avoidance and Reduction of Statelessness, 15 September 1999.

17 Niamh Nic Shuibhne supra at footnote 8.

can go in interpreting the limits of EU citizenship despite the formal solutions inscribed in the Treaty. It remains to be seen whether the ECJ's reasoning can be used to bring under the scrutiny of Union law also loss or acquisition of citizenship in case of non-mobile citizens for whom the status of Union citizenship continues to remain symbolic. However, the *Rottmann* decision is a serious blow to one of the last bastions of state sovereignty, its powers in the filed of nationality.

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R (on the application of SB (Uganda)) v Secretary of State for the Home Department

[2010] EWHC 338 (Admin)[1]

Facts

SB (Uganda) relates to the judicial review of the certification, under ss 94(2) and 96 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'), of further representations submitted to revoke a deportation order, as well as a judicial review of an unlawful detention. The claimant was successful on all issues.

The claimant, a lesbian from Uganda, was accepted to have been arrested in September 2003 and May 2004, having been perceived as a lesbian [46], as she had no boyfriend and portrayed a male, rather than a female persona.[2] Having been bailed following her May 2004 arrest, she fled to the UK. SB then overstayed, and was arrested and found to be in possession of a forged instrument. Deportation proceedings followed in early 2009.

The Secretary of State for the Home Department ('the defendant'), did not accept that SB is a lesbian nor that she was arrested twice whilst in Uganda. Immigration Judge Grimmett accepted that SB is a lesbian and was arrested in 2003 and 2004. The Tribunal also accepted SB's solicitor's evidence that in 2009 he rang the Kampala police station where she was bailed from in 2004, and they confirmed that SB is on a wanted list for having jumped bail. These findings distinguished *SB* from the facts found by the Tribunal in the 2008 Country Guidance

1 References to paragraphs in the judgment are in bold and in square brackets [*****].

2 SB came out to her family in her home town of Mukono in July 2003. Her subsequent arrest in September 2003, was viewed by SB as being due to being denounced by a family member. During her detention, a police officer grabs her breasts and buttocks and sexually intimidates her by pressing himself close to her and asking whether she 'felt anything'. She is asked whether she has a boyfriend, why she does not grow her hair, and why she was 'manly' and 'walked like the king of the town'? She was bailed following payment, but after 6 weeks she absconds to Kampala. Her arrest in Kampala in May 2004, following perception by SB of a further denouncement, involves police officers asking the same questions. She manages to bribe herself out of detention on bail (paid for by a friend), fails to report, and obtains a visitor's visa and flees Uganda for the UK in November 2004 (March 2009 supplementary statement). The 2009 Tribunal held that SB had suffered harassment, not persecution.

determination in *JM (Uganda)*.[3] However, the IJ applied *JM* as the determinative case on country conditions, finding that further evidence did not show ill-treatment of lesbians, or that the criminal law in Uganda applied to lesbians, and held that SB could internally relocate to an area outside the district in Kampala where she was wanted.

The further representations, following exhaustion of the 2009 tribunal proceedings, included an assessment of the country background evidence from Dr Michael Jennings (a Senior Lecturer in the Department of Development Studies, School of Oriental and African Studies), Paul Dillane (Refugee Researcher at Amnesty International), Dr Matthew Merefield (Research Assistant, Country Information Centre at the Immigration Advisory Service), and Dr Chris Dolan (Director of the Refugee Law Project in Uganda). Evidence submitted not only addressed specific risk to SB, but also the evidence relating to 2009–2010 arrests of gay men and lesbians in Uganda, and the Anti-Homosexuality Bill 2009. The defendant's immigration decisions, refusing to revoke the deportation order, certified the representations as being 'clearly unfounded' pursuant to s 94(2) of the 2002 Act, and therefore denied the claimant an in-country right of appeal.

Having applied for permission to judicially review the defendant's decision to certify the further representations, additionally, the claimant successfully applied for an Order to prohibit the defendant from 'taking any steps towards removing' her, until the resolution of the judicial review, or further order of the court. The Order was granted on Thursday, 12 November 2009.

When the claimant reported the following day (Friday, 13 November at 3 pm), the defendant, having received the Order the day before, and having been provided with a copy by the claimant when she reported, detained her on the basis that there were 'no barriers to removal' and 'removal is imminent'. Removal directions had been set for 19 November 2009. The defendant took no steps to apply to vary or discharge the Order, or request, at that time, expedition of the judicial review proceedings. The claimant secured a second Order on Monday, 16 November, ordering the defendant to release the claimant 'forthwith'. The defendant received the Order at approximately 5.30 pm on the same day, but decided it was too late to release the claimant, and that legal advice would have to be sought from Treasury Solicitors. No application was sought to vary or discharge this second Order. On the advice of Treasury Solicitors, the claimant was released at 3.30 pm on Tuesday 17 November 2009. The claimant submitted that her detention by the defendant from 3.00 pm on Friday 13 November to 3.30 pm on Tuesday 17 November 2009 was unlawful.

Held

Mr Justice Hickinbottom quashed the certification under s 94(2) of the 2002 Act. It is therefore strongly arguable that *JM* can no longer apply as a Country Guidance case. It was accepted that the situation has clearly moved on since *JM* was heard in December 2007. The claimant could clearly distinguish herself from the facts found by the tribunal in *JM* which held that there was no evidence of 'violence, arrest or imprisonment of gays or lesbians',[4] on the basis that it was

3 *JM (homosexuality: risk) Uganda CG* [2008] UKAIT 00065. Contrast with *EK (non-overt homosexual) Uganda* [2004] UKIAT 0002, an earlier decision of Tribunal which did accept that there was a possibility of arrest on the basis of sexual identity.

4 See para 111 of *JM*.

accepted that SB was arrested and detained by the Ugandan authorities on the basis of her perceived identity as a lesbian in 2003 and 2004, and that she is currently on a 'wanted list' [7]. The expert evidence (country background material),[5] indicated that as SB is on a wanted list she would be at real risk of detention at the airport (the evidence from the July 2009 Refugee Law Project field study at Entebbe observed information sharing between the UK and Ugandan authorities) or, as the wanted list information would be circulated amongst all police stations, she would not be safe outside Kampala [38]. Any internal relocation alternative was therefore not a viable option. Given the current climate, SB would not be able to bribe herself out of detention [39]. Both Dr Jennings and Amnesty International, based on the facts as accepted by the 2009 tribunal, profiled the claimant as being at real risk of persecution on return [41]. Therefore, the 2009 tribunal determination could not be treated as 'a trump card for the Secretary of State' [48–53].

The court held, in referring to the continuum in *Jain*,[6] that the country conditions in Uganda have certainly shifted since December 2007, and coupled with the factual findings in the claimant's case, which accepted arrests on the basis of her perceived identity as a lesbian, enable her to distinguish her claim from the facts as found by the tribunal in *JM* [47].

The court held that in these circumstances, the defendant's certificate that the claim was 'clearly unfounded', therefore would have 'no prospect of success';[7] pursuant to s 94(2) of the 2002 Act, erred in law. There was 'more than a fanciful chance' that a Tribunal would take a different view on risk on return as a lesbian [53].

Comment

Impact on sexual identity asylum claims

This section of the judgment is important for asylum claims based on sexual identity for the following reasons. Firstly, it continues the shift in focus from a purely 'conduct' based approach relating to sexual acts in the 'privacy' of the home, to an identity based analysis which refers to interaction with the outside world[8]. Paragraph 2 of the judgment states, 'Homosexuality is a matter of sexual orientation or identity rather than behaviour.'[9] The insertion of the word 'just', before 'behaviour', would be more accurate.[10] However, this is a very important step in identity based analysis, as it shifts the focus which solely concentrates on the ability to engage in sexual

5 Following *TK (Tamils risk: LP updated) Sri Lanka* [2009] UKAIT 000149, reference should be made to 'country background' material not 'objective evidence'.

6 *Sahm Sunder Jain v Secretary of State for the Home Department* [2000] Imm AR 76, at 82–83 *as per* Schiemann LJ.

7 Applying the legal test in *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6; [2009] 1 WLR 348 [83]. See also *R (on the application of AK (Sri Lanka)) v Secretary of State for the Home Department* [2009] EWCA Civ 447 [34]. No difference to the fresh claim test of Buxton LJ in *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495; [2007] Imm AR 337 [11].

8 See *S and Marper v the United Kingdom* 25 BHRR 557 [66].

9 See *DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica CG* [2005] UKAIT 00168 [27] and *MN (Findings of Sexuality) Kenya* [2005] UKAIT 00021 [15]. See also *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238; [2007] Imm AR 73 [16–17] following the approach of the High Court of Australia in *Appellant S/395* [2003] HCA 71; [2004] INLR 233 [40–43 and 78–83].

10 This is not an adverse comment regarding the reference in the judgment, as the finding related to Tribunal case law, namely *DW (Jamaica)* [27], which in turn relied on the Tribunal's comments in *MN (Kenya)* [15].

act(s).[11] Secondly, the judgment refers to 'gay men and lesbians' and not just 'homosexuals'. This shift in the use of terminology importantly corrects a historical wrong where previously due to the use of the term 'homosexuality', lesbians have been made invisible.[12] This additionally aids recognition based on self-identification, which is not solely based on homosexual conduct.[13] Thirdly, the judgment affirms the approach of the Court of Appeal with respect to considerable weight to be attached to the opinions of Amnesty International[14] [26 (ii)]. The court additionally held that experts are entitled to draw upon their experience and expertise, without highlighting specific examples [27]. The defendant's counsel, Mr Mandalia, did not 'doubt the experience or expertise of the claimant's experts' [27].

Legislation which is persecutory

With respect to the 2009 Anti-Homosexuality Bill, the court noted the fact that the pre-amble of the Bill directly states that 'same sex attraction is not an innate and immutable characteristic' [35]. This declaration directly strikes at the core of the 'Particular Social Group' Refugee Convention reason, where the definition is based on the protection of those who share an 'innate and immutable characteristic' which includes sexual orientation/identity, which is 'a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not required to be changed'.[15]

The Bill provides criminal sanctions which equally apply to gay men and lesbians (cl 2), and also sentences non-lesbian and gay individuals who provide accommodation to (cl 13), or do not report a gay man or lesbian to the authorities (cl 14) [35]. The Bill further provides for the death penalty for 'aggravated homosexuality' (cl 3(2)) which includes 'serial offenders' ie those convicted for the third time. Another category under 'aggravated homosexuality' is an additional provision which provides the death penalty for an individual who has sexual relations with someone under 18 (cl 3(1)(a)), which only requires a single conviction. Unlike the United Kingdom where unless there exists a position of trust, there will be no blanket prosecution of

11 There is an unfortunate fixation with 'sodomy/buggery' as being *the* sexual act between gay men (see *AT (need for discretion?: Iran)* [2005] UKAIT 00119). This reflects a high degree of ignorance on behalf of the decision maker with respect to the range of sexual acts enjoyed by men, or women, either in heterosexual or same-sex relationships. See also *Appellant Z v Secretary of State for the Home Department* (01TH02634) (8th November 2001) – Tribunal ruling out a fear of '*a flood of fraudulent Zimbabwean (and no doubt other) asylum seekers posing as sodomites*' John Freeman (Chair). This appeal was allowed on the basis that the adjudicator had found that *Z* was an 'active homosexual', he would be subjected to a violation if his human rights by criminal legislation on return (enforced or not). His appeal was therefore allowed (*Modinos* applied). Following *Amare* [2005] and *OO (Sudan) and JM (Uganda)* [2009] such an approach would not be lawful. Other examples include referring to an appellant's 'lifestyle choice' (Nigerian gay man, AIT) or 'he can say that he is not the marrying kind' (Pakistani gay man, Fast-track).

12 See *UNHCR Guidance Note on claims for refugee status under the 1951 Convention relating to sexual orientation and gender identity* (November 2008) [6]. Only since late 2005 has the Secretary of State started to use Lesbian, Gay, Bisexual and Transgender as a sub-heading in his Country of Origin Information Reports, rather than Homosexuals. UKBA is due to publish an '*Asylum Instruction on LGBT Claims*' imminently (source UK Lesbian and Gay Immigration Group, 12 March 2010).

13 The conduct driven approach enables the decision maker to focus solely on whether a lesbian and gay man would be able to have sex in their home without coming to the attention of the authorities. It ignores the fact that when leaving the so-called 'safety/privacy' of the home, in interacting with others in the outside world, their identity as gay men and lesbians results in identification through either actual disclosure (actual or expressed Particular Social Group Convention reason), or through perception (implied PSG Convention reason). Conversely, an identity based approach also recognises groups who engage in same-sex conduct but do not identify, for example, as gay men, ie Men who have Sex with Men (MSMs).

14 See *R (K) v Immigration Appeal Tribunal (1999)* (unreported, 4 August 1999) Transcript page 9, *as per* Buxton LJ.

15 See *In re Costa* (1985) 19 I & N 211 cited in *R v Immigration Appeal Tribunal ex p Shah* and *Islam v Secretary of State for the Home Department* [1999] 2 AC 629 at 641B – reasoning relied on by Lord Steyn at 643C-E.

consensual private same-sex relations with a 16 or 17 year-old, then there is the real threat of art 3 ECHR ill-treatment/persecution of a lesbian or gay man who engages in sexual relations with an individual who is 16 or 17 in Uganda, or is 16 or 17 themselves wanting to engage with sexual relations with someone of their own age. Such offences are not prosecuted in the United Kingdom, and therefore come within Refugee Convention protection.[16]

Even with a recommendation that the death penalty be replaced with 'corrective therapy', such treatment transports the observer back to dark periods in our own history. By its own nature, such 'therapy' is persecutory, as it is punishment which causes an individual to act against their will or conscience.[17] The court adopted the reasoning in *Jain*[18]: discriminatory criminal legislation which is currently not relied upon to prosecute, does not provide a guarantee that such a policy will continue [46].[19]

The Court of Appeal in *HJ (Iran)*[20] established a 'cultural relativism' test in asylum claims based on sexual identity ie attaching a respect for cultural and religious norms in the country of origin to what is reasonably tolerable discretion. The present writer is of the view that little weight attached to this point in Ugandan claims, as the court accepted cogent evidence of ill-treatment [27, 32, 36 and 46],[21] which is indicative of persecution and therefore can not be over-ridden by respect for such social and cultural norms. The Bill is due to be debated by the Ugandan parliament later this year, and the continued climate of fear provides a real threat of harm to gay men and lesbians in Uganda.[22]

'Perception is all'

The court noted the evidence of Dr Dolan with respect to the issue of 'perception', and that the only way the clamant would be able to avoid ill-treatment is to 'present as heterosexual', ie by getting married [40]. The Tribunal in *DW* recognised that there was force in the submission that 'perception is all'.[23] The determinative factor is current sexual identity,[24] and how that is

16 Regulation 6(1)(e) of *The Refugee or Person in Need of International Protection (Qualification) Regulations 2006* (SI 2006/2525) excludes PSG Convention protection to claims based on sexual orientation, where such acts would constitute a criminal offence under UK law. The age of consent is 16, unless there exists a position of trust (see section 16 of the Sexual Offences Act 2003 (2003 Chapter 42)).

17 See *The Greek Case* (Yearbook 1969) [154] provides guidance on art 3 breach, and as it is for a PSG Convention reason, then this results in persecution. See also *MN (Kenya)* [15] and *DW (Jamaica)* [27].

18 Which in turn relied on the reasoning of the Strasbourg Court in *Modinos v Cyprus* (1993) 16 EHRR 485 [24]. *Modinos* relied on the earlier judgment of the Court in *Dudgeon v the United Kingdom* (1981) 4 EHRR 149 [41, 60 and 69], followed in *Norris v Ireland* (1988) 13 EHRR 186 [38] prior to *Modinos*.

19 The writer is of the view that the country background evidence before this Court enables *SB* to distinguish herself on the facts from the Court of Appeal's analysis in *OO (Sudan)* and *JM (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 1432 (18 November 2009). This view is supported by the case analysis of Westlaw. Consequently, this also distinguished *SB* from the approach of the Court of Appeal in *Amare v Secretary of State for the Home Department* [2005] EWCA Civ 1600; [2006] Imm AR 217, with respect to discrimination as not amounting to persecution, as followed in *OO (Sudan)* and *JM (Uganda)*.

20 [32] *as per* Pill LJ. The court did not give an indication of what weight is to be attached to this single point.

21 During the proceedings before the tribunal in *JM*, the Tribunal raised the issue of cultural relativism. Counsel indicated that the SSHD would not pursue this point, where evidence shows a real risk of persecution.

22 See *Preaching Hate in Uganda* (ABC News 11th March 2010) http://abcnews.go.com/Nightline/video/preaching-hate-10069328 (accessed on 12 March 2010).

23 DW [71]. Compare and contrast with C Dauvergne and J Millbank *Before the High Court: Applicant S396/2002 and S395/2002, a gay refugee couple from Bangladesh* 25 Sydney Law Review 97, 122 who refer to increasing visibility with '*the passage of time*'. The writer relies on short-term, if not immediate enquiry by those who encounter the stranger recently arrived in the community.

24 See *NR (Jamaica) v Secretary of State for the Home Department* [2009] EWCA Civ 856 (due to be reported in the second volume of the 2010 INLRs).

presently expressed.[25] However, even when practiced 'discreetly' (ie by telling lies to those who share the public sphere with you, or 'hiding' by 'non-disclosure') there exists in every society a profile connected with gender and sexual roles, which requires positive acts on the part of the (heterosexual) individual to show 'sameness'. An individual who does not act in accordance with the stereotype is therefore 'different', and is identified as being so. Such identification, leads to a perception of 'deviancy' which leads to a perception that an individual who is not heterosexual, is homosexual, and accordingly will be at risk.

The present writer is of the view that the 'perception test' directly undermines the jurisprudence relating to the 'discretion test', most recently affirmed by the Court of Appeal in *HJ (Iran)*.[26] Independent of the lies an individual will be forced to tell on the basis of the 'voluntary discretion test'[27] and assessment of whether this is 'reasonably tolerable',[28] there exists the 'perception test'. Unless an individual constructs a "heterosexual narrative", ie by being seen to conform to acts attached to their gender and (heterosexual) sex-role,[29] then discretion is completely useless in evading a real risk of harm. What is actually involved is a series of positive acts by the lesbian or gay asylum seeker in order to live 'as a heterosexual', ie by forming, or being perceived to form, (sexual) relationships with individuals of the opposite gender. Such acts undermine the jurisprudence underlying the acceptance that sexual identity is not something which should be required to be 'given up'.[30] Alternatively, due to their 'difference' and lack of adherence to the 'heterosexual narrative', lesbians and gay men are easily identified, and then targeted and persecuted where the country background evidence indicates risk.[31]

In both scenarios, discretion, as understood by the present jurisprudence as resulting in passive or clandestine participation in social interaction and discourse, has no role. It is an unfortunate common denominator that the 'discrete' lesbian or gay failed asylum seeker is one who will act in accordance with social norms which 'may extend to avoiding kissing in public or of a public act or remark which might provoke comment or outrage' (see *JM*[32]), or will lead a life where he can 'seek out homosexual relationships through work or friends', whilst recognising the inability to live 'openly' (see *HJ*).[33] This can not be considered a 'normal life'.[34]

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25 See *SZ and JM (Christians – FS confirmed) Iran CG* [2008] UKAIT 00082 [140] in analysing the approach to discretion in *HJ (homosexuality: reasonably tolerating living discreetly) Iran* [2008] UKAIT 00044.

26 *HJ (Iran)* and *HT (Cameroon) v Secretary of State for the Home Department* [2009] EWCA Civ 172; [2009] Imm A. R. 600. Appeals heard by the Supreme Court – 10 to the 12 May 2010. Both UNHCR and the Equalities and Human Rights Commission intervened. The Secretary of State concedes that the issue is one of voluntary discretion – *'It is accepted that applicants may not be refused asylum on the basis that they "could" or "should" or "are expected to" or "are required to" to behave discretely in order to avoid persecution. The issue is always to determine how they will behave upon return and whether on that basis there is a real risk of persecution'* (Skeleton Argument, dated 19 April 2010).

27 A lesbian or gay individual can not be forced to modify their behaviour on return (see *Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578; [2005] Imm AR 75 [16]).

28 See *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238; [2007] Imm AR 73 [16] *as per* Maurice Kay LJ.

29 For example in Jamaica, to live a 'heterosexual narrative' a woman would be expected to have men 'visiting'. If there are no men 'visiting', then men in the neighbourhood would be able to 'call' and seek her attention. At a certain age there is an expectation that she would have had children. Marriage, would not be a determinative factor, but the presence of a man would be expected. The lack of male company will result in 'questions being asked' following suspicion that there is something 'different' about the woman, which leads to identification as a lesbian and consequent verbal and physical abuse which may include corrective rape (see *for example* Women e- news, 3 September 2005 and AI 2006 Report).

30 See *DW (Jamaica)* [27] and *MN (Kenya)* [15].

31 Awaiting consideration by the Tribunal on this point in *SW ('non overt' lesbians) Jamaica CG* – appeal heard December 2009, awaiting promulgation of determination.

32 [149].

33 *HJ (homosexuality: reasonably tolerating living discreetly) Iran* [2008] UKAIT 00082 [44–45].

The individual is portrayed as weak and submissive, living a life of lies, and unable to live openly. The jurisprudence also highlights the severe consequences to an appellant who has crucially failed to demonstrate why it would not be 'reasonably tolerable' to be 'voluntarily' discrete, which in turn results in the dismissal of their claim to asylum (see *Z*[35], *XY (Iran)*[36]and *HT (Cameroon)*).[37] Such a 'life' destroys the ability of a lesbian or gay man to be a fully sexual (human) being as her or his life manifests as a clandestine existence in every arena, public and 'private'. This is not a demand for the right of have sex in public, but a recognition of an ability to tell the truth about an individual's sexual identity, which manifests itself outside the actual sex act. A life of continuous lies, cannot be what participation in a 'civilised society' really consists of.

Consequently, there needs to be a shift away from the 'discretion test' towards an acceptance that 'perception is all'. As was found by the 2009 Tribunal, independent of SB's evidence of having been denounced, it was the perception that SB was a lesbian (for example by being asked in 2004 why she did not have a boyfriend, and being told by the police officers that she was presenting as 'male') which led to her detentions [46]. It is due to this perception that she does not conform to a Ugandan heterosexual narrative, which leads to a real risk of persecution on return. Perception *is* all.

Section 96 Certificate

The certificate under s 96 of the 2002 Act related to the claimant raising in her statement her 'right to family life' with her partner. The defendant certified the claim under section 96, on the basis that the claimant could have raised this point in the earlier 2009 Tribunal proceedings, as she had already commenced her current relationship at that time.[38] This certificate would have prevented a s 82 immigration decision appeal from being pursued at all, whether within or outside the United Kingdom.[39] The claimant submitted, in both written and oral submissions, that no art 8 family life claim was pleaded by her lawyers, as currently Strasbourg does not accept same-sex couples as being protected by art 8 'family life' rights.[40] The claimant additionally submitted that the evidence of the relationship applied to the issue of perception on return. Counsel for the defendant did not pursue the s 96 certificate point [58]. The certificate was therefore quashed [59]. A fresh immigration decision, dated 26 February 2010, acknowledging an in-country right of appeal is being appealed by SB.

34 See C Dauvergne and J Millbank *Before the High Court: Applicant S396/2002 and S395/2002, a gay refugee couple from Bangladesh* 25 Sydney Law Review 97, 107.

35 *Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578; [2005] Imm AR 75 [22].

36 *XY (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 911 [14].

37 *HT (Cameroon) v Secretary of State for the Home Department* [2009] EWCA Civ 172; [2009] Imm AR 600 [45].

38 Section 96 (3) of the 2002 Act.

39 Section 96 (5) and (6) of the 2002 Act.

40 On 25 February 2010 the Grand Chamber heard submissions in *Schalk and Kopf v Austria (Application no 30141/04)* (the 'gay marriage' case). The Court *may* decide that same-sex couples constitute a 'family' for the purposes of art 8 (family life) rights. This will reflect the growing number of Council of Europe nations which provide some sort of legal recognition to same-sex couples. The closest to defining a same-sex partnership as a family unit, in domestic immigration law, is found in *Krasniqi v Secretary of State for the Home Department* [2006] EWCA Civ 391; Times, April 20, 2006 (lesbian appellant living with same-sex partner and same-sex partner's daughter). '[T]*he approach of the parties and of the tribunals below has been to treat the appellant's private life as cognate with family life*' *as per* Sedley LJ [4].

Unlawful detention

As noted, SB obtained an Order at the time of lodging her judicial review claim, prohibiting the defendant from taking 'any steps' to remove her pending her judicial review (granted on 12 November 2009) [66]. As part of the Order, the defendant had the ability to apply for discharge or variation, after providing the claimant's solicitors 24 hours notice of any application.

Although the defendant had notice of the Order on 12 November, SB was detained at 3 pm on 13 November. The minute which assessed the claimant did not record that the claimant posed a risk of absconding. Additionally, applying the defendant's own guidance (paragraph 19.1.2 of the Operation Enforcement Instructions and Guidance Manual, January 2010), the defendant had not lost contact with the claimant, and therefore she could not be described as an 'absconder' [79]. The defendant's view was that the Order was 'no bar to detention' [67]. Removal directions had been set for 19 November 2009, and the defendant had formed the view that the judicial review could be expedited and therefore removal was imminent. However, the defendant had not applied to the court for expedition of the proceedings at that time. The claimant's solicitor's protestations were ignored. On 16 November, a further Order was obtained from HHJ McKenna ordering the release of the claimant 'forthwith'. The defendant's response was that it was 'too late' to release the claimant forthwith (having been notified at approximately 5.30 pm) and, additionally, the defendant required legal advice from Treasury Solicitors. The defendant had not sought to vary or discharge any of the orders. The defendant complied with the order at 3.30 pm on 17 November. Hickinbottom J held that the detention from 13 to 17 November 2009 was unlawful.

The only reason to detain is to remove *(R(I))* [82].[41] The power to detain contained in section 36 of the UK Borders Act 2007 'can only be used for the purpose of removing the detainee by way of deportation' [82]. The court held that detention was a 'step towards removal' and therefore the claimant's detention on 13 November 2009 was unlawful [82]. The court held that the defendant misunderstood the terms of the Order [82]. Detention was therefore in breach of the 12 November 2009 Order [83]. The court rejected the submissions of the defendant on why the claimant was not released 'forthwith' following the second Order: arrangements could have been made and there was no need to wait nearly 24 hours for advice from Treasury Solicitors, as it would be 'available immediately and round the clock' [83]. Detention was held unlawful [85], even though the defendant acted in good faith [82].

The defendant did not appeal and is currently in negotiations with the claimant with respect to settlement of the damages claim for the unlawful detention.[42]

S Chelvan[43]

41 *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888; [2003] INLR 196 at [46] per Dyson LJ applied.
42 A correct statement of facts as of 30 April 2010.
43 Counsel for the claimant, instructed by Sean Mcloughlin of TRP Solicitors.

Ahmed Mahad (previously referred to as AM) (Ethiopia) (Appellant) and others v Entry Clearance Officer (Respondent)

[2009] UKSC 16; [2009] WLR (D) 367

Immigration Rules – family reunification and third party support

Part 8 of the Statement of changes in Immigration Rules (HC 395), on family members, contains a number of rules to be satisfied by family members seeking leave to enter the UK in order to settle with other family members already here. The issue in these appeals was whether the requirement that those seeking entry will be accommodated and maintained without recourse to public funds permits third party support (as the Appellants submitted) or whether it prohibits maintenance provided by anyone other than the sponsor (as was the Respondent's position).

Legal framework

Rule 281 deals with spouses, rule 297 with children and rule 317 with parents, grandparents or other dependant relatives. All of them include a requirement that those seeking entry will be accommodated and maintained without recourse to public funds. The Rules state:

Rule 281 (spouses):

'(iv) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and

(v) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds.'

Rule 297 (children):

'(iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and

(v) can, and will, be maintained adequately by the parent, parents or relative the child is seeking to join, without recourse to public funds.'

With effect from 2 October 2000 (Statement of Changes in Immigration Rules (Cm 4851) those two requirements were substituted for a single previous requirement:

'(iv) can, and will, be maintained and accommodated adequately without recourse to public funds in accommodation which the parent, parents or relative own or occupy exclusively.'

Rule 317 (as amended by Cm 4851) (other dependent relatives):

'(iii) is financially wholly or mainly dependent on the relative present and settled in the United Kingdom; and

(iv) can, and will, be accommodated adequately, together with any dependants, without recourse to public funds, in accommodation which the sponsor owns or occupies exclusively; and

(iva) can, and will, be maintained adequately, together with any dependants, without recourse to public funds.'

The previous case law on third party support painted a very confused picture. Collins J held in *R v Secretary of State for the Home Department, ex p Arman Ali* [2000] INLR 89 that rule 281(v) and the unamended rule 297(iv) allowed third party support. Hodge J in *AA (Third Party Maintenance) Bangladesh* [2005] Imm AR 328 held that the amended rule 297 created a prohibition on third party support whilst the majority of the Court of Appeal in *AM (Ethiopia) v Entry Clearance Officer* [2008] EWCA Civ 1082 held that the amended rule 297 did not create a prohibition on third party support but clarified what that rule had always stated.

Facts

The appeal concerned five Appellants. Three Appellants, AM(1), SA (with her 6 year old daughter AW) and AM(2), sought to enter the UK to in order to join their spouses under rule 281. The other two Appellants sought to enter the UK under rule 317 as dependant relatives. VS to join his son and KA (with her 11 year old granddaughter MI) to join her daughter and granddaughter. Although MI's case should have been considered under rule 297 it was treated as standing or falling with KA's case. Although rule 297 was not directly in issue in any of these appeals it was very relevant to the arguments that the Court heard on the other provisions.

AM (Ethiopia) v Entry Clearance Officer [2008] EWCA Civ 1082 concerned all the appellants apart from AM(2) and the majority of the Court held that all three rules disallowed reliance on third party support. The Court dismissed all of the appeals and remitted AM(1)'s case to the AIT for an assessment of whether her Disability Living Allowance was sufficient in order to provide the necessary support. The AIT dismissed AM(1)'s appeal and so remained a party to the appeal to the Supreme Court.

The other decision under appeal was *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634 which dealt with AM(2)'s case. The Court rejected AM(2)'s submission that art 8 and art 14 of the European Convention on Human Rights (ECHR) required rule 281(v) to be read down or disapplied in the case of a disabled sponsor incapable of work.

Held

The Supreme Court unanimously allowed the appeals, holding that each of the three rules should be read as allowing third party support. AM(1)'s appeal succeeded, the immigration judge's decision being restored, and the other 3 appeals were remitted for determination at the AIT for redetermination in light of this decision.

1) Construction

It was common ground that the Immigration Rules should be interpreted as Lord Hoffmann stated in *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230, 1233 (para 4):

> 'Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy.'

It was held that all three rules were to be interpreted as allowing third party support. Whilst the IDI's were held to be "singularly unhelpful" on the issue of construction the following factors contributed to the Lords' reasoning:

a) Distinction with other rules

A distinction was drawn between Part 8 and Parts 6 and 7 of the Rules which expressly stipulate that income or funds must be self-generated (para 26). It was held that if the Secretary of State intended to rule out third party support in family reunification cases it would have been open to him to use the same language as in the parts 6 or 7 of the Rules (para 52).

b) Other forms of assistance permitted under the rules

It was noted that some funds or forms of assistance were accepted as being legitimately available to the parties in satisfying the maintenance requirement. For example a settled relative can use DLA as he or she likes and under rule 6A is entitled to rely on whatever public funds he or she is entitled to provided only that the family member entering the UK will not increase the entitlement.

c) Third party support already permitted by the rules

It was pointed out that there is no distinction provided in the Rules between salary received by a sponsor through employment obtained through the open labour market and employment provided by a friend or relative.

d) Third party support is no less difficult to verify than other forms of support

The Respondent argued that third party support was more precarious and difficult to police than support provided by a sponsor. This argument was not accepted, as there was no basis for the view that third party support occupies a particular category of uncertainty from other types of support. It was pointed out by Lord Kerr (at para 55) that it could be conceivable that third party support provided by a family member or friend could be a more dependable resource and more effective prevention of dependence on public funds than prospective employment. In any event the Appellant would have to demonstrate that he or she would not be a drain on public funds, which may be high hurdle to cross in itself. If the concern by the Entry Clearance Officer was that the sponsor would not be bound by rule 35 undertaking then he could ask the third party to become a joint sponsor.

e) Freedom of Information Act disclosure

Freedom of Information Act disclosure made it clear that the amendment to rule 297 was not intended to remove the possibility of third party support but instead was a child protection measure to meet the concern that children should be coming to live with their relatives and not somebody else entirely (para 23).

f) The overall purpose of the rules and natural meaning

Due to the above considerations it was held that the Secretary of State's submission that the rules should be interpreted as meaning 'without recourse to third party support' was an artificial interpretation as opposed to natural reading of the Rules. The overall purpose of the Rules is to ensure that there is no resort to public funds by family members entering the UK. If funds can be shown to be available from third parties then the purpose of the Rules is fulfilled. Reading the provisions according to their natural meaning also avoided the anomaly which would allow third party support for accommodation but not maintenance.

2) Article 8

The Appellants submitted that it would be incompatible with art 8 of the ECHR to rule out third support in family reunification cases. It was argued that it was not proportionate or justifiable to rule out all forms of third party support when such support could be verified. The Appellants asked that in the event that the Court found that the Rules were to be read as prohibiting third party support that they be read compatibly not to do so in order to avoid breaching the Convention.

The Secretary of State submitted in response that not all refusals under part 8 would lead to breaches of art 8, for example where family reunification could take place abroad. It was further submitted that Entry Clearance Officers have a duty to act in compliance with the Human Rights Act.

It was decided that as the rules were to be construed in order to permit third party support it was no necessary to decide the art 8 point.

3) Joint sponsors

The Respondent sought to challenge the conclusion of the majority in *AM (Ethiopia) v Entry Clearance Officer* [2008] EWCA Civ 1082 that rules 297 and 317 allowed support by joint sponsors. The Secretary of State's arguments were dismissed on the basis that he was not able to answer the commonsense question of why a relative should not seek entry to join more than one person. Allowing joint sponsors may also be helpful as it would be open to the ECO to request that the individual providing third party support be treated as a joint sponsor which would assist in obtaining a rule 35 undertaking.

Conclusions

The reality of the situation for many immigrant families seems to have been a key consideration in the Lords' reasoning which ultimately turned on the issue of construction of the relevant Rules. Although the art 8 ECHR point on whether a prohibition on third party support was justifiable or proportionate was sidestepped, Lord Brown left the door open for this issue to be decided in the event that the rules were amended to contain express prohibitions on third party support (para 31). Similarly argument on the interesting human rights points raised by AM(2)

on the sponsor's disability and arts 8 and 14 of the Convention were agreed to be unnecessary in light of the Court's decision on construction (see para 38 of decision) and are academic until (and if) the rules are amended to contain an express prohibition on third party support.

Lord Collins summed up the reality of the situation for many immigrant families seeking reunification when he stated at para 48:

> 'The overall point in these appeals is that the arguments for the Secretary of State were founded on the model of nuclear self-supporting family, which is far removed from the reality of the situation in the typical immigration case. Members of immigrant communities have always supported each another.'

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Book Reviews

Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy

Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds)
Oxford: Hart Publishing, 2007
ISBN-10: 1841136840
ISBN-13: 978-1841136844
xxxi + 550 pp
£75

European immigration and asylum law have undergone radical changes since the entry into force of the Treaty of Amsterdam in 1999, so too has the European Union itself, having expanded during that time from 15 member States to 27. This big book aims to take stock of the radical changes which have occurred through a collection of essays by different writers. It is organised around four themes: 1) constitutional issues in European migration law, 2) access to asylum and refugee protection in the EU, 3) borders and enforcement issues and 4) the management of legal migration.

In the introductory chapter Baldaccini and Toner present a useful overview of the radical changes in the area since 1999 and set out the key stages and issues along the way. They ask whether the ideals set out in the meeting of the European Council in Tampere (October 1999), ideals of creating an area of 'freedom, security and justice accessible to all' were, in fact, reflected in the measures adopted by the EU.

Part I of the book (constitutional issues in EU migration law) opens with Guild's masterly review of the developments in relation to EU free movement of persons. Evelien Brouwer presents a review of judicial remedies in relation to immigration and asylum law. She argues, in a very clearly set out text, that even where EU directives and other legal instruments contain only vague procedural guarantees in relation to immigration and asylum law, certain principles of EU law suggest that States are obliged to provide for clear procedural guarantees. Continuing with the issue of remedies, Steve Peers looks at the role of the European Court of Justice in migration and asylum law. Following a detailed (and sometimes fierce) analysis both of the law and of the workload of the Court he argues that the restriction on the Court's preliminary ruling jurisdiction contained in Article 68 EC Treaty prevented it from making an effective contribution to ensuring 'uniform interpretation, effective enforcement or control of the legality of EC immigration and asylum law' and is a unjustified and 'a disgraceful anomaly' to be 'corrected as soon as possible.' Since publication of this book this has been addressed in the Lisbon Treaty, repealing Article 68 and giving the Court a general jurisdiction to make preliminary rulings in the area of freedom, security and justice.

In a new twist for a book on immigration and asylum law, Helen Toner looks at the use of impact assessments in the EU's legislative process. Impact assessments are perhaps not so well known to those outside the law-making field; they aim to assist in assessing different options for policy making and possible legislation. Toner asks whether they could result in better lawmaking in EU migration policy – particularly in relation to compliance with human rights and other international standards, but realistically concludes there is little evidence that they are likely to be used in this way in relation to migration, a politicised area where States have strong policy preferences and underlying assumptions.

Moving on to Part II of the book (Access to Asylum and Refugee Protection) Cathryn Costello surveys the 'Procedures Directive' asking whether it has, as promised,

developed common standard for fair and efficient asylum determination procedures. In her view this is the most controversial of all the post-Amsterdam asylum measures. She criticises it as containing 'highly qualified and differentiated procedural guarantees' as a result of States' reluctance to commit to clear procedural guarantees or to maintain access to asylum within Europe. The Directive is of course now under review.

John Handoll presents a refreshingly straightforward essay on Directive 2003/9 ('the Reception Conditions Directive') looking at why there is such opposition to generous and non-judgemental support of asylum seekers. Handoll then reviews the development of European law in this area and analyses the Directive itself, helpfully setting out UNHCR and ECRE's criticisms throughout.

An interesting assessment of the Qualification Directive is provided by Maria-Teresa Gil-Bazo. Her essay begins by placing the Directive in the framework of international human rights law, exploring areas of European Community law which may be useful and unfamiliar to some refugee law specialists. She explores the strength of the Directive in relation to a right to be granted asylum, but is more critical of its approach to subsidiary protection. The essay then turns to consider the Directive's treatment of security concerns.

Andrew Nicol QC presents a clear and practical analysis of the Dublin II Regulation (Regulation 343/2003) asking whether it has improved on its predecessor – the Dublin Convention. The purpose of both instruments is to determine which EU Member State is responsible for considering a given asylum claim. Nicol briefly highlights various differences between the Convention and the Regulation including its justiciability and the much shorter time limits for Member States to communicate under the Regulation. In Nicol's view it remains to be seen whether the Regulation will lead to greater numbers of asylum seekers being transferred between Member States. He notes that a disproportionate burden is still likely to be faced by those States into which greatest numbers of asylum applicants first enter. He also sounds a cautionary note that the Regulation only applies as between Member States and that they remain free to transfer asylum applicants out of the EU altogether to safe third countries – a practice for which they have 'continuing enthusiasm' (p 276).

Baldaccini clearly outlines the history of the external dimension of EU immigration policy since the proposals made during Austria's presidency of the EU in 1998 through to the EU's recent Regional Protection Programmes ('RPPs'). In general she is critical of the EU's approach as focusing 'almost exclusively' (p 297) on immigration control. Baldaccini's criticisms are understandable – but a longer essay might have considered whether externalising EU immigration policy might be positive under certain circumstances (given the obviously failings of the existing system) and if so, under what circumstances.

Part III of the book looks at borders and migration control. Ryszard Cholewinski places this discussion in perspective by considering the criminalisation of migration in EU immigration and asylum policy. His essay elegantly combines a very broad review of the trend throughout EU immigration and asylum policy with considerable detail and analysis. Thus he traces the development of criminalisation since the 1970s in a wide number of areas from external borders, visas and irregular migration through to the treatment of asylum seekers and the criminalisation of migrants outside of the EU.

Catherine Phuong considers the vexed question of return of irregular migrants and failed asylum seekers from the EU to their countries of origin. She outlines the development of EU returns policy in both general and specific terms, and is critical of the approach taken by the EU and doubtful of its long term success. In her view the approach to negotiating re-admission agreements with

third countries is 'simply astounding' (p 356). She suggests that including reintegration programs for returning migrants and working with third countries as full partners, while expensive, might have more effective results. While inappropriate in a short essay, it would be interesting to see further consideration of the position of third countries and consideration of migrants themselves as actors in this process.

Mitsilegas considers that fears of criminals and migrants flooding into the EU from Eastern Europe following the fall of the Iron Curtain together with terrorist attacks in New York (and then Madrid and London) led to a new conceptualization of state security within Europe. He provides a history and critique of the development of European Union border security in the light of these two factors focusing on the establishment of the European Borders Agency, transmission of air passenger data and development of immigration and other databases.

Immigration detention is, according to Dan Wilsher, a 'difficult issue' (p 425) for the EU because it brings the EU's claimed human rights goals into direct conflict with its pursuit of border controls and, additionally, raises Member States' concerns about sovereignty. The essay contains a useful summary of both ECHR case law on the subject, which he considers to be permissive of lengthy detention, and also the case law of the United Nations Human Rights Committee which he argues provides greater safeguards against arbitrary detention. Wilsher considers the situation in Europe unsatisfactory – the Directives indicate Member State's fears of losing sovereignty in this area and there remains a 'difficult jurisdictional question' about to what extent EU law can or should extend to cover the detention of asylum seekers.

Part IV of the book turns to the question of managing legal migration. Groenendijk presents an interesting and informative review of the Long Term Residents' Directive (Directive 2001/109/EC) and analysis of its strengths and weaknesses. He notes also the possible impacts on countries which are not participating in the directive (such as the UK). Reviewing the Family Reunification Directive (Directive 2003/86/EC), Oosterom-Staples concludes that it reflects existing human rights law and prevents deterioration of rights of third country nationals to family reunification. But, in conclusion, is highly critical of the Directive considering that it 'primarily serves as a means to preserve Member States' interest' (p 487) containing, in her view, vague public policy exclusions and weak provisions on judicial remedies.

Bernard Ryan presents a thought provoking essay on the EU and labour migration raising arguments about whether the EU should regulate immigration for the purposes of employment and/or the rights of migrant workers. While beyond the terms of this book, it would be interesting to see these questions investigated more fully within the context not just of EU immigration law and policy, but also EU employment, social security and discrimination law.

The book concludes with Rollason's investigation of the EU citizenship rights of new EU nationals. He considers some of the broader questions such as the rights of family members and the effect of EU membership on existing cross-border migration patterns with non-EU States and, with a practical lawyer's eye, notes that the limitations on rights may be less effective in reality than on paper. His essay is relevant not just in relation to the EU's most recent enlargement, but also provides food for thought in relation to future enlargement.

In conclusion, this book is a serious and encyclopedic text. It explains and critiques how we got to where we are now in relation to EU free movement, immigration and asylum law. The format, a collection of essays, allows different views and perspectives to be expressed. Despite the passage of time since its publication, this book remains relevant and is important reading for persons interested in European immigration and asylum law and policy as academics, law

makers, policy makers or campaigners. It also contains much practical information (such as case law and possible arguments) of interest and use to practising lawyers and the judiciary.

Nathalia Berkowitz

European Migration Law
Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters
Mortsel: Intersentia, 2009
ISBN978-90-5095-953-7
xxv + 467 pp
€95

When I first began to practise immigration law in the early 1980s, appreciation of the relevance of European and international jurisprudence to immigration cases was limited in the extreme. The substantive rights of the European Convention on Human Rights were not then incorporated into UK law; European Community legislation and the case law of the European Court of Justice were regarded as somewhat exotic sources of law and their potential application to third country nationals often overlooked. All that has of course changed and such sources of jurisprudence are now a central feature of British immigration law. These days, a good working knowledge of relevant EU legislation and decided cases and the meaning and effect of the European Convention is essential for all those with an interest in immigration and refugee law whether as practitioners, judges, students or academics.

The authors of *European Migration Law* are all staff members of, or otherwise affiliated to, the Leiden Institute of Immigration Law, part of the University of Leiden. In this work, published as part of the *Ius Communitatis* series, they advance the proposition that the traditional distinctions between EU citizens and third country nationals, between international human rights legislation and EU legislation and between regular migration and asylum-seekers are no longer as sharp as traditionally thought and that the legal norms applicable to these categories will often overlap.

The opening section of the book includes chapters that introduce the reader to basic concepts of migration law, sources of migration law and the development of free movement in the European Union. The following two sections deal respectively with 'voluntary migration' and 'forced migration'. The section on voluntary migration includes chapters that summarise the law on free movement of persons within the EU, discuss the jurisprudence on article 8 of the ECHR and explain the effect of EU Directives relevant to the admission and stay of third country nationals. The section on forced migration deals with asylum protection under the ECHR and the common EU asylum system. There is also a short chapter on victims of human trafficking.

The fourth part deals with the measures available to European states to enforce immigration controls, such as powers to detain and expel illegal migrants, and the legal limits on those powers. The final part comprises a short chapter setting out the authors' concluding remarks in which they emphasise the increasingly blurred distinction between EU nationals and third country nationals and the overlapping of the legal regimes of the European Union and the European Convention on Human Rights.

In the preface to this work the authors describe their aim as being 'to bring together in one comprehensive text, the different subject matters and the various legal sources relevant to European migration law… Its aim is, in particular, to explore the interrelation between various sources of legislation governing migration in Europe and to assess the coherence of the wide array of legal instruments defining and curtailing the legal power of European States to control the entry and residence of foreigners.' It will be apparent

from this quotation that the book is aimed primarily at those with an academic interest in migration law rather than practitioners seeking assistance in finding solutions to day-to-day immigration law problems, and this is expressly acknowledged by the authors.

Accordingly, the UK practitioner is unlikely to find any great assistance with some of the detailed and problematic issues that have arisen in recent years in the context of the UK's application of EU law. For example, there is a passing reference to the duty imposed on Member States by Directive 2004/38 to 'facilitate' the admission of other family members, but no discussion of what facilitating admission entails. Similarly, the section that discusses the nature of ECHR article 8 rights is clear and accurate but a far deeper understanding of the relevant legal principles will be gleaned from the analysis of article 8 rights in recent judgments of the UK's House of Lords.

The observations above should not be taken as criticism of the work, which is not intended to be a textbook for day-to-day use by the practitioner. What the authors do well is to present a lucid and often thought-provoking survey of the European legal regime applicable to migration that combines identification of underlying principles with appropriately detailed explanations of the legislation and references to European case law. Those with an academic interest in the subject will find much to reflect upon. It is a work that will benefit practitioners who are relatively new to this area of jurisprudence. There are also passages that will interest the more seasoned practitioner: for example, I found the discussion of issues concerning rights of third country nationals arising from the judgments in *Akrich*, and the subsequent cases of *Jia*, *Metock*, and *Eind* illuminating; in the section on protection under the ECHR there is a helpful discussion of the weight and relevance of diplomatic assurances of safety given by a state to which a person is to be sent.

As one would expect in a work of this nature, there are sections devoted to EU legislation that does not apply in the UK such as the Long Term Residents Directive. There are also informative discussions of relevant international human rights provisions that are not limited in territorial scope to Europe, such as the Convention on the Rights of the Child, and I found my attention drawn to articles 17, 23 and 24 of the International Covenant on Civil and Political Rights which provide similar but arguably greater family rights than those in the ECHR.

The back of the book has a list of cases referred to, but unfortunately this does not include the pages of the book where the cases are referred to. There is also an extensive bibliography. The index would be more helpful if some of the entries were subdivided into sub-headings. At the front there is a useful table for converting the old numbering of relevant articles of the Treaty Establishing the European Union to the new numbering of the Treaty on the Functioning of the European Union.

This is a work written by authors who are clearly well familiar with the subject and the material they present. I believe those with an interest in European migration law will find it a welcome addition to the literature on the subject.

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Legal Practice and Cultural Diversity
Ralph Grillo, Roger Ballard, Alessandro Ferrari, André J. Hoekema, Marcel Maussen and Prakash Shah (eds)
Farnham, Surrey: Ashgate Publishing, 2009
ISBN 978-0-7546-7547-1
xiv + 345 pp
£65 (hb)

Legal Practice and Cultural Diversity is a collection of essays discussing the effects of

societal diversification on legal systems, offering a critical analysis of how law and legal practice respond to the challenges brought about by international migration and globalisation. The chapters are based on papers presented at a conference as part of the IMISCOE Network on Excellence for International Migration, Integration and Social Cohesion which was hosted at the Law School of Queen Mary University, London, in July 2007.

Cultural diversity in legal practice is of increasing importance, which makes this book especially topical and valuable for scholars, students and theorists as well as for practitioners, policy makers and those who administer the application of law. The crucial role to be played by well-informed academic discussion in this field has become evident in the light of the fiery reactions of the general public to the speech of the Archbishop of Canterbury, Rowan Williams, on Civil and Religious Law in England.[1] The need to respond in this publication to the general Shari'a debate in Europe and North America is also expressed through the fact that the editors chose to open the introductory chapter with a quote from the Archbishop of Canterbury's speech. Furthermore, although presumably prepared before Rowan William's speech, which was on 7 February 2008, about one third of the authors inserted some reference to this text.

The selection of contributions is telling. It illustrates that the current discourse on accommodation of minority legal practices is at least considerably influenced, if not dominated, by Anglo-American politics and scholars. Apart from the introductory chapters by the editors and the closing chapter by Ballard, which critically reflects on human rights as a vehicle for liberation, most chapters either deal with case studies of particular issues in Great Britain, the United States or Canada or base their more general conclusions on examples or case law from these geographical regions. Reflections on the Shari'a Law debate are offered by Bader and Shah for Canada and Britain respectively. Bakht deals with *niqab* in British court rooms whilst Woodman looks more broadly at the English legal culture and the challenges posed by African customary law. Again for Canada, this time in Québec, Gaudreault-DesBiens gives a sociological account of the 'reasonable accommodation' debate and Renteln relies mostly on US case law to draw her more general conclusions on the influence of culture on the determination of damages. Two chapters by Sandberg and Knights analyse the position particularly of religious minorities in English law and the role of Article 9 ECHR in the domestic context. Continental European thought in this book comes foremost from France in connection with the headscarf affair, (*l'affaire du foulard*) by de Galembert and the respective positions of Jews and Muslims in France by Cohen. There is also a worthwhile contribution by Hoekema on the Dutch judiciary and the question of whether it pluralises domestic law. Among those essays with a broader scope, Rohe's account of Shari'a in a European context deals with a wealth of examples from various jurisdictions. Menski in turn reminds us that diversity is not an exclusively 'Western', post-war phenomenon. His chapter on Indian secular pluralism is the only one focusing on a non-Western example of legal management of religious and cultural diversity. Menski seeks to learn lessons from India's long-standing multiculturalism which, as he argues, can be of relevance to Europe.

An interesting but at the same time arguably problematic fact to be observed is the dominant focus of many chapters on issues regarding Islamic law or Muslim minorities. Writing in the context of cultural *diversity*, the editors of the book are themselves clearly aware of the potential

1 R Williams 'Civil and Religious Law in England: A Religious Perspective'. Speech at the Royal Courts of Justice, 7 February 2008. Available at: http://www.archbishopofcanterbury.org/1575 [accessed 25 February 2010]

danger of stigmatising Muslim communities and Muslim legal practices as inherently problematic when they say that '[a]lthough several contributors are concerned with the challenges to legal systems which come from recent Muslim immigrant presence in Europe and North America, it is important to remember that not all immigrant and minority ethnic settlers of immigrant background are Muslim' (p 4). This is an important point to make given that such caveats are often overlooked.

The primary concern of many chapters is the question of accommodation, and here especially of Shari'a law principles, in domestic legal systems. They ask the question as to what extent legal systems can or should take into account these legal principles. The stated aim of this collection of papers is to document and explore various modes of accommodation from the perspective of social sciences. The reader nevertheless comes across normative arguments in favour of, or against, a particular model of accommodation. These normative stances, as long as they are clearly distinguishable from scientific analysis – and they are – are of great interest and informative value. Moreover, the advantage of this book is that it proposes concrete models of accommodation in a detailed manner. This is not to say that a particular model is being favoured or advocated by the editors.

Having said that the central concern lies with the issue of accommodation, one of the beauties of the book is that it introduces challenging and compelling new arguments to the debate about cultural diversity in legal practice. Many chapters force the reader to rethink preconditioned perceptions of certain contentious areas to do with cultural and religious diversity management. For example in her discussion of the wearing of *niqab* in court rooms, Bakht finds that 'there are very few instances that would make it necessitous to see a woman's face' (pp 131–2). This contrasts with the recent controversial proposal in France for a partial ban of the *burqa*,[2] and offers necessary alternative perspectives in a discourse that at times seems hijacked by one dominant voice.

Another overarching theme of the contributions to the book is the importance of considering the close connection between law, political power and societal context when examining legal practice, the making of law and its application in culturally diverse places. As a whole the various chapters manage very well to capture and communicate the fact that law, including supposedly universal human rights law, is a social and cultural construct that depends to a large extent on its domestic interpretation. In her contribution on Article 9 and the public career of the veil in France, de Galembert most explicitly reminds the reader of the present asymmetry of resources – like the mastery of the media and public discourse, legal competence and proximity to the political-administrative world – which are available to key actors in the quest for accommodation.

In summary, this book raises topical and important issues about the future of legal practice in societies which are increasingly diverse both in culture and religion. The editors deserve credit for the thoughtful arrangement of essays, the intended aim of which is to document and explore a wide range of aspects from the perspective of social sciences. It is evident that normative theory influences each contribution. This is not necessarily a bad thing as it exposes the reader to the key normative positions in the scholarly debate on the accommodation of minority legal practices. Beyond that, many opinions and arguments on contentious topics relating to cultural diversity presented in this book challenge dearly held convictions and presumptions and thus offer welcome food for thought.

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2 'France moves toward partial burqa ban', CNN World, 26 January 2010. Available at: http://www.cnn.com/2010/WORLD/europe/01/26/france.burqa.ban/index.html [accessed 25 February 2010]

Conscientious Objection: Resisting Militarized Society
Özgür Heval Çınar and Coşkun Üsterci (eds)
London: Zed Books Ltd, 2009
ISBN: 9781848132788 (pb)
ISBN: 9781848132771 (hb)
268 pp
£19.99 (pb)
£75 (hb)

In Turkey, various highly sensitive issues have been taboo for most of its 80 year long history. The Kurdish question was a forbidden subject until very recently and discussion of the Armenian genocide remains prohibited. Attempts to shed light on these issues have been severely punished by law and the Turkish state's various ideological and coercive apparatuses have ensured for decades that these issues remain hidden from public debate. One of these issues, perhaps the most potent, is that of conscientious objection (CO). Although conscientious objectors are a rare species in Turkey, a country where 'the very thought of conscientious objection to military service remains a distinctly marginal idea' (p 85), the CO movement challenges and deconstructs the fundamentals of the Kemalist-patriarchal-militarist-nationalist hegemony that has dominated Turkey since its establishment. Conscientious objectors question the very basis of the Turkish nationalist myth of the 'military-nation' (*asker-ulus*) that constructs militarism and military service 'as an immutable characteristic of the Turkish "race"', and a virtue of Turkish culture carried with pride: 'every Turk is born a soldier' (p 89). Accordingly, like other counter-hegemonic movements in Turkey, the voice of conscientious objectors 'has been frequently marginalized and sometimes brutally repressed', yet 'conscientious objectors have nevertheless managed to establish a remarkable discourse of dissent' (p 61).

It is in this regard that the importance of this edited volume is most apparent, as it brings together conscientious objectors, activists and scholars from various disciplines to examine and dissect CO in all its aspects in Turkey and elsewhere in the world. *Conscientious Objection: Resisting Militarized Society* is the product of the International Conference on Conscientious Objection held at İstanbul Bilgi University on 27–28 January 2007, the first of its kind in Turkey, with the participation of prominent scholars and activists from within the CO movement. The highly insightful contributions were first published in Turkish by leti im publishers in 2008 as *Çarklardaki Kum: Vicdani Red – Dü ünsel Kaynaklar ve Deneyimler* (Sand in the Wheels: Conscientious Objection – Philosophical Sources and Experiences). This volume made a significant impact in Turkey as it was the first scholarly book on the topic. The current volume is an extended translation and makes an important contribution to the body of knowledge in this field.

This engaging and innovative volume encompasses four different bodies of knowledge. The first section examines the historical and philosophical aspects of CO as a resistance to compulsory military service and militarism. Here the history of CO is eloquently traced back to Roman times and the different chapters provide chronological examples as well as historical and sociological insights into the different social, political and economical transformations that motivated various individuals to resist military conscription. The prominent historian Erik Jan Zürcher, for example, looks at desertion in the Ottoman Empire while the chapters of Suavi Aydın and Ulrich Bröckling discuss the role of conscription in the construction of modern nations and citizenship in Europe.

The second section cogently brings together Feminist, LGBT and queer perspectives on CO as a struggle against and deconstruction of militarism, patriarchy, sexism and heterosexism. The chapters by various scholars, such as Cynthia Enloe and

Ayşe Gül Altınay, discuss the important role of women in resisting militarism and warn against the trappings of patriarchy, nationalism and hegemonic notions of masculinity. In his interesting chapter, Alp Biricik discusses the constructions of hegemonic masculinity in military medicine and institutions in Turkey. Biricik, for example, informs us that if a candidate to military conscription has declared his homosexuality, he is then faced with various mental and intimate physical examinations and also has to provide photographic evidence taken during sexual intercourse in order to prove his sexuality (p 113).

Section three of the volume concentrates on the different case studies of CO movements and their experiences across the world, ranging from the Americas to Europe, Africa and the Middle East, each country being discussed in its own political context. In South Africa, for example, conscription was the main basis for maintaining the militarist system of apartheid, as only white men were obliged to undertake military service (p 124). Chile, according to Pelao Carvallo, is a highly militarized country and the influence of the militarism of the Pinochet era remains strong, where the military is highly powerful and economically autonomous (pp 145–146). The different case studies lay bare the difficulties faced by the CO movements in their struggle to demilitarize their respective societies. However, the various movements often consider their struggles to be not only against militarism but as a fundamental part of the struggle for democracy and against all kinds of injustice. For example, the activist Coşkun Üsterci and objector Uğur Yorulmaz point out in their chapter that the İzmir War Resisters' Association in Turkey (*İzmir Savaş Karşıtları Derneği* – İSKD) is not only concerned with the issue of conscientious objection but also:

> 'the democratization of the country, human rights, the environment, racism, sexism and discrimination, relationships with Greece, the Cyprus issue, and especially the ongoing war resulting from the Kurdish problem' (p 169).

The final section of the volume concentrates on CO in international as well as national law with an emphasis on the situation in Turkey. Chapters in this part make it clear that conscientious objection, including that of professional soldiers, is recognized by most international bodies. The chapters of Özgür Heval Çınar, Rachel Brett, Friedhelm Schneider and Kevin Boyle provide an overview of the various resolutions and recommendations of international organizations, such as the UN and the EU, as well as examples from various countries and their legal approaches to CO. Kevin Boyle's engaging chapter concentrates on the case of *Osman Murat Ülke v Turkey*, where the European Court of Human Rights found Turkey in breach of international law for its treatment of Ülke and asked it to modify its laws. Boyle points out that this important ruling has 'indirectly advanced the full recognition of the legitimacy of the exception to any general conscription law for military service for those who have an ethical, religious or philosophical conviction against undertaking military service' (p.221). The two final chapters of this section are specifically concerned with the case of Turkey, which does not recognize conscientious objection and has a law banning practices of 'alienating the public from military service', and the authors persuasively elaborate on the various legal, historical and social aspects of CO in Turkey.

This important collection successfully sheds light on the various aspects of the inceasingly important issue of conscientious objection and will become one of the primary sources to consult for anyone interested in this subject.

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Citizenship law in Africa: A comparative study
Bronwen Manby
New York: Open Society Institute and AfriMAP, 2009
ISBN: 978-1-891385-99-5 (English)
ISBN: 978-1-936133-00-0 (French)
x + 109pp
Also available online at
www.afrimap.org/english/images/report/OSI-Citizenship-Law-in%20Africa-full.pdf

Many readers of this journal, tempted by the review in the previous edition ((2010)Vol 24 No 1) to read Bronwen Manby's *Struggles for Citizenship in Africa,* may be interested in this companion volume. Where *Struggles for Citizenship* provided a series of case studies, *Citizenship Law in Africa* provides a detailed comparative analysis of citizenship laws across the continent.

The team who carried out the 'citizenship audit' on which the book is based have gathered a wealth of detailed material, of which Bronwen Manby displays absolute mastery. A lucid and succinct text is supported by detailed notes and an extensive index, as well as a table of legal sources. Comparative tables avoid oversimplification while still managing to present large amounts of information 'at a glance' and could usefully be adopted by anyone attempting an analysis, and in particular a comparative analysis, of nationality laws.

The report opens with careful definitions. Following a summary, a chapter on internal norms on citizenship examines these with reference to the situation on the continent, including a discussion of the jurisprudence of the African Commission on Human and Peoples' Rights. Brief chapters on citizenship under colonial rule law and the basis of citizenship law in Africa today follow. These introductory chapters provide a firm foundation that ensures that readers who are not experts in nationality law will be able to follow the analysis in the subsequent chapters.

Africa provides fertile ground for a study of the challenges that all nationality laws must face. The civil law systems of, *inter alia,* France and Portugal have influenced the countries previously under their rule, while former British colonies have drawn part of their models from the civil law tradition. The citizenship laws have had to address State succession, both on independence from colonial rule and subsequently. Arbitrary borders, cross-border movements including of refugees, independence struggles, conflicts and political instability provide the context for understanding the very real consequences of nationality laws. As in many other parts of the world, the changing status of women has not only affected the nationality laws dealing with marriage and but has also been a factor in shaping changing attitudes toward dual nationality, which is often the way in which guaranteeing parents equal rights with respect to the nationality of their children is ensured.

A study of nationality laws that have developed in such conditions is of interest to nationality lawyers and scholars far beyond Africa, and Bronwen Manby's ability to draw out the broad themes and home in on telling examples makes this a particularly valuable addition to the corpus of work on comparative nationality law. We learn that registration of birth is not compulsory in all States, and in Malawi and Tanzania whether it is compulsory depends upon race or origin. Racial discrimination, or discrimination on the basis of ethnic origin, is not only permitted but enshrined in the nationality laws of a number of States, with enhanced preference given to those of African or of particular ethnic origin and language requirements for naturalisation that strongly favour particular ethnic groups. Good health is a requirement for naturalisation in the laws of many countries; while in a significant number of countries permission is required to renounce citizenship. Protection against statelessness is weak across the continent. The study is concerned with the legal status of statelessness and eschews fashionable but unhelpful discussions about 'de

facto' statelessness while giving full prominence to the way in which 'onerous requirements or costs attached to proof of entitlement to nationality' may make it irrelevant that a person fulfils the legal requirements. Waiver of naturalisation requirements in cases where an individual has provided important or exceptional services to the State offers to the well-connected, and perhaps wealthy, the prospect of avoiding the onerous and unworkable requirements that persist in the law to the detriment of the majority of the population.

Not all the surprising provisions are negative; the laws include imaginative solutions on a continent where in many cases cohesive groups span borders and where many people have not been registered at birth. Anyone from a neighbouring country who has lived in Senegal for five years can opt for Senegalese nationality without further conditions. Ghana makes provision for grants of the 'right of abode' to a person of African descent, while Ethiopia makes special provision for special identity cards to be granted to foreign nationals of Ethiopian origin. Those who have their habitual residence in Senegal and have always behaved and been treated as a citizens are to be presumed citizens. Chad, Algeria, Benin, the Republic of Congo, Morocco and Togo have similar rules on presumption of citizenship, some with an ethnic or religious requirement also. As this list demonstrates, it is possible to identify nationality law solutions common to North African and sub-Saharan African countries and indeed perusal of the comparative tables demonstrates that North African countries are far from forming a homogeneous block where nationality laws are concerned.

The report is not only a study it is also a work of advocacy. Its goal is a Protocol on Nationality to the African Charter on Human and People's Rights and the summary, although not the main body of the report, makes detailed recommendations. While many are designed to address problems observed in the course of the study and make specific reference to such problems, with the exception of ratification of regional instruments, the recommendations are not on their face specific to Africa and do not draw on specific solutions already to be found on the continent. Over and above the identification of solutions that could make a difference in individual states, the proposal that a project of changes to nationality law be attempted not by a single State in isolation but by States within a region is a bold and imaginative one with the potential to speed the pace of change.

The report is available online so there is no excuse for readers of the Journal not to familiarise themselves with this very significant and very accessible scholarly work.

Alison Harvey
General Secretary
Immigration Law Practitioners' Association
(the views expressed are those of the author and not of the Association)

ILPA

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.

Have you visited ILPA's website recently?

ILPA posts briefings and submissions on its website, www.ilpa.org.uk, on a weekly (and sometimes more than weekly) basis. These contain legal and policy analysis as well as evidence of the experiences of members and their clients and are a rich source of information for academics and researchers. Please note that those using the Firefox browser may experience problems with the viewing toolbar on the website.

Our members

ILPA's membership of over 900 individuals and organisations includes lawyers, advice workers, academics and others with a substantial interest in the law, in the UK and beyond. Our members include not only immigration lawyers, but also lawyers whose work touches on immigration, immigration advisors 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 sub-committees, 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 the law. ILPA works across all areas of immigration, asylum and nationality law and its work is widely recognised.

As a member, you will benefit from:

- reduced rates for all ILPA training, which is provided by experts and accredited for continuing professional development (CPD) points by the Bar Council, the Solicitors' Regulation Authority, the OISC and the Institute of Legal Executives
- listing in ILPA's online and hard copy Directory of Members
- ILPA's monthly mailing updating you on new developments and providing you with information not available elsewhere
- email alerts on developments of importance
- opportunities to participate in specialist members-only sub-committees, through e-groups and meetings
- free copies of ILPA publications including best practice guides
- 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

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Work with ILPA

Twenty-five years on, ILPA remains your best option for contributing to raising standards of advice and representation and to a just and equitable immigration, asylum and nationality law practice. By maintaining and renewing your membership, training for ILPA, hosting training sessions or attending them, attending the subcommittees, sharing information with members 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.

Help to

- Promote and improve the advising and representation of immigrants
- Share information on domestic and European immigration, refugee and nationality law
- Work to secure a non-racist, non-sexist, just and equitable system of immigration, refugee and nationality law practice.

By

… strengthening our membership
Maintain or renew your membership and see if you can recruit a practitioner who would benefit from ILPA's support and contribute to ILPA's work.

… supporting our training
Come on training courses, publicise them to others, train for ILPA, suggest or host courses. Increasingly lawyers in all areas of practice find themselves confronting matters of immigration law and ILPA is always interested in reaching out to train those practitioners, as well as immigration, asylum and nationality law practitioners.

… sharing information with others
When you come across something that other immigration practitioners need to know – pass it to ILPA so that we can disseminate it to members. Share information received and write casenotes and memoranda for the ILPA mailing; and/or write articles for the Journal of Immigration, Asylum and Nationality Law

… working to influence the development of law and practice in this area
Get involved in ILPA's subcommittees and members' meetings; represent ILPA at meetings; help with responses to consultations and parliamentary briefings. ILPA is represented on 'stakeholder' and advisory/user groups run by the UK Border Agency, the Administrative Court and tribunals, 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 and House of Lords on legislation, and has excellent links with institutions and organisations working at European level. Our comments on proposed legislation and our responses to consultations influence law and policy in the UK and beyond.

A couple of examples of recent work

ILPA's ***Access to Justice*** subcommittee has worked on ILPA's detailed comments on the rules and practice statements and directions that were proposed for the new Immigration and Asylum Chamber in the First Tier and Upper Tribunals. See the ***Submissions*** page of the website. ILPA was influential in persuading the government to abandon proposals to move all Asylum and Immigration judicial reviews to the Upper Tier Tribunal and instead to restrict cases that can be transferred to judicial reviews of fresh claims. See the ***Briefings*** page of the website. The subcommittee has worked on ILPA's discussions with the UK Border Agency on the Agency's policy of removal without notice, which ILPA considers fails to respect fundamental constitutional rights. (See the UK Border Agency Enforcement Instructions and Guidance Chapter 60).

ILPA's ***European*** subcommittee, convened by Professor Elspeth Guild and Alison Hunter of Wesley Gryk Solicitors has provided detailed comments to the European Commission on its guidance on Directive 2004/38 on free movement. The subcommittee has commented extensively on the question of whether the UK should or should not

opt-in to the draft re-cast qualification and procedures directives and in so doing has provided analysis of the provisions of those draft instruments. It has also commented on the Stockholm programme. See the ***Submissions*** pages of the website**.**

Training

Some examples of ILPA training recent and forthcoming appear below. Please see ILPA's website www.ilpa.org.uk for the full programme which is updated regularly. Academics and researchers, members of ILPA and others, who attend ILPA training sessions have an unparalleled opportunity to learn of experiences of practitioners and thus have access to information not available elsewhere.

CR* – Concessionary rate for ILPA members who are full time students, pupil barristers or trainee solicitors, or employees of Law Centres and smaller voluntary organizations.

CPD – Solicitors, barristers, OISC regulated advisors and legal executives can all sign for Continuing Professional Development hours.

This is a selection of the training sessions offered by ILPA. The full training programme is available on the ILPA website: www.ilpa.org.uk

September 2010

Essential Tax for immigration practitioners
Wednesday 8 September 2010, 4–7.15pm
Speakers
- Sonia K Arora, James Perrott and Elisa Sofocli, PricewaterhouseCoopers Legal LLP

CPD 3 hours
Fee ILPA members £180, CR*£120, others £360, 3 CPD hours
Code DT 1241
It's back! By popular demand: James Perrott is joined by two tax experts to bring you this introduction to the UK tax rules covering the UK tax system, tax residence, tax for employees leaving and arriving in the UK; social security implications for employers and employees; the taxation of short term business visitors and the taxation of non-domiciled individuals. Drawing on real case studies and examples, this course demystifies the tax rules, helps you identify potential problems and opportunities for clients and provides plenty of opportunity to get answers to specific questions.

Domestic violence
Monday 13 September 2010, 4–7.15pm
Speakers
- Raggi Kotak, 1 Pump Court Chambers
- Solange Valdez, Southwark Law Centre

CPD 3 hours
Fee ILPA members £120, CR*£60, others £240
Code DT 1242
How do you evidence an application for leave based on your client's having suffered domestic violence? How do you conduct these cases in a way that best supports your client and minimises risk? What happens if your client is stated to have no recourse to public funds? How do you deal with an appeal hearing in the event of a refusal? A barrister and solicitor team with extensive experience of representing clients who have been subjected to domestic violence at application, appeal and judicial review level, and have been involved in ILPA's influencing work, including in meetings with the Home Office and UK Border Agency on this topic, provide a comprehensive overview of the legal, evidential and practical aspects of these cases and answer your difficult questions. Previous participants on this session described it as 'excellent training', 'very informative', 'the caselaw very helpful and stuff on evidence particularly good'.

Getting started in business immigration law
Wednesday 15 September 2010, 4–7.15pm
Speaker
- Graeme Kirk, Gross and Co Solicitors

CPD 3 hours
Fee ILPA members £180, CR*£120, others £360, 3 CPD hours
Code DT 1243
ILPA's popular introduction to business immigration law, suitable for those who want to get started, fill in gaps in their knowledge or get up-to-date. A comprehensive and comprehensible guide to this fast-changing area. Graeme Kirk, the former Chair of the International Bar Association's Immigration and Nationality Law Committee and an active member of

ILPA's Economic Migration subcommittee brings a wealth of practical experience to this session. Participants on this session described the session as a 'Very good course, presentation excellent and notes very clear"'. They described Graeme Kirk as presenting the session 'coherently, interestingly and with humour' and 'loved' his practical experience. Whether business immigration law is your passion, or just something you cannot avoid, this is the course for you.

Getting started in advocacy – full day session
Thursday 16 September 2010, 10.00am–5.00pm
Speakers
- Frances Webber, Ronan Toal, Garden Court Chambers

Fee ILPA members £220, CR*£110, others £440
CPD 5.5 hours
Code DT 1244
A must for any barrister, solicitor or caseworker starting, or thinking of starting to represent appellants in the Immigration and Asylum Chambers of the unified Tribunal, we have extended our popular introductory session to a full day. No experience of advocacy is required but you will need previous experience of preparing cases for appeal and knowledge of appeals legislation and procedure rules – this is a chance to put knowledge acquired for accreditation in practice. Frances Webber and Ronan Toal, have vast experience of appearing before the Asylum and Immigration Tribunal, predecessor to the new Immigration and Asylum Chambers in the First Tier and Upper Tier Tribunals well as in leading cases in the higher courts. They will use case outlines to cover matters such as drafting skeleton arguments, research, corroborative evidence, oral and written evidence from witnesses and submissions and will also take participants through practical advocacy tasks to ensure that you have all the skills to represent your clients in the new Tribunals.

Refugee and international protection update
Wednesday 22 September 2010, London, 4pm–7.15pm
Speakers
- Peter Jorro and Mark Symes, Garden Court Chambers

CPD 3 hours
Fee ILPA members £120, CR*£60, others £240
Code DT 1245
Make sure you are fully up to speed with legal developments on refugee law, subsidiary protection, other human rights Conventions relevant to protection of migrants, and have identified litigation likely to arise out of these developments. This course will review recent developments to ensure that you are fully up to speed, understand the full potential of the caselaw, are conversant with the latest procedures and understand the areas in which the law is developing. Mark Symes and Peter Jorro are the authors of *Symes and Jorro on Asylum Law and Practice*, now in its second edition, and Mark Symes is the author of *Caselaw on the Refugee Convention*. This comprehensive and informed overview that they provide will save you time and ensure that nothing is missed.

Solving family status problems in immigration cases – marriage, divorce, parenthood and adoption in family and immigration law
London, 4–7.15pm, Tuesday 28 September 4.00–7.15 pm
Speaker
- Kathryn Cronin, Garden Court Chambers

CPD 3 hours
Fee ILPA members £120, CR*£60, others £240
Code DT 1246
Many members have asked for a course looking at questions of domicile and residence and the interface between private international law, family law and immigration law in these complex areas. The course will look at the definitions of a parent in family and immigration law, at how to determine domicile, at habitual residence, at the family law provisions for custody and contact:- international arrangements, European arrangements and domestic and at the family and

immigration aspects of child removal cases. Maggie Jones is family law specialist, described in Chambers and Partners as a 'woman of principle' and 'passionate barrister who always goes the extra mile for her clients.' She is joined by Kathryn Cronin, whose practice covers immigration and family law and whose expertise is well known to ILPA members for she has been involved with ILPA since it was founded. This specialist course will be invaluable to all immigration lawyers who deal with family matters.

October 2010

Update: recent developments in immigration law
Thursday 14 October 2010, 4–7.15pm
Speakers
- David Chirico, 1 Pump Court Chambers
- Sonali Naik, Garden Court Chambers

CPD 3 hours
Fee ILPA members £120, CR*£60, Non members £240
Code DT 1229
David Chirico and Sonali Naik return with this comprehensive course covering recent cases and related developments to ensure that you are fully up to speed. The most efficient way to get up to speed on all recent developments in immigration caselaw and practice, with an opportunity to reflect on their implications for your clients. Feedback on training from this popular team has *included* 'the best ILPA course I have been to', 'very interesting and well presented course, knowledgeable speakers – very good!'

Significant others: applications for partners
Friday 15 October 2010, 10am–5pm
Speakers
- Tim Barnden and Barry O'Leary, Wesley Gryk Solicitors

CPD 5.5 hours
Fee ILPA members £220, CR*£110, Non members £440
Code DT 1236
It's back! This course, covering all aspects of applications for spouses, civil, unmarried and same sex partners is back again by popular demand. '*The best course I have ever attended, brilliant*', '*outstanding*', '*informative, live and important*' says the feedback. Characterised as 'Tim Barnden and Barry O'Leary are described as *particularly helpful tutors*', with one participant commenting '*I would be happy to attend any sessions conducted by Tim and Barry*'. They both specialise in applications for partners at Wesley Gryk solicitors, described in Chambers UK as having a '*fantastic reputation*' and as '*developing knowledge, testing the boundaries and pushing the agenda*'. According to previous participants this 'great, very informative, interesting' session 'full of practical tips', 'very useful material, good insights, well-presented and to the point' will give you an '*excellent opportunity to discuss and clarify the topics*', including on developments on the general grounds for refusal and changes to minimum age for partners and spouses. Previous attendees record 'no dull moments'. Come along and re-ignite your enthusiasm, while honing your knowledge and skills.

Discrimination and immigration
Tuesday 19 October 2010, 4–7.15pm
Speakers
- Declan O'Dempsey, Cloisters Chambers
- Jawaid Luqmani, Luqmani Thompson and Partners

CPD 3 hours
Fee ILPA members £120, CR*£60, Non members £240
Code DT 1234

Nationality law is fun
Thursday 28 October 2010, 10am to 5.15pm
Speakers
- Alison Harvey, ILPA General Secretary
- Mahmud Quayum, Camden Community Law Centre

CPD 5.5 hours
Fee ILPA members £220, CR*£110, non members £440
Code DT 1247

November 2010

Asylum & immigration in the Court of Session: a St. Andrew's Day review
Tuesday 30 November 2010, 2.00–5.15 pm.
Speakers

- Joe Bryce, Advocate and Jamie Kerr, Drummond Miller Solicitors

CPD 3 hours
Fee ILPA members £120, CR★£60, Non members £240
Code DT 1248

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