

THE HUMAN RIGHTS OF DEPORTEES IN THE ENGLISH LEGAL SYSTEM

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Abstract

The Immigration and Asylum Act 1999 received a statement of compatibility under s19 of the Human Rights Act 1998.¹ Yet the provisions under s10 and s63 of the Immigration and Asylum Act (hereafter IAA) effectively remove the right of appeal for most deportees, continuing a trend which began with the Immigration Act 1988. This paper will examine the process by which deportation will be administered under the IAA in the light of the obligations pertaining to private and family life and the right not to be subjected to inhuman and degrading treatment under the Human Rights Act (hereafter HRA).² The question will be asked 'is there a right not to be deported under the Human Rights Act 1998?'

GROUNDS FOR DEPORTATION

s5 of the Immigration Act 1971 allows the Secretary of State to make a deportation order against a person who is liable to deportation under, s3(5) and 3(6) Immigration Act 1971.³ This includes overstayers and those who breach a condition of entry; those whose deportation is deemed to be conducive to the public good, usually after conviction for a criminal offence; spouses and children of another person being deported and those recommended for deportation by a court.⁴ Rule 364 of the Immigration rules HC 395 requires the Secretary of State to balance the public interest against the compassionate circumstances of the case. He is specifically obliged to consider a list of factors including age; length of residence in

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1 Statements of Human Rights Act compatibility have been given to all legislation including the Prevention of Terrorism Act, with the exception of the Local Government Bill which contains the discriminatory Clause 25 provision.

2 Article 8 and Article 3 respectively.

3 Immigration officers can be empowered by the Secretary of State to make a deportation decision following the HL decision in *K v SSHD ex p Oladewuk* [1990] 3 All ER 393.

4 s3(6) following recommendation by a court.- anyone over the age of 17 years and convicted of a criminal offence can be recommended for deportation. There are numerous immigration offences that can give rise to a deportation recommendation, for example overstaying (s24(1)(b) IA 1971) and seeking entry by deception (s24 and s25 AIA 1996).

the UK; personal history including conduct and employment record; previous criminal record and strength of connections with the UK.

As far as nationals of the European Economic Area are concerned, they can only be deported on the grounds listed in Directive 68/360/EEC; namely public policy, public health and public security. In *R v Bouchereau* it was held that an EC national could only be deported if they are a genuine and sufficiently serious threat to public policy affecting one of the fundamental interests of society.⁵

BACKGROUND TO THE CURRENT DEPORTATION CHANGES

The Immigration Act 1988 restricted the right of appeal for potential deportees who had been in the UK for less than 7 years.¹ For those in the UK for less than this time, the appeal was confined to the issue of whether such an order was in accordance with the law in terms of s3 (5) IA 1971; compassionate factors under para. 364 HC 395 were removed from the appellate jurisdiction. The House of Lords decisions in *Malhi and Oladehinde* established that procedural errors are not grounds to be considered in a restricted s5(1) appeal⁷ and it had been held that there could be no legitimate expectation that deportation decisions would consider the ECHR obligations in such an appeals.⁸ However, since the decision in *Abdi*, it has been established that internal guidance and human rights issues could be addressed by an appellate authority even in the restricted appeal.⁹

MARRIAGE POLICY

Since the decision in *Berrehab v Netherlands*, discussed below, it has been Home Office internal policy to consider established family life in deciding whether to issue a notice of deportation in line with Article 8 of the ECHR. The Home Office operates concessions which are outside the immigration rules and the role of the appellate adjudicator is to consider whether the facts of the case would bring it within the policy and whether the Home Office had properly considered the terms of the policy.¹⁰

⁵ [1977] ECR 1999.

⁶ s5 IA 1988 - people who entered the UK less than 7 years before the date of appeal have only a limited right of appeal on the grounds that there was no power in law to make such an order.

⁷ applied by the IAT in *Dharam Singh v SSHD* Appeal TH 8580/97 (G00044) 16.4.99.

⁸ Judith Cam! *Pocí v SSHD* IAT TH/40449/95 (17127) 20.5.98.

⁹ *R v SSHU exp. Abdi* (1996] Imm AR 148.

¹⁰ Ibid.

Para. 5 of the concession DP 3/96 states the general rule that deportation action under s3(5)IA 1971 should not normally be initiated where the subject has a genuine and subsisting marriage with someone settled here and the couple have lived together in this country continuously for 2 years prior to enforcement action; and it is unreasonable to suspect the settled spouse to accompany the spouse on removal. In considering the latter point, it may be particularly important to demonstrate established family ties. If the deportee has criminal convictions, the severity of the offence should be balanced against the strength of family ties."

A Home Office concession also operates for children who have been in the UK continuously for longer than 7 years. In introducing this concession, Home Office minister Mike O'Brien stated "In most cases the ties established by children over this period will outweigh other considerations and it is right and fair that the family should be allowed to stay here".¹² Home Office guidance suggests that deportation will not normally be commenced against parents whose children have been resident for seven years or more continuously. However, the advice goes on to state that in cases of poor immigration history, this presumption can be rebutted.¹⁵

Cohabitation

Home Office policy DP2/93, drafted with the decision in *Berrehab* in mind, applied equally to cohabiting couples who could show conclusive evidence to demonstrate that they had cohabited for two years prior to enforcement action.¹⁴ However, DP3/96 which superseded the previous policy, removes that concession for cohabiting partners. Some unmarried partners may be able to take advantage of the Common Law and Same Sex Relationship concession of 1998 as amended. The latter however, is largely aimed at couples in same sex relationships as the criteria states that the parties should be 'legally unable to marry'.¹⁵

The result of these concessions is that settled spouses who have been married for two years prior to enforcement action and couples who are

¹¹ DP3/96 para 6.

¹² HC Debates, Hansard 24th Feb 1999 Col MO.

¹³ HC Debates Hansard 24th Feb. 1999 Col 1121-1 HO.

¹⁴ *R v SSHD ex v. Watson* CO/2055/94 2.4.96 at 498; *R v SSHD exp. Darby* CO/2259/95 5.2.1996.

¹⁵ Common law and same sex relationships IDI Aug 1998 Chp. 8, Section 7 para. 2 as amended by Immigration Minister Mike O'Brien on 16th June 1999 HC debates Hansard col. 164.

legally unable to marry (otherwise than by consanguinity and age) who have lived in a relationship 'akin to marriage' for two years prior to enforcement action will not normally be subjected to a deportation action. In both cases it must also be demonstrated that it is unreasonable to expect the settled party to accompany the potential deportee on removal.

DP3/96 is more restrictive than its predecessor and there is no specific reference to Article 8 of the ECHR. Those couples who are legally able but have chosen not to marry may not seek to rely on these concessions, as a result their family life may be in danger of being violated.

ABOLITION OF THE RIGHT TO APPEAL

s63 and Schedule 14 para.44(2) of the IAA 1999 provide that appeals against deportation will only be available where the deportation is deemed to be conducive to the public good or in family cases (creating a new s3(5)a and s3(5)b IA 1971). All other categories of deportees will now be liable to administrative removal under s10 IAA 99.¹⁶ The objective of the proposals clearly placed speed over justice; the White Paper aimed "to provide a single right of appeal to those who were lawfully present in the UK at the time of their application to remain in the UK. The appeal would be held quickly after the initial decision had been made and there would be no separate appeal against removal".¹⁷

It is arguable whether speed will indeed be promoted by these appeal restrictions as the only avenue for a person seeking to challenge a deportation decision will be to make an application for asylum or to make a human rights appeal under s65 IAA 99. The application for asylum may be used as a stalling mechanism but unless the applicant can demonstrate a well-founded fear of persecution for one of the five Convention reasons they will not be able to avoid deportation action.¹⁸ It is for this reason that this article will concentrate on the s65 appeal.

¹⁶ With the exception (it appeals under the Special Immigration Appeals Commission Act 1997 which provides for a full right of appeal in national security cases following the ECHR decision in *Chahal v UK*).

¹⁷ Finer, *Faster and firmer: a modern approach to immigration and asylum* Cm 4018 para. 7.15.

¹⁸ A right of appeal is provided against refusal in asylum cases, on the grounds that removal would be contrary to the UK's obligations under the Geneva Convention - s8(4) Asylum and Immigration Appeals Act 1995.

The Human Rights Appeal

An express right of appeal to an adjudicator is provided by s65 of the IAA for people who contend that their human rights have been breached by a public authority contrary to s6(1) HRA1998. Such a public authority will include the Secretary of State, Immigration Officers and the Entry Clearance Officer.¹⁹ Those people carrying out a public function who are not expressly mentioned may still be the subject of an action under the HRA itself as the definition under s6(3) HRA is much wider than that contained in s65 IAA.²⁰

Impact of the Human Rights Act

STATUS OF THE CONVENTION IN DOMESTIC LAW

Case law preceding the introduction of the Human Rights Act provides an indication of the interpretative approach that the courts would adopt post October 2nd. In *exp. Taiye Ajayi and Essieoghen*,²¹ Justice Laws declined to hold that there could be a legitimate expectation that the Home Secretary will consider Article 8 prior to issuing a deportation order. Providing that the Home Secretary considers the effect of deportation as required by the policy guidelines prior to issuing the removal notice and the decision can not be said to be *Wednesbury* unreasonable, there will be no successful challenge in judicial review. Since this decision cases have evolved to require the Secretary of State to engage in a balancing act. In *exp. Gangadeen*²² the CA held that a balancing Act should be conducted stressing that the greater the interference with human rights the more the court would require by way of justification. The court also held that great importance should be attached to the rights of children. In *exp. McQuillan*, Sedley J emphasised the need to conduct a balancing act when considering possible violations of human rights:

"Once it is accepted that the standards articulated in the Convention are standards which both match those of the common law and inform the jurisprudence of the European Union, it becomes unreal and potentially unjust to continue to develop English public law without reference to them...the stan-

¹⁹ s65(7) IAA 1999.

²⁰ s6(3) covers "any person certain of whose functions are of a public nature".

²¹ High Court Co/1605/92 12.5.94.

²² [1998] ImmAR 106.

standard of justification of infringements of rights and freedoms by executive decision must vary in proportion to the significance of the right which is at issue..."

Such an approach has been endorsed by the Master of the Rolls in *R v Ministry of Defence exp. Smith*:²³ "The more substantial the interference with human rights, the more the Court will require by way of justification before it is satisfied that the decision is reasonable...". Failure to undertake the balancing exercise may result in a decision being declared ultra vires.

APPLYING EUROPEAN CONVENTION JURISPRUDENCE

The protection of private and family life under Article 8 ECHR.

(i) evidence of private or family life

Although, private life has been given a wide definition in Strasbourg jurisprudence,²⁴ there remains some reticence about applying it in an immigration context. This is a recognition of the inevitability that private life will be adversely affected by deportation proceedings. However, in *Boughanemi v France*, the European Court of Human Rights recognised that immigration measures could disproportionately affect private life²⁵ and in *C v Belgium*, the court found that social ties accumulated over a number of years could amount to private life within the meaning of Article 8.²⁶

Private life is given some recognition in domestic immigration law by the concessions relating to people with long residence. Persons legally in the UK for ten years or illegally for fourteen years can take advantage of these concessions. There is a legitimate expectation after the time has expired that deportation action will not be commenced except in exceptional circumstances. If deportation action commences before the expiry of the term, the action will stop the clock and no legitimate expectation can arise.²⁷

²³ [1996] 2WLR205.

²⁴ *Niemitz v Germany* (1992) Series A No 251-B para 29; Feldman "The developing scope of Article 8 of the European Convention on Human Rights" [1997] EHRLR 265.

²⁵ (1996) 22EHRR228.

²⁶ *C v Belgium* App 00021794/93 07/08/1996 para. 25.

²⁷ *O/nri* (1994) 26th July CA (unreported), *K v SSHD exp. Uusuh* (1994) 10th Nov. CA.

As far as family life is concerned, evidence of well-established family ties in the United Kingdom will need to be demonstrated. Family life is now considered to extend beyond legitimate formal relationships.²⁸ It has been established in the case of *Abdulaziz*²⁹ that Article 8 does not guarantee a right to establish family life in a particular state. In *exp. Watson*, it was held that states have a wide margin of appreciation in determining the steps necessary to ensure compliance with Article 8. The right to respect for family life did not extend to providing an obligation on a state to respect the decision of married couples to choose their place of residence.¹⁰

(ii) interference

The Court will not find an interference where it is possible for family life to be resumed elsewhere.³¹ In *exp. Sultana* the CA held, obiter, that there was no interference with family life as a British citizen whose husband was threatened with deportation to Pakistan could reasonably be expected to accompany him with their children.³²

(iii) Article 8(2): justification for infringement

The state will need to show that the interference is sanctioned by the law and provide a legitimate reason as listed in Article 8(2). The measure will also need to be 'necessary in a democratic society'. In deciding whether the interference corresponds to a pressing social need the Court will consider the proportionality of the measure and will often defer to the margin of appreciation. In cases deemed conducive to the public good this may be a particular problem for the potential deportee. In the most serious cases something quite overwhelming will need to be demonstrated in order that the family life will not be disrupted. This is the case even when family members likely to be effected are British citizens.

The case of *Berrehab v Netherlands*³³ is extremely significant in the deportation context. The case concerned a Moroccan man threatened with

²⁸ *Marckx v Belgium* (1979) 2 EHRR 330; *Kman v Netherlands* (1994) 19 EHRR 263. This issue is discussed further in Liddy "The concept of family life under the European Convention on Human Rights" [1998] EHRLR 15.

²⁹ (1985) 7 EHRR 471.

³⁰ R v SSHD *exp. Watson* CO/2055/94 2.4.96 at 498.

³¹ *Abdulaziz et al v UK* (1985) 7 EHRR 471.

³² K v SSHD *exp. Shakeela Sultana* FC3/97/5411/D 13.6.97.

³³ *Berrehab v Netherlands* 3/1987/126/177.

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deportation after his marriage to a Dutch woman broke down. The ECHR held that the applicant's right to family life would be violated by the deportation as he had retained regular contact with his young daughter. The approach of the court endorses the fact that the removal of a father in such circumstances would be clearly disproportionate to the interests of the state.

The decision in *Berrehab* led to the changes in Home Office departmental policy discussed above. In the case of children, HO policy indicates that an applicant who has regular access to a child should not face removal. It was established that this applies irrespective of cohabitation or marriage.³⁴

It is apparent that each case will be deciding on its facts and the public interest will be weighed against the disruption to private and family life. In *Mehemi v France*, the Court found that despite the applicant's criminal conviction for drugs offences, the strength of his family links with France and the likely separation from his wife and daughter would be disproportionate to the legitimate aim pursued.¹⁵ A similar decision was reached in *Nasri v France* where the applicant had special needs which required particular support from his family.¹⁶

The decision of the European Commission *Poku v UK*¹⁷ however, is more restrictive and has been criticised for weighting the balance against the applicant and giving too much respect for the margin of appreciation. As the couple had married when the applicant had already been subject to deportation proceedings there was no obstacle preventing the couple and their children from choosing to move to Ghana. Therefore any disruption in family life would have been a result of the couple's choice not to leave the UK together. It was found to be inevitable and indeed acceptable that immigration decisions would lead to some disruption in family relationships. This approach was echoed by the court in *Bouchelkia v France*¹⁸ in which it was established that family life must be established prior to the deportation order:

"the fact that, after the deportation order was made and while he was an illegal immigrant, he built up a new family life does not justify finding, a posteriori, that the deportation order made and executed was not necessary".¹⁹

H R v SSHD *exp. Meftah Zighem* [1996] Imm AR 194.

35 App 00025017/94 26/09/97.

36 App 00019465/92 13/07/95 para. 43.

37 26985/95.

38 112/1995/618/708 22/01/1997.

39 *Ibid*, at para. 52.

The approach in *Poku* and *Bouchelkia* appears to endorse the Home Office guidance in DP3/96.

The issue of proportionality was again raised in the decision of *Gul v Switzerland*⁴⁰ concerning the family life of a Kurdish family from Turkey. Mr Gul had been granted exceptional leave on compassionate grounds and his wife had been receiving medical treatment. They had a daughter born in Switzerland in 1988. The family applied for their younger son to join them from Turkey and this was refused. The Commission found that they could reasonably be expected to move to Turkey despite the fact that their 8 yr old daughter had never been to Turkey and spoke no Turkish. This particularly restrictive decision could be attributed to the fact that the Commission were careful to avoid establishing a positive duty on a state to unite families.

In determining the legitimacy of deportation orders the domestic appellate authorities have engaged in a similar balancing exercise. The Immigration Appeals Tribunal have held that an appellant should not be deported to Syria as the disruption to his family life outweighed the public good requirements of immigration control. It would have been disproportionate to expect a Christian wife who did not speak Arabic and her two children to settle with the appellant in Syria.⁴¹

As far as cases deemed conducive to the public good are concerned it would appear that the responses of the English courts are in keeping with the Strasbourg line established in *Boughanerni v France* when the ECHR held that the deportation of a Tunisian man who had lived in France since the age of 8 and had well-established family ties there was not disproportionate under Article 8 as he had committed various criminal offences.⁴² In *Byron Scott*, the IAT held that when an appellant had been convicted of possessing Class A drugs with intent to supply and had served a five year prison sentence, his family ties could be outweighed by the seriousness of the offence and the possibility of him reoffending.⁴³ The balancing exercise is crucial and in *B v SSHD*, the Court of Appeal held that when dealing with an Italian national threatened with deportation under Community law, the same test of proportionality must also be applied. In

40 53/1995/559/645 (1996) 11 EHRR 95.

41 *AMHI Aldabs v SSHD* IAT Appeal: 13392 14.5.96.

42 ECHR 16/1995/522/608.

43 *Ryann Anthony Scott v SSHD* 31.1.2000 TH/4837/98 (22532). The same decision was reached on very similar facts by a differently constituted tribunal in the earlier case of *Muhmood v SSHD* TH/40326/94 (10804) 12.4.94.

this case the court found that the appellant's ties were 'real and substantial' and the decision to deport was so severe as to be disproportionate to the risk of reoffending.⁴⁴

The test under Article 8 of the ECHR is to justify deportation as 'necessary in a democratic society' and this is arguably a much more stringent test than simply balancing the compassionate circumstances against the public interest as required by DP3/96 and para. 364 HC 395. The decisions of the European Court of Human Rights indicate two clear restrictions on the extent of Article 8 protection: i) a potential deportee cannot attempt to use Article 8 rights to evade immigration control; ii) there is no positive duty on a state to respect family life 8 when determining entry clearance.

In domestic law, if a person marries after enforcement action has taken place then according to DP3/96 they will have no protection from deportation unless there are children. This is clearly in line with the Commission's restrictive interpretation in *Poku*. In *exp. Mirza*,⁴⁵ the applicant had contended that DP2/93 was ambiguous in this respect and that the court should therefore have regard to Convention jurisprudence following *exp. Brine*.⁴⁶ However, it was held that there was no ambiguity and that DP2/93 made it an overriding requirement that the marriage pre-dated enforcement action. In *exp. Telia*, where the marriage had taken place post commencement of enforcement action, the CA held that the wife and young children of a Nigerian national could reasonably be expected to accompany him on removal.⁴⁷

In a recent decision involving a Pakistani national married to a British citizen, the Court of Appeal criticised the drafting of DP 3/96.⁴⁸ The policy was found not to cater for the applicant's circumstances as he had entered without obtaining entry clearance. Furthermore, the court found that although the applicant had a common law right to cohabit in a genuine marriage, the role of the court in judicial review proceedings should be confined to the decision making process rather than the merits of the case. In this case the decision of the Secretary of State to remove the applicant as an illegal entrant could not be said to be unreasonable in a *Wednesbury* sense.

44 B v SSHD [2000] Imm AR 478.

45 R v SSHD *ex. Mirza and Others*, CA Appeal No: 95/7506/D 23.3.96.

46(1991] AC 696.

47 K v SSHV *exp. Telia* IAT: FC3 96/5215/D 29.4.1995.

48 R v SSHD *exp Amjad Mahmood* Times January 9th 2000.

A GAP IN PROTECTION: APPLICATION TO COHABITEES

Here we can see that the development of English law has not been in keeping with the ECHR. It has already been noted that the concession in DP3/96 does not generally apply to cohabiting couples yet there is nothing in the case law of Strasbourg to endorse such an approach. Family life is not dependent upon cohabitation. The Court in *Berrehab* stated:

"it follows from the concept of family on which Article 8 is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life", even if the parents are not then living together".⁴⁹

The High Court in *exp. Gyampo* took a literal interpretation of *Berrehab*⁵⁰ in finding that a father of a young child could be deported. The reasoning appears to be two-fold: on the one hand the father had only retained occasional contact with his son; and on the other hand *Berrehab* was distinguished as the child in this case was not born of a 'lawful genuine marriage'. It is submitted that this approach must be erroneous and does not take into account the spirit of Article 8 or the teleological approach of the European Court.

THE MARGIN OF APPRECIATION

Particularly relevant to issues under Article 8 of the ECHR, the margin of appreciation has been applied by the ECHR to allow the governments of member states a certain amount of discretion in determining the public interest within those states. Although clearly a concept of international law, it remains to be seen as to how far domestic courts will adopt a similar line of reasoning. In a recent article on the decision in *exp. Kebeline* it has been argued by Kerrigan that the provision under s2 HRA that courts should have regard to the decisions and opinions of the Strasbourg authorities inevitably brings the margin of appreciation closer to home as domestic courts will have difficulty in extrapolating and removing the margin of appreciation when interpreting Strasbourg case law.⁵¹ Kerrigan derives support from this disconcerting prediction from the reasoning of Lord Hope in *exp. Kebeline*:

⁴⁹ *Berrehab v Netherlands* (1988) 11 EHRR 322 para. 355.

⁵⁰ *R v SSHD exp. Gyampo* CO/1612/94 9.2.1995.

⁵¹ Kerrigan "Right to a Fair Hearing" *CivLihs* [2000] 64 at 79.

"In some circumstances it will be appropriate for the courts to recognise that there is an area of judgement within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body..."⁵²

THE DECISION IN EXP R

On November 29th 2000, the High Court delivered the first indication that Article 8 would make a significant difference in deportations deemed conducive to the public good.^{51*} R was a Colombian national who had entered the UK with his common law wife and their three children. He had been refused asylum and exceptional leave and had been issued with removal directions following conviction for a series of criminal offences. He applied for a judicial review on the basis that his removal would pose a serious threat to his family life contrary to Article 8. In dismissing the application whilst his wife's leave application was determined, the High Court held that removal would constitute a serious breach of Article 8 and that it would be disproportionate to order such removal on account of his criminal conviction.

THE PROHIBITION ON INHUMAN AND DEGRADING TREATMENT

Protection offered under Article 3 of the ECHR needs to be considered in the light of the prohibition on refoulement contained in the Geneva Convention on the Status of Refugees 1951. Article 33 of the Geneva Convention contains the fundamental principle of non-refoulement which is the cornerstone of international refugee protection. Although the Convention is not incorporated directly into English law, the Asylum and Immigration Appeals Act 1993 annexes the Convention to domestic law.⁵⁴ The principle only applies to people recognised as falling within the scope of Article 1 of the Geneva Convention, that is people who experience persecution for a Convention reason namely on account of their race, religion, nationality, political opinion or membership of a social group.

The prohibition on inhuman and degrading treatment offered by Article 3 ECHR provides wider protection than that offered by Article 33 of the Geneva Convention. In the latter, a person can be removed from the UK

⁵² *K v DPP ex p. Kebeline* unj Others HL [1999] 4 All ER 801 at 843.

⁵³ *R v SSHU ex p R* Times Nov 29th 2000.

⁵⁴ si AIAA 1993 defines an asylum claim as 'a claim made (whether before or after the coming into force of this section) that it would be contrary to the UK's obligations under the Convention for him to be removed from, or required to leave, the UK'.

if their presence constitutes a danger to national security or if they commit a serious non-political crime.⁵⁵ If a potential deportee constitutes a danger to national security the court will engage in a balancing exercise to decide whether the circumstances are such that the principle of non-refoulement should be waived.⁵⁶

Case law⁵⁷ under Article 3 indicates that the ill-treatment must reach a minimum level of severity which will depend on the circumstances of the particular case.⁵⁸ There is no requirement that the ill-treatment be perpetrated by the state authorities. In *Ahmed v Austria* the applicant successfully argued that his deportation to Somalia following a criminal conviction would expose him to a serious risk of mal-treatment at the hands of the Somali authorities.⁵⁹ It is apparent in this case that his expulsion would have fallen within the exception to the non-refoulement principle in Article 33 (2) of the Geneva Convention. A similar decision was reached in the case of *Chahal v UK* which had profound ramifications for domestic refugee law.⁶⁰ Prior to the decision in *Chahal* there had been no effective appeal in national security cases.⁶¹ The only challenge was by way of judicial review on the basis that the Secretary of State had failed to consider international obligations prior to making a deportation decision.⁶² The Special Immigration Appeals Commission Act 1997 established a new appeal process for national security cases that would allow Article 3 issues to be addressed. In both *Ahmed* and *Chahal*, the court reiterated the fundamental prohibition on expulsion in Article 3 cases:

"the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration"⁶³

This approach was endorsed by the Commission in *MAR v UK*⁶⁴ after the IAT upheld the Secretary of State's decision to deport an Iranian national

55 Article 33(2) Geneva Convention on the Status of Refugees 1951.

56 *Rizastraie v SSHD* CA 2.5.95. The CA held in this case that the risk to the community of allowing a convicted drug supplier to remain in the UK outweighed his risk of persecution on return to Iran.

57 *Ireland v UK (1978)* Series A No 25 para. 162, 2 EHRR 25.

58 *Ibid*, relevant factors include the nature of the treatment; the duration and the psychological and physical effects para. 162.

59 (1996) 24 EHRR 278 .

60 (1996) 23 EHRR 413.

61 s15(3) IA 1971.

62 *R v SSHU exp. Chahal* (1993) Times 27th Oct. CA.

63 *Supra* n60 para.4.

64 28038/95.

who had refugee status on the basis that his crimes were sufficiently serious to constitute a danger to the community under Art 33 (2) of the Geneva Convention.

The prohibition on expulsion applies equally in the case of extradition proceedings. In *Soering v UK* the European Court held that the likelihood of the applicant being subjected to the 'death row phenomenon' on his extradition to Virginia would make extradition an Article 3 breach.⁶⁵

It has been established, that the ill-treatment does not need to be perpetrated by a state authority but there must be evidence to suggest that the state authorities are unwilling or unable to protect the applicant from such ill-treatment.⁶⁶ Authority can be found for the proposition that a person who would suffer a serious detrimental effect to the health on removal could also bring an Article 3 challenge. In *D v UK* a broad interpretation was given to Article 3 when it was held unanimously that removal of a person with AIDS would have breached Article 3.⁶⁷ This decision was reached notwithstanding the fact that the applicant had entered the UK illegally and was therefore considered by the Court of Appeal to be making an application for leave to enter rather than to remain in the UK.⁶⁸

Conclusion: a right not to be deported?

The rights under Article 3 are absolute. The decisions in *Chahal* and *Ahmed* indicate that no deportation or extradition order should be executed in cases where there is evidence that the deportee could experience inhuman and degrading treatment. It is these cases where the scope of the HRA will be most apparent given that Article 3 ECHR is couched in far wider terms than Art 33 of the Geneva Convention. Furthermore, people who may be in danger of experiencing persecution for a non-Geneva Convention reason, for example, sexuality or gender, may be able to argue that their expulsion would contravene Article 3. The broad construction of inhuman and degrading treatment to cover health issues in the decision in *D v UK* may encourage domestic courts to look at wider issues than those raised by state - perpetrated violence.

⁶⁵ *Soering v UK* (1989) App. 00014038/88 07/07/89 para.111.

⁶⁶ *HLR v France* (1997) 00024573/94 29/04/97 .

⁶⁷ (1997) 24EHRR423.

⁶⁸ *Ibid*, para.48.

As far as Article 8 is concerned, there is more uncertainty in relation to interpretation as the decision maker must engage in a balancing act. It is found that a case falls under Art 8(1).⁶⁹ This will apply irrespective of whether a person is being deported as an overstayer or in public good cases, although in respect of the latter less will be required by the Secretary of State to discharge the burden of proportionality. In *Roys Fernandez*,¹⁰ the IAT in calculating where the balance should lie, applied the decision in *Bouchereau*¹¹ so that there needed to be evidence of a present threat to the requirements of public policy for a right to family life to be legitimately interfered with.

Whereas appeal rights are retained in cases deemed conducive to the public good, the abolition of the right to appeal against other deportation orders in the IAA 1999 appears as either an irrelevant measure or a nonsensical measure. Advocates of the former perspective would contend that deportees could make an appeal under s65 IAA on the basis that their human rights are violated by the decision to deport; whereas advocates of the latter perspective would argue that s63 and s10 are at odds with the spirit of human rights embraced by the Human Rights Act 1998 and are therefore rather disingenuous.⁷²

Should the domestic courts and tribunals implement the spirit of the Convention as evidenced in the Strasbourg decisions, there will emerge a category of cases in which persons will have a legitimate challenge to a deportation or removal decision. The extent of that category depends on how far the margin of appreciation is deferred to in the judicial process. However, for those people who can demonstrate that they may face ill-treatment on their return, whether or not perpetrated by a state authority, and those people who have well-established family ties in the UK, they may indeed be said to be a right not to be deported under the HRA 1998.

69 For a discussion of this uncertainty see Warbrick "The Structure of Article 8" EHRLR [1998] Vol. 1 32 at 40.

70 Appeal TH 24051/94 (12016) 12.4.1995.

71 1978 1 QB 732; [1981] 2 ALL ER 924.

72 The case law on Article 6 tends to support the view that rights relating to immigration and asylum, including deportation, do not fall within the ambit of Article 6 (*P v UK* (1987) 54 DR 211; *Agee v UK* (1976) 7 DR 164). Similarly in relation to Article 7 it has been established that a deportation order is a security measure rather than a penal sanction (*Moustuquim v Belgium* (1991) 13 EHRF 802). Furthermore, it is apparent that the ECHR views judicial review as an effective remedy under Article 13 (*Vilvarajuh v UK* (1991) 14 EHRR 248).