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Article 8 of the European Convention on Human Rights and UK Immigration Law

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Submitted in fulfilment of the requirements for the Degree of Doctor of Philosophy

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Abstract

This doctoral thesis examines the legal and jurisprudential developments associated with Article 8 of the ECHR in the immigration context. The primary objective of this thesis is to analyse whether the government has achieved its stated objectives of guiding judicial discretion by enacting primary and secondary legislation. The thesis examines both the domestic jurisprudence and that of the European Court of Human Rights to establish whether the UK's approach coincides with that of the Strasbourg Court. Doctrinal cum contextual research methods were adopted in this thesis.

In 2012, the UK government introduced Immigration Rules claiming to be conclusive of the Article 8 proportionality assessment. After extensive judicial interpretations of the rules, courts did not treat the rules alone as conclusive of Article 8's proportionality assessment. The government then introduced primary legislation, inserting Part 5A in the Nationality, Immigration Asylum Act 2002 to guide judicial discretion. These provisions, known as public interest considerations, have been examined at all levels of the judicial hierarchy. The analysis reveals no substantial shift from the jurisprudence predating the 2012 Immigration Rules and the enactment of public interest considerations.

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Author's declaration

"I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution."

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Abbreviations

AIT - Asylum and Immigration Tribunal

BOTC - British Overseas Territories Citizen

CJEU - Court of Justice of the European Union

CUKC - Citizen of the United Kingdom and Colonies

DWP - Department for Work and Pensions

ECHR - European Convention of Human Rights

ECtHR - European Court of Human Rights

EEA - European Economic Area

EEC - European Economic Community

EU - European Union

FtT - First-tier Tribunal

IAC - Immigration and Asylum Chamber

ICCPR - International Covenant on Civil and Political Rights

LASPO - Legal Aid Sentencing and Punishment of Offenders Act

NASS - National Asylum Support Service

PTSD - Post Traumatic Street Disorder

SIAC - Special Immigration Appeals Commission

SSHD - Secretary of State for the Home Department

TCEA - Tribunal Courts and Enforcement Act

TEFU -Treaty on the Functioning of European Union

TWM - Totally Without Merit

Chapter 1: Introduction

1. Introduction

1.1. This doctoral thesis provides an analysis of legislative developments concerning Article 8 of the European Convention of Human Rights (ECHR) and its protection of family and private life in the context of an immigration law perspective. The main objective of this thesis is to elaborate on whether multiple legislative measures in the pre- and post-Human Rights Act 1998 eras in the UK developed different standards and approaches to that of the European Court of Human Rights (ECtHR) in terms of applying the qualifications provided in Article 8 (2). This thesis explains the relevance of the ECtHR's jurisprudence and examines whether the UK's jurisprudence coincides with that of the ECtHR. It explains the dialectical jurisprudential developments between the UK's domestic courts and the ECtHR based in Strasbourg, France. It explains the relevance and effectiveness of domestic jurisprudence developed in regard to the ECtHR's guiding principles. Further, the thesis explains the objectives behind the massive UK legislation seeking to curtail the scope of, and codify the rights guaranteed by, Article 8 of the ECHR. The central question addressed by the thesis is whether and in what way the Government's attempts to direct the courts and tribunals on how to carry out the Article 8 assessment have affected the way in which they have applied Article 8 to the cases which have come before them.

1.2. The European Convention on Human Rights (ECHR) is an international instrument central to this thesis. Ten member states produced the Convention, an inter-governmental body known as the Council of Europe. The UK was part of the Council of Europe[1]. All member states have been obliged to accept the court's compulsory jurisdiction and the right to individual petition to the ECtHR since 1 November 1998. The UK accepted the compulsory jurisdiction of the ECtHR and the right of individual petition in 1966. The UK later took a dualist approach by enacting the Human Rights Act 1998. Before the 1998 Act, the ECHR rights were not directly enforceable in the UK courts. The Human Rights Act 1998 was intended to reduce recourse to ECtHR by making these rights directly accessible to the British people in domestic courts. The

[1] Statute of the Council of Europe 1949 (Cmnd 7778).

1998 Act imposes an interpretative obligation on courts. In family and private life contexts, Article 8 of the ECHR has frequently been invoked by migrants. In *Abdulaziz,* the court considered whether Convention rights, in particular Article 8, extend to aliens in relation to immigration matters. The court ruled that the refusal of entry clearance has deprived settled spouses of the society of their husbands, amounting to interference in the right to have family life as protected by Article 8[2].

1.3. The rights protected by the Article 8 (1) of the ECHR are private and family life, home and correspondence. These rights are subject to the qualifications provided in Article 8 (2). The interference by a public authority must be in accordance with the law and necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others. The need for immigration control will often provide a permissible reason for restricting the right, and that is often necessary to apply a proportionality test to decide whether a measure or a decision is an ECHR complaint. The core of proportionality doctrine is that the measure's intensity interfering with the protected rights has to be proportionate to the legitimate aim pursued.

1.4. These UK domestic courts have developed a more nuanced approach towards the ECtHR jurisprudence, and the Mirror Principle established in *Ullah*[3] has been further explained. The UK's law does not preclude the decision-maker from having regard for ECtHR's guiding principles, and there have been useful dialectical developments between the UK courts and the ECtHR. An era of construing Article 8 on private and family life began with *Mehmood*[4], and that view persisted until the House of Lords corrected the approach in *Huang*[5]. Then, the UK's domestic jurisprudence developed in line with *Huang* and ECtHR. I refer to those judgements as corrective decisions[6]

[2] *Abdulaziz, Cabales and Balkandali v The United Kingdom*, (1985) 7 EHRR 471, para 60.
[3] *Ullah v Special Adjudicator* [2004] UKHL 26.
[4] *R (on the application of Mehmood) v Secretary of State for the Home Departmen*t [2001] 1 WLR 840.
[5] *Huang v Secretary of State for the Home Department* [2007] UKHL 11.
[6] *R(on application of Chikwamba) v Secretary of State for the Home Departmen*t [2008] UKHL 40; *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, para 12; *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; *R (Baiai & others) v Secretary of State for the Home Department* [2008 UKHL 53; *R (on application of Aquilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45.

because they restored the correct approach in terms of giving effect to Convention rights in domestic law.

1.5. The coalition government perceived Convention rights, in particular Article 8, as part of the problem in controlling family migration. In the government's view, the judicial interpretations of Article 8's protection of family rights have been too generous, and migrants have been abusing the Convention. Further, the government saw the court's fact-sensitive approach in corrective decisions as onerous, meaning it was difficult to achieve consistency in the decision-making process. Thus, the government decided to introduce first-time Article 8 considerations within the Immigration Rules, claiming that the rules alone would be conclusive of the Article 8 proportionality assessment. The rules introduced on 9 July 2012 were an attempt to resurrect the exceptionality test laid to rest by the House of Lords in *Huang*. Initially, the term "*insurmountable obstacle*" was not even defined in the rules, and EX.2 was inserted later in the Appendix FM of the rules, which defined the phrase "*insurmountable obstacle*". The court[7] refused to accept the rules as conclusive of the Article 8 assessment, and recommended a two-stage test. That is, a claim is first assessed within the Immigration Rules, then under Article 8.

1.6. The UK government responded by enacting the Immigration Act 2014. Section 19 of the Act inserted Part 5A into the Nationality, Immigration Asylum Act 2002. Sections 117A-117D are statutory directions to courts and tribunals with the stated objective of guiding judicial discretion. The real objective of the statutory directions was to curtail the judicial discretion in deciding Article 8 claims.

1.7. This thesis closely examines the domestic and ECtHR jurisprudence and concludes that neither the UK's Immigration Rules nor the government's statutory directions to the courts and tribunals have curtailed the scope of residual discretion available to the primary decision-maker and courts because the rules and statutory directions are flexible and allow fact-sensitive analysis. The rules and statutory directions have not diminished the relevance of corrective decisions. The introduction of Article 8

[7] *Secretary of State for the Home Department v Izuazu* [2013] UKUT 45 (IAC), para 41.

considerations within the rules and statutory directions add nothing to the proportionality exercise.

Why conduct research on this topic?

1.8. The author of this thesis has been practising as a solicitor in Scotland since 2009, and representing Article 8 claims at all levels has been a part of his practice. There has been unprecedented legislation in this area of the law, and each measure triggers an avalanche of litigation. The legislative exercise and resulting litigation in this area of the law are consuming significant judicial time and public money. In that context, the author decided to research this area of law to assess the use of legislative measures.

Thesis structure

1.9. The thesis is divided into seven chapters. The first chapter introduces the thesis topic. The second chapter details the historical evolution of nationality and immigration law, and traces the different themes of immigration control after the retreat of the British Empire. The chapter also summarises the legislative developments, detailing measures of immigration control and explaining changes in appeal rights. Chapter two further explains other restrictive measures intended to create a hostile environment for migrants, and explains the use of certification powers, changes to immigration bail, and powers to detain and remove migrants. Finally in Chapter two, an explanation of the right to work and access to services is also offered. Chapter three explains the sources of the UK's immigration and human rights law. It also explains the relevance of ECHR jurisprudence in the context of Article 8. Chapter four begins by explaining the margin of appreciation and the proportionality principle. It outlines the UK's qualifications to the Article 8 rights and their relevance to immigration law, discusses the scope of private and family life under ECtHR jurisprudence, and explains the guiding principles. Chapter five gives an overview of the legal developments in the UK related to Article 8 from 1998 to the present. Chapter six presents an analysis of the public interest considerations introduced by Section 19 of the Immigration Act 2014, and chapter seven provides the summary conclusions of the thesis.

Research contribution

1.10. This thesis explores whether the government has achieved the objective of controlling immigration by introducing a number of restrictive measures, and whether the flurry of legislation has changed the process of proportionality assessment. The thesis also explores whether the government has overcome the problem of generous interpretation of Article 8 rights and whether the legislative measures have assisted the government in resolving differences with the judiciary.

Research methods

1.11. Doctrinal and contextual research methods are used in this thesis. The majority of the research work is focused on analysing the relevant primary and secondary legislation, domestic and ECtHR case law, and government policies. The cases selected for analysis were those reported cases of significant importance for the development of legal doctrine on the issues covered by the thesis, e.g. Article 8 and UK immigration control measures. The cases chosen from the ECtHR jurisprudence include those dealing with the guiding principles concerning proportionality assessment in Article 8 private and family life context, which are the central theme of the thesis. The UK cases selected included cases illustrating the position before the Human Rights Act 1998 and cases after the enactment of the Human Rights Act 1998, illustrating the dialectical developments between the ECtHR and domestic courts and explaining the application of the doctrine of proportionality in accordance with the law. In addition I examined a range of significant cases involving challenges to various policies and measures introduced by successive governments from 2000 to 2012, challenges to the inclusion of Article 8 considerations within the Immigrations Rules and cases concerning the interpretation of the public interest considerations inserted by Section 19 of the Immigration Act 2014.

Chapter 2: History of Immigration Control

2. Introduction

2.1. In order to understand how Article 8 of the European Convention has affected immigration control and how it has been applied by UK courts and tribunals, it is necessary to understand the history of immigration control in the UK. This chapter gives an account of that history. The first section of the chapter provides a brief account of the development of British nationality law, which has been closely linked to UK immigration law. That discussion is followed by an account of the development of immigration law itself, beginning with the early history of immigration law at a time when immigration control was not clearly separated from nationality law. It then expands into the different emerging themes shaping the UK's modern immigration control system. It considers the legislative motives and objectives behind the Acts of Parliament and refers to the contemporary geo-political scenarios which have resulted in policy changes. Then, I provide a descriptive but brief summary of recent UK legislative developments. The general trend of developments in recent decades has been towards a narrowing of access to British nationality and the imposition of stricter immigration controls. EU citizens have been an exception to the general pattern of stricter UK immigration controls, but that ended after the UK left the European Union on 31 January 2020. Transitional arrangements in relation to free movement ended on 1 January 2021, since which time the UK's immigration controls equally apply to EU and non-EU citizens. This part provides a vivid description of the changing themes of immigration control with reference to economic and political imperatives.

2.2. The second section briefly outlines the legislative developments in immigration law and how the system of immigration control has evolved. The objective of this historical narrative is to understand the changing policy objectives. It also provides a brief historical account of European Convention on Human Rights (ECHR) law, and how this has been given effect in UK domestic law since the Human Rights Act 1998. It then describes the main legislative provisions and makes brief reference to the legislative objectives and further expands on the legislative developments in

relation to specific areas of immigration control. It identifies significant legislative changes and comments on the practical impact of those measures. In particular, this part expands on the measures taken in relation to regulating marriage registration, certifications of human rights and asylum claims, statutory provisions introducing public interest considerations in relation to Article 8 claims, provisions tightening the UK's immigration enforcement regime, and restricting access to services, etc. The section concludes that measures enhancing immigration control are consistent with the government's policy of creating a hostile environment for immigrants.

2.3. This chapter provides a historical perspective of legal and geopolitical responses restricting immigration control. The study of past and contemporary public impulses forcing various governments to impose stricter immigration control bridges the gap between the past and present restrictive legal regimes concerning family migration. These include the generally restrictive approach taken to immigration and the restrictive approach taken specifically in the context of admission of family members. The explaining of measures concerning control of family life can be seen as representing a continuity of approach and as an element of a generally restrictive system.

Historical perspective of British nationality law

From medieval times to the nineteenth century

2.4. An understanding of nationality law is essential to grasp the modern concept of immigration control as the two areas of law have evolved together, with each influencing the development of the other. A detailed analysis of current nationality law falls outside the scope of this thesis. I will begin with nationality law. The modern conception of nationality, that of a person's link to a territory, did not exist in medieval times, when instead, the key concept was that of allegiance to the sovereign. The earliest division of people in both England and Scotland was between aliens and natural born subjects. Persons born within the dominions of the Crown of England were natural born subjects, and the rest were known as aliens.

Ius soli[8] and *jus sanguinis*[9] were both ways of becoming a subject of the Crown; illegitimate children and children born to alien parents within the King's rule were not excluded[10]. This was similar to the Roman Law of 212 A.D. in the reign of Emperor Caracalla.[11] Citizenship depended upon allegiance, and this concept stems from the old feudal system of personal loyalty owed by the tenant to the Lord of the manor[12]. In 1608, all persons born within the Crown's Dominions were subjects of the Crown, and children born to such subjects outside the Dominions acquired the same status. Everyone else was considered to be an alien.[13] A variety of legal statuses and terms were used to describe those who were Crown subjects. The common law preferred the term "subject" rather than "citizen" in describing the relationship between the individual and the state. However, legislation since the Second World War has generally referred to "citizen" and "citizenship." Some scholars have used the terms "subject" and "citizen" interchangeably[14]; however, the term "allegiance" had a broader scope than modern concepts of nationality, and Salmond recognised that the terms "subject" and "citizen" were not interchangeable in English law. He argued that the term *subject* includes any person subject to the power and jurisdiction of the state, and that therefore a resident alien's status would be akin to that of a subject[15]. In the early seventeenth century, Lord Coke defined allegiance as "*the natural bond and obligation between the King and his subjects, whereby subjects are called his liege subjects because they are bound to obey and serve him, and he is called their liege lord because he should maintain and defend them."*[16] Lord Coke based his findings on the maxim "*protectio trahit subjectionem et subjectio protectionem*", which means "the duty of the ruler to protect his subjects in return for their taxes and allegiance[17]", and made clear that the status of subject stemmed from allegiance rather than birthplace. Three centuries later, Lord Jowitt

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[8] 1367- 42 Ed. III c.10, law of the soil, birth right citizenship.
[9] Citizenship by descent.
[10] Anon (1562) 73 E.R. 496. & Anon (1544) 73 E.R. 872.
[11] Bevan, Vaughan, *The Development of British Immigration Law, p.109.*
[12] Bevan, Vaughan, *The Development of British Immigration Law, p.107.*
[13] The year of Calvin's case 77 E.R. 377.
[14] JW Salmond, *Jurisprudence of the Theory of the Law (Stevens & Haynes 1902) 192*. Also see *Twenty-first century banishment: citizenship stripping in common law nations* by Sangeeta Pillai and George Williams; International & Comparative Law Quarterly 2017.
[15] C.R.G. Murray: *In the shadow of Lord Haw Haw: Guantanamo Bay, diplomatic protection and allegiance, Public law 2011*. See, also J. Salmond, "*Citizenship and Allegiance"* (1902) 18 L.Q.R. p.49.
[16] Calvin's Case (1606) 6 Co.Rep. 2a at 5a.
[17] Z. Deen-Racsmany, "*Diplomatic Protection and International Criminal Law: Can the Gap Be Bridged?" (2007) 20 L.J.I.L. 909,* p.912.

described who owes allegiance to the King in *Joyce v DPP*[18] as follows: "*allegiance is owed to their sovereign Lord the King by his natural born subjects; so it is by those who, being aliens, become his subjects by denization or naturalization…*". There is a legal sanction against the breach of the obligation of allegiance, namely the offence of treason under the Treason Act 1351. All non-subjects were known as aliens. Aliens could only change their status by way of naturalization, which required an Act of Parliament. A naturalised subject was equal to a natural-born subject except for the qualifications provided within the Act.[19] In 1844, new legislation enabled aliens to take an oath of allegiance as *naturalised subjects.*

2.5. Aliens could also avail themselves of the limited status of a denizen through the granting of royal letters of patent. The letters of denizen were issued under the Crown's prerogative. Denizen status was a kind of middle state between that of an alien and a natural-born subject, and had characteristics of both.[20] The use of Denizen status continued from the mid-14th century until the late 19th century. Denizen status holders had the right to hold land, but were prohibited from political participation. The narrative of immigration control became one of national security in the aftermath of the French Revolution and during the Napoleonic Wars, and various measures were taken to control aliens' immigration into the United Kingdom[21]. Denizen status fell into disuse before the end of the Victorian era when it was replaced by full naturalization[22]. The relationship between the state and individuals continued to evolve over time, and British citizenship replaced the concept of British subjects.

The Empire and the Commonwealth

2.6. In the early twentieth century nationality law was inclusive, and the British Nationality and Status of Aliens Act 1914 was the first comprehensive statement of nationality law which applied across the British Empire. According to the Act, *"any person within His Majesty's dominions and allegiance was a natural-born British*

[18] [1946] A.C. 347 at p.366.
[19] Naturalised subjects were barred from certain offices, and all Bills of Naturalisations had to contain a clause reciting the disabilities – Geo.1 c.4.
[20] Blackstone, Book 1, ch.10, p.374. Quoted by Bevan on p.147.
[21] Bevan p.61-63.
[22] Mahmud Quayum & Mick Chatwin: *Demise of the Commonwealth; Journal of Immigration Asylum and Nationality Law 2009.*

subject[23]". This approach required revision as colonies started to opt for self-governing dominion status. In 1931, the Statute of Westminster largely removed the UK Parliament's right to legislate for the self-governing Dominions of Australia, New Zealand, South Africa, Canada, and Newfoundland, the latter now part of Canada. This legislation altered the concept of British subject-hood. These self-governing Dominions were separate autonomous units and equal in status, were free to legislate on their domestic and external affairs including border control, were united by a Common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations[24]. The Dominions opted for their own citizenship laws, and the Canadian Citizenship Act 1946 was the first independent legislation pertaining to nationality laws within the self-governing Dominions. The right of each Dominion to frame its own citizenship laws was recognised at the Commonwealth Conference held in 1947, where it was agreed that all such citizens would be British subjects and recognised as such by other Dominions, but that each Dominion had the prerogative to qualify the rights associated with the status of British subjects. For instance, Australia imposed immigration controls on British subjects of Indian sub-continental origin. In response to the Commonwealth Conference, the UK government enacted the British Nationality Act 1948 which on 1 January 1949 replaced the 'British subject' status with the status of 'Citizen of the United Kingdom and Colonies' (CUKC). In essence, all subjects of the Crown within the Commonwealth, including citizens of self-governing Dominions, were henceforth regarded as British nationals, and retained an unrestricted right of entry to the UK until 1962[25]. When further colonies became independent the usual provision was that any person who became a citizen of the new Commonwealth or non-Commonwealth country lost their former citizenship of the UK and Colonies, unless they had a parent or grandparent who was born in the UK or in a country which remained a colony at that time; however, the law differed from country to country[26]. The British Nationality Act 1948 also devised a common badge of citizenship known as "Commonwealth Citizenship", which was a complex formulation. The new status of British subjects entailed a qualified right of

[23] British Nationality and Status of Aliens Act 1914, section 1.
[24] Cmnd. 2768, p.14.
[25] The Commonwealth Immigration Act 1962, s.1; Also see *DPP v Bhagwan* [1972] A.C.60.
[26] Ian A Macdonald QC & Ronan Toal: *Macdonald's Immigration Law & Practice*, Ninth Edition Volume 1, p111.

movement and residence within the Empire, and Citizens of the United Kingdom and Colonies and Commonwealth Citizens had equal status under the 1948 Act. The category of British Protected Persons continued to exist separately; they were neither British subjects nor aliens and had some of the privileges of British subject status[27]. A surge in immigrant arrivals was first noted in 1956[28], and a gradual increase continued into the 1960s. By the 1960s, Asian migration exceeded that from the Caribbean and, seeking the ability to control immigration from the 'new Commonwealth', the UK government proposed and Parliament enacted the Commonwealth Immigrants Act 1962[29].

Tightening immigration control

2.7. Prior to the 1962 Act, Commonwealth Citizens were free to enter and settle in the UK and could acquire citizenship after a five year period of residence in the UK. A Commonwealth Citizen could be free from immigration control after evading detection for 24 hours, except provided s/he had not previously been refused admission[30]. The Act imposed immigration control on Commonwealth Citizens for the first time, and the control was the same as for non-British subjects. The new legal regime brought material change to the concept of British subject status and to the rights associated with it. Immigration control was progressively extended to those citizens of the United Kingdom and Colonies (CUKC) who lacked ancestral or defined connections with the United Kingdom, and the condition of the ancestral linkage was enacted by the Commonwealth Immigrants Act 1968.[31] Unrest in newly independent East African countries triggered an influx of East African Asian migrants into the United Kingdom, as those migrants had retained the citizenship of the United Kingdom and Colonies with an unqualified right to enter the UK. The European Commission of Human Rights found the legislative measure to be in

[27] Lord Goldsmith QC, *Citizenship Review; Citizenship: Our Common Bond 2008* http://image.guardian.co.uk/sys-files/Politics/documents/2008/03/11/citizenship-report-full.pdf, last accessed on 23 July 2017.
[28] Bevan, p.77.
[29] Bevan, p.77.
[30] Commonwealth Immigration Act 1962, Sch 1 para 1(2).
[31] Section 1 of the 1968 Act.

violation of Article 3 of the ECHR, but this remedy was too little too late for most of the aggrieved litigants.[32]

2.8. The separation of the right of citizenship from the right of abode in the 1968 Act was the most conspicuous development in citizenship law since 1948. The 1948 Act brought the common law concept of right of abode into statutory form, and that right of abode became a status of enormous importance after the Commonwealth Act 1962. The Immigration Act 1971 further constrained the operation of the common law right of abode, and it emerged separately in statute law from the broad concept of British nationality and the status of British subjects. Under the Immigration Act 1971, the right of abode stemmed from the status of citizenship, whereas other legal permissions to enter the UK including, for instance, free movement, exemptions from immigration control, and settlement, became based on the immigration control provisions of the Act. Prior to the 1981 Act, the statutory right of abode was defined in s.2 of the 1971 Act as depending on whether or not a person was "partrial". Five categories of the right of abode were set out: i) Citizen of the United Kingdom and Colonies (CUKC) by birth, adoption, naturalisation, or registration in the UK[33]; ii) CUKCs with similar connections to the UK through a parent or grandparent[34]; iii) CUKCs who had ordinarily been resident in the UK for five years[35]; iv) Commonwealth citizens with a parent born in the UK[36]; and v) Commonwealth women who had become partrial through marriage[37] .

The British Nationality Act 1981

2.9. The next major reform of nationality law was the British Nationality Act 1981 which took effect on 1 January 1983. It is worth noting that under the British Nationality Act 1948, all British nationals had an automatic right of abode, which that meant all of them were free from immigration control and could not be removed or deported, except for extradition, unless they were unable to prove their status. Later, the common law concept of right of abode appeared in a statutory form in the

[32] *East African Asians v The United Kingdom, 14 Dec 1973.*
[33] The 1971 Act, old s. 2(1) (a).
[34] The Immigration Act 1971, old s.2(1)(b).
[35] The 1971 Act, old s.2(1)(c).
[36] The 1971 Act, old s.2(1)(d).
[37] The 1971 Act, old s.2(2).

Immigration Act 1971.[38] The 1981 Act refined the former five nationality categories into three: i) those who automatically became British citizens via the 1981 Act coming into force on 01 January 1983[39], which included all former CUKCs who had the right of residence for five years; ii) Commonwealth citizens who immediately before commencement had the right of abode by having a parent who was born in the UK; and iii) female Commonwealth citizens who immediately before commencement had the right of abode. Commonwealth citizens born after the commencement of the 1981 Act would not acquire citizenship and therefore had the right of abode only by virtue of having a parent born in the UK[40]. Also, female Commonwealth citizens no longer had an automatic right of abode by virtue of marriage to a British man, and Section 6 of the 1981 Act required them to naturalise in order to become British citizens. Further provisions changing the right of abode of specified groups of people were introduced in 2002.[41] The Immigration Act 1971 brought further qualifications to the rights associated with British subject status. Citizenship of the UK and its colonies through birth, adoption, parents, grandparents, and by five years residence in the UK continued. These changes ended Commonwealth citizens' unqualified right to enter the UK, and the common badge of citizenship created by the 1948 Act lost much of its intrinsic value.

2.10. The British Nationality Act 1981 was enacted to consolidate and rationalise various complex categories of citizenship. The new scheme was based on the strength of connection within the United Kingdom. The British Nationality Act 1981 replaced citizenship of the United Kingdom and the Colonies with the following three categories of citizenship:

i. British citizenship: This category included former citizens of the UK and the Colonies who essentially had ancestral links with the UK.

ii. British Dependent Territories Citizenship. Prior to the British Nationality Act 1981 that the category of CUKC should be divided into two new categories and the British Dependent Territories citizenship is one of those two. This category was subsequently

[38] The Immigration Act 1971, s.1(1).
[39] The British Nationality Act 1981. s.11
[40] Old section 2(1) (d) of the Immigration Act 1971.
[41] Ian A Macdonald QC and Ronan Toal: *Macdonald Immigration Law and Practice*, ninth edition Volume 1, p.98-103.

renamed as British Overseas Territories Citizen (BOTC) in the British Overseas Territories Act 2002.[42] Section 3 of the Act confers automatic British citizenship and the right of abode in the UK on anyone who was a BOTC immediately before commencement. Thereafter, Section 6 of the 2002 Act was amended in line with the High Court's ruling in *Bancoult*[43] to include the residents of the Chagos Islands in the BOTC category

iii. British Overseas Citizenship. This category included citizens of the UK and the Colonies who did not qualify for the new British citizenship, in the absence of ancestral connections with the UK or with one of the British Dependent Territories. These were individuals whose citizenship had been derived from a connection with a former colony, and who had retained that citizenship following independence[44].

iv. Other categories of British subjects, for instance Commonwealth citizens and British Protected Persons, also continued to be recognised.

2.11. The Citizenship status of 3.2 million British Dependent Territories Citizens of Hong Kong was reviewed before the transfer of sovereignty of Hong Kong to China on 1 July 1997. This was one of the major legal developments in nationality law after the 1981 Act. The Hong Kong (British Nationality) Order 1986 provided that by virtue of their Hong Kong connections, British Dependent Territories Citizens would cease to be such citizens on 1 July 1997[45]. The same Order created a new category of citizenship known as British National (Overseas), or BNO. This was only open to those who had registered, not to all British Dependent Territories Citizens. Those who did not register, and who would otherwise have become stateless, became British Overseas Citizens[46]. However, it is no longer an option for those relying on their Hong Kong connections to acquire British Overseas Territories Citizens status by way of registration under the British Nationality Act 1981 (The BNA 1981)[47]. The BNA 1981 abolished automatic acquisition of citizenship by birth, and children born in the UK will only become British citizens if one of their parents is a British

[42] See sections 1 and 2 of the Act for name changes.
[43] *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2001] 2 WLR 1219.
[44] Lord Goldsmith's Review, p. 17.
[45] Hong Kong (British Nationality) Order 1986, SI 1986/948, art 3.
[46] SI 1986/948, art 4 & 6.
[47] Section 14 of the Nationality, Immigration and Asylum Act 2002.

citizen or was settled in the UK prior to the child's birth[48]. The Borders, Citizenship and Immigration Act 2009 inserted provisions specifically for members of the armed forces.[49] A member of the armed forces is defined in s.50 (1A) and (1B) (inserted in s. 49 (1) of the British, Citizenship and Immigration Act 2009). Children born out of wedlock were not British citizens, and had to trace entitlement through either parent[50]. The subsequent marriage of their parents could legitimise the child, but the child could only trace entitlement through his or her mother[51]. Illegitimacy is no longer a bar to the acquisition of British nationality through the father[52]. S. 9 of the 2002 Act did not cover children born out of wedlock before 1st July 2006. This was later addressed by s. 65 of the Immigration Act 2014, which inserted new Sections 4E to 4J into the BNA 1981[53].

2.12. Substantial changes to the law of naturalisation were included in the Borders, Citizenship and Immigration Act 2009. However, the Conservative party won the 2010 general election forming a collation with the Liberal Democrats, and before the changes had come into effect the new Home Secretary announced on 5 November 2010 that those changes would not be brought into force and would be repealed. Historically, the Secretary of State required a certificate of good conduct to be signed by a trustworthy person in order to issue a letter of denization[54], but this has always been at the Home Secretary's discretion. The good character requirement previously only existed for naturalisation as a British citizen. It was subsequently introduced into Section 58 of the Immigration, Asylum and Nationality Act 2006 as a requirement for specific routes to registration as a British citizen. The British Nationality Act 1981 does not define "Good Character", and there is no statutory guidance as to how this requirement should be interpreted and applied. However, the Nationality Instructions[55] provide detailed guidance on the

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[48] British Nationality Act; s.1.
[49] Borders, Immigration Citizenship Act 2009, s.42 (1), (2) inserting s. 1 (1A) into BNA 1981 from 13 Jan 2010 by SI 2009/2731, art 4 (a).
[50] The BNA 1981, s.47.
[51] The BNA 1981, s. 59(9), before amendment by Nationality, Immigration Asylum Act 2002, s. 9.
[52] Nationality, Immigration and Asylum Act 2002, s.9, in force 1st July 2006 by SI 2006/1498, art 2 and amended by the Human Fertilisation and Embryology Act 2008.
[53] In force from 6th April 2015, art 4 (b), The Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendments) Order 2015.
[54] Bevan p.124.
[55] Vol 1, Chapter 18, Annex D.

Good Character requirement. This guidance was amended on 12 December 2012. From 1 October 2012, certain immigration and nationality decisions were exempted from s.4 of the Rehabilitation of Offenders Act 1974.[56] It implies that the caseworkers will not refer to the 1974 Act in assessing applications made after 12 December 2012, which are being assessed under the Nationality guidance. Applicants who had been in breach of immigration laws within the ten years prior to application were to be refused naturalisation on good character grounds.

Summary

2.13. The earliest distinction between the British subject and alien was between those who owed allegiance to the Crown and those who did not. This was reaffirmed in the British Nationality and Status of Aliens Act 1914. The intermediate status of 'denizens' remained in use from the mid-14th century to the late 19th century for those who were not British subjects. Natural born persons within the Kingdom and Dominions and children born to them were British subjects. The reorganisation of British nationality law in 1948 provided a common citizenship for all Commonwealth citizens who continued to have the right of abode in the UK, as a continuation of the inclusive concept of British subjecthood. Immigration control was tightened on aliens during the first and second World Wars, but Commonwealth citizens' immigration remained unhindered until the changing geopolitical situation within the former Empire in the 1960s changed the narrative and Commonwealth citizens became subject to immigration control, which has been relatively strict ever since. Further legislation in the 1970s and 1980s has narrowed down the broad concept of subjecthood to be replaced with citizenship, broadly stemming from ancestral links and naturalisation. The primary and secondary legislation enacted over the past three decades has been progressively exclusive, and has significantly curtailed the right to British citizenship. Restrictive approaches in response to varying political scenarios have been consistent.

[56] LASPO 2012, s.140 inserted s.56A in the UK Borders Act 2007.

Evolution of Immigration Control in the UK

From medieval times to the nineteenth century

2.14. The development of what we now call immigration control can be traced from medieval times. After the Norman invasion of 1066, England did not face the possibility of foreign invasion for nearly 900 years, and its geographical location assisted in maintaining effective immigration control. The Carta Mercatoria of 1303 was a declaration of faith confirming the economic usefulness of aliens. However, history reveals the recurring theme of native discomfort towards immigrants, for varying reasons. Between the 12th and the 15th centuries the native populace resented the growing presence of aliens for religious, racial, and economic reasons. The immigration of skilled workers to the Kingdom was encouraged for its economic benefit, and incentives like trading and residence rights were offered to promote a sense of permanence among aliens, but hosting provisions were reaffirmed in the 15th century to address the concerns of the local population. In the 15th century, various measures were taken to curb alien immigration. These measures, which included hosting provisions, the requirement to work or trade under the supervision of natives, and various other protectionist measures restricting aliens' work and trade activities, were taken for economic reasons.[57] In the 16th century, prerogative powers were frequently used to issue denizen status to aliens with the objective of retaining economically active aliens and encouraging more participation. Religious migration from Europe was a new phenomenon in the 16th century, and prerogative powers were generously used in the settlement of refugees. In the 17th and 18th centuries, there was a mixed response to alien immigration. However, as native emigration to the colonies was on the rise, England was perceived to be underpopulated and immigration was officially encouraged. Despite this, covert measures known as trading privileges slowed inward immigration and Parliament reviewed the law in 1708, making the acquisition of citizenship only subject to Oath and Sacrament. That law was repealed in 1711. In the 18th century, conflict with France shifted the focus from naturalisation to immigration control.

[57] Bevan, Vaughan, *The Development of British Immigration law* p.52.

This time, the change in narrative was motivated by national security considerations, unlike the economic and racial motives of the past.

2.15. The Aliens Act 1793[58] provided a substantial mechanism for immigration control. The Act provided for aliens to be recorded upon arrival and to register with the local justice of the peace, and some of these provisions were retained in later statutes. Courts were empowered to impose indefinite bans on those returning in breach of expulsion orders unless these were revoked by the court on appeal[59]. This can be said to be similar to the modern deportation order. The 1793 Act did not obstruct the flow of refugees, due to an increase caused by the French revolution followed by Napoleon coming to power in France. In anticipation of potential abuse, Parliament revised the Act in 1798. Those amendments were applied retrospectively to those who had entered the Kingdom before 1792. Aliens were required to obtain Royal Licence under the Aliens Act 1798, a precursor of today's entry clearance requirements. Most present-day legislation is built on the skeleton of the 1798 Act[60]. Relations with France later improved, and the Aliens Act 1802[61] revised and eased the immigration control on aliens. A right of appeal against an expulsion order was provided before the Privy Council on very narrow grounds, which could be only invoked after two months of detention. In 1803, the conflict with France took another turn and harsher measures on the 1798 model were implemented. A limited right of appeal was not included in the emergency legislation. This process involving the reversal and revision of various legislative measures continued until 1905. A limited system of immigration control applying to aliens had taken shape by the early 19th century. However, some measures conceived in emergency legislation during the Napoleonic wars featured in later legislation.

[58] 33 Geo. III c.4.
[59] (1753) Parliamentary History, XIV, col. 1381.
[60] Aliens Act 1798; 33 Geo. III, c.50. Also see Bevan at pp. 60-61.
[61] 42 Geo. III, c. 92.

Immigration control from the 1900 to the 1950s

2.16. An unhindered flow of refugees continued until the commencement of the Aliens Act 1905. This Act has been described as an attempt to accommodate simultaneous but opposing impulses of humanitarianism and exclusion.[62] The Act was the first among modern immigration laws, was updated during World War I (1914-1918), and eventually provided the substance of the Aliens Order 1953. The Aliens Order 1953 remained in force until it was repealed by the Immigration Act 1971. A combination of geo-political factors both within and outwith the Empire's Dominions led the British government to impose stricter immigration control[63]. The proud and sacrosanct principle of asylum had lost popularity with the public because of Jewish immigration to Britain between 1880 to 1905.[64] The aliens' behaviour was identified as a concern, rather than their numbers[65]. The Act was then enacted by the Conservative government, although it lost the general election of 1906. The new Liberal government quickly realised the implications of the rigid application of the 1905 Act. As is mentioned below, aliens had only twenty four hours to appeal against a decision. They had no right of representation, and the press was not allowed access either. The new government did not repeal the Act, but sought considerable concessions by making representations to the Immigration Board, urging it to consider giving the benefit of the doubt to those alleging persecution, and similar instructions were issued to immigration officers[66]. However, ambivalence in immigration law and policy continued to persist. Immigrants were given a right of appeal before the Immigration Board, and the right of legal representation at the appellants' cost was conceded later, but an onward right of appeal to the high court was denied on the grounds of having little practical utility because those who could afford to litigate in the high court could simply avoid immigration control by traveling in first or second class. In practice, the apparent strictness of the Act was diluted by the exceptions provided within the Act; for instance, immigrants with sufficient means to travel in first or second class were not

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[62] Helena Wray: *The Aliens Act 1905 and the immigration dilemma.*
[63] Bevan p.67.
[64] Ian Macdonald: *Rights of Settlement and prerogative in the UK- a historical perspective.*
[65] Royal Commission's Report 1903, para 36, 88.
[66] Bevan p.72.

subject to immigration control. Contemporary evidence points to the abuse of those concessions. Arguably, the Act remained a useful piece of legislation until 1914. The series of legislative amendments and orders in these decades was a direct result of the unusual geopolitical situation before and after the World Wars.

The 1960s to the 1980s

2.17. There was significant growth in Commonwealth Immigration in the late 1940s. Immigration was a major issue at the Conservative Party Conference in Oct 1961, with many resolutions calling for a restriction of immigration put forward. That concern led the government to promote the Bill which became the Commonwealth Immigration Act 1962. The Act was intended to ameliorate the impact of immigration on employment, housing, education, and health services in the UK. Economic and social impulses coupled with adverse public opinion against an open door immigration policy were the primary motives behind the 1962 Act. The key difference between the Acts of 1905 and 1962 was that the former targeted aliens while the latter placed Commonwealth citizens, who were not subject to control under prerogative powers, under immigration control.[67] The Act was conceived as a response to a campaign against black Commonwealth immigration. Citizens of the United Kingdom and Colonies (CUKC) were exempted from control, except those who were born in Crown Colonies and had obtained their passport there. CUKCs born in independent Commonwealth countries who had retained that status after independence were exempted from control provided they had a UK passport.[68] Large portions of the Asian community living in Kenya, Uganda, and Tanzania had retained CUKC status rather than acquiring the local citizenship after independence, and under the 1962 Act all of these citizens were entitled to come to Britain as of right, and many did so because of the policy choices made by the newly independent East African nations. Unrest in East Africa triggered a mass migration of CUKCs to Britain, and the Commonwealth Immigration Act 1968 sought to bring CUKCs who were not of UK ancestral origin under immigration control. The Act therefore divided CUKCs into two separate categories, as UK passport holders without

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[67] *Odelola v SSHD* [2009] UKHL, 25.

[68] Ian A Macdonald QC and Ronan Toal: *Macdonald Immigration Law and Practice, ninth edition Volume 1, p.10.*

ancestral links were made subject to immigration control. Ancestral links to the UK became immensely important, and the objective was to exclude East African Asians from the meaningful use of CUKC citizen status. Later, the European Commission declared the law to be contrary to Article 3 of the ECHR.[69] By that time, the UK had granted individuals the right to petition the European Commission on Human Rights in Strasbourg[70]. East African Asians, excluded from the country of their nationality, began the trend of using the ECHR to seek remedies for immigration grievances. The Commonwealth Immigrants Act 1962 and 1968 did not provide appeal rights, but the Committee on Immigration Appeals[71] recommended appeal rights and their report was presented to the Parliament in August 1967. The Committee report recognised the ideals of the rule of law and the due process of law[72] and as a result of the Committee's report, the Immigration Appeals Act 1969 was enacted; however, it provided appeal rights only to Commonwealth citizens. Soon afterwards, the Immigration Act 1971 extended appeal rights to aliens and provided a two-tier appeal system which remained in place until 4 April 2005, when the tiers were amalgamated into one. The obvious dual purposes of establishing an appellate system were to provide a domestic remedy against immigration decisions, and to reduce recourse to Strasbourg. The Tribunals, Courts and Enforcement Act 2007 has re-established a two-tier appellate system.

2.18. The formation of the European Economic Community (EEC) granting free movement rights to EEC citizens was the next stimulus for change in immigration law. The Immigration Act 1971 was followed by the Treaty of Rome, which came into force on 1 January 1973, the former providing rights of free movement to the citizens of EEC member States.[73] The Immigration Act 1971, therefore, had to take account of membership of the EEC, and in particular the rights of freedom of movement conferred by the Treaty of Rome. In accommodating those rights of freedom of movement, the Act placed a group of persons who were technically aliens (the nationals of Member States) in a better position in immigration law than

[69] *East African Asians v United Kingdom* (1973) 3EHRR 76, pars 76, 83-84.
[70] *Singh (Harbajan) v United Kingdom* (Application 2992/66 (1967).
[71] Chaired by Sir Wilson Roy QC, Cmnd 3387.
[72] See comments of then Home Secretary James Callaghan HC Deb Vol 776, Col 490 (January 22, 1969).
[73] France, Germany, Belgium, Netherlands, Luxembourg, Ireland and Italy were EEC members.

many Commonwealth citizens. Subsequently, the Immigration Act 1971 was amended by the 1981 Act to bring its definition of who had the right of abode into line with the new nationality law. The 1971 Act now essentially confirms the policy of the British Nationality Act 1981 on this issue. Decolonisation, economic slowdown resulting in a reduced need for foreign workers, and negative public opinion stemming from cultural concerns were the primary motives behind the policy shift.

2.19. The 1971 Act did not itself set out a policy for immigration control beyond redefining the right of abode. However, it empowered the Secretary of State for the Home Office to make Immigration Rules by setting out detailed requirements for entry and residence. It is these Immigration Rules which contain most of the substantive policy of UK immigration control, including detailed instructions on how Article 8 of the ECHR affects immigration control decisions, which is the subject of this thesis.

2.20. Section 1(5) of the 1971 Act provided that the Rules should be framed so that Commonwealth Citizens settled in the UK at the coming into force of the Act and their wives and children would not, by virtue of anything in the rules, be any less free to come into and go from the UK than if the Act had not been passed. This provision was repealed in 1988. Schedule 1 of the Act maintained the right of Commonwealth nationals to register as UK citizens after five years, rather than seeking discretionary naturalisation. This provision was removed by the Nationality Act 1981. The gradual tightening of the law on the immigration of Commonwealth citizens was obvious, and this was a policy reflecting a shift in response to emerging challenges at home and abroad, which was also a continuation of the process begun in 1948. The role of the Commonwealth has gradually been eroded by persistent alterations to the rules and legislation, and public opinion during the last few decades has generally been in favour of stricter immigration control[74]. Successive changes in the rules towards more restrictive immigration control during the 1980s and 1990s included virginity tests for brides coming from the Indian sub-continent

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[74]Mahmud Quayum and Mick Chatwin: Demise of the Commonwealth, Journal of Immigration Asylum and Nationality Law 2009.

and the primary purpose rule, which restricted the entry of husbands of UK-resident women.

2.21. From the early 1990s, the attention of policy-makers became focussed on people seeking entry as refugees. The UK and most other European countries had signed up to the UN Refugee Convention 1951 and its 1967 Protocol, but following an increase in refugee applications, measures aimed at making it more difficult to claim refugee status were introduced. These included sanctions against transport carriers and the imposition of visa controls on Commonwealth citizens, as part of a pan-European policy of keeping asylum seekers at bay. Developments in immigration law in the 1980s and 1990s reflected the battle between the exclusionary imperatives of European immigration policy in relation to the poor countries of the world on the one hand, and the humanitarian imperatives of international human rights law on the other. Strict visa controls indirectly triggered the trade of false passports and documents, and human trafficking. Most of the immigration legislation enacted during the 1990s addressed these issues[75].

1999 onwards: the Human Rights Act 1998

2.22. At this point, it is useful to describe a legal development of central importance to this thesis. This paragraph and the next below provide a brief historical description of the ECHR and its importance in domestic law, both before and after the Human Rights Act 1998. The European Convention of Human Rights (ECHR) is an international instrument of huge significance. Important lessons were learned from wartime atrocities, and there was a collective political will arising from the devastation of the Second World War to promote and protect basic human rights. The UK and continental Europe shared this objective. The Convention was produced by The Council of Europe, an inter-governmental body formed in 1949 by ten Member States. The Charter of The Council of Europe required Member States to subscribe to the rule of law and to afford human rights and fundamental

[75] Ian A Macdonald QC and Ronan Toal*: Macdonald Immigration Law and Practice*, ninth edition Volume 1, p.13.

freedoms to all within their jurisdiction.[76] The Convention's principal objectives were to maintain and further realise human rights and fundamental freedoms, and to ensure effective recognition and observance of the rights set out in the Universal Declaration of Human Rights 1948. All signatory states have been obliged to recognise the right of individual petition and to accept the compulsory jurisdiction of the court since 1 November 1998.[77] Member States are bound by Article 46 (1) to abide by the final judgement of the court in any case to which they are parties.

2.23. The European Union also includes protection of human rights amongst its core objectives. Article 6(2) of the Treaty on European Union, as consolidated by the Treaty of Lisbon[78], requires the Union to respect fundamental rights as guaranteed by the ECHR within their constitutional restraints. This means that although the EU itself was not party to the ECHR, its standards became part of EU law. Therefore, all EU law on immigration and asylum under Articles 61-64 of the revised Treaty of the European Communities, and any national law based on it, has to be compatible with the ECHR.

2.24. The UK accepted the compulsory jurisdiction of the European Court of Human Rights (ECtHR) and the right of individuals to petition the court in 1966. Since then, many applications have been made alleging violations by the UK, including in the context of immigration control, and a substantial number of findings of violations of the Convention rights have been issued by the ECtHR. However, as the UK has taken a dualist approach to international law, prior to 1998 the ECHR's provisions were never directly enforceable in the UK courts. The purpose of enacting the Human Rights Act 1998 was to make these rights more directly accessible to the British people by making them enforceable in the domestic courts.

2.25. The 1998 Act[79] does this in several ways. Firstly, it specifies the rights which are protected under the Act. These are the substantive ECHR rights as set out in Articles 2-12 and 14, Article 1-3 of Protocol 1, and Article 1 of Protocol 13. Secondly, it

[76] Statute of the Council of Europe 1949 (Cmnd 7778).
[77] ECHR Protocol 11 came into force on 1 November 1998.
[78] The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community was signed at Lisbon on 13 Dec 2007, OJ 2007/C 306/01.
[79] HRA 1998 section 4.

imposes an interpretative obligation on the courts[80], to interpret all legislation compatibly with the Convention insofar as it is possible to do so. Thirdly, where it is not possible to compatibly interpret a provision of primary legislation, any of the superior courts may make a declaration of incompatibility. However, a declaration of incompatibility does not affect the validity of the primary legislation or oblige Parliament to remedy it, because Parliament is not a public authority[81] and public authorities are not required to act compatibly with the Convention if primary legislation prevents them from doing so[82]. Fourthly, it imposes an obligation on public authorities, including courts, to act compatibly with Convention rights[83].

2.26. The ECHR has a substantial impact on immigration control. The Secretary of State is a public authority, and therefore has an obligation to act compatibly with Convention rights, which means that immigration control decisions must be compatible with the Convention rights even where no specific reference is made to them in the relevant Immigration Rules[84]. However, following the changes made by HC 194 and the statutory changes included in the Immigration Act 2014, there are specific provisions on how Article 8 of the convention should be taken into account in decision-making. Subsequent changes made to the Immigration Rules in compliance with recent Supreme Court judgements have made them more compatible with Article 8 of the Convention[85]. The public interest considerations inserted by Part 5A of the 2014 Act have been subjected to judicial interpretations, and Section 117B (6) appears to be a child-centred exception. The analysis of these statutory provisions is within the scope of this thesis, and is presented in subsequent chapters. The Human Rights Act has arguably been the most important legislative development in the UK's immigration law of the last six decades, with a major impact on immigration control decision-making. That impact will not be considered in detail in this part of the thesis, but will be addressed below.

[80] HRA 1998 section 3.
[81] HRA 1998 section 6 (3).
[82] Merchant Shipping Act 1988, section 14; Merchant Shipping (Regulation of Fishing Vessels) Regulation 1988 (S.I.1988 No.1926).
[83] HRA 1998 section 6.
[84] *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719.
[85] *MM (Lebanon) v SSHD* [2017] UKSC 10.

1999 onwards: further immigration control measures

2.27. This section of the chapter describes developments in UK immigration control over the last two decades. There have been rapid statutory developments in relation to immigration and asylum since 1998, with a total of fourteen Acts of Parliament enacted from 1999 to 2016[86]. This flurry of legislation has transformed family law and family immigration law. Significant changes have been made in four main areas. These developments have gradually scored out the fifty year legacy of appeal rights. Appeal rights now only extend to asylum and human rights grounds, and these are subject to complex certification provisions. A brief description of these developments will assist in understanding the scale and motives of the legislative change. These changes primarily relate to the following areas:

- Amendments to substantive rules related to initial decision making, e.g., the automatic deportation of foreign criminals, sham marriages etc.;
- Changes to the initial decision making process;
- Changes affecting individual remedies, certifications of claims as unfunded; administrative review substituting appeal rights; and the removal of appeal rights;
- Broadening enforcement beyond the Home Office - sanctions for carriers and employers; changes affecting access to public sector services; regulating landlords; and the retention of driving licences.

Support mechanism for asylum claimants and other measures

2.28. The preamble to the Immigration and Asylum Act 1999 broadly explains the objectives of the Act, but its primary objectives were to create a support mechanism for asylum seekers, to regulate marriages involving foreign spouses, and to introduce further measures in relation to the entry and removal of illegal entrants

[86] Immigration Asylum Act 1999; Nationality, Immigration and Asylum Act 2002; Civil Partnership Act 2004 - effective from Dec 2005; Asylum and Immigration (Treatment of Claimants Act 2004; Immigration, Asylum and Nationality Act 2006; UK Borders Act 2007; Tribunals, Courts and Enforcement Act 2007; Criminal Justice and Immigration Act 2008; Borders, Citizenship and Immigration Act 2009; the Identity Documents Act 2010; European Union Act 2011; Crime and Courts Act 2013; Immigration Act 2014 and the Immigration Act 2016.

and overstayers. Section 4 of the Act defines the categories of persons eligible for accommodation and support. This is known as the National Asylum Support Service (NASS). The Act also introduced various measures for obtaining passenger and criminal intelligence information and for such information to be used in the effective monitoring of immigration control and the decision making process for entry clearance applications. The Act introduced the significant but controversial change of the summary removal of overstayers, those living in breach of visa conditions etc., and illegal entrants. This change treated overstayers and illegal entrants in the same manner[87]. Section 9 of the Act provided a regularisation period for overstayers stretching from 1 February to 1 October 2000.[88] These provisions were later amended by the Nationality, Immigration and Asylum Act 2002[89]. The Act inserted further offences into the Immigration Act 1971, including the offence of travelling with false documents which was created by Section 31. Section 31 was considered in *Adimi's* judgement, which held that the prosecution of asylum seekers for travelling with false documents is a breach of Article 31 of the 1951 Refugee Convention, which provides a statutory defence. Section 31 prescribes that the defence is available in more limited circumstances than those required by the 1951 Convention.[90] Registrars were required to report a suspected sham marriage to the Home Office, although this was later amended by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and the Immigration Act 2014.[91] These changes are discussed below.

2.29. The Race Relations (Amendments) Act 2000 outlawed race discrimination by public authorities in relation to functions not previously covered under the Race Relations Act 1976[92]. It extends to all public authorities undertaking immigration and nationality work. However, an exception under s.19D (3) allows discrimination on the grounds of nationality or ethnic or national origin, and this can be exercised both by a minister acting in person and by an immigration officer with ministerial authorisation. Later, the House of Lords rejected the justification for discrimination

[87] Immigration and Asylum Act 1999, s.10 and Sch. 14, para 44.
[88] Immigration (Regularisation Period for Overstayers) Regulation 2000, SI 2000/265
[89] Sections 114(1), (2), 161, Sch. 9.
[90] *R v Uxbridge Magistrates' Court, ex p Adimi* [1999] 4 All ER 520.
[91] Section 24 of the 1999 Act.
[92] S. 19B of the Race Relations Act 1976.

against the Roma people by denying them access to aircraft coming to the UK, on the basis that direct discrimination, unlike indirect discrimination, can never be justified.[93]

Changes related to appeal rights and citizenship

2.30. The Nationality, Immigration and Asylum Act 2002 introduced further changes. The 2002 Act introduced a new power, with appeal rights, to deprive British citizens of their citizenship for doing anything deemed seriously prejudicial to the vital interests of Britain or an overseas territory.[94] The 2002 Act also provides a right to register as British citizens to British Overseas Citizens, who lost their special voucher rights in 2002, if they have no other citizenship or nationality.[95] Furthermore, s. 11 of the 2002 Act defines "in breach of the immigration law" for the purpose of nationality. This provision does not apply to illegal entrants and overstayers granted temporary admission while their claims are pending. The significance of this provision is that someone should be penalised at the time of naturalisation for the time spent in temporary admission. Furthermore, Parts 2 and 3 of the 2002 Act make provisions for asylum support. Part 3 amends the 1999 Act by giving the Secretary of State more powers in assessing and granting asylum support. It provides exclusion from asylum support of those with refugee status in any other country, EEA nationals and dependents, failed asylum seekers who did not cooperate with the removal process, and persons unlawfully in the UK.[96] Part 3 also makes provision for assistance to voluntary leavers which enables the Secretary of State to engage in international efforts to reduce migration and to ensure safer repatriation[97].

[93] *European Roma Rights Centre v Immigration Officer at Prague Airport* [2004] UKHL 55.
[94] Sections 4 of the Nationality, Immigration and Asylum Act 2002, amending and inserting sections 40 and 40A in the Nationality Act 1981.
[95] Section 12 of the 2002 Act inserted s.4B in the British Nationality Act 1981.
[96] S.54, Sch. 3 of the 2002 Act.
[97] Section 59 of the 2002 Act.

2.31. The 2002 Act also introduced a new system of immigration appeals[98]. Appeal provisions appear in Part 5 of the 2002 Act. In the new appeal system, a right of appeal was only available against 'immigration decisions' as defined in s.82 on grounds specified in s.84 of the Act. Further exceptions to appeal rights were inserted in the Act in relation to who can use in country right of appeal, etc[99]. The Act also specifies the matters to be considered by the tribunal in determining the appeal and whether an appeal is to be suspensive of removal or not[100]. The appeal suspensive of removal means that the appellant will not be removed from the UK before exhausting all their appeal rights. In a non-suspensive appeal, the appellant appeals against the decision after leaving the UK, and that can be as a consequence of certification as will be discussed later in this chapter. The Act also defines the powers of the Immigration Tribunal[101]. The Act introduced a one-stop appeal process requiring all appellants and applicants to state all the grounds on which they seek to rely, and it precludes appeals where there has been an earlier opportunity to raise the grounds later relied upon[102]. The Act also provides onward appeal rights from the tribunal, appeals to the High Court, the Court of Appeal, and the Court of Session etc., depending on the composition of the tribunal[103]. The Act also defines when an appeal is pending and finally determined. This provision is important to understand the timeline of when an appeal right suspensive of removal ends, after which time the process of the appellant's removal can begin[104].

2.32. The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 introduced radical changes to the appeal regime which have been discussed with reference to the 2002 Act above. The 2004 Act created a number of new criminal offences; for instance, it is a criminal offence even for someone fleeing from persecution not to produce a passport or other form of valid identity document upon arrival without a reasonable excuse. The Act also created a serious new offence of human trafficking for exploitation, and immigration officers were given a range of new policing

[98] S.81 of the 2002 Act was substituted by the s.26(1) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.
[99] S.88A inserted by the 2004 Act, s.29 (1).
[100] Ss 85 and 92 of the 2002 Act.
[101] Ss 86 and 87 as amended by Sch 2, para 19 of the 2004 Act.
[102] Ss 96 and 120 of the 2002 Act.
[103] See s.103A-E of the 2002 Act.
[104] S.104 of the 2002 Act.

powers[105]. The Act has created a statutory presumption by defining[106] certain kinds of behaviour as damaging an asylum claimant's credibility. The provision is broad is scope, and is frequently relied upon by the Home Office and tribunals.

2.33. The Civil Partnership Act 2004 recognised civil partnership as a new legal relationship which can be registered by the two people of the same sex. Thus, it provides legal recognition of their relationship. The Immigration Rules have been amended[107] to give civil partners rights akin to those of spouses for the purposes of immigration control. Further legislation was introduced enabling same-sex couples to marry and to convert their civil partnerships into marriage[108].

2.34. The Immigration, Asylum and Nationality Act 2006 brought further changes to the appeal system, but as these were later repealed by the Immigration Act 2014 there is no point in explaining those historic changes in detail. A new scheme of sanctioning employers is significant, and was intended to assist in controlling illegal working and reducing the pull factor for immigrants. The new statutory regime in relation to employer's sanctions has been in place since 29 February 2008[109], and the relevant provisions of the Asylum and Immigration Act 1996 were repealed[110]. There are two main aspects of these sanctions. The first relates to a civil penalty which the Home Office can impose, and the details are contained in the order[111]. Further details of the employer's sanction will be discussed below. Secondly, the Act creates a new criminal offence of knowingly employing someone who does not have the right to work due to their immigration status.

Policing powers and other restrictive measures

[105] S.1 of the 2004 Act amending s.25 of the Immigration Act 1971.
[106] S.8 of the 2004 Act.
[107] HC 582 of the Immigration Rules.
[108] The Marriage (Same Sex Couples) Act 2013, applicable in England and Wales and the Marriage and Civil Partnership (Scotland) Act 2014.
[109] Ss.15-26 of the Immigration, Asylum and Nationality Act 2006.
[110] Ss. 8 and 8A of the 1996 Act were repealed by s.26 and Sch. 3 of the 2006 Act.
[111] Immigration (Restrictions on Employment) Order 2007, SI 2007/3290 as amended by the Immigration (Restrictions on Employment) Codes of Practice and Amendment) Order 2014, SI 2014/1183.

2.35. The UK Borders Act 2007 provided further policing powers to the immigration officers at ports to detain suspected criminals for three hours until the arrival of the Police[112]. The Act makes it mandatory to have a Biometric Immigration Document[113]; the purpose of this document is, in certain circumstances, to check the immigration status of a person. The Act also lists the consequences of non-compliance with the compulsory registration. The Act introduced a further condition which can be attached to the granting of leave to remain and also in relation to reporting and residence. The Act extended eligibility for asylum support until the conclusion of the appeal process[114] and provides further powers of arrest to immigration officers without warrant, where they suspect an offence of fraud related to asylum support[115]. The provisions related to the automatic deportation of foreign criminals attracted significant media attention at the time. Immigration Officers' powers in relation to detention were enhanced, and judicial review of refusals under paragraph 353 of the Immigration Rules, refusing to accept fresh asylum and human rights claims, were transferred to the Upper Tribunal[116]. The Act sets out the detailed conditions and procedures under which a foreign national prisoner will be automatically deported[117]. These provisions will be considered later in this thesis, along with paragraph 398-399 of the Immigration Rules and ss. 117A-117D of the 2002 Act.

Further procedural and substantive changes to immigration appeals

2.36. Part 3 of The Crime and Courts Act 2013 made procedural and substantive changes to immigration appeals. It enabled simultaneous service in one document of a decision to refuse to vary leave with a decision to remove, with the result that both appeals can be heard at the same time. This was done in response to the Upper Tribunal's findings in *Adamally & Jaferi v SSHD*[118]. The Act abolished the full right of appeal for family visitors against entry clearance refusals, and their grounds of

[112] Ss. 1-4 of the 2007 Act.
[113] Ss. 5-6 of the 2007 Act.
[114] S.17 of the 2007 Act.
[115] S.18 of the 2007 Act.
[116] (Commencement No 2) Order 2011, SI 2011/1741, brought into force s.53 from 08 Aug 2011.
[117] Ss 32-39 of the 2007 Act.
[118] [2012] UKUT 00414 (IAC).

appeal were restricted to human rights and race discrimination only. The Act further restricted the rights of appeal of persons whose presence in the UK was certified by the Secretary of State, acting in person, as no longer conducive to the public good, and of persons subject to a deportation order made on national security grounds [119].

Creation of a hostile environment for migrants

2.37. The Immigration Act 2014 was enacted to prevent the abuse of the immigration system, and created a hostile environment for immigrants who disregard the law. Administrative review, which is a review by the Home Office or an entry clearance officer following the initial refusal of an application - and this applies to leave to remain and entry clearance applications excluding asylum and human rights claims - was extended to more categories of the points-based system migrants, who have no right of appeal against entry clearance refusals. Rights of appeal against refusals of leave to remain or variations of leave were ended in Oct 2014 unless the person in question raised asylum or human rights claims in their application. The Immigration Act 2014 is the most important legislation since 1971, as it has a sprawling reach and has brought substantive changes to Immigration Law and practice. The Act is divided into six parts, and has created new enforcement powers and restricted access to bail applications. The applicant cannot afford an oral hearing within 28 days after the refusal of an earlier bail application, and the Secretary of State's consent is required if the removal is set within 14 days from the date of bail hearing. The Act has severely restricted access to residential tenancies for those without immigration status, and includes provisions to penalise both landlords and tenants. It has curbed access to health services, bank accounts, and driving licences for those who have to prove a right to remain. Other powers include the investigation of suspicious marriages and the deprivation of nationality, which applies only to naturalised British Citizens, on the conducive to public good ground. The Immigration Act 2016 builds on the Immigration Act 2014. The Act received Royal Assent on 12 May 2016, and amends the Immigration Act 2014, making further provisions for residential tenancies and creating new criminal offences

[119] Crime and Courts Act 2013, ss. 53-54.

which landlords and agents may commit. The Act makes further provisions in relation to eviction notices, bail conditions pending deportations, illegal working, and in relation to unaccompanied minors. The Act[120] has preserved s. 55 of the 2009 Act which imposed a duty on immigration officers in relation to the wellbeing of children. Its provisions relating to marriage registration involving foreign spouses, administrative removal, deportation, and the certification of claims as clearly unfounded and administrative review etc. will be discussed later in this chapter.

Marriage registration and Article 12 of the ECHR

2.38. In the last two decades, the UK government has introduced various amendments to the primary legislation and Immigration Rules to prevent alleged abuse of the family migration route by those who attempt to enter into sham marriages and civil partnerships to gain an immigration advantage. The government's stance is that sham marriages and civil partnerships pose a significant risk to the UK's immigration control.[121] In a report published in 2013, the Home Office estimated that around 4,000 to 10,000 applications a year were being made under the Immigration Rules and EEA Regulations, based on reports made under Sections 24 and 24A of the Immigration and Asylum Act 1999 and on estimates of senior case workers and the method of estimation described at page 44 of the report[122]. The figure does not include Home Office decisions withdrawn during the appeal process and decisions reversed on successful appeals. Given the methods used to arrive at the estimate, the figures given in the report should be viewed with extreme caution.

Certificate of approval scheme

2.39. The Certificate of Approval Scheme was established by s. 9 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Unless they had been given entry clearance expressly for the purpose of enabling them to marry in the United

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120 The Immigration Act 2016, s.90.

121 See Explanatory Notes: Immigration Act 2014 Chapter 22, at p.6.

122 Sham Marriages and Civil Partnerships: Background information, published November 2013, p.5 together with p.44 of the report. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/256257/Sham_Marriage_and_Civil_Partnerships.pdf; last accessed on 26 April 2020.

Kingdom, or were already "settled" in the UK, everyone subject to immigration control had to have the written permission of the Secretary of State before they could marry. Applications had to be made in writing, and the applicant had to pay a fee of £295. The House of Lords found the scheme to be in violation of Article 12 of the ECHR on the basis that that none of the conditions had any relevance to the genuineness of a proposed marriage, which is the only relevant criterion for deciding whether permission should be given be given to an applicant who is qualified under national law to enter into a valid marriage[123].

Further measures restricting the registration of marriage

2.40. The measures introduced by the 2014 Act are a mirror image of the views expressed in a November 2013 report. The government had consulted on the family migration route in 2011, and the objective of that consultation was to further reform the family migration route and to tackle sham marriages. The changes introduced in appendix FM of the Immigration Rules on 09 July 2012 deal with the issue of genuine and subsisting partnership and marriage. Part 4 and Schedules 4,5, and 6 of the Immigration Act 2014 introduced a broad range of reporting and investigation powers in relation to suspicious marriages where one party to the marriage could potentially gain an immigration advantage. Both parties to a marriage in which at least one party is a non-EEA national are required to give notice of their intention to marry in person at a designated Registry Office. Parties to the marriage are required to produce a specified form of identity document, valid passport, or national identity card to establish their claimed nationality. In practice, a couple, for instance with children or proof of prolonged cohabitation, may easily establish the existence of a genuine and subsisting relationship, but one party to the marriage may not have a specified form of identity document due to being an illegal entrant or overstayer. The notice of intention to marry is not valid until both parties to the marriage provide a valid form of identity document. The registrar has been placed

[123] *R (Baiai & others) v SSHD* [2008] UKHL 53.

under a continuing duty to report suspected sham marriages to the Home Office either before or after the receipt of a valid notice of intention to marry[124].

2.41. The 2014 Act increased the notice period from 15 to 28 days, and the Home Office has 28 days to decide whether they intend to investigate a marriage before registration or not. If the Home Office decides to investigate then the superintendent registrar will be notified of that intention, and the marriage will be placed on hold for 70 days. The Home Office within the extended notice period of 70 days can conduct home visits and interview the parties involved. If the Home Office considers the marriage to be a sham one, then the option of taking enforcement action can be considered. The difference between the Certificate of Approval Scheme and the new legal regime under the 2014 Act is that the Home Office cannot stop a marriage indefinitely, except where the parties to the marriage do not comply with the investigation requirements. The Home Office cannot place a marriage registration on hold for more than 70 days. In practice, the Home Office, in some cases after interviewing or conducting home visits, intimates that the registration may go ahead and reserves its findings on the issue of sham marriage to be included in a subsequent immigration decision. In the recent past, the Supreme Court has opined on the issue of the burden of proof in this matter, and ruled that it is for the Secretary of State to prove that a marriage is a sham or one of convenience[125]. Furthermore, the Independent Chief Inspector of Borders and Immigration has criticised the handling of marriage interviews by the Home Office in a report entitled "The Implementation of the 2014 'hostile environment provision for tackling sham marriages".[126]

ID requirements for a valid application

[124] Sch 4, para 8, of the 2014 Act, inserting a new section 28H into the Marriage Act 1949 and para 24 inserting a new section 12A into the Civil Partnership Act 2004, Also see ss 24, 24A of the Immigration and Asylum Act 1999.
[125] *Sadovaska and others v SSHD* [2017] UKSC 54.
[126] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577880/Sham_Marriage_report.pdf, last accessed on 28 April 2020.

2.42. Paragraph 34 of Part 1 of the Immigration Rules sets out the requirements for a valid application, and paragraph 34 (5) specifies the acceptable forms of identity documents. The Home Office no longer accepts applications without valid identity documents as specified in the Rules unless the applicant falls under one of the exceptions provided therein. In practice, the ID requirement is difficult for illegal entrants to satisfy in leave to remain cases. Applicants making protection claims, along with victims of human trafficking and domestic violence, can seek exemptions from the ID requirement. However, the ID requirement is a hurdle for someone who is only relying on Article 8 on private and family life who does not have a valid form of ID.

Measures affecting family visitors

2.43. Prior to June 2013, applicants had a statutory right of appeal against the refusal of a family visitor entry clearance application before the Immigration Tribunal. The Immigration Appeals (Family Visitor) Regulations 2003 were broad in scope, and Regulation 2 included even extended family members within the definition of family members for the purpose of availing appeal rights against an entry clearance refusal. Later, the Immigration Appeals (Family Visitor) Regulations 2012[127] narrowly defined family members by excluding aunts, uncles, nieces, and nephews. These extended family members were given a restricted right of appeal only on human rights grounds and under the Race Relations Act 1976. The government later abolished all appeal rights of family visitors with effect from 25 June 2013.[128] The government's intention in doing so was to reduce the adjudication cost of family visitors appeals; the embarrassingly high number of successful appeals was ignored. Around 42% of family visitors appeals were allowed in 2007/08.[129] Those who are refused entry clearance can make a fresh application according to modernised guidance that will be considered on its merits[130]. In country refusal to extend the

[127] Regulation 2 of the 2012 Regulations.
[128] S.52 of the Crime and Courts Act 2013 amending s.88A of the Nationality, Immigration and Asylum Act 2002; Crime and Courts Act 2013 9Commencement No.1 and Transitional and Savings Provisions) Order 2013, SI 2013/1042.
[129] Robert Thomas; *Mapping immigration judicial review litigation: an empirical legal analysis; public law 2015.*
[130] IDI Modernised Guidance, general visitors 14 July 2014, section on 'Visiting family, in the UK - family visitors.

leave of a family visitor attracts a right of appeal, but switching to another category is not allowed. Refusal or cancellation of leave on the 'not conducive to public good' ground is appealable, but only before the Special Immigration Appeals Commission (SIAC).

Effects of losing appeal rights on family visitors

2.44. In the absence of statutory appeals rights, family visitors can only seek judicial intervention through a judicial review which does not extend to the substantive merits of the case; it only reviews the legal propriety of the decision. Time and cost factors make it extremely difficult to seek relief by raising judicial reviews. In many cases, following repeat applications, judicial review may be the only remaining option. The availability of proper legal representation varies across the UK. It is easier to secure legal aid funding, subject to satisfying merits requirement, in Scotland. This is not the case in the English jurisdiction and few can afford to litigate privately, bearing in mind the other party's cost risk in the event of losing the challenge. In Scotland, the Secretary of State tends to concede[131] judicial review petitions well before a substantive hearing, perhaps to avoid judicial criticism of the poor quality of primary decision making.

2.45. Information accessed via a Freedom of Information Request[132] reveals that around 75% of family visitors' applications from Pakistan were refused following the end of appeal rights. The real problem was, and remains, the quality of the decision-making process, and the government has purportedly addressed this problem by ending the much-needed statutory appeal rights. The culture of template refusals, in the absence of affordable judicial oversight, has compromised the essence of the protected right to a family life. In administrative terms the government's abolition of appeal rights might be cost effective but it does not promote the rule of law and the right of access to justice. The Immigration Tribunal formerly accepted jurisdiction to hear appeals against refusals of family members' visitor entry

[131] The author of this study represented nineteen petitioners from 2017 to January 2022 in the Court of Session against the refusal of family visitor entry clearance, and all were conceded by the Home Office with expenses before the substantive hearing.
[132] http://www.dawn.com/news/1243537; last accessed on 28 April 2020.

clearance applications on Article 8 grounds, provided a proper claim was raised in the application[133]. However, following the Court of Appeal findings in *Onuorah[134],* the Tribunal became less willing to accept a notice of appeal against the refusal of a family visitor refusal on Article 8 grounds. Judicial approach in relation to Article 8 will be analysed in a later section of this thesis.

Administrative review

2.46. Historically, the Home Office has seen a complex appeal process which is suspensive of removal as a hurdle to maintaining effective immigration control[135]. The Home Office view is that the lengthy appeal process hinders enforcement action, and that delays in removal resulting from the exercise of in country appeal rights increase applicants' chances of ultimately remaining in the UK by deploying human rights arguments, particularly arguments based on Article 8 of the ECHR. Around 40 per cent of appeals have been successful - but the Home Office has sought to curtail appeal rights by admitting that the high appeal success rate was due to poor decision making in that 60 per cent of appeals were allowed due to caseworker errors[136]. The Home Office argued that the delays and costs associated with appeals were not fair to the applicants. The government response to this high margin of error was not to improve the quality of their decision making, but rather to reduce the opportunities for challenge[137].

2.47. In the immigration context, the process of Administrative Review involves a review of a Home Office decision by an immigration officer or entry clearance manager by their colleagues to establish whether there was an error on the part of the earlier decision maker. The remedy of administrative review was introduced as a substitute for appeal rights before the immigration tribunal. The points-based system was introduced in 2009[138], ending appeal rights in many points-based system categories in entry clearance cases, including students. So, points-based system migrants were

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133 *Entry Clearance Officer Sierra Leone v Kopoi*; [2017] EWCA Civ 1511; [2017] 10 WLUK 205; [2018] Imm. A.R. 330; *Mostafa (Article 8 in Entry Clearance)*; [2015] UKUT 112 (IAC); [2015] 3 WLUK 174.
134 *Onuorah v SSHD* [2017] EWCA Civ 1757.
135 Theresa May, Home Secretary, speech to the Conservative Party conference, Manchester, September 2013, http://www.ukpol.co.uk/theresa-may-2013-speech-to-conservative-party-conference/
136 Home Office, Impact Assessment of Reforming Immigration Appeal Rights, p.7.
137 Hansard, HC Vol.569, col.199 (22 October 2013) (Barry Gardiner MP). See also Hansard, HC Vol.569.
138 HC 1113 of the Immigration rules, see statement of changes.

given the right of administrative review against the refusal of an entry clearance application. The points-based system will be separately analysed later in this chapter.

2.48. The government introduced administrative review by means of a statement of changes in the Immigration Rules[139]. The Rules list casework errors as instances of when the original decision maker applied the wrong rules, etc[140]. An administrative review may result in the decision being upheld or withdrawn, or in reasons for the decision being withdrawn, or new reasons being given.[141] The Rules make detailed provisions as to the procedure to be followed in an administrative review[142]. Fresh evidence is not permissible in the review process except to address an issue raised under general grounds of refusal.[143]

2.49. It is interesting to compare the decision-making by the Home Office with that of the Department for Work and Pensions (DWP), which decides around 12 million benefit claims per year. Arguably, the process of administrative review by a public body has considerable advantages to users in being efficient, cost effective, informal, and able to resolve matters in a better and quicker way[144]. The process of mandatory reconsideration used by the DWP is analogous to that of an Administrative Review by the Home Office, but mandatory reconsideration is free and claimants have a right of appeal to the first-tier tribunal following mandatory reconsideration. In contrast to the DWP, the Home Office only decides around 3.5 million[145] applications per year, and applicants are required to pay the Home Office for an administrative review without further appeal right. The government removed immigration appeal rights to save £261 million over a period of ten years[146].

2.50. It has been suggested that adjudication by tribunal judges generally results in a higher standard of decision making compared with that of pressurised front-line primary decision makers. The appeal process involves a complete assessment,

[139] HC 693, 16 October 2014, Appendix AR.
[140] Appendix AR para AR3.4.
[141] Appendix AR, para AR2.2.
[142] Paragraphs 34L-34Y, HC 693, 16 October 2014.
[143] Para 320 of the Immigration Rules etc.
[144] Robert Thomas; *A different tale of judicial power: Administrative Review as a problematic response to the judicialization*.
[145] Robert Thomas; *A different tale of judicial power: Administrative Review as a problematic response to the judicialization of tribunals.*
[146] Home Office, Impact Assessment of Reforming Immigration Appeal Rights (TSO, 2013), p.2.

whereas administrative review only extends to correcting caseworker errors. [147] Assurances were given by the Immigration Minister that administrative reviews would be undertaken by fully trained and experienced staff who would be independent of the original decision maker, and that a separate operational unit would be established[148]. However, an inspection undertaken by the Chief Inspector of Borders and Immigration[149] later revealed that none of those assurances had been honoured. In the administrative review process institutional independence remains questionable, and it should not be regarded as a proper substitute for a right of appeal.

Certification provisions

2.51. In the immigration context, the certification of a claim means that a person cannot use an in country right of appeal. The term "certification" is not new in the UK's immigration law. The primary purpose of certification provisions is to expedite the removal process because the procedural delay caused by in country appeal rights enables applicants to build up their human rights claims. The effect of certification is thus to limit the exercise of in country appeal rights. Certification does not deny the applicant a right of appeal, but the right of appeal can then only be exercised after leaving the UK. The scope of examination of certification's impact in this thesis is limited to human rights claims only. The Home Secretary can issue a deportation order to a non-British subject on the ground that the person's presence in the UK is not conducive to the public good. The Immigration Act 1971 provides that those who are refused entry clearance must appeal from abroad, and those cases frequently involve a family life issue under Article 8 of the ECHR. Section 92 of the Nationality, Immigration and Asylum Act 2002 determines the place from which an appeal may be brought and continued against the refusal of a human rights or protection claim made in the UK. Section 82 of the 2002 Act, as amended by s. 15 of the Immigration Act 2014, now provides appeal rights only against the refusal of human rights and protection claims.

[147] Robert Thomas' article cited above.
[148] Home Office, Statement of Intent: Administrative Review (TSO, 2013), p.4.
[149] Independent Chief Inspector of Borders and Immigration, An Inspection of the Administrative Review Processes Introduced Following the Immigration Act 2014 (TSO, 2016).

2.52. A human rights claim can be certified as "clearly unfounded" under s.94 of the 2002 Act and as a consequence, an appeal can only be brought from outside the UK. The real cause of concern, for Article 8 claims, is the certification powers under s.94B of the 2002 Act which were inserted by the Immigration Act 2014.[150] Initially, the scope of s.94B was limited to a human rights claim raised by an applicant subject to deportation, but it was then extended[151] to a human rights claim where the applicant is not subject to deportation with effect from 1 December 2016. There is a statutory background behind the enactment of s. 94B, as Section 32 of the UK Borders Act 2007 had provided for the automatic deportation of a person who was found to be a "foreign criminal". Deportation was automatic where a person was not a British citizen and had either (i) been convicted in the UK of an offence for which he had been sentenced to a period of imprisonment of at least 12 months, or (ii) had been sentenced to any period of imprisonment for any offence that had been specified by order. Section 32 (4) of the UK Borders Act 2007 provided that the deportation of a foreign criminal is conducive to the public good under s.3(5)(a) of the Immigration Act 1971 and Section 32 (5) provided that the Secretary of State must make a deportation order unless one of the exceptions given under s.33 of the 2007 Act apply. These exceptions include instances where a deportation order would breach a person's Convention rights, or the UK's obligations under the Refugee Convention.

2.53. There was a political motivation behind introducing the statutory scheme under s.94B of the 2002 Act. The Home Secretary announced[152] that "*where there is no risk of serious irreversible harm, we should deport foreign criminals first and hear their appeal later*". Clause 12 of the Immigration Bill, which later become the Immigration Act 2014, inserted s.94B and the Home Secretary explained the objectives of the clause as follows:

[150] The Act came into force on 28 July 2014.
[151] Section 63 of the Immigration Act 2016 amending s. 94B of the 2002 Act.
[152] Conservative Party Conference, 30 September 2013.

"*Foreign criminals will not be able to prevent deportation simply by dragging out the appeal process, as many such appeals will be heard only once the criminal is back in their home country. It cannot be right that criminals who should be deported can remain here and build up a further claim to a settled life in the United Kingdom*"[153].

Then, the Minister for Immigration explained the legislative objective:

"*The new power is to help speed up the deportation of harmful individuals, including foreign criminals.....many people use the appeal mechanism not because they have a case but to delay their removal from the United Kingdom. In some cases, they attempt to build up a human rights based claim under Article 8, which they subsequently use, sometimes successfully, to prevent their departure".*[154]

Parliament's intention was thus to deport harmful individuals before the commencement of the in country appeal process, and as was mentioned earlier, this provision was originally enacted to certify the human rights claims of foreign criminals as defined in s. 32 of the 2007 Act, those subject to automatic deportation, before being extended to all Article 8 claims. Human Rights claims involving Articles 2 and 3 of the ECHR will not be suitable for certification under s. 94B, but that debate is not within the scope of this thesis.

2.54. In the recent past the UK Supreme Court[155] subjected s.94B to judicial scrutiny and considered whether certification requiring the appellants to pursue their appeal from abroad would breach their rights as protected by Article 8 of the ECHR. In this case, both appellants had been deported under the "deport first; appeal later" procedure. The Supreme Court unanimously found certification to be in breach of Article 8 and issued very useful guidance for courts and tribunals. Both appellants were facing deportation, but the scope of the Supreme Court's guidance is not limited to deportation cases; it also covers the certification of human rights claims of those

[153] HC Deb, vol 569, col 161.
[154] Public Bill Committee attendance of 05 November 2013; Deb 5, cols 205, 206.
[155] *R (on application of Kiarie) v Secretary of State for the Home Department* [2017] UKSC 42.

who are not liable to deportation[156]. The court emphasised the need for an effective remedy to be available, and recognised the inherent public interest in the existence of effective appeal rights[157].

2.55. The court opined that in deciding whether an out-country appeal against the refusal of an human rights claim was compatible with the procedural requirements of Article 8, the fact-sensitive questions that had to be addressed were whether (a) the appellant would be able to secure legal representation which might have been available had he remained in the UK, and whether he would be able to give instructions and receive advice from his lawyers; (b) the appellant's absence from the UK would cause difficulties in obtaining professional evidence; (c) oral evidence was needed from the appellant; and (d) if there was a need for live evidence, a video link would be satisfactory. Where an appellant is not legally represented, the tribunal would need to consider whether this was because of his deportation, and where the appellant had representation it would need to consider whether communication by telephone and email was adequate. In terms of professional evidence, the court would have to consider whether there was a genuine need for such evidence, and whether face-to-face contact between the appellant and the expert was required. The Supreme Court did not rule that every appellant who was abroad as consequence of s.94B certification had to be given the opportunity to give live evidence. However, live evidence might be required if there were disputed findings of fact. In 94B cases, the public interest might make the appellant's deportation a proportionate interest with the Article 8 rights of all concerned, even if there was likely to be a need for live evidence. In such a scenario, the issue would be whether the Secretary of State could demonstrate that a satisfactory video link facility could be established between a suitable place outside the UK and the tribunal hearing centre[158]. The court of appeal has opined that the immigration tribunal is the proper forum for the determination of factual issues and that it would be able to conduct an effective appeal in relation to Article 8 rights.[159]

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[156] See para 9 of Kiarie's judgement referred to above.
[157] See para 35 of Kiarie.
[158] The Supreme Court's views were further summarised in *AJ (S.94B: Kiarie and Byndloss Questions: Nigeria)* [2018] UKUT 115 (IAC).
[159] *R. (on application on Nixon) v SSHD* [2018] EWCA Civ 3.

2.56. The scope of s.94B certification now includes the Article 8 claims of those who are not subject to deportation. The Supreme Court guidance is relevant to all s.94B certifications, irrespective of whether the applicant is subject to deportation or not. The Immigration Rules prescribe distinct criterion for the Article 8 claims assessment of those who are subject to deportation. The deportation of a person will be conducive to the public good and in the public interest where, in the view of the Secretary of State for the Home Department, the offending has caused serious harm, or the person is a persistent offender and has shown a particular disregard for the law[160]. In other words, this is the criterion given within the Immigration Rules where a person's deportation is presumed to be conducive to the public good or in the public interest. In deportation cases, the secretary of state will consider all the factors relevant to an Article 8 claim as described in paragraphs 399 or 399A of the Immigration Rules. Paragraph 399 of the rules includes identical considerations to the ECtHR Article 8 proportionality assessment, and if these considerations do not apply then the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 339A of the rules. The person subject to deportation has to show compelling circumstances over and above those described in Ex. 2 of Appendix FM of the rules, and it is obvious that the rules prescribe a much more rigorous and distinct criterion for the assessment of Article 8 claims raised by those who are subject to deportation.

2.57. The exception given in Appendix FM of the rules[161] describes how the Secretary of State intends to assess an Article 8 claim made by someone not subject to deportation, within the Immigration Rules. The requirements are less stringent than claims subject to deportation, and have been further reinforced by the statutory guidance brought in by Part 5A of the 2002 Act.[162] A detailed analysis of these statutory provisions is not within the scope of this chapter; however, in the absence of criminality, it will be considered whether the couple commenced their

[160] Paragraph 398 of the Immigration Rules.
[161] Ex. 1 (a) and (b).
[162] The Immigration Act 2014 inserted Part 5A in the 2002 Act.

relationship at a time when the immigration status of the non-qualified partner was precarious, and whether an insurmountable obstacle exists to establishing a family life somewhere else. In cases where the applicant has a genuine and subsisting parental relationship with the qualifying child, a non-national child who has lived in the UK for seven years or is a British citizen, and the removal of such a claimant or expecting the child to accompany his non-national parent would be unreasonable, the public interest does not require the removal of such a person from the UK.[163]

2.58. The deport first, appeal later provision[164] involves pre-certification assessment and the Secretary of State is required to consider whether the claimant's removal from the United Kingdom, prior to commencing or pending the appeal process or after exhausting appeal rights, would not be unlawful under s.6 of the Human Rights Act 1998 which requires that the public authorities do not act contrary to the Convention. The certification of a claim prohibits in country exercise of appeal right, and a human rights claim can be certified even after the commencement of the appeal process in the UK. In practice, human rights claims which only rely on Article 8 are susceptible to s.94B certification because it is difficult to prove the risk of serious irreversible harm as a consequence of removal. It would be reasonable for the claimants to allege the existence of such harm on removal if the claim involves Articles 2, 3, and 8 of the Convention. Claims certified under s.94B are not clearly unfounded, so these are not without merit, and the removal arguably deprives the applicant of an effective remedy against the administrative decision. The Immigration Rules and relevant statutory provisions, as mentioned above, prescribe different criteria for the assessment of Article 8 claims subject to deportation involving criminality and administrative removal. There could be further reasons to justify the lawfulness of certification in deportation cases, but it is hard to envisage such reasoning in certifying an Article 8 claim where the applicant is not subject to deportation. *Byndloss*[165] was the first case in which the UK Supreme Court examined the lawfulness of s.94B certification subject to deportation and found the certification of both appellants' claims unlawful. The Supreme Court has

[163] See section 117B (6) of the 2002 Act as amended by the Immigration Act 2014.
[164] Section 94B of the 2002 Act.
[165] *R (0n application of Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42, also known as Kiarie.

emphasised the need for a fact-sensitive approach, and the guidance given in the case is very helpful in examining the lawfulness of certification. The certification of Article 8 claims subject to administrative removal is of great rarity, and the present author has not seen one in practice. So, the amended s.94B[166] might be of little use, for claims not subject to deportation, in the presence of s.94 under which a claim can be certified as clearly unfounded. Depending on the merits of their case, the applicant can challenge certification via a judicial review. The certification only will be subject to challenge in judicial review, and such a challenge does not extend to considering the substantive merits of the claim because the statutory provision prohibits such considerations. The issue at hand in the judicial review will be to consider whether or not the claim is "clearly unfounded". The House of Lords opined that the test is an objective one, as it does not depend on the Secretary of State's view but upon a criterion which a court can readily reapply once it has the material which the Home Office's original decision maker had, and a claim is either clearly unfounded or it is not.[167]

2.59. The principal effect of preventing claimants from lodging merits appeals until they leave the UK is that many do not do so, as the Secretary of State is aware. This was raised by Lord Rosser in the House of Lords as follows:

> "*available data show that in the year since the provision came into force the foreign national offenders, the number of appeals against deportation brought out of country has dropped by 87% compared with the number brought in country in the year to April 2013. The rate of success is also lower than before, decreasing from 26% in the year to April 2013 to just 13%. That suggests that many individuals are unable to appeal effectively a decision following removal from the UK, and that appeals which would have been successful are not being brought*[168]".

[166] Amended by the Immigration Act 2016, extending the scope of certification to all claims by removing specific reference to "deportation" from s.94B.
[167] *ZT (Kosovo) v SSHD* [2009] UKHL 6, per Lord Phillips at [23], per Lord Brown at [75-[76] and per Lord Neuberger at [83].
[168] Hansard: HL: Report 3 Feb 2016: col 1794.

Furthermore, the presentation of evidence from abroad by video link is not without difficulties, and the Supreme Court considered these difficulties in *Byndloss*. The majority of first-tier tribunal judges think that the IT equipment used in the tribunals hearing centres is of a poor standard[169]. The practical effect of this situation on s.94B certification is that the challenge can only be raised by judicial review whilst the person is in the UK on limited *Wednesbury* review grounds rather than on a merits appeal. In cases where the court on judicial review finds the temporary removal of the subject unlawful, then in a merits appeal the argument that the permanent removal of the appellant would also be unlawful would have a better prospect of success. The new certification powers brought by the 2014 Act and further amended by the 2016 Act have moved further away from a right to a merits appeal in favour of more limited judicial challenges. Arguably, these provisions do not speed up the removal process of those who should not permitted to remain in the UK; rather, these provisions render the process by which it can be determined whether such persons should be or should not be permitted to remain in the UK in the first place far less fair and just[170].

Immigration bail

2.60. Substantial changes were brought to immigration bail to tighten immigration control. The Immigration Act 2014 introduced major changes, and certain provisions of the Immigration Act 2016 reinforced those changes. The new legal regime related to immigration bail is part of the government plan to create a hostile environment for migrants. Thus, a brief introduction of the new legal framework is necessary, although a detailed analysis is not within the scope of this thesis. The Immigration Act 2014 introduced procedural restraints on repeat bail applications. Before these changes, repeat bail applications were allowed even when the Secretary of State had set removal directions. The Immigration Act 2016 makes further statutory provisions in relation to bail applications. These statutory changes are briefly summarised below.

[169] "2016 UK Judicial Attitude Survey" by Professor Thomas, UCL Judicial Institute.
[170] Peter Jorro; *The enhanced non-suspensive appeals regime in Immigration cases; Immigration, Asylum and Nationality Law 2016*.

2.61. The Immigration Act 2014 provides[171] that where the removal directions are in place against a person seeking release on bail within fourteen days from the date of decision, then the person should not be released on bail without the consent of the Secretary of State. This provision gives a sort of veto power to the Secretary of State against the decision of the tribunal or the Special Immigration Appeals Commission resulting in the grant of bail[172]. Before the Immigration Act 2014, it was for the judge to consider the imminence of removal and the risk of absconding. The rationale behind introducing this new provision appears to be that the Secretary of State differs with the tribunal's approach as to how the imminence of removal and the risk of absconding should be assessed. The immigration judge can consider exceptional circumstances to grant bail, and if they are minded to grant bail then the judge can invite the Secretary of State to consider whether consent should be given or refused. The Secretary of State is supposed to give serious consideration to release[173]. The Home Office considers that the existence of removal directions within fourteen days of the bail application makes the imminence of removal self-evident and increases the risk of absconding in the event of release on bail. The statement of intent confirms that the tribunal should only consider release on bail in exceptional circumstances when removal directions are in place within fourteen days from the date of application. Examples of exceptional circumstances include recent bereavement and complex medical requirements. The Secretary of State confirms his consent or dissent in open court. In practice, it is odd for the judges where the Secretary of State differs with the tribunal's assessment and refuses consent in the presence of applicants and financial guarantors. This provision empowers the Secretary of State to overrule the tribunal's assessment in favour of granting bail.

2.62. The 2014 Act[174] requires the tribunal to refuse a bail application made within twenty eight days from the last refusal of bail unless the applicant shows a material change

[171] Section 7(2) inserts a new paragraph 20(4) into Schedule 2 to the 1971 Act.
[172] Schedule 9 of the 2014 Act.
[173] Immigration Bill Statement of Intent: Bail – effect on removal directions; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/254845/SoI_Bail.pdf last accessed on 06 January 2019.
[174] Section 7 of the 2014 Act.

in circumstances. The tribunal's procedure rules have been amended accordingly[175]. Neither the statute nor the tribunal's procedure rules describe what a material change in circumstances amounts to. It is for the tribunal to take a fact sensitive approach in each bail application. In practice, anything material which was not before the tribunal in the last bail application amounts to a material change of circumstances; for instance, a judicial review petition seeking the reduction of a decision certifying a claim or grant of in country right of appeal following the service of a pre-action protocol letter on the Secretary of State. This is not an exhaustive list of what constitutes a material change in circumstances. The Immigration Act 2016 mainly makes provisions for bail management and provides statutory bases for bail conditions to be imposed, further variation and extension of bail. The Act further amends the law in relation to electronic monitoring.[176] The Act empowers[177] an immigration officer or constable to arrest a person subject to bail conditions, without a warrant, for failing to comply, or being likely to fail to comply, with a condition of immigration bail. Further analysis of bail provisions is not within the scope of this thesis.

Powers to detain and remove

2.63. The Immigration Act 2014 has in a way consolidated powers to detain and remove. Prior to 14 November 2014[178], the powers to remove those who have breached the conditions of their leave or obtained leave by deception, including their family members, were provided under Section 10 of the Immigration and Asylum Act 1999. Section 1 of the 2014 Act replaced Section 10 of the 1999 Act in a way that it provides for the removal of all those in the United Kingdom without leave and their family members. Section 1 of the Immigration Act 2014 confers sweeping removal powers on immigration officers, and a person can be removed from the United Kingdom if they require leave to remain but do not have it. Lord Taylor of Holbeach commented that Section 1 seeks to introduce "*a system where only one*

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[175] Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.
[176] Schedule 10 of the Immigration Act 2016.
[177] Paragraph 10 of Schedule 10 of the 2016 Act.
[178] The Immigration (Removal of Family Members) Regulations 2014, SI 2014/2816.

decision is made served, giving, refusing or varying leave. Following that decision, those who require leave but do not have it will be removeable"[179].

2.64. Under the previous regime, Section 47 of the Immigration, Asylum and Nationality Act 2006 provided for the service of a notice of removal with the immigration decision, in the same envelope but on separate paper, taking effect when the person's leave as extended by statute expires. Section 47 was repealed by Section 75 (3) of the 2014 Act.[180] Previously, the refusal of leave to remain was not an immigration decision and there was no right of appeal against such a decision. However, a decision to remove was an immigration decision and was appealable. There had been extensive litigation[181] under the previous regime where separate decisions were made refusing or curtailing leave with an intention to remove. The Supreme Court concluded that there was no requirement on the part of the Secretary of State to make a decision to remove. The commencement of Section 1 of the 2014 Act has addressed these concerns. However, the Supreme Court has elaborated on the surrounding uncertainty of removal under the previous regime. The present law does not require a separate removal decision; a decision refusing or curtailing someone's leave is sufficient for the purpose of removal.

2.65. After the repeal of Section 47 of the 2006 Act, Section 10[182] is the sole power concerning the removal of persons in the UK without leave. The legal regime in place prior to the Immigration Act 2014 had defined "immigration decision"[183], and a right of appeal was only available against an immigration decision. The refusal of a leave to remain application made at the time when the applicant had no leave to remain was not an immigration decision; thus, there was no right of appeal against such a decision. However, a decision to remove an overstayer or an illegal entrant was an immigration decision, and such a decision would entail a right of appeal. The practice of the Secretary of State was to defer the removal decision to a later unspecified time, leaving the applicants in limbo to avail their appeal right. The

[179] Hansard HL, 3 March 2014: Columns 1118-9 per Lord Taylor of Holbeach.
[180] Repealed on 20 Oct 2014, Sch, 9, para 5, S.I.2014/2928.
[181] See *Patel and ors, Anwar and Alam v SSHD* [2013] UKSC 72.
[182] Immigration and Asylum Act 1999.
[183] See the old section 82(2) of the Nationality, Immigration and Asylum Act 2002.

chain of litigation referred to in the paragraph above relates to this issue. Section 15 of the 2014 Act has introduced simplified appeal rights and grounds of appeal[184].

2.66. The new provision provides in country appeal rights against all decisions refusing protection and human rights claims, but subject to certification provisions. The impact of certification on appeal rights has been discussed above in this chapter. The current law does not treat overstayers and illegal entrants differently from people who had leave to remain at the time of intimating a protection or human rights claim to the Home Office. They are not required to wait for the removal decision to avail their appeal right either. Those who had leave at the time of intimating a protection or human rights claim will continue to avail all rights subject to the conditions attached with their previous leave.

2.67. The Immigration Act 2014 makes detailed provisions in relation to the removal of families and unaccompanied children[185]. Schedule one provides detailed enforcement powers. The detention of unaccompanied children is subject to certain restrictions[186]; for instance, an unaccompanied child can only be detained while removal directions are in place, and their cumulative period of detention in a short-term holding facility must not exceed twenty-four hours. Families can be detained in a pre-departure holding facility for not more than seventy-two hours or - on the authorisation of a Minister - not more than seven days[187]. James Brokenshire, then Immigration Minister, explained the use of holding facilities as follows: "*we are providing a separate legal basis for pre-departure accommodation, independent of other removal centres. It will be used only for holding families with children and only within the existing maximum times limits*"[188]. It is clear from the Minister's comments that short-term holding facilities are different from existing detention centres. Stephen Shaw in his initial report recommended, *inter alia,* that the presumption against detention be extended to include victims of rape and other

[184] S.I 2014/2771, commenced on 20 October 2014.
[185] Sections 1 to 6; see also schedule 1 and 9 of the 2014 Act.
[186] Section 5 of the 2014 Act.
[187] Section 6 and amended section 147 of the Immigration Act 1999; also see Immigration Act 2014 (Commencement No.1, Transitory and Savings Provisions) Order 2014, SI 2014/1820, article 3 (e).
[188] Hansard HC, 7 May 2014: Columns 223-4 per James Brokenshire MP.

sexual and gender-based violence to those with a diagnosis of post-traumatic stress disorder (PTSD), transsexual people, and those with learning difficulties. He also advised an absolute exclusion of pregnant women from detention. He further concluded that rule 35 has failed to protect vulnerable people in detention[189]. The government accepted those recommendations and Mr Shaw was asked to undertake a shorter follow-up review assessing the progress made in implementing his recommendations. His second report was published on 24 July 2018. Section 59 of the Immigration Act 2016 obliges the Secretary of State to issue guidance specifying the matters to be considered in the detention of vulnerable persons. The present guidance in pursuance of Section 59 was published in July 2018 reflecting Shaw's recommendations[190].

Right to work and access to services

2.68. The government introduced various legislative measures to control illegal working in the UK, and various provisions in the 2006 Act prohibit the employment of adults subject to immigration control. The 2006 Act replaced the former scheme introduced under section 8 of the Asylum and Immigration Act 1996, which first made it a criminal offence to employ a worker without immigration status. The civil penalty regime and applicable criminal sanction are part of those prohibitions introduced by the 2006 Act. The Immigration Act 2014 amended legislation in relation to the removal process of those without leave to remain in the UK, and these measures indirectly assist in preventing the stay of illegal workers by removing them from the UK. The government took the view that the procedure of enforcing civil penalties was too complex for the Home Office. The Home Office published a consultation paper[191] on 09 July 2013. The government considered labour market exploitation as an increasingly organised criminal activity, and identified the need

[189] Rule 35 of the Detention Centre Rules 2001.
[190] Home Office: Immigration Act 2016, Guidance on adults at risk in Immigration Detention.
[191] Strengthening and simplifying the civil penalty scheme to prevent illegal working; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/249531/Results_of_the_consultation_on_illegal_working.pdf, last accessed on 20 Dec 2018.

to introduce a stricter regulatory regime ensuring workers' rights[192]. This was also a Conservative party election manifesto pledge.

2.69. The primary purpose of the Immigration Act 2016 is to discourage illegal immigration by making it harder for those who seek to stay and work illegally in the UK to do so. The government believes that the measures introduced by the 2016 Act will force illegal migrants without access to work and services to depart voluntarily, and for those who choose not to depart, the Act includes enhanced measures for enforced removals. The 2016 Act seeks to reduce the 'pull' factors for illegal immigration to avoid the consequences of unfair competition and revenue evasion[193]. The Immigration Act 2016 amended section 21 of the Immigration Asylum and Nationality Act 2006 so that employing an illegal migrant became a criminal offence punishable by up to five years imprisonment on indictment; it was previously two years, and on summary not exceeding twelve months in England and Wales or not exceeding six months, on summary, in Scotland and Northern Ireland. The Immigration Act 2014 also doubled the amount of civil penalty from ten thousand pounds to twenty thousand pounds, and these penalties are regularly enforced.[194] The 2016 Act, in various ways, supplements the legal sanctions brought by the 2006 and 2014 Acts. The 2006 Act only allowed prosecutions for knowingly employing an illegal worker, while the 2016 Act makes it easier to prosecute employers for employing illegal workers where they had "reasonable cause to believe" that the employee had no immigration status[195]. The 2016 Act also seeks to reduce the scope of illegal self-employed working by making immigration checks mandatory rather than advisory for licensing authorities[196]. The rationale behind this provision is to prevent illegal working by self-employed illegal workers who are not subject to the usual right to work checks undertaken by employers. So, what is usually the employers' task has been assigned to the licensing authorities in relation to self-employed workers, such as private hire taxi drivers, security guards, delivery

[192] See Consultation Paper: "Tackling Exploitation in the Labour Market. Also see response to the Consultation: "Tackling Exploitation in the Labour Market: Government Response.
[193] "Tackling Exploitation in the Labour Market: Government response.
[194]In https://www.gov.uk/government/collections/employers-illegal-working-penalties, there appear quarterly figures of penalty notices being issued to employers.
[195] Read Section 35 of the 2016 Act amending Section 21 of the 2006 Act and further provisions of Part 1 of the 2016 Act.
[196] Section 37 and Schedule 5 of the 2016 Act .

drivers, etc. The government also undertook a number of consultations to curb illegal migrants' access to services like social housing[197], employment[198], and the National Health Service[199], as well as their ability to open bank accounts, acquire a driving licence, etc. The primary objective of the 2014 Act was to create a hostile environment for illegal immigrants which prevents their access to basic services. The Act now strictly prohibits illegal migrants' access to the NHS, bank accounts, driving licences, housing, etc. Part 3 of the 2014 Act[200] includes detailed provisions regulating access to services. Furthermore, the Immigration Act 2016 fills the gaps left by the 2014 Act in preventing access to services. Parts 1 to 3 of the 2016 Act make a number of provisions further tightening access to services. In relation to housing, a lack of immigration status is now a ground for eviction, and the 2016 Act has created four new offences targeting rogue landlords and agents failing to comply with the right to rent scheme introduced by the 2014 Act. Many driving licences were revoked under the 2014 Act[201], but the Act provided no mechanism preventing the use of those revoked licences. The 2016 Act empowers the police and immigration officers to search for and seize UK driving licences in the possession of a person without immigration status. The Act makes driving in the UK without legal immigration status a criminal offence, and empowers courts to order the forfeiture of the vehicles in question. The 2014 Act introduced provisions preventing illegal migrants from opening new banking current accounts, although the law did not apply to the existing current accounts held by illegal migrants. The 2016 Act requires banks and building societies to undertake periodic checks and to notify the Home Office where a person disqualified from holding a current account by reason of his immigration status has been identified.

2.70. The existing regime requires landlords to check a prospective tenant's immigration status before entering into a tenancy agreement, and to undertake periodic checks because the tenant's leave can expire or be curtailed by the Home Office. The repeat check helps landlords in a statutory excuse against civil penalty under section 24 of the 2014 Act, but the landlord must notify the Secretary of State of the tenant's expiry of leave to the statutory excuse. The immigration status of a tenant was not

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[197] Tackling illegal immigration in privately rented accommodation.
[198] Strengthening and simplifying the civil penalty scheme to prevent illegal working.
[199] Controlling Immigration – Regulating Migrant Access to Health Services in the UK.
[200] Chapter 1 of the 2014 Act.
[201] 16000, see the Home Office Explanatory Notes, Immigration Act 2016.

a ground for gaining possession of the property. Section 40 of the 2016 Act inserted sections 33D and 33E in the Immigration Act 2014, and the amendment included an implied term in the residential tenancy agreement that a contract can be terminated where the premises are occupied by an adult disqualified as a result of his immigration status[202]. Thus, landlords have been given the power to terminate a residential tenancy agreement on the ground of immigration status[203]. In the recent past, the Court of Appeal[204] found the Right to Rent Scheme[205] compatible with Articles 8 and 14 of the ECHR. The court took the view that the scheme is capable of being operated by landlords in a proportionate way in all cases, and that in any event, the discrimination is justified. However, it was observed that if it had been necessary to decide whether Parliament's assessment that the scheme's adverse effects were proportionate to the benefits to the public, the court would have concluded that was manifestly without reasonable foundation. This means that the scheme now has judicial endorsement.

Introducing a points-based system for migration

2.71. The UK government published a five year strategy for asylum and immigration[206]in 2005, of which the introduction of a points-based system formed part. The main aim of the points-based system was described in the Prime Minister's foreword to the five year strategy document, as follows: "*The challenge for the Government is to maintain public confidence in the system by agreeing immigration where it is in the country's interests and preventing it where it is not*". The points-based system was therefore designed to achieve the following objectives: to better identify and attract the migrants most capable of contributing to the UK's economy; to establish an objective, efficient, and transparent application process; to improve compliance; and to reduce the scope for abuse of the immigration system. The Statement of Changes to the Immigration Rules[207] included the changes proposed in the White

[202] Section 33E of the 2014 Act.
[203] The Immigration (Residential Accommodation) (Termination of residential tenancy agreements) (Guidance etc) Regulations 2016.
[204] *R (on the application of Joint Council for the Welfare of Immigrants) v SSHD* [2020] EWCA 542
[205] Ss.20-37 of the Immigration Act 2014.
[206] *Controlling Our Borders; Making Migration Work for Britain, Five Year Strategy for Asylum and Immigration* published in February 2005.
[207] HC 1113

Paper.[208] The points-based system was introduced in 2008, and Tier 1 was first to commence followed by Tier 2 in November 2008. Tier 3 was for low-skilled workers and was never implemented. Tier 4 commenced on 31 March 2009. Tier 1 is the route for highly-skilled professionals and workers. This category is for self-employed workers who do not need an employer in the UK or a job offer. Tier 2 is for skilled workers, and migrants in this category require a job offer from a UK Tier 2 licenced employer. Tier 4 is for student migrants, who need a certificate of sponsorship from Tier 4 sponsors. Tier 5 is for short- and long-term low-skilled workers, who also require a job offer from a UK licenced employer. The regime introducing the points-based system has tightly regulated sponsors, employers, and educators alike. The Home Office has provided very detailed guidance for employers and educators[209].

2.72. The points-based system introduced an objective assessment criterion which curtailed residual discretion on the part of the decision maker. Migrants entering the points-based system do not have appeal rights, and in the absence of judicial oversight, there is a risk that flaws in primary decision making can go unchecked. Further changes to the points-based system were introduced on 29 March 2019[210] by inserting Appendix W into the Immigration Rules. These changes are substantial[211] and the rules are less complex.

2.73. On 19 February 2020, the Home Secretary announced[212] the government's intention to introduce a new points-based immigration system which would commence on 1 January 2021. The free movement rights associated with EU membership ended on 31 December 2020. The UK implemented a points-based immigration system on 1 January 2021 focusing on skills and talent rather than where a person comes from.

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[208] *A Points Based System: Making Migration Work for Britain (CM 6741*) was published. This document can be found at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/ pbsdocs/.
[209] https://www.gov.uk/government/collections/sponsorship-information-for-employers-and-educators
[210] Statement of changes HC1919 of the Immigration Rules.
[211] HC 1919 is a 294-page document; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/784057/CCS001_CCS0319710302-001_HC_1919__PRINT.pdf
[212] https://www.gov.uk/government/publications/the-uks-points-based-immigration-system-policy-statement/the-uks-points-based-immigration-system-policy-statement

Summary

2.74. It is evident from this brief history that the UK government's focus has shifted from reactively controlling to proactively managing immigration. The power to make Immigration Rules has been very useful in the recent past. The rules have been amended on several occasions since 1998, and have been constantly more restrictive of immigration. Steps have been taken to prevent abuse of the immigration system, and several statutory changes restricting appeal rights have been implemented along with the points-based system which replaced appeal rights with administrative review. Administrative review is not a substitute for appeal rights.

2.75. Restrictions on appeal rights in relation to the points-based system and family visitors have deprived migrants of effective judicial oversight. Administrative review and right of appeal are available against decisions made by the Department of Work and Pensions (DWP), but this is no longer the case against Home Office decisions in several categories, as was explained above. There is therefore a disparity of approach by the government, and as immigration decisions have life-changing consequences, judicial oversight is equally important. Points-based system migration has brought employers and educational undertakings under licensing arrangements, skilled migration has been tightened, and the Home Office has forced the closure of bogus educational institutes sourcing visas for those who do not intend to study in the UK. Immigration rules have significantly restricted the entry of non-EU spouses, elderly dependents, and other dependents' relatives. Students' right to work and to sponsor dependents have also been restricted. Several appendices have been included in the Immigration Rules to make those requirements legally enforceable. All these objectives have been achieved without enacting primary legislation. Immigration rules are neither primary nor secondary legislation, and are passed under the negative resolution procedure. The administrative enforcement framework provided by the Immigration Act 1971 is still in use, and it was last modified for present use by the Immigration Acts 2014 and 2016. Time-tested immigration and asylum systems have developed to reach their current shape.

Conclusions

2.76. Immigration control was not a problem for the British Isles for centuries due to its geographical location. The British Empire was expanding when the industrial revolution changed Europe's economic landscape, and migration was one of the most vital economic needs. The nationality law evolved over time, and links to territory became the most important feature of a nationality law that did not exist in medieval times. After the Second World War, the term citizenship replaced "British subject". Immigration control had previously become a matter of national security during the Napoleonic Wars at the start of the nineteenth century, and from that perspective, strict immigration control measures were taken. The UK's Self-governing Dominions[213] devised their own nationality laws, which were exclusionary. The post-war final retreat of the Empire resulted in the independence of British colonies, and the Commonwealth emerged as a family of nations with a common badge of citizenship. Commonwealth citizens enjoyed privileged status akin to that of EEA citizens before the UK's exit from the EU until the late 1960s, when reactive measures were taken to deal with mass migration from the East African[214] nations. The condition of having an ancestral link to gain the right of citizenship was an exclusionary measure that impacted cohorts of Commonwealth citizens in curtailing the scope of the right to British citizenship. The process of tightening immigration control which began in 1948 continued, as successive governments used nationality law to minimise migration after the retreat of the Empire. The Immigration Act 1971 introduced comprehensive legislation to control the migration of visa nationals. The British Nationality Act 1981 presents law related to citizenship in its current form.

2.77. In the 1960s through to the 1980s the focus was on reducing black and ethnic migration. In the 1960s the UK had granted the right of individual petition. In the absence of appeal rights, recourse to the European Commission on Human Rights in Strasbourg grew, resulting in adverse judgements against the United Kingdom. The Immigration Appeals Act 1969 provided appeal rights to Commonwealth

[213] Canada, Australia, and New Zealand.
[214] Kenya, Uganda, and Tanzania.

citizens. The objective of the Act was to provide a domestic remedy and to reduce recourse to the European Commission on Human Rights. Initially, the EEA was conceived as an economic union which guaranteed free movement to establish economic and political cohesion. EEA citizens were subject to nominal immigration control until the UK's recent exit from the EU. Since the 1990s successive governments have maintained a consistent narrative not only portraying immigration as a problem but also claiming that the remedial system, e.g., appeals and judicial review, is being exploited to undermine immigration control. Also, as Article 8 has become extensively used as a ground for challenging decisions, adjudication on Article 8 has been seen by the government as a part of the problem which needs to be "fixed". This view has been used to justify both changes to substantive law and changes to the remedies, including instructing courts and tribunals how to decide cases. These details will emerge later in this thesis.

2.78. The difficulty for government is not to have different notions of the rule of law, and due process of law for migrants, although there have been successive attempts to sabotage the due process of law by curtailing appeal rights and excluding immigration decisions from the scope of judicial review. These details will be discussed later in this thesis. Immigration control became a simmering political issue in the UK in the General Election campaign in 2010. Military interventions in Libya and Syria had triggered mass illegal migration via the Mediterranean Sea. As a consequence, governments in the UK and Europe were forced to take tough measures to control illegal migration. The previous Labour government had already introduced a points-based migration system in 2008, implemented it in phases. Since 2010, successive Conservative governments further tightened control on employers and education institutions sponsoring foreign students. By July 2012, the Conservative government had a strong legal framework in place to control non-EU migration, but the 2014 and 2016 Immigration Acts were introduced mainly in line with the political rhetoric of creating a hostile environment for migrants and reducing net migration from hundreds of thousands to tens of thousands.

2.79. The new legal framework, in summary, has restricted access to appeal rights, bails, housing, health care, education, residential tenancies, bank accounts, and driving

licences. The main objective of these measures has been to deter immigrants and to make the UK the least comfortable place for them. This theme is not new in British immigration history.

Chapter 3: Sources of Immigration and Human Rights Law

3. Overview

The primary focus of this thesis is on private and family life under Article 8, from an immigration perspective. So, it is essential to briefly explain the sources of immigration law. This chapter is divided into three parts, each beginning with an introduction and ending with a conclusion. Then at the end of the chapter, there is a summary conclusion. The first part of the chapter introduces the basic sources of the law. The second part of the chapter explains the importance and use of the European Convention of Human Rights. It further explains the significance and background of the Human Rights Act 1998 as a source of law. The third part is relatively lengthy because it elaborates on the government's approach to treating the remedial system as part of the problem. Several measures were brought in to reduce access to judicial oversight. This part explains those legislative measures as having an impact on judicial review in Scotland, England and Wales along with the background and details of appeal rights, the withdrawal of appeal rights in various categories, and the use of certification powers.

Introduction

The purpose of this section of the chapter is to provide an outline of the sources of immigration and human rights law. It provides a brief description of the legislative significance of each source of law, in the following order:

- Prerogative powers;
- Immigration statutes, orders, and regulations;
- Immigration Rules and immigration operational guidance;
- Judicial decisions;
- EU Law.

The first paragraph considers the use of prerogative powers to regulate immigration from a historical perspective, and the reasons why these powers have been preserved by modern legislation. It explains the reduction in the scope of prerogative powers and the increased reliance on statutory powers. Then, it briefly reviews the interrelation of domestic law and international treaties with particular reference to the rights protected by the ECHR. The second paragraph outlines the significance of immigration statutes, orders, and regulations as sources of immigration law. It provides a brief description of each statute with reference to the legislative provisions which had an impact on different areas of immigration law until 2016. Then, it briefly explains the significance of orders and regulations and their importance as rapidly developing sources of law. The third paragraph explains the status of the Immigration Rules as a source of law and their acceptance by the UK's higher courts as quasi-law. The fourth paragraph considers judicial decisions as sources of law and briefly explains the important contributions made by the Immigration Upper Tribunal, formerly known as AIT, the

higher domestic courts, and the ECtHR in Strasbourg. The fifth paragraph considers European Community law with the ECHR.

Royal Prerogatives

3.1.The Royal Prerogative was a principal means of controlling the entry of aliens into the realm for centuries. It appears that friendly aliens have not been subject to control by prerogative power since the 1770s[215]. However, the use of prerogative powers against enemy aliens was preserved by successive statutes is currently preserved by s.33 (5) of the Immigration Act 1971, although today immigration is regulated primarily under statutory powers. One area in which the prerogative continues to be the principal source of law is the issuance of UK passports, which remains subject to the royal prerogative as exercised by Her Majesty's Foreign Secretary.[216] Today, decisions taken under the prerogative, including the refusal to issue a passport[217], can be challenged via judicial review[218]. These prerogative powers are a source of immigration law. It is settled law that the exercise of prerogative power can be suspended, or abrogated, by an Act of Parliament.[219] Historically, the Crown's prerogative powers have existed in times of war to intern, expel, or otherwise control enemy aliens at its discretion. Residual prerogative powers were used to deal with exceptional circumstances, such as during both World Wars. The prerogative powers to regulate aliens' immigration, preserved by the Immigration Act 1971, do not apply to British and Commonwealth citizens, and the exercise of powers over them are subject to statute. In other words, these powers were preserved for enemy aliens only. In recent times, the scope of prerogative powers has been curtailed in the context of immigration, and it has been suggested that prerogative has no part to play in immigration law.[220] The Supreme Court has recently made it clear that the power to make immigration rules under the 1971 Act is a statutory power, not an exercise of prerogative power[221].

Immigration statutes, orders, and regulations

3.2.Immigration statutes are the core source of immigration law. Although some earlier statutes dealt with immigration, with hindsight we can identify that the Aliens Act 1905 marked the beginning of the modern history of immigration law. This source of law has rapidly grown in importance and volume over the last three decades, and the principal statute is the

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[215] State Paper, vol. 42 (1852-1853).

[216] 209 HL Official Report (5th series) col 860.

[217] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811, [1989] 1 All ER 655, CA.

[218] *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 374, 1974.

[219] *A-G v De Keyser's Royal Hotel Ltd [1920] AC 508; R (On application of Alvi) v SSHD* [2012] UKSC 33, at para 28; *Munir v SSHD* [2012] UKSC 32, para 33, cited by Ian a Macdonald QC, p 25, *Ninth Edition Volume 1*.

[220] Ian Macdonald: *Rights of settlement and the prerogative in the UK – a historical perspective; Journal of Immigration Asylum and Nationality Law.*

[221] *R (On the application of Alvi) v SSHD* [2012] UKSC 33.

Immigration Act 1971[222] which sets out the general framework of immigration control. It specifies the persons who are subject to immigration control, confers the powers necessary for immigration control, and creates certain criminal offences. The Act confers on the Secretary of State several powers to make Orders and regulations for the purposes of immigration control. In particular, section 3 (2) of the 1971 Act empowers the Secretary of State for the Home Department to make rules as to the practice to be followed in the administration of the Act. These are the Immigration Rules, which are discussed further below. There are also several other important Acts of Parliament including the Nationality, Immigration and Asylum Act 2002, as amended by the Immigration Acts 2014 and 2016, which primarily deals with immigration, asylum and human rights appeals. The Immigration Act 2014 has brought significant changes to appeals, by inserting Part 5A into the 2002 Act, Immigration bail, covering powers to remove, the policing of immigrants, the retention of driving licences, access to bank accounts, and residential tenancies. The Immigration Act 2016 revamped some of the above changes. A catalogue of orders and regulations has also been made under statutory powers and these are growing in number[223]. These orders and regulations have immense importance in bringing the existing statutory regime into practice. For instance, EEA Regulations 2016 regulate the entry, residence, removal, and deportation of EEA citizens.

3.3. In addition to the above legislation, substantial non-statutory materials also guide decision-making. Orders and Regulations are statutory rules under delegated powers to the ministers of the crown. The Codes of Practice further explain and simplify the legal modalities of Orders, Regulations and Immigration Rules etc. Section 3(2) of the Immigration Act 1971 states that:

> *"the Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances…"*

Thus, Immigration Rules are detailed statements by ministers of the Crown as to how the Crown proposes to exercise its executive power to control immigration.[224] Section 19 (1) of the 1971 Act states that, subject to satisfying other conditions, an adjudicator should allow an appeal if s/he considers that a decision or action against which the appeal is brought was not in accordance with the law or with any of the Immigration Rules applicable to that case. So, misapplication can be a ground of appeal, and that explains the importance of the Immigration Rules. The legal status of the rules has been considered by the courts

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[222] The 1971 Act came into force on 1st January 1973; SI 1972/1514.

[223] These regulations and orders can be accessed in Macdonald's Immigration Law Practice, Ninth Edition Volume 2; and also Immigration Law Handbook Ninth Edition.

[224] *Odelola v SSHD* [2009] UKHL 25, para 6, Lord Hoffmann.

several times, and it has been concluded that they are not 'delegated legislation'[225]. *Pankina*[226] was a challenge to the minimum savings requirement for Tier 4 Migrants which was part of the policy guidance rather than the substantive Immigration Rules, and the court in that case ruled that impugned requirements must be part of the substantive immigration rules. Now, there are a number of appendixes detailing further requirements including specified forms of evidence, and these are part of the Rules. The Rules also include an assessment criterion for Article 8 considerations. Immigration Rules have been granted the status of quasi-law.

3.4. *Pankina* was upheld by the Supreme Court but modified the test for deciding whether something was a rule or merely guidance.[227] The unfettered power to make decisions on entry, stay, and deportation directly comes from the 1971 Act, not from the Immigration Rules. The rules are not binding on the administrative court in the same way statutes are, and the court can strike out rules on various grounds. The Home Office provides operational guidance to caseworkers[228] and in practice these are an important influence on immigration decision-making, but such guidance is not legislation in any sense, and has no legal authority. In practice, guidance cannot be relied upon to interpret the immigration rule unless the rule is ambiguous. However, operational guidance can be helpful in understanding the purpose and context of the rule. On occasions, operational guidance has played a decisive role in determining the legality of Home Office actions.[229] The Secretary of State has also always operated administrative policies outside the Immigration Rules; for instance, DP2/93 and DP3/96, policies which were withdrawn on 24 April 2008[230]. The Home Office's current policy in relation to leave outside the Immigration Rules was published for caseworkers on 27 February 2018[231]. Under these policies, persons subject to immigration may be given more favourable treatment than the rules may imply in areas where rules are inconclusive. Recent changes in the Immigration Rules have mostly filled those gaps. However, the Secretary of State cannot, in the absence of statutory authority, adopt measures which are inconsistent with a statutory authority or Immigration Rules, and s/he cannot adopt measures which are coercive, irrational or unfair.

3.5. There are constraints on what may be included in the rules. Section 6 (1) of the Human Rights Act 1998 requires public authorities not to act in a way which is incompatible with

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[225] *R v Immigration Appeal Tribunal, ex p Begum (Manshoora)* (1986) Imm AR, QBD; *MM (Lebanon) v SSHD* [2017] UKSC 10; *R (on application of Syed) v Secretary of State for the Home Department* [2011] EWCA Civ 1059.

[226] *Secretary of State for the Home Department v Pankina* [2011] QB, 376.

[227] *R (On application of Alvi) v Secretary of State for the Home Department* [2012] UKSC 33.

[228] www.gov.uk/immigration-operational-guidance

[229] *R (On application of S) v Secretary of State for the Home Department* [2007] EWHC 1654. See Macdonald's Immigration Law and Practice, Ninth Edition; p.39.

[230] *BP(DP3/96- Unmarried Partners) Macedonia* [2008] UKAIT 00045.

[231] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684049/lotr-compelling-compassionate-grounds-v1.0ext.pdf.

a right protected by the European Convention on Human Rights[232]. So, the rule-making power is subject to the Human Rights Act. Furthermore, section 2 of the Asylum and Immigration Appeals Act 1993 provides that nothing in the Immigration Rules shall lay down any practice which would be contrary to the 1951 Refugee Convention. Thereafter, section 71 of the Immigration Act 2014 preserves the duty imposed by section 55 of the Borders, Citizenship and Immigration Act 2009 in relation to the wellbeing of children. The validity of these subordinate rules and regulations have been challenged on various occasions in the recent past[233], and the last challenge was concluded in February 2017.

Judicial decisions

3.6. The decisions of courts and tribunals are an important source of immigration law. Appeals from specific decisions may be made to the First-tier tribunal, from which there is a further appeal on a point of law to the Upper Tribunal[234]. The decisions of the First-tier tribunal are not binding on future tribunals, and therefore have little value as precedent. Determinations of the former Immigration Appeal Tribunal and the present Upper Tribunal of the Immigration and Asylum Chamber have become a major source of immigration law. The decisions of the Upper Tribunal are binding on the First-tier Tribunal, and are an important source of precedent. The Upper Tribunal has made a huge contribution to the interpretation of the legislation and the Immigration Rules, and has decided a large number of cases relating to the Refugee Convention, the European Convention on Human Rights, and European Union Law. The Upper Tribunal has recently developed a system of reported cases by replacing the practice of starred decisions.

3.7. Judgements of the Scottish Court of Session, Outer and Inner House, are also binding on Tribunals. However, the Court of Session's decisions are only persuasive authority in the higher courts of England and Wales. The House of Lords and the Supreme Court have both asserted the power to depart from earlier decisions[235]. The judgements of the English and Welsh High Courts are binding on the First-tier Tribunal, while the judgements of the House of Lords, the Supreme Court, and the Court of Appeal are binding on those courts and on lower courts and tribunals.

European Union law

3.8. The Treaty of Rome came into force on 1 January 1973 and established the European Economic Community (EEC). The Treaty guaranteed free movement of community citizens. The free movement principle was originally stated in Article 48 of the Treaty of

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[232] *R (On application of Syed) v Secretary of State for the Home Department* [2011] EWCA Civ 1059.

[233] *R v Immigration Appeal Tribunal, ex p Begum (Manshoora)* [1986] Imm AR 385, QBD and most recent one is *MM (Lebanon) v SSHD* [2017] UKSC 10.

[234] Nationality, Immigration and Asylum Act 2002, Section 82.

[235] Practice Statement [1966] 3 All ER 77.

Rome, now Article 45 of Treaty on the Functioning of European Union (TEFU). The European Union has adopted a number of regulations and directives to implement the principle. The sources of EU immigration law are the treaties, the Charter of Fundamental Rights, as well as regulations, directives, and decisions. The Court of Justice of the European Union (CJEU) provides authoritative interpretation of these sources, some of which are of particular importance for immigration control[236]. The UK became a member of the European Community, now the European Union, in 1973, and its domestic immigration law developed in conformity with the freedom of movement principle and the resulting legal obligations. The Qualification Directive[237] provided a new dimension to the UK's asylum law, and the Citizens Directive[238] was transposed into domestic law by the Immigration (European Economic Area) Regulations. The Citizens Directive consolidated and modernised free movement rights. The Immigration (European Economic Area) Regulations have been amended several times, and the 2016 Regulations were effective from 1 February 2017. These Regulations consolidate the 2006 Regulations and give effect to certain judgements of CJEU, as well as addressing issues related to the practical application of the Citizens Directive. The UK has implemented the result of the referendum held on 23 June 2016, exiting the EU. The EEA Regulations were revoked on 31 December 2020. The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 preserved parts of the EEA Regulations for immigration but not for social security purposes[239]. All requirements concerning entry and residence of EEA or EU nationals now appear in the immigration rules[240] and the post-Brexit changes ended freedom of movement for EU citizens subject to the rights protected by the Withdrawal Agreement entered into force on 01 February 2020.

[236] The Immigration (European Economic Area) Regulations 2016; Directive 2004/83/EC; Council Directive (2004/83/EC.

[237] Directive 2004/83/EC.

[238] Directive 2004/38/EC.

[239] , Sections 7,9 of the Act and Schedule 3 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020/1309)

[240] Appendix EU (Family Permit), Appendix ECAA: Extension of stay; Appendix ECAA: Settlement, Immigration Rules Appendix AR (EU) etc.

Human Rights Act 1998 and immigration control

Introduction

3.9.This section of the chapter initially provides a brief background to the European Convention on Human Rights. Then, it explains the development of the ECHR jurisprudence. It expands on the legal significance of adopting the ECHR provisions in domestic law, then goes on to explain the fundamental objectives of the Human Rights Act 1998, and by analysing the interpretative and review powers of the courts it concludes that the Act maintains the constitutional balance between the judiciary and legislature. It further explains its impact on immigration and asylum and judicial input in the context of interpretative obligations under sections 2 and 3 of the Act. It expands on the practical implications of the Act in the development of the current immigration legal regime.

Background of the ECHR

3.10. The European Convention on Human Rights was adopted in Rome on 4 November 1950 by the Council of Europe based in Strasbourg, France, an international organisation comprising an initial ten member states[241] formed after the Second World War. The principal objectives of the Convention were to maintain and further realise human rights and fundamental freedoms, and to foster effective political democracy.[242] The Convention was intended to secure effective recognition and observance of the rights set out in the Universal Declaration of Human Rights 1948. The Convention came into force on 3 September 1953, and has since been ratified by all existing forty-seven member states. The United Kingdom was the first country to ratify the Convention, on 8 March 1951, and the UK accepted an individual's right of petition to the European Commission, now the European Court of Human Rights, in 1966. The First, Fourth, Sixth, Seventh, Twelfth and Thirteenth Protocols have added further rights to the substantive rights originally contained in the Convention, and these are binding on all those states that have ratified them[243]. Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides a broad but qualified right of free movement, including the right to leave one's own country. The Protocol has been ratified by 38 of the 46 current Council of Europe Member States. The UK has signed but not ratified the Protocol.

UK's reluctance to ratify Protocol 4

[241] Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom.

[242] Lord Steyn in *Brown v Stott (Procurator Fiscal, Dunfermline*) [2003] 1 AC 681, [2001] 2 All ER 97, PC.

[243] Harris, O'Boyle & Warbrick; *Law of the European Convention on Human Rights, Fourth Edition, p4*.

3.11. The Joint Committee on Human Rights published its report on 23 March 2005. The report summarises the government's stance on why it does not wish to ratify Article 2 of Protocol 4[244]. The significance of the UK not ratifying Protocol 4, in the government's view, is that Articles 2 and 3 of the Protocol could confer more rights in relation to passports and right of abode on categories of British nationals who do not currently have those right. Furthermore, the Joint Committee took the view that the freedom to choose residence under Article 2 of Protocol 4 may also be incompatible with Armed Forces discipline. Generally, the ratification of Protocol 4 would curtail the scope of the qualifications included within the rights guaranteed by the Convention.

An overview of core Convention rights and jurisprudence

3.12. The following paragraphs make a number of general points about the Convention. Article 1 of the Convention appoints member states as primary protectors of the rights and freedoms included in the Convention, and it leaves only a subsidiary function for the European Court of Human Rights (hereafter referred to as 'the Strasbourg Court' or 'ECtHR'). This means that the Strasbourg Court has a supervisory role in the protection and enforcement of rights protected by the Convention. This point was made clear in *Handyside v United Kingdom*:

> "*The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights… The convention leaves to each Contracting States, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contributions to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted."*[245]

3.13. States have both positive and negative obligations under the ECHR. A positive obligation requires the state to take steps to protect an individual's rights. A negative obligation requires the state not to interfere with an individual's enjoyment of their rights; to do nothing. For instance, Article 3 of the Convention imposes both negative and positive obligations on the state. The positive duty of the state can be in express or implied form. The Court ruled in relation to Article 8 that:

> *"….although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from interference: there may, in addition to this primary negative*

[244] https://publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9902.htm
[245] *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48.

undertaking, be positive obligations inherent in an effective respect for private or family life."[246]

3.14. Furthermore, the concept of state responsibility requires an allegation of breach to be levelled against the state rather than an individual or non-state organisation. This is commonly known as a vertical effect between the state and an individual. The Convention in certain circumstances can also have a horizontal effect between individuals, where positive obligations are in play[247], but this possibility is unlikely to have consequences in the context of immigration control.

3.15. The teleological or purposive rule of interpretation used in the Convention's jurisprudence gives priority to the purpose of the Convention[248]. The court has taken a dynamic or evolutionary approach to interpreting the Convention, perceiving it to be a living instrument which must be interpreted in the light of present day conditions.[249] This means that the court's views of what the Convention requires may change over time, and that it does not apply a strict doctrine of precedent. However, the certainty principle requires an existing decision to be followed where there are no cogent reasons to depart from it[250].

3.16. The Convention, Protocols, and even the Rules of the Court do not specify which issues are to be considered when deciding whether there has been a violation of the Convention right. However, a general list of criteria has emerged from case law which identifies six issues to be considered[251]:

- Whether a right guaranteed by the Convention or Protocol is *prima facie* engaged;
- Whether any exceptions are permitted in respect of that right, or whether any reservation or derogation applies;
- If an exception is permitted, whether it is provided for in the State's domestic law;
- Whether the state has a legitimate objective in applying the exception;
- Whether applying the exception is necessary to achieve that legitimate objective – i.e., the limitation on, or interference with, the right must be in proportion to the objective to be achieved;
- Whether the state is to be permitted some leeway in exercising its discretion - i.e., a margin of appreciation.

[246] *Stubbings v United Kingdom* (1996) 23 EHHR 213, para 62.
[247] *Stubbings v United Kingdom* (1996) 23 EHHR 213, para 62
[248] *Wemhoff v Germany* (1968) 1 EHHR 55, at para 8.
[249] *Tyrer v United Kingdom* (1978) 2 EHRR 1 at para 31; *Loizidou v Turkey* (1995) 20 EHHR 99, para 71. Also quoted in Blake & Fransman: *Immigration, Nationality and Asylum under the Human Rights Act 1998.*
[250] *Cossey v United Kingdom* (1990) 13 EHHR 622, at para 35.
[251] Blake & Fransman: Immigration, *Nationality and Asylum under the Human Rights Act 1998, at p 11.*

3.17. The principle of proportionality is part of European case law, which applies where there is a balance to be struck between the enjoyment of rights and freedoms and justifiable interference with their enjoyment. It is explicitly set out for the qualified rights protected by Articles 8-11 of the Convention, but is not limited to those rights. The principle implies that the interference with, or limitation of, the right must be no greater than is necessary to achieve the legitimate objective. In applying the principle of proportionality, the state has some discretion when it takes legislative, administrative, and judicial measures pertaining to a Convention right, and this is known as the margin of appreciation[252]. In other words, the relevant state authorities are allowed some discretion in judging what restriction on the exercise of a right is necessary to safeguard a legitimate interest, because they are better placed than an international court to decide what the Convention requires in the context of their own society, and the extent of that discretion is the margin of appreciation.[253] In *Handyside,* the court described the chronological order of the administrative decision-making process and said that the state makes the initial assessment applying the margin of appreciation; and the Court then exercises its supervisory function and checks whether the proportionality requirement has been correctly applied.

3.18. As was noted above, Article 2 of the Fourth Protocol (freedom of movement) is directly relevant to immigration control, but it has not been ratified by the UK. However, several other rights protected by the Convention may be affected by immigration control measures. The right to life (Article 2), the right not to be subject to torture or inhuman or degrading treatment or punishment (Article 3), and the right to respect for private and family life (Article 8) have all been the subject of applications to the Convention authorities, and in recent years, the right to respect for private and family life has been the right most frequently invoked in immigration cases heard by the courts and tribunals of the UK.

The Human Rights Act 1998

3.19. Prior to the Human Rights Act 1998, except for the Refugee Convention and the European Convention on Human Rights (ECHR), the role of international instruments was barely counted as a source of immigration law. These were not part of domestic law. The Human Rights Act has brought the ECHR rights within the reach of domestic courts. The European Convention on Human Rights and immigration and asylum law covers a substantive part of the Strasbourg jurisprudence which had developed prior to the Human Rights Act 1998. There are various ways in which the courts may have regard to international obligations. Judicial opinion was divided in the UK on the permissible application of other unincorporated international Conventions[254]. One view is that,

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[252] *Handyside v United Kingdom* (1970) 1 EHRR 737.

[253] Blake & Fransman: Immigration, *Nationality and Asylum under the Human Rights Act 1998, at p 17.*

[254] International Covenant on Civil and Political Rights (ICCPR); decisions of the UN Human Rights Committee; International Covenant on Economic; Social and Cultural Rights; the Convention on the Rights of

wherever possible, a statute should be construed in conformity with those international obligations[255], famously known as the *Garland* view; another view is that regard should be given to the Convention only in the construction of ambiguous statutes, commonly known as the *Brind* view.[256] The second view has prevailed, which means that the Secretary of State is not obliged to have regard to the Convention when framing rules and directives under primary legislation. However, there is now open recognition that a decision which breaches an individual right must be justified, and that the scale of interference must be proportionate to the legitimate aim pursued.[257]

3.20. The axiom that the European Convention on Human Rights is not part of English law has not prevented English courts from developing a jurisprudence on ECHR in many significant areas of law, including immigration and asylum, even before the Human Rights Act.[258] The United Kingdom received valuable guidance from Strasbourg in shaping its modern immigration control in order to be compliant with the ECHR obligations.[259] Clear references were made to the Convention rights in various ministerial statements in both houses of Parliament, and in the Home Office policy material relating to permanent migration and deportation[260].

3.21. In *Abdulaziz* and *Soering*[261], the court held that immigration decisions such as exclusion and expulsion engage obligations under international human rights law. However, the process of availing remedy in Strasbourg is expensive and involves a very lengthy procedure. The Human Rights Act 1998 made these rights directly enforceable in the UK's courts and tribunals from 2 October 2002. Easy enforceability of the ECHR rights was one of the core objectives of the Human Rights Act[262], and it was no longer necessary to seek remedy in Strasbourg. However, recourse to Strasbourg is still open after exhausting all domestic remedies.

3.22. The Labour Party made a manifesto commitment in the 1997 General Election to introduce legislation incorporating the European Convention on Human Rights into United

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the Child (UNCRC); the Convention on the Elimination of all Forms of Discrimination Against Women; the UN Convention Against Torture and other Cruel, Inhuman and Degrading Treatment etc.

[255] *Garland v British Rail Engineering Ltd* [1983] 2 AC 751.

[256] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1AC.

[257] Ian A Macdonald QC, *Macdonald's Immigration Law and Practice, 9th Edition Vol 1, p 45, 518-519.*

[258] *Akdag v SSHD* [1993] Imm. A.R. 172; *Balbir Singh v SSHD* [1992] Imm A.R. 426; *Chahal v SSHD* [1993] Imm. A.R 362; *Chahal v SSHD* [1995] 1 W.L.R. 526.

[259] *Chahal v United Kingdom* (1997) 23 E.H.R.R.413. The Special Immigration Appeals Act 1998 was enacted after this case.

[260] Minister of State Home Office Baroness Blatch, HL, Second Reading of the Asylum and Immigration Bill, 14 March 1996, col. 959 and the Home Office's old policy DP/2/93.

[261] *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471; *Soering v United Kingdom* (1989) 11 EHRR 439.

[262] Rights Brought Home, *The Human Rights Bill Oct 1997, CM 3782, para 1.14.*

Kingdom law.[263] The Human Rights Act 1998 was thus enacted and came into force on 2 October 2000. Schedule 1 of the Act incorporates Articles 2-12 and 14, and 16-18 of the Convention, Articles 1-3 of the First Protocol, and Article 1 of the Thirteenth Protocol into the UK's domestic law. The Home Secretary Jack Straw MP, as he then was, explained the scope of the Act in the House of Commons:

"*The Bill will guarantee to everyone the means to enforce a set of basic rights, establishing a floor below which our standards will not be allowed to fall. The Bill will achieve that by giving further effect in our domestic law to the fundamental rights and freedoms contained in the European Convention on Human Rights"*[264].

3.23. The incorporation of ECHR rights into domestic law has practical significance, and after the Human Rights Act 1998 these rights have been perceived as part of the domestic legal framework by the UK public and courts alike. Prior to the Human Rights Act, enforcement of the Convention rights was subject to a complex and expensive lengthy procedure in Strasbourg.[265]

3.24. The Human Rights Act affects UK immigration law in several ways. The interpretative obligations under sections 2 and 3 of the Human Rights Act 1998 are equally relevant to immigration and asylum cases. In practice, aggrieved migrants frequently invoke ECHR rights as a remedy of last resort against administrative removal and deportation cases. Section 2 (1) of the Human Rights Act prescribes the following to be taken into account in the interpretation of Convention rights: a) the judgment, decision, declaration or advisory opinion of the European Court of Human Rights; (b) the opinion of the Commission given in a report adopted under Article 31 of the Convention; (c) the decision of the Commission in connection with Article 26 or 27(2) of the Convention; or (d) the decision of the Committee of Ministers taken under Article 46 of the Convention.

The mirror principle and section 2 of the Human Rights Act 1998

3.25. Lord Bingham stated in *Ullah*[266] that: "*The duty of national courts is to keep pace with Strasbourg jurisprudence as it evolves over time: no more, but certainly no less*. This dictum is commonly referred to as "*the mirror principle*". There are some exceptions to the mirror principle. The Act retains internal constitutional arrangements by not making Strasbourg case law binding on the domestic courts, but it is likely to be highly persuasive. The UK courts are free to develop their own human rights jurisprudence, and there has been fast development in case law since 2000. Human rights jurisprudence in the areas of immigration and asylum is still growing rapidly at the domestic level, and an aggrieved

[263] *Lawless v Ireland (No. 3)* 1 EHRR 15; *Ireland v United Kingdom* (1978) 2 EHHR 25.
[264] HC Second Reading, 16 Feb 1998, Col 769.
[265] The average time to conclusion was five years, and the average cost was £30,000. See Rights Brought Home The Human Rights Bill Oct 1997.
[266] *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323

party still has a right to approach the ECtHR - but only after exhausting all domestic remedies.

3.26. The House of Lords' view in *Ullah* is clear on three issues: firstly, although not strictly binding, our courts should generally follow the clear and constant jurisprudence of the Strasbourg Court; secondly, the Strasbourg Court is the ultimate forum for the authoritative interpretation of the Convention; thirdly, our national courts, subject to duty imposed by s.2 (1) of the Human Rights Act 1998 and without strong reason, should follow Strasbourg case law. Lord Bingham's view could have been different on giving weight to Strasbourg jurisprudence had s.2 of the Human Rights Act 1998 not included the phrase "must take into account". The above interpretation of s.2 makes quite clear that the previous Strasbourg and native jurisprudence in relation to Article 8 remains relevant. However, the House of Lords approach in *Ullah* has been controversial[267].

3.27. The Independent Human Rights Act Review Report[268] was presented to Parliament by the Secretary of State for Justice in December 2021. The report includes detailed discussions[269] on *Ullah*[270] in the context of section 2 of the Human Rights Act 1998. The Independent Human Rights Act Review Report acknowledges the development of a mature approach to the *Ullah* principle, and states that:

> *"113. It is evident that the Ullah principle and the UK Courts' approach to it over the first twenty years of the HRA's existence has matured. <u>An initial, rigid, approach that emphasised the need to follow, and not depart from, ECtHR case law has gradually given way to a more nuanced and flexible approach.</u> 114. Ullah now forms part of a broader approach to ECtHR case law that gives proper weight to context-specific factors, to the need not to follow the ECtHR and to go beyond it in appropriate cases. The approach now being taken strikes a good balance between the HRA's aims of securing 'broad consistency' with ECtHR case law, giving effect to the Convention domestically, and securing an effective dialogue between the UK, its Courts, and the ECtHR.115. It follows that the strength of the concerns which might have been expressed as to the Ullah principle in its initial phase is much reduced; in terms of the ToR, the application of Ullah in practice over an extended period of time has allayed many of those concerns. Moreover, as a matter of realism, any discussion of Ullah must respect the reiterated support of high authority for the principle, most recently in AB. Nonetheless, in considering whether there is a need for any amendment of section 2 and, if so, what that amendment should be, it remains pertinent to learn lessons from the evolution of the Ullah principle with a view to informing our options, and recommendations, for reform. Concerns with the approach taken in Ullah can be summarised as follows…".*

[267] *R (on the application of Quila) v Secretary of State for the Home Department* [2011] UKSC 45.
[268][268] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf (Last accessed on 24 February 2022).
[269] The Independent Human Rights Act Review Report p46-102.
[270] *R(Ullah) v Special Adjudicator* [2004] UKHL 26.

The report quotes the case of *AB*[271], which further explains the application of the *Ullah* principle:

"*59. It follows from these authorities that it is not the function of our domestic courts to establish new principles of Convention law. But that is not to say that they are unable to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. In situations which have not yet come before the European court, they can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law. Indeed, that is the exercise which the High Court and the Court of Appeal undertook in the present case. The application of the Convention by our domestic courts, in such circumstances, will be based on the principles established by the European court, even if some incremental development may be involved. That approach is discussed, for example, in Rabone v Pennine Care NHS Trust (INQUEST intervening) [2012] UKSC 2; [2012] 2 AC 72, paras 112 and 121, Surrey County Council v P [2014] UKSC 19; [2014] AC 896, para 62, Kennedy v Charity Commission [2014] UKSC 20; [2015] AC 455, paras 145-148, and Moohan v Lord Advocate (Advocate General for Scotland intervening) [2014] UKSC 67; [2015] AC 901, para 13".*

3.28. *AB* is extensively quoted in the report, which provides the most recent judicial view of the *Ullah* principle. AB quoted a passage from Lord Hope on *Smith v Ministry of Defence*[272] as follows:

"*Lord Bingham's point* [in Ullah, para 20] *was that Parliament never intended by enacting the Human Rights Act 1998 to give the courts of this country the power to give a more generous scope to the Convention rights than that which was to be found in the jurisprudence of the Strasbourg Court. To do so would have the effect of changing them from Convention rights, based on the Treaty obligation, into free-standing rights of the court's own creation*."

The Independent Human Rights Act Review Report draws similar conclusions.

3.29. Section 3 of the Act requires all legislation - primary, secondary, past, and future, to be read and given effect to so far as possible in a way which is compatible with ECHR rights. This interpretative formula, which was adopted from European jurisprudence[273], means that the courts must strive to find an interpretation of the legislation which is consistent with Convention rights as far as the language of the legislation allows, and that a declaration

[271] *R (on application of AB (Appellant) v Secretary of State for the Home Department* [2021] UKSC 28, see paragraphs 54-59.
[272] [2013] UKSC 41.
[273] *Marleasing SA v La Comercial International de Alimentacion SA C-106/89* [1992] 1CMLR 305, ECJ.

of incompatibility should be a last resort[274]. However, in practice, the application of section 3 of the Human Rights Act has sometimes been controversial[275]. The courts are not bound by previous interpretations[276], and the interpretative obligation applies to the Immigration Rules[277]. The courts are empowered to disapply or strike down a subordinate legislation as *ultra vires* which is impossible to interpret consistently with ECHR rights in the absence of anything in the parent Act requiring the incompatibility[278]. The immigration tribunal has no power to strike down the incompatible rules, but it can set aside an immigration decision which is unlawful as being incompatible with Convention rights, regardless of whether the immigration decision was in accordance with the rules.[279] Section 6 of the Human Rights Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. This provision is significant in several ways. It is binding on courts and tribunals, being public authorities, and it affects the validity of subordinate legislations and of decisions taken under such legislation. This now appears as a ground of appeal in s. 84 (1) (c) of the Nationality, Immigration and Asylum Act 2002, as amended by s.15 of the Immigration Act 2014. The term "public authority" has been broadly construed by the UK's domestic courts[280].

3.30. Courts can make a declaration of incompatibility under section 4 of the Act, and if the incompatibility of primary legislation cannot be redressed by the new method of construction or subordinate legislation cannot be read compatibly because the parent Act prevents this, then the only remedy is a declaration of incompatibility. Nine declarations of incompatibility were made within the first two years of the Act's operation, and in the recent past the Supreme Court has made a declaration of incompatibility in a case concerning the compatibility of the Immigration Rules with Article 8 of the ECHR and s.55 of the Borders, Citizenship and Immigration Act 2009. The UK courts made a total of 29 declarations of incompatibility from 2 October 2000 until 2015[281], and around eight of those were directly related to immigration and asylum cases[282].

3.31. The immigration Rules were amended on 9 July 2012 to make immigration decisions more consistent and compatible with the ECHR provisions. The amendment triggered an avalanche of litigation in the higher courts, and the legitimacy of Article 8 considerations inscribed in the rules was confirmed. However, courts were unenthusiastic about taking

[274] 583 HL Official Report (5th series) col 535, 18 November 1997.

[275] *Ghaidan v Godin-Mendoza* [2002] EWCA Civ 1533; [2004] UKHL 30.

[276] Starmer European Human Rights Law (1999) LAG, p.16.

[277] *R v Secretary of State for the Home Department, ex p Ali (Arman)* [2001] INLR 89.

[278] *R v Secretary of State for the Home Department, ex p Saleem* [2000] 4 All ER 814.

[279] *Huang v Secretary of State for the Home Department* [2007] UKHL 11, see Nationality, Immigration and Asylum Act 2002, s84 (1) (c), (g).

[280] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37

[281] Human Rights Joint Committee Report: https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/13006.htm

[282] http://www.lse.ac.uk/humanRights/documents/2013/incompatibilityHRA.pdf .

Immigration Rules as on a par with primary legislation.[283] Then, the government introduced statutory directions to the courts and tribunals by inserting Part 5A in the Nationality, Immigration and Asylum Act 2002. The Human Rights Act 1998 remains a strong primary statutory base in the exercise of ECHR rights, and has significant relevance in shaping the present legal regime pertaining to immigration and asylum.

3.32. The Human Rights Act 1998 has had a profound impact on the UK's immigration-related human rights law, and interferences with the rights protected under the Act have been subject to frequent judicial challenges in all domestic courts. Challenges have been diverse but very significant in the development of post-Human Rights Act domestic jurisprudence. In *Ullah*[284], the House of Lords considered the extra-territorial reach of the Convention and concluded that removal may engage both qualified and unqualified ECHR rights where the risk of flagrant violation exists in the receiving country. The proper role of the courts in deciding whether an immigration decision is proportionate was considered by the House of Lords in *Razgar*[285] and the court held that the appellate authority exercises an independent judgement on the material before it. The application of Article 8 will be considered in Chapters 3 to 5 of this thesis.

Changes in appeal rights

Introduction

3.33. The principal remedies for adverse administrative decisions have been appeals to tribunals and judicial review. This part provides a brief historical background and overview of the present day use of judicial review and statutory appeal rights in asylum, human rights, and immigration law. It begins by analysing various developments in appeal rights since the 1960s. Thereafter, the legislative exercise of adding and subtracting appeal rights with reference to major acts is examined in descending order. A brief background to the legislative imperatives behind each statute is given and then the net effect of those provisions is examined. The legislative objectives of introducing appeals suspensive of removal are explained. The terms "suspensive appeal rights" and "certification" are frequently used in this section, so an explanation of these terms might assist the reader. The certification of human rights or a refugee claim deprives the claimant from in country right of appeal, and the person can exercise their appeal right after leaving the country. So, the appeal right of a certified claim is not suspensive of removal. Before expanding on the remedy of judicial review, a brief conclusion on the effectiveness of appeal rights is provided.

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[283] *Izuazu (Article 8. New Rules. Nigeria)* [2013] UKUT 45 (IAC); [2013] Imm. A.R. 453.

[284] *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26.

[285] *R (on the application of Razgar) v Secretary of State of the Home Department* [2004] UKHL 27.

3.34. Thereafter, this part covers the remedy of judicial review and provides a brief historical background on judicial review from the perspective of asylum and human rights law. The difference between appeal and judicial review is explained, then the essential legislative developments in England, Wales, and Scotland affecting or limiting the use of judicial review are explained. The availability of legal aid is inextricably linked to the remedy of judicial review, and various legislative developments affecting access to legal aid are examined. The devolution of supervisory powers to the Upper Tribunal and their use is also briefly examined. Finally, a summary conclusion in relation to the effectiveness of judicial review remedy appears at the end of this section.

Statutory appeal rights

3.35. In the late 1950s, racial tensions were on the rise and MPs from both mainstream parties, Labour and Conservative, were suggesting a need to 'stop immigration'. They really meant to stop non-white immigration, as the restrictions imposed under the Commonwealth Immigration Act 1962 made obvious[286]. The preamble of the Act stated that it was: '*An Act to make temporary provision for controlling the Immigration into the United Kingdom of Commonwealth Citizens.'*

The law was extended each year until the passing of the Commonwealth Immigrants Act 1968. The first part of this chapter covers the history of immigration control, and this part will only focus on the development of statutory appeal rights in British law.

<u>Wilson Committee Report – realising the need for appeal rights</u>

3.36. The 1968 Act introduced a discretionary scheme of special vouchers which ended Commonwealth Citizens' common law right to enter the UK freely. The Act did not make any provision for appeal. However, the Immigration Appeals Act 1969 provided Commonwealth citizens with rights of appeal against exclusion, removal, and other decisions affecting immigration. The legislation followed on from the report of the Wilson Committee. The legislation was intended to address the fears of racial discrimination emanating from the restrictions imposed by the 1962 Act on Commonwealth citizens, and to promote rational decision making against the threat of arbitrary interference by the authorities.[287] The right of legal representation was not provided by the Act, and the

[286] James, Charles: 50 years of family immigration: changes in British legislation for partner and family immigration: 1955-2005: Part 1:1955-1973, Immigration and Asylum Nationality Law 2006.
[287] Committee on Immigration Appeals, set up in 1966, chaired by Sir Roy Wilson QC (Cmnd 3387, 1967) Also cited by Ian MacDonald QC, *MacDonald's Immigration Law and Practice (6th Edition) Lexis Nexis*, Butterworths para 18.2 at p.1160.

appellate system was only for Commonwealth citizens. There was no right of appeal against deportation or against restrictive action, the precursor of the modern day exclusion order, made primarily on political grounds[288]. There were obvious flaws in the appellate system, as it did not provide rights of appeal against all categories of immigration decision, and in some cases where there was a right of appeal, it could only be exercised after removal from the UK. There was no in country right of appeal to those refused leave at entry or to those who had not obtained pre-embarkation entry clearance. This was a huge disadvantage to those claiming asylum on arrival. Thus, there was no right of appeal against deportation recommended by a criminal court and against the removal of allegedly illegal entrants. Likewise, there was no in country right of appeal against the refusal of leave to enter or remain to those subject to exclusion or deportation orders on national security grounds. There was only a right to extra-statutory advisory procedure without disclosing the ground(s) of proposed exclusion.[289] Aliens had no right of appeal of any kind under the 1969 Act; there was no mechanism of suspensive appeal rights, where removal or deportation etc. from the UK is suspended until all appeal rights are exhausted.

Appeal rights under the Immigration Act 1971

3.37. The Immigration Act 1971 extended appeal rights to aliens for the first time. The Act included suspensive appeal rights to those subject to deportation orders, and those who had overstayed in breach of their visa conditions. This was recognition of the fact that unlike illegal entrants, overstayers had been admitted to the UK lawfully, so they were given the right to be heard before removal.[290] Illegal entrants were excluded from having a suspensive appeal right suspending removal until the final outcome of appeal, unless they made an asylum claim after arrival. The range of immigration decisions subject to a right of appeal has not remained static; it has been expanded and contracted at different times. A system of immigration appeal was established. Adjudicators and an Immigration Appeal Tribunal are the administrative features of the appeal system.

3.38. The Immigration Act 1988 qualified the scope of suspensive appeal rights, and s. 5 of the Act stipulated that only those who had entered the United Kingdom seven years prior to the decision to deport could avail themselves of a right of appeal suspensive of deportation. Exceptions to the seven-year rule were laid down by statutory instrument, resulting in an arbitrary distinction between those who had a right of appeal and those who did not[291]. The practice of harsh decision making was criticised by Lord Griffiths[292], whose

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[288] Cmnd 3387, para 191.

[289] Ian A Macdonald QC; *Macdonald's Immigration Law and Practice, 4th Edition,* see para 15.52 to 15.57.

[290] Ian A Macdonald QC:

[291] Idrish [1985] Imm AR 155. Quoted by Macdonald's Immigration Law and Practice, Ninth Edition, Volume 1, p-1719.

[292] *R v Secretary of State for the Home Department, ex p Oladehinde* [1991] 1 AC 254 see speech of Lord Griffiths.

observation highlights the importance of judicial supervision of the executive's decision-making process. The stripping of suspensive appeal rights from asylum claimants triggered lengthy litigation, and it finally reached the European Court of Human Rights.[293] *Vilvarajah's* case was lost and the judgement appeared after the draft Bill of 1993 had been made public[294]. In *Vilvarajah,* the court did not find a breach of Article 3 and accepted the UK government's submission that the system for judicial review of administrative decisions provided an effective remedy for the purpose of Article 13 of the ECHR.

The plight of non-asylum migrants under the 1993 Act

3.39. The Asylum and Immigration Act 1993 also intended to reduce recourse to costly and lengthy litigation in the European Court of Human Rights, but non-asylum claimants paid the price by losing their appeal rights. The 1993 Act extended the scope of suspensive appeal rights to almost all asylum claimants, including those who had first entered the United Kingdom via EU member states. The Act provided no appeal right to visitors refused leave to enter on arrival or to short-term students. Migrants attempting to enter without documents had no right of appeal either. Asylum claimants entering the United Kingdom via EU member states who were facing removal on *refoulement* ground prior to the Act won appeal rights, however.[295] EEA nationals and their family members were not required to have leave to enter and remain under the Immigration Act 1971, so in consequence they could not avail themselves of appeal rights against exclusion, removal, and deportation. The legislature could not possibly have envisaged this class of European migrants back in 1971 and the primary focus of the legislation was on Commonwealth citizens. Immigration (EEA) Order 1994, SI 1994/1895 partly fixed the legislative omission for EEA nationals. Later amendments were brought in to give effect to three EU directives, and maintenance provisions were introduced in amendments.[296] These orders were precursors to the present EEA Regulations[297]. The 1993 Act appeared to make the asylum process more compliant with Convention rights, but this was achieved at the cost of depriving other migrants from appeal rights who were not relying on Convention rights; for instance, students, visitors, etc.

Reversal of asylum seekers' suspensive of removal appeal rights

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[293] *Vilvarajah v United Kingdom* [1991] 14 EHRR 248.

[294] *Macdonald's Immigration Law and Practice 9th Edition, p.1719.*

[295] Ian A Macdonald QC; *Macdonald's Immigration Law and Practice (6th Edition) Lexis Nexis; p. 1161.*

[296] The Immigration Economic Area (Amendment) Order 1997; came into force on 1 Feb 1998.

[297] See latest Immigration Economic Area (Regulations) 2016; came into force on 1 Feb 2017.

3.40. In early 1990s, asylum seekers were winning most of their appeals against removal to the 'safe' countries of the EU on the ground that *refoulement* from these countries to the country of persecution could not be ruled out[298]. One of the objectives of the Asylum and Immigration Act 1996 was to curb the appeal rights of a group of asylum seekers who were resisting removal to 'safe' EU countries. The Act deprived asylum claimants of an in country right of appeal.[299] Section 2 of the Act provided sweeping powers to the Secretary of State to certify that the claimant would be safe in the country to which he was being removed, and s.3 reinforced those certification powers with statutory procedural restraints in accessing the in country right of appeal. A claimant's country of origin, and the timing and nature of the claim were factors to be weighed in the certification process. Neither the Asylum and Immigration Act 1993 nor the Asylum and Immigration Act 1996 provided a right of appeal to those who could not claim to be refugees but whose removal could arguably breach their fundamental rights protected by, for instance, Articles 3 and 8 of the Convention. That was a serious omission, and consequently a huge number of judicial reviews were instigated against administrative removals[300]. Section 169 (3) and schedule 16 of the Immigration and Asylum Act 1999 repealed sections 2 and 3 of the 1996 Act on 2 Oct 2000. The 1999 Act is contemporary with the Human Rights Act 1998. However, following the ECtHR's criticism in *Chahal* and the ECJ's in *Shingara* and *Radiom*'s right of appeal against deportation, exclusion orders and detention made on political or public security grounds were introduced under the Special Immigration Appeals Commission Act 1997. The purpose of the legislation was to protect the UK against further findings of being in breach of the rights protected by the ECHR, particularly Article 3, but unlike asylum cases, there was no mechanism of direct human rights appeals.

<u>Suspension of removal appeal rights under the 1999 Act</u>

3.41. The Human Rights Act 1998 and the Immigration and Asylum Act 1999 entered into force simultaneously on 2 October 2000. The Human Rights Act 1998 imposes a duty on a public authority to act in a way which is incompatible with a Convention right. Section 10 of the Immigration and Asylum Act 1999 ended the distinction between an overstayer and an illegal entrant in terms of availing themselves of appeal rights. Section 10 ended the appeal rights of overstayers unless an appellant asserted that the removal would be in breach of their protected human rights. The Act also provided a free-standing suspensive appeal right for those who claimed that their removal offended their protected human rights, or that the decision was racially discriminatory.[301] The removal of an asylum claimant to an EU Member State or other designated country was an exception to the general rule, and the Secretary of State could certify the claim as 'manifestly unfounded', which means that

[298] Macdonald's Immigration Law and Practice (9th Edition), p.1719.
[299] Asylum and Immigration Act 1996, s2 and 3.
[300] *R v Secretary of State for the Home Department, ex p Kebbeh* [1999] EWHC 388 (Admin) and *R v Secretary of State for the Home Department, ex p Ahmed and Patel* [1998] INLR 570.
[301] Immigration and Asylum Act 1999 as amended by s.65 of the Race Relations (Amendment) Act 2000.

the removal would not breach the claimant's human rights[302]. These provisions were repealed by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 which came into force on 1 October 2004. The 1999 Act also introduced a one-stop appeal process, and the objective of this provision was to prevent repetitious and multiple appeals by one person and his/her family members, but the procedure designed to effect it was needlessly obscure and complex.[303] These provisions were repealed on 1 April 2003.[304]

3.42. The needlessly complex and obscure procedure brought in by the 1999 Act prompted the need for new legislation to simplify the appeal process. Part 5 of the Nationality, Immigration and Asylum Act 2002 attempted to remove the disparities in appeal rights against a variety of immigration decisions. The term "immigration decision" was defined in s.82 (1) and (2) of the Act, and a right of appeal was specified against certain immigration decisions. Section 82 of the Act effectively made appeal rights available against entry clearance, leave to remain, leave to enter, and leave to vary refusals. The right of appeal was available only against an immigration decision, and s.82 listed kinds of immigration decisions which would trigger a right of appeal, but these appeal rights were subject to exceptions provided in Part 5 of the Act. There was no right of appeal against the refusal to vary leave unless the result of the refusal was that the person had no leave to enter or remain[305]. There was a right of appeal against a student's entry clearance provided that the length of the course was not less than six months[306]. Family visitors were given a right of appeal against refused entry clearance applications, and family members were defined in the regulations.[307] Illegal entrants and overstayers were given a right of appeal against removal, but these appeal rights were subject to certification powers. The Act removed the suspensive appeal rights of all whose asylum or human rights claims were certified as clearly unfounded[308], and it created a quasi-presumption in favour of the certification of claims pertaining to the listed countries[309]. These provisions came into force on 1 April 2003[310]. Section 12 (1) (b) of the Immigration Asylum Act 1999 had similar provisions[311]. The 2002 Act included provisions for removing someone to a country from where they had fled persecution, and the right of an in country appeal was taken away; in other words, this was a practical consequence of certification[312]. The option of judicial review against the Immigration Appeal Tribunal's refusal was replaced by a statutory review which is a paper

[302] Immigration and Asylum Act 1999, ss.11(3), 12 (5) and designated countries were named by order.
[303] See Asylum Appeals (One-stop Procedure) Regulations 2000, SI 2000/2244 and *Macdonald's Immigration Law and Practice 6th Edition,* p.1162.
[304] Sections 73-76 were relevant to one-stop procedure and these were repealed by the Nationality, Immigration and Asylum Act 2002, ss114(1), (2) and 161, sch 9.
[305] Nationality, Immigration and Asylum Act 2002, s.82
[306] Section 91 of the 2002 Act.
[307] Immigration Appeals (Family Visitor) Regulations 2003.
[308] Nationality, Immigration and Asylum Act 2002, s.94.
[309] Asylum (Designated States) Order 2003, SI 2003/970.
[310] SI 2003/754.
[311] Asylum (Designated Safe Third Countries) Order 2000.
[312] Section 94, Nationality, Immigration and Asylum Act 2002.

review, and the Tribunal's jurisdiction was reduced to points of law only.[313] The 2002 Act introduced provisions for cost awards and for public funding to be withheld in unmeritorious cases in the Tribunal.[314]

3.43. The question of when an in country right of appeal can be accessed against the refusal of a human rights claim under the 2002 Act was subjected to judicial examination[315], and it was concluded that human rights claims cannot be raised at the appeal stage.

Procedural measures under the 2004 Act

3.44. The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 brought in a number of measures limiting appeals rights suspensive of removal to designated states[316], including the introduction of an amended one-stop appeal system, where applicants and appellants were required to state all the grounds on which they sought to rely, and it precluded appeal where they had had an earlier opportunity to raise the ground(s)[317]. Section 8 of the 2004 Act prescribes the statutory criteria for assessing the credibility of the claimants' and the use of this provision is very common in asylum cases. The 2004 Act has since been amended in the Immigration Act 2014. The 2004 Act[318] replaced adjudicators and the Immigration Appeal Tribunal with a single-tier tribunal. The Asylum and Immigration Tribunal (AIT) was empowered to hear all immigration and asylum appeals except those involving national security.[319] During the legislative process of the 2004 Act the Secretary of State and the Lord Chancellor attempted to oust the higher courts' jurisdiction in immigration and asylum matters. This was an unprecedented move, and it could not withstand House of Lords scrutiny.[320] The 2004 Act also provided for a tribunal's decision to be reconsidered by the tribunal, and to be remade if the original decision contained a material error of law.[321] The Immigration and Nationality Act 2006, the UK Borders Act 2007, and the Crime and Courts Act 2013 made further changes to appeal provisions, but a detailed examination of those changes is not within the scope of this chapter.

Appeal rights and the Immigration Act 2014

[313] Nationality, Immigration and Asylum Act 2002, s. 101 (1) (2).
[314] Nationality, Immigration and Asylum Act 2002, s. 101 (3) (d) & 106 (3).
[315] *R. (on the application of Nirula) v First-tier Tribunal [2012] EWCA Civ 1436 and SS (Turkey) 2006 UKAIT 00077.*
[316] Section 27 of the 2004 Act.
[317] Section 30 of the 2004 Act.
[318] Asylum and Immigration (Treatment of Claimants, etc) Act 2004.
[319] See s.81 of the 2002 Act, substituted by s.26 (1) of the 2004 Act on 4 April 2005.
[320] Select Committee on Constitutional Affairs, Second Report (2003-04) session), March 2004
[321] See s.103A of the Nationality, Immigration and Asylum Act 2002.

3.45. The government felt the need to introduce multiple measures in relation to citizenship, appeal rights, regulating the marriage of foreign nationals, access to public services facilities, and employment with reference to immigration status[322]. The Immigration Act 2014 amended Part 5 of the Nationality, Immigration and Asylum Act 2002.[323] Part 5A of the Act includes public interest considerations, which are a category of directions to courts and tribunals, in relation to Article 8 considerations. The new legislation removed the majority of appeal rights by amending ss.82 and 85 of the 2002 Act. The government argued that the previous appeal regime was too complex and slow, and that multiple appeal rights were obstructing removals from the United Kingdom. It therefore reduced the number of appealable immigration decisions and the grounds[324] of appeal which could be raised before the First-tier Tribunal. Therefore, the majority of decisions can only be challenged by way of judicial review[325].

3.46. The amended s.84[326] provides the following three general grounds of appeal against the Secretary of State's decisions: a) the refusal of a protection claim; b) against the refusal of a human rights claim; and c) against the refusal of protection status. The current appeal regime only offers an in country right of appeal against a 'protection claim' and a 'human rights' claim subject to certification provisions. The Upper Tribunal concluded that the Secretary of State's refusal to treat a human rights claim as a 'fresh claim' was not a decision refusing a human rights claim; rather, it was a decision that no human rights claim had been made at all.[327].

Certification provisions

3.47. According to the 2002 Act[328] as amended by the Immigration Act 2014, all appeals must be brought within the UK unless certified by the Secretary of State under s.94 of the 2002 Act and where the decision relates to the removal of an asylum seeker to a safe third country; or the Secretary of State certifies a human rights claim made by a person liable to deportation. In cases involving the revocation of protection status, the place from where the appeal must be brought would depend on whether the appellant was in or outside the UK on the date of the decision.

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[322] Preamble of the Immigration Act 2014.

[323] S.15(2) of the IA 2014, substituting a new s.82 in the 2002 Act.

[324] https://www.parliament.uk/business/lords/media-centre/house-of-lords-media-notices/2014/march-2014/immigration-bill/

[325] Immigration Act 2014 (Commencement No 3, Transitional and Saving Provisions) Order 2014/2771 and Immigration Act 2014 (Commencement No 4, Transitional and Savings Provisions Amendment) 2015/371.

[326] See s.84 (1) of the 2002 Act.

[327] *R (on the application of Robinson) v Secretary of State for the Home Department* [2016] UKUT 133 (IAC)

[328] See Section 92 of the Nationality, Immigration and Asylum Act 2002.

Certification of human rights claims

3.48. Section 94B of the 2002 Act empowers the Secretary of State to certify a human rights claim made by a person subject to deportation provided that the claimant would not face a risk of "serious irreversible harm on removal[329]. Prior to these provisions coming into force, more than 40% of all immigration appeals to the First-tier Tribunal were allowed[330], so the principal effect of the abolition of appeal rights was to take away an important, accessible, and effective remedy against injustice[331]. Section 63 of the Immigration Act 2016 amended s.94B of the 2002 Act, and with effect from 1 December 2016, the Secretary of State can certify any human rights claim. Prior to that amendment, the power was only applicable to human rights claims of appellants subject to deportation.

Appeal rights of Points-based system migrants

3.49. There is no right of appeal against a decision taken under the points-based migration system. The only remedy for applicants is an administrative review, which only reviews the previous decision and does not allow fresh evidence to be submitted. After exhausting the remedy of administrative review, they have recourse to a judicial review, which is not the best substitute for a statutory appeal right. The new appeal regime applied to Tier 4 students with effect from 20 October 2014 and was extended to Tier 1, 2, and 5 main applicants and family members with effect from 2 March 2015. This change left all point-based system migrants at the mercy of the Home Office, and few could afford to challenge these decisions by way of judicial review.

Conclusion

3.50. There appears to have been a pattern of the subtraction and addition of appeal rights since 1971. The initially generous appeal rights extended by the Immigration Act 1971 were qualified by the Immigration Act 1988. Those qualifications were serious, and non-suspensive appeal rights became devoid of purpose. Then, the 1993 Act extended the scope of immigration appeal rights and later, the 1996 Act introduced qualifications similar to the 1988 Act. The 1999 Act was more compliant with international obligations in terms of protecting Convention rights, but the certification powers introduced in the 2002 Act made appeal rights less useful and recourse to judicial review continued. The most recent changes brought by the Immigration Act 2014 have restricted appeal rights to human rights and

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[329] *R (on application of JT) v Secretary of State for the Home Department* [2015] 537 IAC.

[330] Tribunals Statistic Quarterly: April to June 2014, Ministry of Justice, 11 September 2014, showed that 42% were allowed in the financial year 2013/14.

[331] *Macdonald's Immigration Law and Practice 9th Edition*, Volume 1, p.1723.

asylum claims, and only a handful of claimants are able to access the luxury of an in country right of appeal. This severe reduction of appeal rights has left migrants with very little judicial oversight, and the executive decision-making process has been left unchecked. A report based on empirical analysis suggests that the removal of appeal rights under the 2014 Act does not seem to have led to a significant increase in judicial reviews[332] because the Act now provides the right of appeal against the refusal of all protection and human rights claims, with the exceptions of certified claims and refusals of points based system applications. Furthermore, the number of categories of appealable decisions has been reduced by the 2014 Act, but the scope of appeal rights is broad. The right of appeal is no longer linked to "immigration decision" as was defined in the old section 82 of the Nationality, Immigration and Asylum Act 2002. However, previous appeal rights reforms, predating the points based system and the Immigration Act 2014, increased recourse to judicial review. Judicial review is not the best remedy against Home Office decisions because, unlike statutory appeal, it does not extend to the substantive merits of the case. Points-based system migrants may therefore be tempted to raise human rights claims in their applications to avail themselves of a right of appeal against the refusal. The review system is neither the best example of achieving the aim of administrative convenience nor a good mechanism for the effective dispensation of justice.

The remedy of judicial review in immigration and asylum cases

3.51. Judicial review is arguably the most effective way in our democracy of holding the government and public bodies to account for the legality of their actions. This is the way in which an aggrieved person seeks the court's intervention to consider whether the public body has followed its own rules or laws set by Parliament. The King's writ was the precursor of modern day judicial review, and it was used to hold the King's own ministers to account. Originally, judicial review was not available to challenge administrative decisions concerning immigration and citizenship, because immigrants were considered to have no enforceable right to enter and reside in the realm. The subject of immigration decision making, under the Royal Prerogative, was regarded as being the exclusive domain of the Secretary of State for the Home Department. Immigration decisions were described as non-justiciable.[333] The remedy of judicial review was available for those decisions where the primary decision maker, the executive, was under a duty to act judicially, and immigration decisions were excluded from that category[334]. The distinction between the exercise of administrative powers and acting judicially was eroded[335] with the passage of time, and it was established that any decision affecting an individual's rights or interests is

[332] https://www.research.manchester.ac.uk/portal/files/131898159/Immigration_Judicial_Review_Report_Online_.pdf; *Immigration Judicial Reviews An Empirical Study* by Professor Robert Thomas and Dr Joe Tomlinson.

[333] *Musgrove v Chun Teeng Toy* [1981] AC 272 (PC).

[334] *R v Leman Street Police Station Inspector ex p, Venicoff* [1920] 3KB 72.

[335] *Ridge v Baldwin* [1964] AC 375.

subject to the principles of judicial review, and that these principles apply to the prerogative powers[336].

Difference between judicial review and statutory appeal

3.52. In the simplest terms, a judicial review is not an appeal. The court's function is supervisory in nature, and it only extends to reviewing public bodies' decisions on grounds of illegality, irrationality, and procedural impropriety. The Human Rights Act 1998 requires courts to consider whether the conduct complained of was proportionate. Irrationality was once equated with 'Wednesbury unreasonableness'[337], and the threshold of the irrationality test is high. It applies to a decision which goes against the accepted moral standards in a manner that no sensible person would have chosen by applying his mind. The working definition of proportionality appears in *Bank Mellat*[338], where Lord Sumption stated that:

> "*The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law, notably R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 (in particular the speech of Lord Steyn), R v Shayler [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), Huang v Secretary of State for the Home Department [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and R (Quila) v Secretary of State for the Home Department [2012] 1 AC 621 at para 45.Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them*".

[336] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 375.
[337] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 375.
[338] *Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) (No.2)* [2013] UKSC 39, Lord Sumption Para 20, Lord Reed para 68-76. In particular, see para 74.

Then, Lord Reed explained the elements and historical perspective of proportionality as follows:

> "*The judgment of Dickson CJ in Oakes provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in Oakes can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in De Freitas, and the fourth reflects the additional observation made in Huang. I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure*".

<u>Judicial review in the immigration and asylum context</u>

3.53. We discussed earlier that the scope of judicial review is restricted to the propriety of the decision under review, and highlighted that the higher judiciary cannot assume the role of primary decision maker. Statutory appeal systems assessing the substantive merits of immigration decisions were not without their flaws. Even the introduction of suspensive appeal rights in 1993 could not diminish the importance of judicial review, and the pressure on higher courts continued to rise. The government unsuccessfully attempted to oust the High Court's jurisdiction in relation to Immigration and Asylum tribunal decisions. Then, the government resorted to shifting immigration and asylum cases elsewhere. Judicial oversight has been perceived as part of the problem, and governments have been trying to insulate their decisions from challenge. Successive governments have viewed a majority of judicial reviews as unnecessary, vexatious, and counterproductive. The Conservative-Liberal Democrat Coalition government expressed their frustration by claiming there is a "*culture of using meritless judicial review applications to delay immigration decisions*"[339].

[339] House of Commons Special Standing Committee on the Immigration and Asylum Bill 1999, May 11, 1999, col.1413 (Mike O'Brien MP). In 2004, the Government sought unsuccessfully to abolish immigration judicial reviews altogether. See R. Rawlings, *"Review, Revenge and Retreat" (2005)* 68 M.L.R. 378.

Shifting judicial review to the IAC Upper Tribunal

3.54. AIT was abolished, and two tiers of Immigration and Asylum Chambers were established in 2010, the First-tier and the Upper Tribunal. Section 15 of the Tribunals Courts and Enforcement Act 2007 (TCEA) extended the Upper Tribunal's jurisdiction to make mandatory, prohibitive, quashing , declaratory, and injunctive orders in relation to specified classes of cases according to s. 18 of the TCEA 2007. Initially, cases related to age disputes and fresh claims under paragraph 353 of the Immigration Rules were transferred to the Upper Tribunal. The 2007 Act implemented the recommendations of the *Leggatt Review*.[340]

3.55. Since 1 November 2013, the majority of judicial reviews have been transferred to the Upper Tribunal. The Crime and Courts Act 2013 transferred more judicial review powers to the Upper Tribunal. The Senior President of the Tribunals' Annual Report in 2017 revealed that the Immigration and Asylum Upper Tribunal was dealing with 95% of judicial review cases, and the Administrative Court retains jurisdiction in the residual category. Between 1 November 2015 and 31 Oct 2016, 16,195 new judicial reviews were lodged in the Upper Tribunal[341]. Professor Robert Thomas further assessed the impact of judicial reforms in his report published in 2019[342].

Significance of the Second Appeal Test

3.56. The second appeal test does not apply to judicial review cases generally; it applies to the Upper Tribunal's decision to refuse permission to appeal to the Court of Appeal or Inner House Eba[343] and Cart[344] related to the interpretation of TCEA. Eba and Cart judicial reviews pose additional hurdles to raising a judicial review. The adoption of a second appeal test restricts access to judicial remedy and insulates decision making, which is an important theme of this thesis. So, it is relevant to explain the importance of Eba and Cart tests. Eba originated in Scotland and was decided by the Court of Session, and Cart was decided by the Court of Appeal in England. The Inner House of the Court of Session concluded that the scope of review was unlimited, and it has not been expressly reduced by TCEA 2007 in the absence of a leave to appeal procedure as required in English jurisdiction. The Court of Appeal decided that the judicial review by the Upper Tribunal was only available in "exceptional circumstances" where exceptional circumstances means "outright excess of jurisdiction" or the denial of fundamental justice. The Supreme Court reconciled the different views and ruled that judicial review of the Upper Tribunal's

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[340] Tribunal for Users: One system, one Service (2001). http://www.tribunals-review.org.uk/

[341] Senior President of the Tribunal's Annual Report 2017, p.28.

[342] https://www.research.manchester.ac.uk/portal/files/131898159/Immigration_Judicial_Review_Report_Online_.pdf; *Immigration Judicial Reviews An Empirical Study by Professor Robert Thomas and Dr Joe Tomlinson*.

[343] *Eba v Advocate General for Scotland* [2011] UKSC 29.

[344] *R (Cart) v Upper Tribunal* [2011] UKSC 28.

unappealable decisions should be restricted to the grounds on which permission might be granted for second-tier appeal in the Court of Appeal. The court further confirmed that the same approach should be taken in Scotland, such as the second-tier appeal test under English jurisdiction. Lord Hope considered that there was no substantial difference between English and Scots law as to the grounds of review, and thus there was no good reason to adopt a different approach[345].

3.57. The second-tier appeal test requires the relevant court to consider whether the proposed appeal would raise an important point of principle or practice, or that there was some other compelling reason for the relevant appellate court to hear the appeal[346]. The Court of Appeal in England and Wales is the relevant court for the purpose of s.13 (6) of the Act. However, the same test was reproduced in rule 41.59 of the Rules of the Court of Session, and the rule gives effect to the particular intention as to when a question of law should be subject to further judicial scrutiny by higher courts. The Independent Review of Administrative Law recommended the reversal of Cart Judicial Review, based on the incorrect information provided by the government that only 0.22% of Cart judicial reviews were successful. A later government accepted that the success rate is in fact fifteen times higher, at 3.4%. Another view is that the Cart judicial review success rate could even be above 5.7%[347].

Judicial review of excluded decisions

3.58. The TCEA has restricted recourse to judicial review. S.11 (5) of the TCEA defines "excluded decision", and the Appeals (Excluded Decisions) Order 2009 lists categories of decisions for immigration and asylum purposes. After the refusal of permission to appeal applications from the First-tier and Upper Tribunal, the decision will be treated as an excluded decision and a second tier appeal test will apply, as mentioned in sections 13 (6) and (6A) of TCEA 2007. The application of a second tier appeal test is not limited to asylum support decisions under section 103 of the 1999 Act. The understanding of the term "excluded decision" is very significant in availing the supervisory jurisdiction of the higher courts because further permission to appeal is subject to the second tier appeal test under s. 13 (6) and (6A) of the TCEA 2007. Subsection 6(A) applies to Scotland. The provision requires that permission to appeal should not be granted unless the court considers that the proposed appeal would raise some important point of principle, or that there is some other compelling reason for the court to hear the appeal. In *Cart*[348], Lady Hale opined that the exercise of supervisory jurisdiction by the superior courts remains imperative for the following reasons: a) the chances of leave to appeal from the Upper Tribunal are remote,

[345] Para 46 of Eba, Lord Hope.

[346] S.13 (6) of the Tribunals Courts and Enforcement Act 2007.

[347] Download.ashx (jcwi.org.uk), last accessed 15 February 2022.

[348] *R (Cart) v Upper Tribunal* [2011] UKSC 28.

and recent practice accords with her perception; b) the First-tier tribunal cannot deviate from the Upper Tribunal's approach because the Upper Tribunal is a court of record and sets precedents for the FtT; c) High Court judges sit on the Upper Tribunal, but they do not decide permission to appeal applications; d) the Upper Tribunal will become the final arbiter of law, which is not what Parliament had provided; and e) the inability of the Upper Tribunal to review its own refusal, even after knowing they had erred in law, and no independent means is provided of spotting errors. A study conducted under the supervision of Robert Thomas showed a seven-fold increase in judicial review caseload from 2004 to 2013[349], which was largely attributed to Article 8 of the ECHR claims following changes to the immigration rules from 9 July 2012.

The use of totally without merit certificate power

3.59. The government proposed changes to judicial review in December 2012; its proposals were criticised in the consultation responses. However, Chris Grayling, the then-Lord Chancellor and Justice Secretary, maintained his stance. The stated objective of the proposed changes was to filter out weak, frivolous, and unmeritorious cases at an early stage to ensure the early disposal of arguable cases[350]. The power to certify claims totally without merit (TWM) was introduced in 2013 after amending the Civil Procedure Rules. Rule 23.12 states: that "*Where the court refuses permission to proceed and records the fact that the application is totally without merit in accordance with rule 23.12, the claimant may not request that decision to be reconsidered at a hearing.*" This means that permission which is refused on paper and certified without merit bars the renewal of oral hearing. The certification can be challenged in the Court of Appeal. The Upper Tribunal Procedure Rule 30 (4A) includes a similar provision. Data reveals that from 2013 to 2015 the Administrative Court, the High Court in England and Wales, had deemed 31% of immigration claims TWM and 27% were deemed so by the Upper Tribunal during the same time period. This appears to be a large-scale weeding out of unmeritorious claims, and conversely it should be assumed that the remaining claims are not without merit.

3.60. The practice of certification in the High Court and the Upper Tribunal prompted the Court of Appeal to provide some guidance on the issue[351], and Lord Justice Maurice Kay expanded on the rationale behind introducing the civil procedure rule as being to prevent vexatious litigation and to reduce the burden on public bodies, concluding that "*I have no doubt that in this context TWM means no more and no less than "bound to fail"*.

[349] Thomas, Robert; *Mapping immigration judicial review litigation: an empirical analysis, Public law 2015.*
[350] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228535/8611.pdf; Reform of Judicial Review: the government response CM 8611.
[351] *R (On the Application of Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091.

3.61. In the court's view, the test has two safeguards in the application of CPR 54.12.7. First, no judge will certify an application as TWM unless s/he is confident after careful consideration that the case truly is bound to fail while keeping in mind the seriousness of the issue and the consequences of the decision. Secondly, the claimant still has access to a judge of the Court of Appeal who, with even greater experience and seniority, will approach the application independently and with the same care. However, these safeguards might not be enough in an appeal to the Court of Appeal against a TWM certificate case because the Court of Appeal is limited to considering the case on paper only, and there is no right to request an oral hearing[352].

3.62. In the recent past the Court of Appeal considered Grace[353] and opined that adjectives and phrases of the kind such as "bound to fail, "hopeless" and "no rational basis" are helpful but imprecise. The court further observed that a) judges should certainly not certify applications as TWM as the automatic consequence of refusing permission, and added that the criteria of certification is different by adopting the Maurice Kay reasoning given at para 15 of Grace[354]; b) no judge will certify an application as TWM unless s/he is confident after careful consideration that the case truly is bound to fail; c) separate reasons to those why permission is being refused should be given as to why the TWM certificate was imposed; d) an oral hearing is an opportunity for the claimant to address the perceived weaknesses in the claim which have led the judge to refuse the permission on paper; and e) the judge should only certify the application as TWM if they are satisfied that in the circumstances of the particular case, a hearing could not serve such a purpose and the claimant should have the benefit of any real doubt. *Wasif* was decided in February 2016 and certification powers were introduced in 2013. Given the high ratio of certifications prior to the Court of Appeal guidance, it is likely that many claims might have been wrongly certified TWM, indicating a need for broader judicial supervision. Post *Wasif,* the practice of the High Court and Upper Tribunal would reveal the real impact of the Court of Appeal's guidance. The law and practice at the Upper Tribunal level has UK-wide implications. There are procedural differences in Scotland, but these are of less significance against excluded decisions and where claims are certified TWM.

Judicial review reforms in England and Wales

3.63. Part 4 of the Criminal Justice & Courts Act 2015 brought substantial legal and procedural changes to judicial review proceedings in England and Wales. The objective of these reforms was to deter, either wholly or in part, unmeritorious proceedings in the Courts of England and Wales. The bill was opposed in Parliament, and many viewed it as

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[352] See CPR 52.15.1A and 52.15.A for the High Court and Upper Tribunal respectively.

[353] *Wasif v the Secretary of State for the Home Department* [2016] EWCA Civ 82

[354] *R (On the Application of Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091.

unnecessary[355]. These reforms extended to all types of judicial reviews, but the main bulk of asylum and immigration were to be affected more by the absence of other alternative remedies, such as statutory appeal rights.

3.64. S. 84 of the 2015 Act is of great significance because it imposes a new duty on judges, with a different test, in assessing the merits of the case.[356] Parliament intended to address the mischief resulting from procedural technicalities in s. 84[357], and the Lord Chancellor cited some examples of "procedural mischiefs"[358]. Although the section does not refer to procedural technicalities, S.84 inserted 2A in S. 31 of the Senior Courts Act 1981, which requires the High Court to refuse to grant relief at the permission stage of an application for judicial review if it appears to the court to be "highly likely" that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred[359] or after hearing the merits[360]. The court may disregard the requirements in subsections 2A (a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

Common law "inevitability" and statutory "highly likely" tests

3.65. It appears that the statutory test for granting a remedy on judicial review is more stringent than the common law test applied before. It may assist the reader here to explain the difference between the common law and statutory tests, as the difference between the common law "inevitability" test and statutory "highly likely" test is substantial, and therefore important. The literal and jurisprudential meaning of "inevitability" excludes any possibility that the outcome might have been different. The key question in applying the common law materiality test is whether a flaw made a difference to the outcome, or whether the decision would inevitably have been the same even without the flaw. The common law test leaves no room for probability[361] and the court is not required to ask whether the decision maker would, or probably would, have come to a different conclusion; it is only necessary to exclude the contrary contention, that the decision maker necessarily would still have made the same decision[362]. UK courts have been cautiously applying the inevitability test, partly in recognition of the fundamental common law protection of access

[355] See comments of Rt. Hon Lord Woolf: Judicial Review and the Rule of Law: *An introduction to the Criminal Justice and Courts Act 2015, part 4, Bingham Centre for the Rule of Law, Justice and Public Law Project London.*

[356] "Highly likely" test. S. 84 of the Criminal Justice and Courts Act 2015.

[357] Ministry of Justice Consultation paper, *Judicial Review: Proposal for further Reform (September 2013) "perfectly reasonable decisions or cations" challenged on the basis of technicalities, para 99.*

[358] HC Dec, 13 January 2015, Col 819.

[359] Section 84(1) of Criminal Justice and Courts Act 2015.

[360] Section 84 (2) of the 2015 Act.

[361] *R (Smith) v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 129, para 10; *Minister Care Management Ltd v the Secretary of State for the Home Department* [2015] EWHC 1593.

[362] *R (Mavalon Care Ltd v Pembrokeshire County Council* [2011] EWHC 3371 (Admin) [61] (Beatson J.).

to courts, and in upholding the proper constitutional and institutional competence of the judiciary. The inevitability standard has been considered by the courts in diverse factual, legal, substantive, and procedural propositions.[363]This high standard requires the court to engage in a purposeful analysis by way of careful calibration to determine the question of materiality.[364] Therefore, courts have been disinclined to deny relief unless the same decision would undoubtedly be reached[365]. This does not mean that the common law has not recognised the need to limit access to judicial review in cases where a challenge would have made no material difference to the outcome.

3.66. The real qualification in s.84 of the Criminal Justice and Courts Act 2015 is exceptional public interest. The then-Lord Chancellor and Secretary of State for Justice suggested during the debate that the public interest exception is intended to go beyond the general interest in good administrative decision making. It was suggested that the purpose of the "exceptional hurdle" may be elevate to the public interest exception[366], but the exceptionality would not be over-rigorous in its application and it was acknowledged that the public interest would be served by allowing the courts to consider even procedural breaches which otherwise would satisfy the test.[367] The concession made by the Lord Chancellor curtailed the scope of excluding procedural mischiefs from the ambit of judicial review, and one might wonder what objective dictated the law to be enacted, and whether the act had real objectives to achieve.

Legal Aid reforms in England and Wales

3.67. Legal aid reforms restricted access to courts and judicial oversight. Thus, it is relevant to discuss this area of legal development in this thesis. The government felt the need to reform the legal aid system in England and Wales, and published a consultation paper in November 2010[368]. The stated objective of the legal aid reforms was to discourage people from resorting to lawyers and using the court as a last resort, and encouraging them instead,

[363] Failure to engage in public consultation process as required by law *R (Smith) v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291; a failure to include a specific option within a consultation document *(R) v National Association of Health Stores v Department of Health [2005] EWCA Civ 154*; review of the High Court decision denying judicial review on the basis that it had no jurisdiction over the issue *BX v SSHD* [2010] EWCA Civ 481; a failure to follow published guidance regrading asylum policy *R (Mlloja V SSHD* [2005] EWHC 2833 and a decision by the Secretary of State that an appeal under Human Rights Act 1998 was clearly unfounded *R (Nadesu) v SSHD* [2003] EWHC 2839.

[364] Bingham Centre for the Rule of Law (Fordham et al.) Streamlining Judicial Review in a manner consistent with the Rule of Law (February 2014 para 5.7).

[365] Lewis, *Judicial Remedies in Public Law* (5th edition, Sweet & Maxwell. 2015) 12-28.

[366] HC Deb, 13 Jan 2015, Cols 8, 21-22.

[367] HC Deb, 21 Jan 2015, Col 1343 & HC Deb, 13 Jan 2015, Col 819.

[368] Proposal for the Reforms of legal aid in England and Wales CM 7967. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf (Accessed on 16 February 2022).

wherever it is sensible to do so, to consider alternative dispute resolution methods which may be more effective and suitable. After implementing the proposed reforms, the government predicted a 23% reduction in legal aid spending. Parliament enacted the Legal Aid Sentencing and Punishment of Offenders Act 2012, hereinafter referred to as LASPO, which restricted the availability of legal aid in England and Wales[369]. The Act applies to asylum and immigration litigation; only cases involving protection claims, domestic violence, human trafficking, and liberty can have recourse to legal aid subject to the qualifications provided within the Act. The government rationale was that legal aid should be restricted to cases involving complex issues, and those where an individual cannot protect his/her interests without professional assistance[370].

3.68. The Act includes a provision for exceptional funding, which applies to cases where a refusal to provide legal aid would offend an individual's Convention rights, as enforced by the Human Rights Act 1998, or in relation to enforceable EU rights; or where the circumstances of the case merit the granting of legal aid[371]. The government claimed that the exceptional funding provision complies with the UK's domestic and international obligations concerning the protection of fundamental freedoms. These provisions have been effective since 1 April 2013[372], and further changes introducing a 10% reduction in legal aid rates were enforced on 2 December 2013.[373] Despite admitting the importance of legal aid in judicial reviews[374], the scope of accessing legal aid in immigration and asylum cases has been restricted. Secondary legislation has further restricted the availability of legal aid in the First-tier and Upper Tribunal[375]. The majority of consultation responses, including those from the judiciary, opposed the reforms introduced via secondary legislation[376]. The government did not consult on the regulations specifically.[377] The House of Lords Secondary Legislation Scrutiny Committee criticised, in line with practitioners' views, the lack of clarity in the Regulations.[378] From a practitioner's point of view[379] these

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[369] Section 9, Schedule 1, Part 1 qualifies the availability of legal aid.

[370] Rowena Moffatt and Carita Thomas: *And then they came for judicial review; proposal for further reforms; journal of Immigration, Asylum and Nationality Law 2014.*

[371] Legal Aid Sentencing and Punishment of Offenders Act 2012, section 10 (3).

[372] The Civil Legal Aid (Remuneration) (Amendment) Regulations 2013(SI 2013/2877).

[373] The Legal Aid Sentencing and Punishment of Offenders Act 2012 (Commencement No.6) Order 2013 (S1 2013/453).

[374] Proposals for the Reform of Legal Aid in England and Wales, November 2010 (Cm7967), paras 4.67 and 4.99.

[375] Regulation 22, The Civil Legal Aid (Merits Criteria) Regulations 2013.

[376] Civil Legal Aid (Remuneration) (Amendment) No 3 Regulations 2014 (SI2014/607). See the Public law Project Response to Judicial Review: Proposals for further reforms Consultations, 1st November 2013, and the ILPA's response to the same consultation.

[377] HC Bill 192 (as amended in Public Bill Committee) Pt 4, cls 52-58.

[378] House of Lords, Secondary Legislation Scrutiny Committee, 37th Report of Session 2013-2014, HL Paper 157, para 19.

[379] Rowena Moffatt and Carita Thomas: *And then they came for judicial review; proposal for further reforms; journal of Immigration, Asylum and Nationality Law 2014.*

reforms have placed an unequal burden on individual migrants and on their representatives in terms of access to justice.

Residence test

3.69. Section 9 (2) of LASPO empowers the Lord Chancellor to add, vary, or omit services in Part 1 of Schedule 1 by way of delegated legislation. In April 2013, the Ministry of Justice proposed a residence test with some exceptions and a draft order was laid before Parliament on 31 March 2014. The test proposed an eligibility requirement on applicants to have lawfully been present in the UK for at least twelve months, at any point in the past, to access civil legal aid. The "lawfully" requirement excludes cohorts of migrants from accessing legal aid. Anyone on bail with conditions prohibiting employment and recourse to public funds or on temporary admission subject to reporting conditions would fail to meet the lawful residence test. The Public Law Project petitioned in the High Court on two grounds, that: a) the order was *ultra vires*, being outwith the scope of power granted under the primary legislation; and b) the order is unjustifiably discriminatory in effect. The Divisional Court allowed both craves but the Court of Appeal allowed the Lord Chancellor's appeal and held that the order was *intra vires* and the discrimination could be justified. The Supreme Court heard the Public Law Project Appeal on 13 July 2016, and in an unprecedented move the Public Law Project appeal was allowed during the hearing and the judgement was handed down on 13 July 2016.

3.70. The court observed that s.9 (2) (b) provides a power to vary or omit services, but the draft order seeks to reduce the class of individuals who are entitled to receive those services by reference to their personal circumstances and the characteristic, the length of residence, was unrelated to the services aspect, and that therefore, the draft order does not comport with the wider constructions of the act because the Act itself does not impose geographical restraints[380]. The rules that the draft order attempted to achieve something which the legislature never had in mind when enacting s. 9 of the Act.

3.71. The proposed test made all immigration cases involving ECHR rights except asylum claims subject to exceptional funding provision. The measure was perceived as a hostile development among practitioners and the judiciary. A sagacious judicial intervention prevented a travesty of justice from taking place. The so-called residence test was a covert attempt to curtail the scale of judicial intervention by leaving the enforceability of protected rights at the executive's discretion.

Judicial review reforms in Scotland

[380] *R (on the application of the Public Law Project) (Appellant) v Lord Chancellor (Respondent)* [2016] UKSC 39.

3.72. Following the publication in 2007 of *Civil Justice: a case for reform* by the Civil Justice Advisory Group under the chairmanship of Lord Coulsfield, Cathy Jamieson MSP, the then-Minister for Justice, invited the Lord Justice Clerk to conduct a Review of the Scottish Civil Courts.

3.73. The theme of restricting access to judicial review was adopted in Scotland and the necessary legislation was enacted.[381] The UK's government's view was that the Court of Session was overwhelmed by unmeritorious immigration and asylum related cases. The Scottish Government appointed Lord Justice Clerk, Lord Gill, to undertake a review and report on Scottish judicial reforms. The remit of the review was broad, and Lord Gill made detailed recommendations in his report. Chapter 12 of the report deals with judicial review reforms, and Lord Gill recommenced the limitation period and leave to proceed for judicial review.[382] However, empirical analysis of the government's purported assertion reveals otherwise.[383] The Judicial Reforms (Scotland) Act 2014 reflects Lord Gill's recommendations. In Scottish jurisdiction, amended procedure rules and the Judicial Review Scotland Act 2014 brought broad legal and procedural changes in the judicial review structure. S. 89 of the Judicial Reforms (Scotland) Act 2014 amends the Court of Session Act by inserting s.27A to 27D. These provisions were enforced in 2015. Prior to s.27A there was no limitation period to raise judicial review in Scotland, and now it is subject to a three month limitation period.

Limitation period

3.74. The limitation period does not apply to appeals against excluded decisions of the Upper Tribunal. In immigration cases, the limitation period applies to decisions refusing leave to remain applications, certifications of asylum and human rights claims, removals and deportations of foreign criminals, and applications from the victims of domestic violence. The three month limitation period starts from the date of the notice of decision subject to challenge.

Permission to proceed requirement

3.75. Section 27B of the Court of Session Act 1988 was inserted by s.89 of the Courts Reforms (Scotland) Act 2014, and was subsequently amended by the Courts Reforms (Scotland) Act 2014 (Consequential Provisions and Modifications) Order 2015/700. Section 27B requires the litigant to seek permission to proceed from the Court of Session

[381] Tribunals Courts and Enforcement Act 2007 and Courts and Crime Act 2013.

[382] Three month duration to raise judicial review para 38-39 and 51to 52 of Lord Gill's report.

[383] Thomas, Robert, *Mapping immigration judicial review litigation: an empirical legal analysis, Public Law 2015.*

invoking the supervisory jurisdiction of the court, and there is a different test for cases coming from the relevant Upper Tribunal. The court may grant permission to proceed only if it is satisfied that the applicant has shown sufficient interest in the subject matter of the application, and the application has a real prospect of success.

3.76. Where the application relates to the relevant Upper Tribunal, for the purpose of this thesis the relevant tribunal is the Upper Tribunal (Immigration and Asylum Chamber). In an immigration context, the second-tier appeal test applies to permission to proceed with applications against the excluded decisions of the Upper Tribunal. Where the First-tier Tribunal or Upper Tribunal has granted permission to appeal after the refusal of appeal to either party by the First-tier Tribunal, a subsequent rejection by the Upper Tribunal in granting leave to appeal will not be subject to the second appeal test. Since the enforcement of the Judicial Reforms (Scotland) Act 2014 the permission to proceed is a very important procedural step in judicial reviews. In addition to the forestated requirements, the Court has to be satisfied either that the application raises an important point of principle or practice, or that there is another compelling reason for allowing the application to proceed. This is also known as the *second-tier appeal test*. Chapter 58 of the Court of Session Procedure Rules makes detailed provisions for permission for applications to proceed. The practice is to crave permission to proceed in the petition, and this can be done with or without an oral hearing. The Lord Ordinary, if he deems it appropriate, directs the parties to attend the oral hearing. If the Outer House of the Court of Session refuses permission to proceed on paper or grants permission on limited grounds, then the aggrieved party can seek review in the Inner House. This becomes even more challenging if both the Outer and Inner Houses of the Court of Session refuse permission to proceed while a legal aid application is pending, and the work was undertaken under special urgency cover. In such a scenario, the court can make a cost order against the petitioner in the absence of a legal aid certificate.

Conclusion

3.77. In the UK jurisdiction the remedy of judicial review was conceded, in an immigration context, after historic reluctance. Increased judicial supervision has proven vital in holding the government to account. Judicial review does not extend to the substantive merits of the case, and grounds are limited to irrationality, illegality, and procedural impropriety, but in the absence of statutory appeal rights recourse to judicial review should not be restricted disproportionately, and a fair balance must be struck between the interests of the state and the individual concerned. The government's frustration after failing to oust the higher courts judicial review jurisdiction in relation to immigration cases was obvious.[384] History has since shown that the reduction of statutory appeal rights has generally resulted in

[384] The Lord Chancellor and the Secretary of State made the abortive attempt during the passing of the 2004 Act, see *Macdonald's Immigration Law and Practice* 9th Edition, p 1722.

increased volume of judicial reviews[385]. So, the best solution would be to have more statutory appeal rights in place because these are easier to access, less expensive, and a speedy way of disposing of immigration and asylum claims.

3.78. The Upper Tribunal is now dealing with around 95% of judicial reviews, and powers to certify applications as totally without merit (TWM) have been tempting for the Upper Tribunal. However, the second appeal test in challenging excluded decisions of the Upper Tribunal remains a high hurdle to negotiate, and higher courts are generally slow to interfere and tend to attach considerable weight to the judgment of a specialist tribunal. The crude use of totally without merit (TWM) certification power has been criticised by the Court of Appeal[386], and guidance was set to follow. The court intervened more than two years after the legislation had taken effect, and the outcome of those decisions made prior to the guidance remains irreversible. However, the tribunal's practice after the Court of Appeal guidance is likely to be more cautious in certifying claims as TWM. Successive legislative changes have further restricted access to judicial review and the scope of higher courts' jurisdiction. An abortive attempt to link the availability of legal aid with minimum residence requirements was the most recent measure of this kind. Likewise, limitation periods and a permission to proceed procedure have been introduced in Scotland and a significant number of judicial reviews are ending at the permission stage. Overall, both procedure and law have restricted recourse to supervisory jurisdiction at a time when there has been an unprecedented reversal of statutory appeal rights. These developments do not promote the rule of law, and have resulted in a reduction in judicial oversight of the executive's decision-making process.

Summary conclusions

3.79. The Royal Prerogatives remain an important source of immigration law, although their use is limited. Since the twentieth century, the use of statutes and immigration rules have significantly increased in immigration control. The Human Rights Act 1998 was an important development, and will be discussed, among other statutes, as a source of law later in this thesis. From an Article 8 perspective, the importance of section 6 (1) of the 1998 Act is that it requires public authorities not to act in a way that is incompatible with a right protected by the European Convention on Human Rights. The use of immigration rules is effective in managing migration. Rules are detailed statements by ministers of the Crown, and these have become overly complex and too detailed. It is not possible to include all the possible details covered by rules in statutes. So, rules supplement statutes but remain a distinct source of law. The first time the government introduced rules, including Article 8 considerations on 9 July 2012, and since then, the rules have been an important source of law from an Article 8 perspective. The purpose of including Article 8 considerations within

[385] As noted at para 3.50 this did not happen after the Immigration Act 2014.
[386] *Wasif v the Secretary of State for the Home Department* [2016] EWCA Civ 82.

the rules was to manage the volume of family migration. The application of immigration rules and relevant statutes in practice will be discussed at a later stage in this thesis.

3.80. Lord Gill's judicial review reforms have introduced permission to proceed with tests and a three-month limitation period in Scotland. In practice, the permission to proceed stage has become an important procedural step. From an immigration perspective, the Home Office tends to concede most cases after the grant of permission to proceed. The Home Office commonly reviews the decision subject to judicial review within three months. In England and Wales, most judicial review work has been transferred to the Upper Tribunal to save cost and reduce the workload in the administrative court. The government also unsuccessfully attempted to introduce a lawful residence test for legal aid in England and Wales. The measure was intended to hinder access to judicial intervention.

3.81. In the immigration context, the importance of judicial decisions is now more obvious than ever as a source of law. In the last thirty years there has been an unprecedented amount of legislation related to immigration control, and the judiciary is performing the challenging task of interpreting the legislation consistently with Convention rights. This thesis involves an analysis of the judicial decisions appertaining to Article 8 jurisprudence, which will emerge in later chapters.

3.82. Successive changes in appeal rights and curtailing the scope of judicial review are measures which have had the effect of restricting judicial oversight. The introduction of the second-tier appeal test against excluded decisions has not made much difference because the success rate of *Eba* and *Cart* judicial reviews is relatively high. The government's view is that the courts have entertained too many weak, unmeritorious, and frivolous cases, causing the backlog. There has been a misuse of some measures like certifying a claim as TWM. Likewise, the government regarded appeals suspensive of removal to be part of the problem. Although certification powers were introduced, their scope was limited. So, the government introduced administrative review as a substitute for appeal rights, and the appeal rights of many migrant categories have been taken away.

Chapter 4: Explanation of the ECtHR Case Law on Article 8 in the Immigration Context

4. Introduction

4.1. The primary objectives of this chapter are to familiarise the reader with the requirements of Article 8 of the ECHR and to explain how the ECtHR has interpreted and applied this right. The chapter provides a brief introduction to the margin of appreciation doctrine. It then includes discussions of the mirror principle and the exceptions to it under Article 8 in the immigration context. Then, it briefly summarises the historical background of proportionality and explains its features. Some brief comments are made on the practical approaches of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). Then, an explanation of the significance and relevance of the ECtHR's guiding principles from an immigration perspective is provided.

4.2. International human rights guarantees are valuable, and the European Convention on Human Rights (ECHR) is one of the most important international guarantees. The Council of Europe was established after the Second World War, and this international organisation undertook the task of framing the ECHR. The European Convention on Human Rights was adopted in 1951 partly in response to the grave human rights violations which occurred during the Second World War, and provided a bulwark against communism, which had spread from the Soviet Union into other European states[387]. The Convention imposes an obligation on a state party to accept the principles of the rule of law and the indiscriminate enjoyment of fundamental rights and freedoms by all persons. The primary responsibility to enforce the Convention lies with the states parties to it. The contracting states are not required to incorporate the Convention into their domestic law[388]. However, incorporating the Convention into national law makes reliance on the Convention in national courts more convenient and efficient. The Convention has now been incorporated into national law by all member states[389].

4.3. The ECHR is based on the obligation of contracting states to give effect to the core values of a democratic society; e.g., pluralism, openness and broadmindedness, the rule of law, and freedom of expression, and is designed to maintain and promote those values[390]. It is a living instrument which must be interpreted in the light of present-day conditions[391]. This implies that the content and scope of rights might be deepened and broadened over time - but not that entirely new rights might be created.[392] Chapter 2 of this thesis has already

[387] Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights*, 4th Edition, p.1.
[388] *Observer and Guardian v UK* a 216 (1991); 14 EHRR 153 PC.
[389] Harris, O'Boyle & Warbrick as above, p.26.
[390] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, para 53.
[391] *Tyrer v United Kingdom* [1978] 2 EHRR 1, para 31; *Marckx b Belgium* [1979] 2 EHRR 330; *Loizidou v Turkey* [1995] 20 EHRR 99, at para 71.
[392] *Johnson v Ireland* [1986] 9 EHRR 203.

provided a brief description of the ECHR and its status in UK law. It briefly explained the role of the European Court of Human Rights (ECtHR) in interpreting the Convention.[393] Chapter 2 did not explain in detail the case law of the ECtHR on Article 8, and the Court of Justice of the European Union (CJEU), formerly known as the European Court of Justice, (ECJ). Both courts have a supervisory role in the interpretation and implementation of Convention rights. This chapter explains their case law more fully.

4.4. Article 8 provides the following:

> '(1) *Everyone has the right to respect for his private and family life, his home and correspondence.*
>
> *(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'*[394]

4.5. The rights protected by Article 8 are not absolute. Paragraph (2) of Article 8 lists the interests which may qualify the rights provided in Article 8 (1). Any interference with the right must advance one of these interests, and must also be prescribed by law and be necessary in a democratic society in pursuit of such an aim (the proportionality requirement). Article 8 protects four rights: (1) private life, (2) family life, (3) home, and (4) correspondence, and Article 8 has been described as the 'least defined' and most unruly of the rights enshrined in the Convention.[395]

The doctrine of the margin of appreciation

4.6. The Convention guarantees rights that are practical and effective, not theoretical and illusory.[396] The Convention allows a margin of appreciation to member states in giving effect to the rights enshrined in it. The term "margin of appreciation" refers to the space for manoeuvre that the Strasbourg organs are willing to grant to national authorities in fulfilling their obligations under the Convention. The legal basis of the doctrine may be found not only in the jurisprudence of the French *Conseil d'état*, which has used the term "*marge d'appréciation",* but also that of the administrative law system within every civil jurisdiction. The most sophisticated and complex doctrines of administrative discretion

[393] See heading of Core Convention rights and jurisprudence.
[394] European Conventions on Human Rights.
[395] *Wright v Secretary of State for Health* [2006] EWHC 2886 (Admin) para 66.

[396] *Golder v United Kingdom* (1975) 1 EHRR 524, paras 28-36.

have been developed in Germany[397]. The term margin of appreciation was defined in *Handyside,*[398] and the definition has been reproduced in Chapter 3. It implies that the Convention need not be applied uniformly by all contracting states, and it may vary according to local needs and conditions. Some terms, e.g. 'civil rights and obligations', 'penalty', 'property', etc., have autonomous meanings[399] under the Convention and cannot be redefined by states to avoid their obligations.[400] The doctrine of proportionality requires the court to investigate the reasonableness of the restrictions by having regard to the margin of appreciation afforded to the state party and its institutions. The supervisory judicial role is to ensure that the rights laid down in the Convention are not unnecessarily interfered with. The principle of proportionality requires that there be a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective.

4.7.The ECHR allows states a margin of appreciation in deciding how best to give effect to the rights enshrined in it pursuant to obligations under Article 1 and Article 13. States have various choices to comply with the obligations, but a law that fails to satisfy the requirement, to protect and promote private and family life, violates Article 8[401].The margin of appreciation means the degree of latitude accorded to the national authorities and courts in recognition of the fact that, by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions.[402] The ECtHR recognises that the practice may vary in each member state depending on the local needs and conditions.

Proportionality

4.8. Chapter 2 referred briefly to the doctrine of proportionality[403]. It is important to view the doctrine in legislative and historical perspective in order to understand the essence of Strasbourg jurisprudence. The doctrine of proportionality has evolved through the centuries and it remains a conspicuous feature of European jurisprudence. The doctrine has been universally acknowledged, and has attained the level of constitutional principle. Although the principle of proportionality remains an unwritten rule, even in modern democracies, it has huge significance in advancing and guarding civil liberties and the rule of law. The origin of the doctrine is the subject of academic debate, but some argue that the doctrine is contemporary with, or even older than, Hammurabi[404]. The doctrine emerged in administrative law at the end of nineteenth century[405] in Europe. The Prussian

[397] G. Nolte – *General Principles of German and European Administrative Law – A Comparison in Historical Perspective*, Modern Law Review Limited, Blackwell Publishing, Oxford, 1994.
[398] *Handyside v United Kingdom* (1976) 1 EHRR 737, paras 48-49.
[399] *Adolf v Austria* (1982) 4 EHRR 313, para 30.
[400] *Chassagnou v France* (1999) 7 BHRC 151, para 100.
[401] *Marckx v Belgium* [1979] 2 EHRR 330, para 31
[402] *Handyside v United Kingdom* [1976] 1EHRR 737, para 48-49.
[403] See heading "An overview of core Conventions rights and jurisprudence".
[404] The Code of Hammurabi, a Babylonian code, dates to 772 BC, and was referred to by Rt. Hon. Lady Justice Arden in speech: *Proportionality: the way ahead?* Public law.
[405] *Kreutzberg* June 14, 1882, Pr OVG, 29, 253, source ibid.

Administrative Court developed the idea that special permission was required in order to interfere with the civil liberties of citizens. The *Kreutzberg* case provided the foundation that the measure's intensity has to be proportionate to the legitimate aim pursued. This is at the core of the doctrine of proportionality. More recently, the Federal Constitutional court of Germany, established after the Second World War, has made a major contribution to the development of the proportionality doctrine. It was first referred to by the European Court of Human Rights in 1968[406].

4.9.The doctrine of proportionality has three distinguishing features as developed by the Federal Constitutional Court of Germany, namely: suitability, necessity, and fair balance. The suitability of the measure depends on the legitimacy of the aim being pursued, so prior consideration remains establishing a legitimate aim. A measure is likely to be unjustified in the absence of a legitimate aim. The 'necessity' test means 'no more than necessary' or 'least intrusive measure', and remains one of the criteria for assessing proportionality. The fourth requirement[407] is that the measure must achieve a fair balance between the interests of the individual(s) involved and the wider community.

Applying qualifications to the Article 8 rights

4.10. Articles 8-11 of the Convention have similar qualifications, and these are regarded as qualified rights, unlike Article 3 which provides absolute or near absolute protection against any interference. The purpose of this part is to briefly highlight the practical application of the qualifications provided in Article 8 (2). An interference in rights protected by Article 8(1) can be on the grounds of national security, public safety, or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or the protection of the rights and freedoms of others. However, the public authorities must justify that the interference is in accordance with the law and is necessary for a democratic society for one of the objectives stated in Article 8 (2). In practice, the court considers these elements separately in the following order: law, objectives, and necessity. The court must be satisfied that the impugned measure is necessary, at least for the protection of one of the aims advanced by the state. In the absence of any violation, there is no need to consider other aims pleaded by the state.[408]

4.11. The phrase '*in accordance with the law'* requires the respondent state to refer to some specific legal provision or legal rule which legitimises its interference with the protected right. The rule of law can be a part of domestic law, international law, or EU law provided that it purports to authorise the interference[409]. Delegated legislation and judge-made law are not excluded from the whole of the legal regime authorising the interference.[410] The Strasbourg Court has shown reluctance to scrutinise national courts' interpretation and

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[406]*The Belgian Linguistic* case (No.2) 1 EHRR.
[407] Case of *Soering v the United Kingdom* (Application No. 14038/88). The requirement relates but not restricted to Article 8 of the European Convention on Human Rights cases.
[408] Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights*, 4th Edition, p.506.
[409] *Groppera Radio AG and Others v Switzerland* A 173 (1990); 12 EHRR 321 para 68.
[410] *Barthold v Germany* A90 (1985); 5 EHRR 383 paras 45-6.

application of national law.[411] However, the court concluded that the notion of 'law' is autonomous[412], and that domestic legality is a necessary but not sufficient condition. It is conceivable that the notion of law could include the element of propriety, and the Court has added two further criteria for a rule to be a 'law'.[413] Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it has been formulated with sufficient precision to enable the citizen to regulate his or her conduct. These criteria are further guarantees against substantively arbitrary rules. It has also been accepted that an understanding of the text may require access to appropriate advice[414]. The UK government conceded that restrictions imposed on prisoners' correspondence based on unpublished prison orders and instructions that supplemented the relevant delegated legislation could not be used to establish that interferences had been '*in accordance with the law'*.[415]

4.12. The legitimate aims of interference are listed in Article 8 (2), and one of these objectives must be identified by the state seeking to interfere with the rights protected in Article 8 (1). Aims asserted by states have been subject to frequent challenges[416]. However, the qualifications in Article 8 (2) are broad in scope; for instance, the protection of public order would cover any reasonable measure to maintain public order, and a state can easily justify interference with a protected right. Applicants have alleged bad faith on the government by the latter not disclosing the 'real' reason for the interference. The court has only rarely accepted such arguments, but there are instances where the court has refused to accept the stated objective. It is important to identify the aim because an interference which might be appropriate to one aim will not necessarily be appropriate to another.[417]

4.13. In addition to identifying the aim or aims of interference, it is imperative for the respondent state to show that the interference is '*necessary in a democratic society'*. The scope of the phrase is ambiguous, and the Court has explained the meaning of necessary in *Handyside v UK*[418] and concluded that the notion of necessity implies that an interference corresponds to a pressing social need, and, in particular that it is proportionate to the legitimate aim being pursued[419]. The court identified tolerance and broadmindedness as two hallmarks of a democratic society. These are the characteristics which require greater protection against the intolerance and narrow-mindedness of others.[420]

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[411] *Bosphorus Airways v Ireland*; 42 EHRR 1 para 143.
[412] *Sunday Times v UK*; 2 EHRR 245, para 49.
[413] *Sunday Times v UK* (No.1); 2EHRR 245 para 49.
[414] *Sunday Times v UK* (No.1).
[415] *Silver and Others v UK* (1983) 5 EHRR 347 paras 87-8 and 91.
[416] *Campbell v United Kingdom* (1992) 15 EHRR 137 para 39-41 and *Vereiningung Bildender Kunstler v Austria* (2007); 47 EHRR 189 para 31.
[417] *Observer and Guardian v UK* (1991), 14 EHRR 153 paras 55-56.
[418] (1976); 1 EHRR 737 para 48.
[419] *Olsson v Sweden* (No.1) A 130 (1988); 11 EHRR 259 para 67.
[420] *Dudgeon v UK* A 45 (1981); 4 EHRR 149 para 53.

4.14. In *Handyside*[421], the Court also provided a classic formulation of the margin of appreciation doctrine, and under this doctrine the Court defers to states' institutions in the initial assessment of whether interference is justified. In other words, the Court's evaluation of whether interference is 'proportionate to the legitimate aim' is subject to the margin of appreciation doctrine. The domestic margin of appreciation thus goes hand-in-hand with European supervision. Such supervision concerns both the aim of the measure challenged and its necessity; it covers the basic legislation and the decision applying it, even when it is given by an independent court[422]. But, the Convention's role in protecting human rights is 'subsidiary' to the roles of the national legal systems[423]. The Court has acknowledged different conceptions of the rights, and the superiority of the organs of a state in fact-finding and in the assessment of what the local circumstances demand by way of limitation of rights[424].

4.15. The ECJ/CJEU and the ECtHR approaches to proportionality differ in structure and scope. It has been suggested that ECtHR has kept a primary focus on fair balance while the ECJ/CJEU has taken a more structured approach towards proportionality[425]. The difference will be further explored below. As some Convention rights are qualified, for instance Articles 8-11, they may be subject to interference by the state. So, the Strasbourg Court assesses the intensity and necessity of the measure in question. For instance, Article 8 (2) specifies the purposes which might justify limiting the right to private and family life. The fair balance approach suggests that it would not be enough to show that the interference is for one of the purposes; instead, it must be a proportionate means of achieving the objective being pursued.

Relevance and enforceability of Article 8 in immigration law

4.16. The case of *Abdulaziz*[426] raised the question of whether Convention rights could be invoked in relation to immigration cases. In this case, all three applicants were women seeking leave for their foreign spouses to enter the UK. Their applications were declined because the immigration rules which were then in force did not entitle women, even though permanently settled in the UK/citizens of the United Kingdom and Colonies, to sponsor the admission of their husbands. The UK government's argument was that the protection offered by Convention rights, in particular Article 8, does not extend to aliens in relation to immigration matters, and that the UK had no such obligation to afford the protection. The court rejected this submission *in limine*[427]. The court took the view that the applicants' spouses had acquired permanent residence in the United Kingdom at the time of seeking the entry and residence of their husbands. The threat of removals in two cases and refusal

[421] Paras 48-50.
[422] *Handyside v UK* para 49.
[423] *Handyside v UK* Para 48.
[424] *Muller v Switzerland* A 133 (1988); 13 EHRR 212 para 35.
[425] Referred by Rt. Hon. Lady Justice Arden in speech: *Proportionality: the way ahead?* Public law.

[426] *Abdulaziz, Cabales and Balkandali v The United Kingdom*, (1985) 7 EHRR 471.
[427] *Abdulaziz*, para 60.

of entry clearance in one case had deprived settled spouses of the society of their husbands. So, the right to form and enjoy private and family life of the applicants had been interfered with and they had no effective remedy. The ECtHR upheld the applicants' plea of sex discrimination, and they succeeded under Article 14 in conjunction with Article 6. The court found no violation of Article 8 alone. Subsequently, in *Soering*[428], the court held that immigration decisions, e.g., expulsion, engage obligations under international human rights law. In these cases, therefore, the court confirmed the relevance and enforceability of Article 8 in immigration cases.

4.17. The European Court of Human Rights (ECtHR) is based in Strasbourg, France, and for that reason, the ECtHR's jurisprudence is often referred to as 'Strasbourg jurisprudence'. The ambit of Strasbourg jurisprudence is broad, and it includes Court judgements, Commission opinions, and admissibility decisions. The UK has given effect to the ECHR in domestic law via the Human Rights Act 1998. The relevance of the Human Rights Act to domestic ECHR jurisprudence will be discussed later in this chapter. The Human Rights Act 1998 specifies Articles 2-12 and 14, Articles 1-3 of Protocol 1, and Article 1 of Protocol 13 as the relevant rights for the purpose of the Act. However, the Strasbourg jurisprudence, which must be taken into account, is not confined to the Articles specifically incorporated in the 1998 Act[429]. During the passage of the Bill which became the Human Rights Act, the Lord Chancellor, Lord Irvine of Lairg, said: "*The Bill gives effect to Article 1 by securing to people in the United Kingdom the rights and freedoms of the convention. It gives effect to Article 13 by establishing a scheme under which convention rights can be raised before our domestic courts"*[430]. Since 1 November 1998, member states have accepted the right of individual petition and to submit to the court's compulsory jurisdiction.[431] Lord Irvine's explanation on whether the courts are to be permitted to take into account case law on Article 13 emanating from the European Court of Human Rights is as follows:

> "*One always has in mind Pepper v Hart when one is asked questions of that kind. I shall reply as candidly as I may. 'Clause 2(1) provides: 'A court or tribunal determining a question which has arisen under this Act in connection with a Convention right must take into account any… judgement, decision, declaration or advisory opinion of the European Court of Human Rights'. That means what it says. The court must take into account such material"*[432].

4.18. To ensure the orderly development of the law, the ECtHR usually follows its previous decisions[433]. However, the ECtHR is not bound to follow its previous case law. The

[428] *Soering v United Kingdom* (1989) 11 EHRR 439.
[429] *Chahal v United Kingdom* (1996) 23 EHRR 413, para 153-154.
[430] HL Committee 18.11.97, Col 475.
[431] ECHR, Protocol 11.
[432] HL Committee 18.11.97, Col 476.
[433] *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163.

Convention is a living instrument. It is to be interpreted purposively and dynamically according to the developing conditions[434]. In *Selmouni v France*[435] the court stated that:

> "*certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future----the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies*".

A judgement of the ECtHR is binding in international law only on the states which are parties to a case, although clearly the court's case law provides authoritative guidance for all states on the interpretation of the ECHR. However, section 2 of the 1998 Act only requires UK courts to take into account the Strasbourg jurisprudence, without making it binding. The Strasbourg case law should, in general, be treated as highly persuasive by UK courts. The House of Lords held that in the absence of special circumstances, the courts should follow any clear and constant jurisprudence of the European Court by according particular weight to the decisions of the Grand Chamber[436].

Summary of general principles

4.19. Like any other sovereign state, the UK is required to comply with its international obligations concerning unincorporated and incorporated Conventions. There are separate general principles about unincorporated Conventions, and a summary of those principles will assist the reader in comprehending the legal regime appertaining to incorporated Convention, e.g. the ECHR. The following general principles are part of both the Strasbourg and domestic UK jurisprudence:

i) There is an assumption that the Parliament does not intend to legislate in a manner incompatible with the UK's international obligations[437].
ii) The court will interpret legislation in a manner consistent with the international obligations wherever possible[438].
iii) The court will interpret a statute, enacted to fulfil an international obligation, by assuming that it is intended to be effective for that purpose.[439]
iv) The court will strive to decide in a manner compatible with international obligations in a scenario where there are gaps in the law and the common law on that proposition is uncertain.[440]

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[434] *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705 .
[435] (1999) 29 EHRR 403, para 101.
[436] *R (on application of Ullah v Special Adjudicator* [2004] UKHL 26.
[437] *Garland v British Rail Engineering* [1983] 2 AC 751.
[438] *Lister v Forth Dry Dock and Engineering Co* [1990] 1 AC 546.
[439] *R (on application of Mullen) v SSHD* [2002] EWCA Civ. 1882.
[440] *DPP v Jones* [1999] 2 AC 240 HL.

v) Where possible, the courts will use their discretion compatibly with the UK's international obligations[441].

vi) The court will anxiously scrutinise, in the process of review, the exercise of discretion by public authorities and such acts, omissions or decisions require strong justification if they are not to be regarded as irrational or disproportionate and therefore unlawful.[442]

vii) The courts will give effect to established rules of international law as a matter of legal public policy.[443]

4.20. The Human Rights Act 1998 incorporated the ECHR into UK domestic law. Before that, the UK's judicial opinion was divided on the relevance of the Convention to the interpretation of statue and the proper exercise of administrative powers. Chapter 2 summarises both judicial views, commonly referred to as the *Brind*[444] and *Garland*[445] views, and there is no need to expand on these. This chapter explains the extent of family life under Article 8 of the ECHR.

Private and family life under Article 8 from an immigration perspective

4.21. The right to private and family life under Article 8 has been the most frequent source of claims under the ECHR in recent years. This part explains the scope of private and family life under Article 8 of the ECHR in the immigration context. Private life and family life are distinct concepts within Article 8. The concept of private life has been broadly construed. It extends to various types of arbitrary interferences by the public authorities in the enjoyment of private life, provided that the aim or result was to unjustifiably disturb private life. In setting the scope of private life under Article 8, the court has stated that it would be too restrictive to limit the notion of private life to the inner circle in which the individual may live in his personal life and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise the right to establish and develop a relationship with other human beings[446]. This means that any complaint showing restriction in interacting with others would be within the scope of Article 8 of the ECHR[447]. The concept of private life covers the physical, psychological[448], and personal autonomy and moral integrity of a person[449]. The UK Immigration rules now provide a criterion for the assessment of private in individual cases[450], but the rules are still not conclusive of Article 8 assessment. The two-stage assessment criteria continue to apply,

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[441] *Rantzen v Mirror Group Newspapers* (1986) Ltd [1994] QB 670, CA.
[442] *Bugdaycay v SSHD* [1987] AC 514, HL; *R v SSHD, ex p Thompson and Venables* [1998] AC 407, HL.
[443] *European Roma Rights Centre v Immigration Officer at Prague Airport* [2004] UKHL 55, para 98.
[444] *R v SSHD ex p Brind* [1991] 1 AC 696
[445] *Garland v British Rail Engineering* [1983] 2 AC 751.
[446] *Niemietz v Germany A 251-B* (1992); 16 EHHR 97 para 29.
[447] *Molka v Poland* No 56550/00 2006-IV DV.
[448] *Pretty v UK* 2002, para 61.
[449] *X and Y v Netherlands* A19 (1985); 8 EHRR 235.
[450] Paragraph 276ADE of the Immigration Rules, from 9 July 2012.

and later in this chapter the relevance of the immigration rules under Article 8 will be discussed.

4.22. The concept of family life in general, with reference to *Abdulaziz*[451], has been explained earlier in this chapter. In the immigration context, being engaged without cohabitation is not enough to establish family life. Where the parties are only religiously married, and the civil marriage has not been registered, the court will consider the substance of the relationship, including any children from the union, to establish a family life[452]. The Court and Commission maintained for a long time the view that a same sex-couple's emotional and sexual relationship did not fall within the ambit of family life, and these were considered instead as an aspect of private life[453]. Since then, the law and practice have evolved at both the domestic and European levels. The Civil Partnership Act 2004 introduced a legal framework for recognising and registering civil partnerships, and the Marriage (Same-Sex Couples) 2013 Act legitimised same-sex marriages in the UK. However, relationships outwith wedlock are still subject to a durability test. Appendix FM of the Immigration Rules defines two years of cohabitation, before the date of application, as representing a durable relationship[454]. The same-sex couple which has registered a civil partnership can avoid the two year cohabitation requirement by registering the marriage, a choice which was not available before the 2013 Act. The UK's legislative regime relevant to Article 8 will be discussed later in this thesis.

4.23. Unmarried cohabiting couples with children enjoy family life from the birth of the first child[455], and a single mother establishes family life with the child from birth[456]. However, there is no automatic recognition of the father's right to family life with the child[457], and mere biological relationship with the child is not enough[458]. However, a father's quality and frequency of relationship with the child after birth, intention to maintain the relationship, financial support for the child, and formal recognition of paternity are all relevant factors in assessing the existence and strength of family life[459]. The importance of intention means that family life can extend to the potential relationships that could have developed between a biological father and his child, even if the father has had no contact with the child since birth. Family life does not exist between a father and child where the child was conceived as a result of a relationship of a sexual nature with no intent to form a family life or any commitment to the child before its birth,[460] and such a relationship will be considered only as potentially an aspect of private life. A biological link is not necessary to show a family life between a parent and child.[461] The court has accepted the existence

[451] *Abdulaziz v United Kingdom*.
[452] *Wakefield v UK* No. 15817/89.
[453] *Mata Estevez v Spain* No 56501/00 2001 and *Hink and Hink v Netherlands* No. 15666/89 hudoc (1992) DA.
[454] GEN 1.2 of Appendix FM.
[455] *Berrehab v Netherlands* A 138 (1988).
[456] *Marckx v Belgium* A 31 (1979).
[457] Seventh Protocol Article 5.
[458] *G v Netherlands* No 27110/95 1999 -VI DA.
[459] *Nylund v Finland* No 27110/95 1999 -VI DA.
[460] *Ahrens v Germany* Hudoc (2012).
[461] *X,Y. and Z v UK* 1997-II, 24 EHRR 143 GC.

of family life in cases concerning second-parent adoption by the same-sex partner of the biological parent, subject to the existence of a *de facto* family life.[462]

4.24. Likewise, family life exists between an adopted parent and a child. The position of foster parent and child is no different. The broader concept of family life includes husbands and wives, unmarried partners, children, adopted children, and foster children, as well as family life between uncles, aunts, nieces and nephews[463], between grandparents and grandchildren[464], and relationships between siblings.[465] However, the nature of the interdependence and subsistence of the relationship will be relevant in the proportionality assessment under Article 8 (2). Divorce may end a family life between husband and wife. However, it may not have the same effect on family life with children of the marriage[466]. Likewise, the placement of a child in public care and the child's adoption does not sever the bond of family life.[467]

The Case Law of the ECtHR on Article 8 in the Context of Immigration Control

4.25. Article 8 of the ECHR does not expressly deal with immigration control. In fact, the right of entry and residence of a non-national in a signatory state is not guaranteed by the ECHR. However, the Court observed that immigration control has to be exercised consistently with the state's obligation under the Convention. Not every exclusion or removal from the country of residence of the applicant's family constitutes an interference with the right to respect for family life.

i- Scope of family life under Article 8

4.26. The Court has defined the scope of family life. A lawful and genuine marriage will be enough to constitute family life between two people;[468] cohabitation is not a prerequisite. A sham marriage does not give rise to a family life[469]. Generally, the family unit includes husband and wife, parent and child. Relationships with other siblings, such as grandparents and grandchildren, uncles and nephews[470], could be within the scope of family life depending on the strength of emotional ties[471]. A child born out of wedlock will usually become part of the family from birth and will only cease to be so in exceptional

[462] *Gas and Dubois v France* hudoc (2012).
[463] *Boyle v UK* A 282-B (1994); 19 EHRR 179 Com Rep.
[464] *Marckx v Belgium* A 31 (1979); 2 EHRR 330 PC.
[465] *Gaskin v UK* A121 (1987) 10 EHRR 29 PC.
[466] *Berrehab v Netherlands* A 138 (1988); 11 EHRR 322.
[467] *W v UK* (1987).
[468] *Abdulaziz v United Kingdom.*
[469] *A and A v Netherlands* (1992) 72 DR.
[470] *Boyle v United Kingdom* (1995) 19 EHRR 179.
[471] *Marckx v Belgium* (1979) 2 EHRR 330, para 45.

circumstances,[472] even where there has been a voluntary separation between the parents and child.[473] Whether family life exists, which is worthy of affording protection under Article 8, between adult siblings or adult children and their parents is a fact-sensitive question and it depends on substance as much as form.[474]

ii- ECtHR's guiding principles in applying Article 8 of the ECHR

4.27. The ECtHR's jurisprudence has developed over time, and the case law has immense importance in the interpretation and practical understanding of Convention rights. In cases concerning the expulsion or refusal to admit third country nationals, who are nationals of non-EEA countries, living with close family members who are citizens of a state party to the Convention, the family would need to demonstrate obstacles to family life being established elsewhere because Article 8 does not oblige states to respect the choice by married couples of their matrimonial residence or to accept the non-national spouse for settlement in the country.[475] There does not appear to have been a consistent approach in the Strasbourg jurisprudence until the Court decided *Boultif*[476].

4.28. The Commission's jurisprudence appears to be very tough on the expulsion and admission of non-EU nationals, including children. The deportation of a British child's mother was declared compatible with Article 8 because the child was of adoptable age[477]. Likewise, the Court upheld a refusal to admit a child into a member state where his parents had been granted humanitarian protection, finding no real obstacles to the parents returning to their country of origin[478]. However, divorced and separated parents have an advantage because national parents are likely to encounter obstacles in accompanying or maintaining contact with children staying in another parent's state of residence[479]. In retrospect, there was less consistency in the Commission's decisions than in the Court's decisions. The Commission was abolished by Protocol 11 which came into force in 1998. A parent might be prohibited by a court order from taking the child away from the Court's jurisdiction[480]. The removal of a parent from a member state while contact or care proceedings are ongoing is likely to be incompatible with Article 8[481]. Most of the ECtHR case law on the application of Article 8 to immigration control relates to three main categories of applicants: adult foreign offenders, juvenile foreign offenders, and overstayers seeking

[472] *Berrehab v Netherlands*, para 21.
[473] *Sen v Netherlands* (2003) 36 EHRR.
[474] *Marckx v Belgium* para 31.
[475] *Abdulaziz* para 68.
[476] *Boultif v Switzerland* (Application No. 54273/00, 02 August 2001) para 48 of the judgement.
[477] *Sorabjee v United Kingdom* (Application 23938/93; *PP v United Kingdom* (1996) 21 EHRR CD 81; *Jaramillo v United Kingdom* (28865/94.
[478] *Gul v Switzerland* (1996) 22 EHRR 93.
[479] *Berrehab v Netherlands* (1989) 11 EHRR 322.
[480] *Da Silva and Hoogkamer v Netherlands* (2006) Application No. 50435/99.
[481] *Ciliz v Netherlands* [2000] 2 FLR 469.

residence in the absence of criminality. All three categories require a fact-sensitive approach, and the ECtHR has developed distinct assessment criteria for each category.

Foreign offenders and their families

4.29. *Boultif v Switzerland* is a deportation case with particular importance in setting guiding principles for undertaking proportionality assessment in cases of foreign criminals alleging breaches of core Convention rights. So, it is important to explain the factual matrix of the case and the court's reasoning. Mr Abdeluahab Boultif, an Algerian citizen born in 1967, arrived in Switzerland in December 1992 as a visitor after lawfully residing in Italy from 16 August 1989 until 21 February 1992. Mr Boultif married a Swiss national on 19 March 1994, and he committed offences of robbery and damage to property on 24 April 1994. On the prosecution's appeal, he received a two-year term of imprisonment and began serving the sentence on 11 May 1998. After conviction, the concerned authority refused to renew his residence permit, and a claim alleging breach of Article 8 was also refused. An order prohibiting his entry indefinitely in Switzerland was issued on 15 January 2000. Mr Boultif left Switzerland on an unspecified date in 2000 for Italy. There was no history of reoffending, and he had displayed good behaviour while serving the prison sentence. He had learned multiple skills while in prison and had worked as a waiter, painter, assistant gardener, and electrician. No child was involved in the applicant's Article 8 claim.

4.30. General guidance on the approach to be taken in applying Article 8 in the context of immigration control was first issued in *Boultif,* which relates to the deportation of a foreign national, but the guiding principles prescribed by the court in this case apply also to non-deportation cases involving Article 8 assessment. In the court's view, the following criteria should be applied in the evaluative exercise:[482]

> *"In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion".*

The court considered factors associated with the applicant's compliance with the deportation order, the indefinite re-entry ban, the absence of a history of reoffending,

[482] *Boultif* para 48.

rehabilitation efforts, and good behaviour in prison, as well as his spouse's inability to speak Arabic, an insurmountable obstacle to commencing life in Algeria.

4.31. In the case of *Uner v Netherlands*, Mr Ziya Uner, a Turkish national, was facing deportation following convictions on various charges. The ECtHR, sitting as the Grand Chamber, decided his case on 18 October 2006. A brief history of the case is as follows. The applicant was a Turkish citizen born in the country of his nationality in 1969. He migrated to the Netherlands with his mother and two brothers in 1981 to join his father. At that time, Mr Uner was ten years old, and he was granted permanent residence in 1988. He committed a number of offences from January 1989 to 16 May 1993. The most serious offences were manslaughter and assault, and he received seven years' imprisonment for these two offences. He was sentenced on 21 January 1994 and finished his sentence on 14 January 1998. The applicant commenced a relationship with a Dutch citizen, and the couple started cohabitation in June 1991. A son was born to the couple on 4 February 1992. In November 1992 their relationship encountered difficulties, and the applicant moved out to mitigate tension, but he maintained close contact with the child. The couple later resumed cohabitation, and a second son was born on 26 June 1996. Their children were Dutch citizens. Except for the applicant, none of his family members could speak Turkish. His partner maintained contact with him by visits, and their family life subsisted. The concerned authority revoked his permanent residence and made an exclusion order effective for ten years on 30 January 1997. The applicant continued living in the Netherlands, disregarding the exclusion order until he was caught working illegally on a cannabis farm and received three months' imprisonment. He was deported to Turkey again on 16 May 2006. The applicant's family maintained contact with him by regular visits, and his family life continued with his partner and children after he moved to Turkey. The court considered the severity of the offence and ties with the countries of residence and nationality. The court weighed in the balance the nature of the offences committed and the length of the exclusion order. By fourteen votes to three, the court found no violation of Article 8 of the Convention.

4.32. The case of *Uner v The Netherlands*[483] was decided by the Grand Chamber almost five years after *Boultif*. In this case, the court rejected the argument that expulsion is a punitive measure in addition to the original sentence, as it applies only to foreign criminals. It was also made clear that an alien's position cannot be equated with that of a national[484]. The court considered *Boultif* in detail. The court confirmed and further extended the guiding principles set in *Boultif*. The court made explicit the best interests and well-being of the children, and in particular the nature of the difficulties they would face in the event of expulsion. The court further emphasised that the social, cultural, and family ties of a child with the host country and with the country of destination are included in the assessment criteria which Article 8 requires.

[483] *Uner v The Netherlands* (application no: 46410/99.

[484] *Uner* para 56.

4.33. *Maslov v Austria* is a case of significant importance in ECtHR jurisprudence. An explanation of the facts of the case will assist the reader in understanding the correct approach to Article 8. The applicant was a Bulgarian national, born in 1984 and belonging to the Turkish minority, and had no understanding of the Bulgarian language. He lawfully accompanied his parents to Austria at the age of six. His parents had become Austrian citizens. A statutory exception in Austrian law prohibited the exclusion of an alien child who had been a lawful resident at the age of three. The applicant could not benefit from the exception and was granted indefinite leave to remain in September 1999. Mr Maslov was convicted of 22 counts of attempted and aggravated gang burglary, gang extortion, and unauthorised use of a vehicle. He committed these offences between November 1998 to June 1999. He received eighteen months' imprisonment out of thirteen months suspended, with a condition to undergo drug therapy. He failed to comply with the condition and committed further offences between June 1999 to January 2000. He was sentenced to fifteen months' imprisonment on eighteen counts of aggravated burglary, attempted and aggravated burglary. He finished his education in prison and started helping his father in business on release. Mr Maslov was deported to Sofia on 22 December 2003, and the exclusion order was valid for ten years. The applicant had indefinite leave and was living with his parents when the exclusion order was made. The court found the exclusion order to be in breach of Article 8. The judgement echoes the views of dissenting judges in *Uner*[485]. *Maslov v Austria*[486] is an authoritative judgement of the Grand Chamber affirming the guiding principles set in *Boultif* and *Uner*. The case also provides a specific criterion for deportation cases involving foreign juvenile offenders. The court stated that very serious reasons are required to justify the expulsion of a settled migrant who has spent all or part of his childhood and youth in the host state. This approach is different from the 1990s jurisprudence. This is a general principle applicable in cases involving juvenile offenders. The approach taken in *Moustaquim*[487] and *Beljoudi* was confirmed in this case.

4.34. In *Jeunesse v The Netherlands*, the Grand Chamber considered the refusal of a residence permit to an overstayer. The applicant had established family life in the Netherlands when her immigration status was precarious. The applicant's two children and spouse were Dutch citizens. The court considered the guiding principles established in previous cases[488]. The court took the view that *Jeunesse*'*s* facts are distinguished from cases concerning settled migrants because those cases involve the withdrawal of residence rights in the host state after being convicted of a criminal offence or offences. Thus, the criteria developed in the ECtHR case law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 cannot be transposed automatically to the situation of *Jeunesse.* The court stated that the question to be examined was whether, having regard to the circumstances as a whole, the Netherlands authorities were under a

[485] *Uner v Netherlands*, see dissenting views at the end of judgement.
[486] *Maslov v Austria* (Application No 1638/03) paras 71-75.
[487] *Moustaquim v Belgium* (A/193): (1991) 13 E.H.R.R.802.
[488] *Jeunesse v The Netherlands* (Application No. 12712738/10 at para 104.

duty pursuant to Article 8 to grant her a residence permit, enabling her to exercise family life in the Netherlands. The court considered the following factors:

> "*Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Butt v. Norway, cited above, § 78). 108. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious."*[489]

The court considered best interests of the children at para 109 of the judgement.

4.35. It was considered that the case involves an allegation of failure on the part of the respondent state to comply with a positive obligation under Article 8 of the ECHR. However, there is no bright line rule defining a state's boundaries between positive and negative obligations[490]. In doing so, the court also considered *Butt v Norway* in which the question of positive and negative obligations was raised.[491] In *Sen*[492] the excluded family member was a daughter who was nine years old at the time of application seeking to join her parents in the Netherlands. The court acknowledged that long term residents in member states can themselves face obstacles in returning to their countries of origin, due to having to give up the settled status and integrated position that they and their children had achieved. In such circumstances, a refusal to admit a family member left behind in the country of origin, especially a child, could potentially be in breach of Article 8[493]. The court found that there had been a breach of Article 8 because the circumstances of the applicant's case were exceptional and a fair balance had not been struck between the personal interests of the applicant, her husband, and their children in maintaining their family life in the Netherlands and the public order interests of the government in controlling immigration.

4.36. The courts considered four critical factors in favour of granting relief[494]. The first factor is that all family members of the family unit, except the applicant, are Dutch citizens and have the right to enjoy family life with each other in the Netherlands. The second factor is that the applicant was a Dutch citizen by birth who lost her citizenship, not by her own choice, after Suriname became independent. The applicant had also spent sixteen years of life in the Netherlands. The third-factor court considered was the family would experience

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[489] *Jeunesse* at para 107-109.
[490] *Jeunesse* at para 106.
[491] *Butt v Norway* 47017/09, para 77-78.
[492] *Sen v The Netherlands* (2003) 36 EHRR 7.
[493] *Sen v Netherlands.*
[494] *Jeunesse* at 113-119.

hardship in the absence of insurmountable obstacles, and the court considered the impact on all family members as a unit which included three children.

4.37. There has been an obvious shift in the Court's approach since 1990. At that time, the Court's findings in favour of applicants were rare even where they had close family members in member states. It appears that since then, the Court has lowered the threshold for violations of Article 8 based on obstacles faced by the family in relocating elsewhere. In the ECtHR's recent case law, there is a general acceptance that removal will normally constitute an interference with family life. The Court has placed the burden of proof on contracting states to establish that a removal or refusal to admit would not constitute an interference with family life[495]. This approach does not remove the margin of appreciation available to member states to maintain a proper immigration control. However, the Court's structured approach is helping member states to comply with their international obligations. Having reviewed the developments in the ECtHR case law, the next part will focus on the scope of private and family life from an immigration perspective.

Strasbourg's view on the relevance of Article 8 in the immigration context.

4.38. There was a brief reference to the relevance of Article 8 in the immigration context earlier in this chapter. This part gives a more detailed explanation of the Strasbourg Court's view on Article 8 in the immigration context. The case of *Abdulaziz*[496] was a significant development in defining the relevance of the Convention rights to immigration control. The Court in considering the issue of entry clearance of foreign spouses stated that state parties are entitled to refuse entry clearance or entry to an alien under Article 8 (2). There is no explicit reference to immigration in Article 8, but the Court took the view[497] that a foreigner's right to enter or remain in a country was not guaranteed by the Convention as such. However, immigration controls had to be exercised consistently with Convention obligations, and the exclusion of a person from a member state where members of his or her family were living might raise an issue under Article 8. The case of *Abdulaziz* has been discussed in this chapter elsewhere, but in a different context.

4.39. The Court's conclusion is important in two ways. It confirms the relevance of the Convention and the applicability of Article 8 in an immigration context while making it clear that the right to family life must be seen in the context of a state's right to control immigration, and that Article 8 does not oblige member states to respect the choice of matrimonial residence made by married couples, or to accept non-nationals for settlement in that country[498]. In *Abdulaziz*, the court found a violation of Article 14 taken together with Article 8. The discriminatory nature of the immigration rules preventing wives from sponsoring their husbands was the Court's paramount consideration in finding a violation

[495] *Yildiz v Austria* (2003) 36 EHRR 32.
[496] *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471.
[497] *Abdulaziz* paras 59-60.
[498] *Abdulaziz* para 68.

of Articles 8 and 14. However, the Court did not accept that there had been a violation of Article 8 taken alone in the absence of any 'obstacles' to establishing family life somewhere else. The court thus accepted a wide margin of appreciation afforded to member states in the context of maintaining effective immigration control[499].

4.40. The positive obligation under Article 8 requires the member states to admit family members, foster family life, and consider where family life might best develop. It has been suggested that *Abdulaziz* should not be followed as authority based on the proposition that the exclusion of a non-citizen spouse would not interfere with the right to family life if the couple could also establish family life in another country.[500] In *Osman*, the Court opined that in the context of both negative and positive obligations, the state must strike a fair balance between the individual's interests and those of the community as a whole. In *Abdulaziz,* the majority decision was based on the distinction between the positive and negative obligations having lost its significance in the immigration context. However, at the domestic level, in *Quila*, a challenge to immigration rules putting a blanket ban on the entry of spouses under the age of 21, the UK Supreme Court recognised '*colossal interference*' with the right protected by Article 8.[501] A detailed analysis of domestic Article 8 jurisprudence will be undertaken later in this chapter, and the following paragraphs continue to focus on Strasbourg jurisprudence.

4.41. In Strasbourg case law, a distinction between decisions on the admission of non-nationals and removal to the country of nationality is evident in an Article 8 context. The Court has been slow to accept violations of Article 8 in entry clearance cases where there was no pre-existence of family life in the country refusing admission. However, practice suggests a significant shift in emphasis since 2001 which has lowered the threshold for finding a violation of Article 8 based on 'obstacles' to establishing family life elsewhere.[502] The case of *Boultif*[503] was decided in 2001; before that, the inconsistency in the Court's approach was apparent[504]. Chapter 3 makes detailed reference to the guiding principles set in *Boultif.*

4.42. Although the above criteria were prescribed in a deportation case; the majority of points are equally relevant to non-deportation Article 8 claims. The application of Strasbourg principles in domestic law and practice will be discussed later in this chapter. The court further made previously implicit criteria explicit in *Uner v Netherlands.*[505] It concluded that the seriousness of the difficulties any children of the applicant were likely to encounter in the country to which the applicant might be expelled were a relevant consideration, and

[499] *Abdulaziz* paras 69 and 83.
[500] *Osman v Denmark* (Application No. 38058/09 (14 June 2011), unreported.
[501] *R (on application of Aquilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, paras 43 and 72.
[502] Ian A Macdonald QC and Frances Webber: *Macdonald's Immigration Law and Practice*; Sixth Edition, p.427.
[503] *Boultif v Switzerland* (2001) 33 EHRR 1179.
[504] *Dalia v France; Beldjoudi v France; Moustaquim v Belgium.*
[505] (Application No. 46410/99), [2006] 3 FCR 340.

in doing so, the solidity of social-cultural and family ties with the host country and with the country of destination must be assessed in tandem[506]. Since *Abdulaziz*, Article 8 jurisprudence has continued to evolve. Strasbourg and domestic courts always encourage immigration authorities to take a fact-sensitive approach in Article 8 cases, and there could be further factors other than those prescribed above which are relevant to a proportionality assessment in specific case. The proportionality analysis in the context of immigration rules and Article 8 will appear later in this chapter.

4.43. An Article 8 claim can also be raised in deprivation of citizenship cases, and the case of *Ramadan v Malta*[507] involves a similar question. The court ruled that the Convention or its Protocols do not guarantee the right to citizenship, but that an arbitrary denial of citizenship might raise an issue under Article 8 of the Convention in certain circumstances because of the causal impact of such a denial on the private life of the individual.

Conclusion

4.44. ECtHR jurisprudence provides insight into the margin of appreciation and proportionality doctrines, and over time the practical application appears to become more structured and coherent. In *Abdulaziz*[508] the relevance of Article 8 in the immigration context was accepted. Article 8 is frequently invoked in immigration cases, and there has been exponential growth in Article 8 jurisprudence. The ECtHR has defined the practical application of the qualifications provided in Article 8 (2), and in that context the ECtHR guiding principles provided in [509]*Boultif,* [510]*Uner* and [511]*Maslov* are of great significance in guiding judicial discretion and developing a consistent approach in the supervisory function of the court.

[506] *Uner v Netherlands* para 58.
[507] Application No. 76136/12; final 17 Oct 2016.
[508]*Abdulaziz, Cabales and Balkandali v The United Kingdom, (1985) 7 EHRR 471.*
[509] *Boultif v Switzerland* (Application No. 54273/00.
[510]*Uner v The Netherlands* (46410/99).
[511]*Maslov v Austria* (Application No. 1638/03).

Chapter 5: Explanation of the developments in UK law in Response to Article 8 in the Immigration Context from the Human Rights Act 1998 to the Present

5. Introduction

5.1. This chapter is divided into three parts. Based on the analysis of relevant legislative developments, the chapter will first show the government's overriding objective to reduce access to judicial oversight by treating Article 8 as an obstacle to effective immigration control by seeking to direct judicial decision-making in an unusually precise way. This first phase briefly explains the treatment of Article 8 before the Human Rights Act 1998. The second phase includes detailed discussions of Article 8 jurisprudence starting from the Human Rights Act 1998 up until before the introduction of the Immigration Rules, including Article 8 considerations in the Rules. In the third phase, there is an analysis of Article 8 after the Rules were introduced on 9 July 2012. The first part starts with an overview of the Home Office policies concerning Article 8. The second phase offers an explanation of the principles of proportionality and deference, and explains the mirror principle. Then, the impact of the Court of Appeal decision in *Mahmood* is discussed. The second phase also explains decisions developing Article 8 jurisprudence and reversing the impact of *Mahmood.* Later in this thesis, those decisions are referred to as corrective decisions. The third phase explains application of Article 8 within the Immigration Rules. This part explains government's view and reasons for introducing article 8 considerations within the rules. This chapter thus encompasses dialectical developments, examines the reasons behind the introduction of immigration rules, including Article 8 considerations, and explains the judicial treatment of the immigration rules in private and family life contexts. It discusses the relevance of the two-stage test then considers the family life exceptions provided in Appendix FM of the Immigration Rules. After that, it looks at the judicial interpretation of the exceptions provided within the Immigration Rules in the context of married and unmarried couples and children concerning non-deportation cases. Then, it expands on the exceptions provided within the Immigration Rules concerning deportation cases and explains the judicial treatment of Article 8 claims concerning foreign offenders. In the end, the chapter explains the judicial view confirming the compatibility of the Immigration Rules with the UK's obligations under Article 8 of the ECHR.

Article 8 in the UK before the Human Rights Act 1998- Phase one.

5.2. This part of the chapter will provide an overview of the UK's domestic jurisprudence in relation to Article 8 and an analysis of a few dialectical developments in that domestic

jurisprudence. The Home Office had various policies in place to assess family life claims prior to the Human Rights Act 1998 and DP2/93, DP3/96, and DP5/96 etc. were among those. DP2/93 was relatively liberal and broad in scope, but was replaced by DP3/96. DP3/96 related to marriages, and DP5/96 included considerations of Article 8 claims involving children. These policies existed outside the Immigration Rules. Their main objective was to set an assessment criterion for claims which could not succeed within the Rules, and to indirectly make the Rules more convention compliant. The other objective of these policies was to narrow the range of responses from the Secretary of State that might be considered reasonable. However, the Home Office's decisions often failed to reflect its own policies. Failures to apply them were often challenged in courts and such practices were criticised by domestic courts on numerous occasions.[512] These policies could be described as the precursor of the Article 8 considerations which were included in the Immigration Rules on 9 July 2012. Finally, the Home Office withdrew DP5/96 in December 2008 citing the reason that the policy had no purpose to serve because the Convention has been adopted in domestic law[513]. The other reason for withdrawing that policy could have been that in *Huang, Chikwamba* and *EB (Kosovo)* the House of Lords had more clearly identified the possible scenarios where interference in the protected rights could be disproportionate.

5.3. In the simplest terms, in order to comply with Article 8 it is not sufficient for a state merely to refrain from removing a person where such removal would offend the subject's right to respect for private and family life. Contracting states also have a positive obligation to confer such immigration status, as is necessary, to enable the person to freely exercise that right[514]. However, the positive obligation does not require a contracting state to grant a particular kind of status to an individual[515].

UK law from the Human Rights Act 1998 until 09 July 2012- Phase two

The concepts of proportionality and deference in domestic courts

5.4. In terms of demanding a greater degree of justification, the *Wednesbury* test is less rigorous, intrusive, and objective than the proportionality test. In *Daly*[516]*,* the court expressed an approach to the proportionality test which was subsequently accepted as generally applicable. The three prongs test set in *de Freitas*[517] was adopted in full: i)

[512] *Mahmood v Secretary of State for the Home Department* [2001] 1 WLR 840; *NF (Ghana)* [2008] EWCA Civ 906; *AB (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 1302; *AG and others (Policies; executive discretions; Tribunal's powers) Kosovo* [2007] UKAIT 00082.
[513] Immigration Minister statement of 09 December 2008.
[514] *Sisojeva v Lativa* (2007) App No 60654/00, Grand Chamber.
[515] *Sisojeva v Latvia.*
[516] *R(on the application of Daley v SSHD* [2001] UKHL
[517] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

whether the legislative objective is sufficiently important to justify limiting the fundamental right; ii) whether the measures designed to meet the legislative objective are rationally connected to it; and iii) that the means used to impair the right or freedom are no more than is necessary to accomplish the objective. The court stated that "*it may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational and reasonable decisions. It may require attention to be paid to the relative weight accorded to interests and considerations….the heightened scrutiny test developed in ex p Smith is not necessarily appropriate to the protection of human rights"*[518]. In *Huang*[519], the court referred to *Razgar*[520] paragraph 20 and added a fourth element to the test: iv) whether the measures strike a fair balance between the rights of the individual and the interests of the community. The UK's higher courts have made it clear again and again that the proportionality test, not the *Wednesbury* review, is to be applied in human rights cases.[521]

5.5. In the UK, the general approach has been to give substantial weight to ECHR case law on cases arising under Article 8. The discussions below of the mirror principle also relate to this topic. In considering the application of proportionality, UK judges have sometimes invoked the concept of deference to the other branches of the government. The concept of deference was explained in ex p *Kebilene*[522] as follows:

"in this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In those circumstances, it will be appropriate for the court 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 or person whose act or decision is said to be incompatible with the Convention… it will be easier for such an area of judgement to be recognised where the Convention itself requires a balance to be struck, much less so where the rights are stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection…"

In doing so, Lord Hope stated on a question of constitutional importance by defining the boundaries of deference and their flexibility in different contexts. In another case[523] the Court of Appeal conceded a wide margin of discretion to the Secretary of State, in the immigration context, as an elected representative's personal opinion than more routine immigration decisions taken on behalf of the Secretary of State. Likewise, in deportation cases, immigration judges have accorded a large margin of discretion, on public policy

[518] Daley para 27.
[519] *Huang v SSHD* [2007] UKHL para 19.
[520] *R (on the application of Razgar) v SSHD* [2004] UKHL 27.
[521] *Huang v SSHD* [2007] UKHL 11.
[522] *R v DPP, ex p Kebilene* [1999] 3 WLR;993-994.
[523] *R (on application of Farrakhan v SSHD* [2002] EWCA Civ 606.

grounds, to the Secretary of State, which have gone beyond personal ministerial decisions. *Samaroo*[524] is an example of the deconstruction of the proportionality test in domestic jurisprudence, and *Samaroo* was subsequently corrected in *Huang.*[525] One judicial view was that the tribunal should find *a decision to remove unlawful only when the proportionality is so great that no reasonable Secretary of State could remove.*[526] The House of Lords[527] rejected the approach and ruled that in a statutory appeal, the adjudicator should exercise an independent judgement on the issue of proportionality, based on all the material adduced on the appeal. The famous five-stage *Razgar* test has been reproduced earlier in Chapter 4 in a different context.

The mirror principle

5.6.Lord Bingham opined in *Ullah* that "*The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less*[528]". The above is a famous dictum and is frequently cited by judges in domestic jurisprudence and commonly referred to as "*the mirror principle*". Members of our higher judiciary have expressed their views as to how the mirror principle should work in practice. Baroness Hale, former president of the Supreme Court, said it would be 'absurd' for the Supreme Court not to decide a question merely because Strasbourg had not yet done so, and that there would be no point in waiting for something which may never come.[529] Likewise, Lord Kerr stated:

> "*We [national judges in the United Kingdom] should not feel ourselves constrained from forming our own judgment on a contested Convention right where Strasbourg has not yet expressed a view: for a dialogue to be effective, both speakers should be prepared, when the occasion demands, to utter the first word*."[530]

5.7.In Smith, Lord Hope emphasised the need to take a cautious approach and ruled that:

> "*Care must… be exercised by a national court in its interpretation of an instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg Court… Parliament never intended by enacting the Human Rights Act 1998 to give the courts of this country the power to give a more generous scope to the Convention rights*

[524] *R (on application of Samaroo) v SSHD* [2001] EWCA Civ 1139.
[525][2007] UKHL 11.

[526] *R(on application of Mahmood) v SSHD* [2001] 1 WLR; *Edore v SSHD* [2003] EWCA Civ 716; *M (Croatia v SSHD* [2004]UKIAT 24.
[527] *R(on the application of Razgar) v SSHD* [2004] UKHL 27.
[528] *R. (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323.
[529] B. Hale, *What's the Point of Human Rights?*, Warwick Law Lecture 2013, November 28, 2013https://www.ein.org.uk/news/lady-hale-whats-point-human-rights
[530] Kerr, "*The Need for Dialogue between National Courts and the European Court of Human Rights*" *in Flogaitis*, Zwart and Fraser (eds), The European Court of Human Rights and its Discontents (2013), at p.113 https://www.elgaronline.com/view/edcoll/9781782546115/9781782546115.00018.xml

than that which was to be found in the jurisprudence of the Strasbourg Court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's [that is to say, the Supreme Court's] own creation."[531]

In *Al Skeini*[532], Lord Brown had expressed similar views, and Lord Hope confirmed that approach in *Smith*. Lord Kerr[533] stressed the need for dialogue between the national courts and Strasbourg and described: "*a conscientious mutual striving to fulfil the common aim of providing for the societies we serve the civilised human rights standards which we all aspire*".

5.8. One may wonder under what circumstances a national court may refuse to follow a clear and constant approach taken by the Grand Chamber. In *Chester*[534], the Supreme Court confirmed the usefulness of dialogue with Strasbourg by the national courts. It stated that "*It would then have to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level*". As I discussed earlier, the Strasbourg Court has a subsidiary role in protecting the rights guaranteed in the Convention, and the primary protection has to be secured at the domestic level. In that regard, Strasbourg has conceded the margin of appreciation available to member states. However, as contemplated by Lord Bingham, the ultimate success of the Convention system will depend on the quality of the co-operation between Strasbourg and the courts in member states. There is a need for bilateral judicial co-operation, and:

> "*it should involve the Strasbourg Court's acknowledgement of the national courts' better grasp both of the facts and of the national policy and other issues involved in balancing the respective interests of the individual and of the community. On the other side, the closer the analysis of human rights issues by the national courts reflects the standards and case-law of the Convention, the greater the deference of the Strasbourg Court towards the ruling of the national courts is likely to be."*[535]

It has been suggested that the risk of illegitimate incursion by the Strasbourg Court into the contracting states can be further minimised by adopting a co-operative rather than a hierarchical or competitive approach, and that doing so would assist in ensuring maximum judicial protection of the Convention rights at the national level[536]. The mirror principle has

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[531] *Smith v Ministry of Defence* [2013] UKSC 41.
[532] *R (on application of Al Skeini) v SSHD* [2007] UKHL 26.
[533] Kerr, *"The Need for Dialogue between National Courts and the European Court of Human Rights" in Flogaitis*, Zwart and Fraser (eds), The European Court of Human Rights and its Discontents (2013), at p.114.
[534] *R. (on the application of Chester) v Secretary of State for Justice* [2013] UKSC 63, para 27.
[535] Paul Mahoney, *The relationship between the Strasbourg court and the national courts*; L.Q.R. 2014, 130(Oct), pp. 568-586.
[536] Paul Mahoney, former British Judge at Strasbourg, as cited above.

survived judicial interpretations, and it continues to be regarded as an important legal principle in domestic jurisprudence.

Exceptions to the mirror principle

5.9. There are several clearly understood exceptions to the mirror principle, which are as follows: (i) where there is no clear or no consistent line of authority from the ECtHR, or where it is old, or where the Convention jurisprudence was criticised when it was handed down, or where it could reasonably be concluded that the European Court would revise its approach[537]; (ii) where the ECtHR case law is inconsistent with some fundamental or procedural aspect of domestic law and its reasoning appears to have overlooked or misunderstood some argument or point of principle[538]; (iii) if it would undermine the UK courts' ability to engage in a constructive dialogue with the European Court[539]; (iv) where there are only one or more chamber decisions of the Strasbourg Court, or where there was a Grand Chamber decision but it involved 'some truly fundamental principle of our law or some most egregious oversight or misunderstanding'[540]; and (v) where the UK's court cannot properly follow the Strasbourg Court's reasoning, or its application would cause practical problems.[541]

Summary

5.10. The UK's national courts have explained the application of the mirror principle in practice. The primary objective of the mirror principle is to alert domestic courts not to go beyond what is warranted in protecting Convention rights. Recent case law has clarified the application of, and exceptions to, the mirror principle. It has been argued that the success of the Convention system depends on the quality of the cooperation between the courts in the member countries and the Strasbourg Court. The two-way cooperation should involve the Strasbourg Court's acknowledgement of the national court's better grasp both of the facts and of the national policy and the other issues involved in balancing the respective interests of the community and the individual. Furthermore, the closer that the analysis of human rights issues by the national courts reflects the standards and case law of the Convention, the greater the deference of the Strasbourg Court towards the rulings of the national courts is likely to be. Thus, a cooperative rather than hierarchical or competitive relationship between national courts and the Strasbourg Court can place the centre of gravity of the judicial protection of human rights at the national level, which

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[537] *R (on application of Aquilar Quila) v SSHD* [2011] UKSC 45, paras 38-43. *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, paras 20-25, 31.

[538] *R (On the application of Horncastle and others* [2009] UKSC 14, paras 9-11.

[539] *R v Horncastle [2009] UKSC; Manchester City Council v Pinnock* [2010] UKSC 45, para 48.

[540] *R (on the application Chester v Secretary of State for Justice (Rev 1)* [2013] UKSC paras 34-40, 69-75. *R (on application of Haney) v Secretary of State for Justice* [2014] UKSC 66.

[541] *R (on application of Haney) v Secretary of State for Justice* [2014] UKSC 66, paras 16, 18-19, 35-36, 39.

would enable the Strasbourg Court to play its subsidiary role in the Convention system. The continuation of judicial dialogue between the state parties and the Strasbourg court will further minimise the perceived risk of illegitimate incursion by the Court into the democratic life of the state parties to Convention[542].

5.11. The Human Rights Act 1998 incorporated the ECHR into domestic law. Before that, the UK's judicial opinion was divided on the relevance of the Convention to the interpretation of statue and the proper exercise of administrative powers. Chapter 2 summarised both judicial views, commonly referred to as the *Brind*[543] and *Garland*[544] views, and there is no need to expand on these any further. Chapter 3 briefly explained the scope of family life under Article 8 but did not expand on the private life aspect.

5.12. Following *Mahmood*[545], after the Human Rights Act 1998 there was a period when the UK's courts developed a more conservative approach to Article 8[546]. The domestic court departed from the ECtHR guidance in *Boultif* [547]and *Sen.*[548] In *Mahmood*, the Master of the Rolls set the benchmark from which the courts were afterwards reluctant to stray[549]. The decision subject to challenge predated the Human Rights Act 1998. The Secretary of State considered a family life claim of an applicant involving his British spouse and a minor British child, the applicant's second child born on 6 October 1999, which predated the Court of Appeal judgement in Mahmood. In Mahmood, after considering the family life claim under DP3/96 the Home Office concluded "*that any concerns there may be about the family's welfare are outweighed by the public interest in maintaining an effective system of immigration control".*[550]

5.13. The court considered all further evidence lodged in process to the Home Office, which included details of the applicant's life with his British spouse and two British children. The applicant was an illegal entrant living in the UK since 11 January 1995 and his asylum claim had been refused. He had formed his family life in the UK at time when his immigration status was precarious. As an illegal entrant without leave, he could not have

542 Paul Mahoney '*The relationship between the Strasbourg court and the national courts'* L.Q.R. 2014, 130(Oct), pp. 568-586.
543 *R v SSHD ex p Brind* [1991] 1 AC 696.
544 *Garland v British Rail Engineering* [1983] 2 AC 751.
545 *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1WLR 840.
546 *Secretary of State of the Home Department v G (Somalia)* [2003] UKIAT 175; *G (Azerbaijan)* [2003] UKAIT 155; *Secretary of State of the Home Department v Vujnovic* [2003] EWCA Civ 1843; *Kugathas (Navaratnam) v Immigration Appeal Tribunal* [2003] EWCA Civ 31; *R (on application of Ekinci) v Secretary of State for the Home Department* [2003] EWCA Civ 765; *Janjanin and Musanovic v Secretary of State for the Home Department* [2004] EWCA Civ 448; *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105.
547 *Boultif v Switzerland* (2001) 33 EHRR 50.
548 *Sen v Netherlands* (2003) 36 EHRR 7.
549 Macdonald, Ian A QC, *Macdonald's Immigration Law & Practice*, Sixth Edition, p.431.
550 *Mahmood v SSHD*, para 14, the Home Office's review decision of 29 September 1999.

switched to the spouse settlement route whilst living in the UK. The proper course for him to take within the Immigration Rules was to seek entry clearance from abroad as a spouse of a settled or British person. The Court ruled that:

> "*Firm immigration control requires consistency of treatment between one aspiring immigrant and another. If the established rule is to the effect – as it is – that a person seeking rights of residence here on grounds of marriage […] must obtain an entry clearance in his country of origin, then a waiver of that requirement in the case of someone who has found his way here without an entry clearance and then seeks to remain on marriage grounds, having no other legitimate claim to enter, would in the absence of exceptional circumstances to justify the waiver, disrupt and undermine firm immigration control because it would be manifestly unfair to other would-be entrants who are content to take their place in the entry clearance queue in their country of origin.*"[551]

Thus, the court concluded that illegal entrants or overstayers must not skip the queue, and should seek entry clearance from abroad. This approach prevailed until the House of Lords decided *Chikwamba* and *EB (Kosovo).* These cases are discussed in detail below.

5.14. The court set out the following guidelines for Article 8 considerations at para 55 of *Mahmood*:

> *(1) A State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.*
>
> *(2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.*
>
> *(3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.*
>
> *(4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.*
>
> *(5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.*

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[551] *Mahmood v SSHD* para 23, ibid.

(6) Whether interference with family rights is justified in the interests of controlling immigration will depend on
(i) The facts of the particular case and (ii) the circumstances prevailing in the State whose action is impugned.[552]

5.15. The above guidance was reduced to a catch-phrase, '*insurmountable obstacles',* by the primary decision makers in the Home Office. Likewise, in the Tribunal, the phrase was too often parroted by the adjudicators, as they were, and by the Home Office's Presenting Officers alike to avoid a careful analysis of the difficulties which family members would face after removal in the destination country.[553] It appears that *Boultif*[554] and subsequent ECtHR cases have placed less emphasis on 'precarious' immigration status than have the UK courts, and have treated this factor merely as one factor in the balancing exercise along with the various other factors that might act in the applicant's favour. In the case of *Vujnovic*'[555], the Court of Appeal found the ties between the applicant and his brother and mother, with whom he had fled his country of nationality after sharing dreadful experiences, to be irrelevant.

5.16. In entry clearance cases there was a trend of following *H (Somalia)*[556], where the Upper Tribunal had concluded that:

> "*It would normally be the position that the combination of the provisions of the Immigration Rules and extra-statutory policy and discretion would provide a proportionate basis for any interference with or lack of respect for family life in the light of the well-established right of a State to control entry, whether or not that is to be regarded as a free-standing restriction on the scope of Article 8 or as falling within the qualification in Article 8(2)*."

The Tribunal's approach does not coincide with *Sen v Netherlands*[557] and it does not require the Home Office to identify a legitimate aim of the rules and policy in question. Furthermore, it does not engage with the balancing exercise that must be carried out on a case-to-case basis. However, in *Arman Ali* [558] the Court of Appeal suggested that where third party support is offered in place of support from the sponsor, a failure to meet the immigration rules on maintenance and accommodation should not be fatal given that the purpose of the restrictions is to meet one of the aims of Article 8 (2). If the applicant is to be supported without recourse to public funds, then any aim of protecting the economic interests of the state has been met. In *H (Somalia),* the tribunal's approach appears to be narrower in scope than the Court of Appeal's findings in *Arman Ali.*

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[552] *Mahmood v SSHD* para 55.
[553] Macdonald QC, *Ian A, Macdonald's Immigration Law and Practice*, Sixth Edition, p431; Sheona York, "*Immigration control and the place of Article 8 in the UK Courts- an update*", J.I.A.NL, 29 (3), pp. 289-307; *R(on application of Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11.
[554] (2001) 33 EHRR 50
[555] *Secretary of State for the Home Department v Vujnovic* [2003] EWCA Civ 1843.
[556] *AH (Article 8 _ ECO _ Rules) Somalia* [2004] UKIAT 00027, see para 46.
[557] (2003) 36EHRR 7.
[558] *R v Secretary of State for the Home Department, ex p Ali (Arman*) [2000] INLR 89.

5.17. In *Mahmood,* the Court of Appeal took the view that in the absence of exceptional circumstances, an applicant had to return abroad to obtain entry clearance when required to do so under the Immigration Rules. It is worth reminding that *Mahmood* was not a case under the Human Rights Act 1998, nor did it concern statutory appeal rights. The Court of Appeal assumed in *Mahmood* that the Immigration Rules, even including the requirement to seek entry clearance from abroad, had themselves struck a justified and proportionate balance under Article 8 except in wholly exceptional cases. This view persisted until the House of Lords decided *Huang*[559].

5.18. In *Ullah*[560] and *Razgar*[561], the House of Lords affirmed that Article 8 may be relied upon where a person faces removal from the UK. The House of Lords distinguished foreign cases, where what is feared are poor conditions in the country of origin, from domestic cases, where what is feared is the impact on the family / private life as established in the UK. In *Razgar*, the House also considered mixed cases; where a mixture or combination of these two factors was at play. The House of Lords agreed that foreign cases could also engage Article 8. The significance of *Razgar* in the domestic jurisprudence will be discussed later in this chapter.

5.19. In *Razgar*[562]*,* Lord Bingham framed a five-stage assessment process to determine whether a decision breaches Article 8, which largely reflects the text of Article 8 itself:

i. *whether the proposed removal would be an interference by a public authority with the exercise of the applicant's right to respect for private and family life, as the case may be;*
ii. *if so, whether such interference would have consequences of such gravity as potentially to engage the operation of Article 8;*
iii. *If so, is such interference in accordance with the law?*
iv. *If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others?*
v. *If so, is such interference proportionate to the legitimate public end sought to be achieved proportionate to the legitimate public end sought to be achieved?*

5.20. Due to the way the test is framed, the first and second questions require positive answers. The remaining three questions require negative answers for a breach of Article

[559] *Huang v Secretary of State for the Home Department* [2007] UKHL 11.
[560] *Ullah v Special Adjudicator* [2004] UKHL 26.
[561] *Razgar v Secretary of State for the Home Department* [2004] UKHL 27.
[562] *Razgar v Secretary of State for the Home Department* [2004] UKHL 27, para 17.

8 to be found, and a negative answer to any one of them could establish a breach. The first questions address the issue of whether Article 8 is engaged. This five stage test remains a widely acknowledged criterion for the assessment of Article 8 claims.[563]

5.21. In *Razgar*, the House of Lords identified the potential areas where Article 8 can be relied upon. In their dissenting opinion Baroness Hale and Lord Walker opined that reliance could, in principle, be placed on Article 8 to resist a removal decision, even where the main issue was not the severance of the family and social ties which the applicant had enjoyed in the expelling country, but was instead the consequences for his mental health of removal to the receiving country. This view is akin to Strasbourg's approach taken in *Bensaid* [564] and it was acknowledged that the threshold of successful reliance is high. The court took a view that within the meaning of Article 8, private life extends to those features which are integral to a person's identity or ability to function socially as a person. Furthermore, the rights protected by Article 8 could be engaged by the foreseeable consequences to the individual's health of removal from the UK, even where such a removal did not violate Article 3.

5.22. In *Huang*[565], the House of Lords considered the scope of review by the appellate authority in relation to asylum and human rights claims. It was held that, on appeal against an immigration decision, the tribunal's jurisdiction is not limited to reviewing that decision when considering any Article 8, or indeed any human rights, grounds. The tribunal's jurisdiction, as has long been recognised to be the case in asylum decisions, is as an extension of the decision-making process, so it is not limited to considering the reasons given and the evidence considered by the Secretary of State. There is no place for 'deference' to the Secretary of State.

5.23. The House further emphasised that the tribunal is required to follow Strasbourg's clear and constant jurisprudence[566]. The House rejected the much more stringent approach taken by the Court of Appeal in *Huang*[567]. It was held that the question for the Tribunal in assessing proportionality is whether, taking account of all relevant considerations, the Secretary of State's decision prejudices the family / private life of the individual in a manner sufficiently serious to amount to a breach of his/her Article 8 rights. There can be no extra-legal threshold of exceptionality[568]. Furthermore, the Secretary of State's proposition that the Immigration Rules should be deemed to have struck the balance appropriately in the generality of cases was rejected by the House of Lords. This clearly marks a departure from the benchmark set by the Court of Appeal in *Mahmood*[569].

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[563] *Huang v SSHD* para 16.
[564] *Bensaid v United Kingdom* (44599/98) (2001) 33 E.H.R.R. 10.
[565] *Huang v Secretary of State for the Home Department* [2007] UKHL 11.
[566] *Huang v Secretary of State for the Home Department* [2007] UKHL 11.
[567] *Huang v Secretary of State for the Home Department* [2005] EWCA.
[568] *Huang v SSHD* [2007] UKHL 11, para 20.
[569] *Mahmood v Secretary of State for the Home Department* [2001] 1 WLR 840.

5.24. *In Chikwamba*[570] Lord Brown considered the use of policy requiring spouses to apply for entry clearance from abroad, and stated:

> "*Is not the real rationale for the policy perhaps the rather different one of deterring people from coming to this country in the first place without having obtained entry clearance and to do so by subjecting those who do come to the very substantial disruption of their lives involved in returning them abroad*"?

Lord Brown was not questioning the policy objective; rather, his subject was the inflexible application of the policy.

5.25. In *Chikwamba,* the House of Lords considered *Mahmood* by replacing an adverse exceptionality test with a positive one. More fundamentally, *Mahmood* was predicated on the implicit premise that the immigration rules struck the balance required by Article 8. However, that was a false premise. The contrary proposition was a legal fiction upon which the exceptionality tests, both as regards substance (*Huang* CA) and procedure (*Mahmood*), were built. It was troubling that the fiction continued to be deployed even post-Huang[571] and *MB (Somalia*)[572]. *Chikwamba* and *EB (Kosovo)*[573] are therefore landmark corrective decisions in this area of the law. Thus, an exceptional case must be shown by the appellant to overcome any entry clearance obstacles to an Article 8 claim. Following *Chikwamba* the Home Office needs to show an exceptional case if entry clearance is being suggested as proper course for an applicant from abroad.

5.26. Lord Brown stated that the following are relevant considerations in assessing an exceptional claim on the part of the applicant: a) the strength of the claim under the rules -the stronger the claim, the less appropriate it would be to remove to obtain entry clearance; b) the individual's immigration history; c) the likely timescale in which a decision would be taken; d) any delay in consideration of the case; e) the prospective length and degree of family disruption involved in applying for entry clearance; f) whether the Entry Clearance Officer is better placed than the Immigration Officer to investigate the claim; and g) whether the entry clearance option would simply result in a second appeal on Article 8 grounds from abroad. If an applicant meets the requirements of the Immigration Rules but his/her application is likely to be refused owing to bad immigration history then one should consider the implications of the general grounds of refusal within the Immigration Rules, e.g., refusals under paragraph 320(11) including the impact of lengthy mandatory exclusion. One should also consider the appellant's possible inability to give live evidence from abroad in the event of refusal. The significant procedural delays in entry clearance appeals is also a relevant consideration.

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570 *R (on application of Chikwamba) v Secretary of State for the Home Department* [2008] UKHL 40, para 41.
571 House of Lords judgement.
572 *MB (Somalia) v. ECO* [2008] EWCA Civ 102 at para 59.
573 2008] UKHL 41.

5.27. In *EB (Kosovo)*[574] Lord Bingham stated:

"*Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which Article 8 requires*".

This observation has resonance in the context of including Article 8 considerations within the Immigration Rules, and also in directing Courts and Tribunals by enacting public interest considerations in the primary legislation. This aspect will be explored later in this chapter.

5.28. In *VW(Uganda*)[575] which was decided by the UK Court of Appeal, Lord Justice Sedley further explained the application of the five stage *Razgar* test, and finally the requirement of an "insurmountable obstacle" referred to in *Mahmood* was put to rest in domestic jurisprudence. The Court stated that:

"*As this court made clear in AG (Eritrea) [2007] EWCA Civ 801, para 26-28, the phrase "consequences of such gravity" in question (2) posits no specially high threshold for Article 8(1). It simply reflects the fact that more than a technical or inconsequential interference with one of the protected rights is needed if Article 8(1) is to be engaged. There will also be unnecessary difficulty if the relationship of questions (4) and (5) is misunderstood. The emphasis in question (4) is not on simple necessity but on whether the need for the general restriction on the primary right lies within one of the specified purposes. If it does, then whether the particular restriction is necessary in a democratic society engages question (5). Clearly, if the restriction is plainly unnecessary, the Art. 8 question will be answered in the appellant's favour; but that will be rare. In any other case, once a permitted purpose has been established in answer to question (4) (as in cases governed by the Immigration Rules it generally will be), the inquiry moves to question (5) which, by focusing on the proportionality of the measure in the individual case, gives effect to the jurisprudence of the*

[574] *EB(Kosovo v Secretary of State for the Home Department* [2008] UKHL 41, para 12.
[575] *VW (Uganda) and AB (Somalia) v SSHD* [2009] EWCA Civ 5.

Strasbourg court as to what is "necessary in a democratic society". There is no discrete or prior test of necessity."

5.29. In Betts[576], the Court of Appeal held that human rights of family members, i.e., the partner, children, mother, etc., of the appellant, were only relevant insofar as they affected those family members. The House of Lords rejected this approach in *Beaku-Betts*[577] and Lord Brown followed Strasbourg's holistic approach taken in *Sezen v Netherlands*[578] and made it clear that the relevant unit to consider was a 'functioning family unit where the parents and children are living together' even though only one of them is facing removal or deportation. It was confirmed that the same consideration will apply where family life exists. The House made it clear that there is only one family life, as assuming that the appellant's removal would be disproportionate to the family unit as whole, then each affected family member is to be regarded as a victim.

5.30. In *ZH (Tanzania)*[579] the UK Supreme Court held that in the process of proportionality assessment under Article 8, the best interests of the child must be a primary consideration which means that they must be considered first. However, this could be outweighed by the cumulative effect of other considerations. In broader terms, the best interests of the child mean the well-being of the child. That involves consideration of whether it was reasonable to expect the child to live in another country and in that regard the relevant factors may include the level of the child's integration and the length of absence from another country; where and with whom the child was to live, and the arrangements for the child's care in the other country. Furthermore, consideration also needs to be given to the strength of the child's relationship with parents or other family members which would be severed if the child had to move away. The court held that it would not be enough simply to say that a young child would readily adapt to life in another country, specifically children who had lived all their lives in the United Kingdom. The court further ruled that the intrinsic importance of citizenship should not be played down. This is the most authoritative judgement in relation to the best interests of the child, and it still stands.

5.31. After *Mahmood* there followed a period during which domestic courts took a much more conservative approach to Article 8. In that period, the general presumption was that in the absence of an 'insurmountable obstacle' to family life being enjoyed outside of the United Kingdom, the exclusion or removal of a family member would not breach Article 8, nor would a decision made in accordance with the Immigration Rules breach Article 8 unless there were truly exceptional circumstances. The House of Lords' judgements in *Huang, Chikwamba,* and *EB (Kosovo)* are corrective in nature and have decisively put an end to such notions. However, the domestic landscape has been further complicated by the Immigration Rules introduced on 9 July 2012 and by the public interest considerations

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[576]*Betts v Secretary of State for the Home Department* [2005] EWCA Civ 828.
[577]*Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, para 37-38.
[578] (2006) 43 EHRR 621.
[579] *ZH (Tanzania) v Secretary of State for the Home department* [2011] UKSC 4.

brought into force on 28 July 2014 by the Immigration Act 2014. These changes will be analysed later in this thesis.

Legislation and case law- some dialectical developments

5.32. The UK government responded to the developments in the UK case law by trying to tighten the Immigration Rules in various ways, with three changes related to the conditions for the admission of spouses. The English language requirement for the entry and residence of foreign spouses, the Certificate of Approval Scheme, and the increase in minimum age to marry a foreign spouse were introduced. The government suggested a pre-entry English language requirement for foreign spouses in 2007 followed by a consultation paper in December 2007.[580] The key objectives of the pre-entry English requirement for foreign spouses were stated as follows:

i. *To assist the spouse's integration into British society at an early stage;*

ii. To improve employment chances for those who have access to the labour market;

iii. To raise awareness of the importance of language and to prepare for the tests they will need to pass for settlement.

There were further deliberations, and finally the coalition government implemented the English language requirement effective from 29 November 2010. It applied only to non-European spouses, and the applicants had to pass an English test in speaking and listening at Level A1 of the (Common European Framework Reference) CEFR. The Immigration Rules were amended[581] accordingly, and on 16 March 2011 the English language requirement was extended to the spouses and partners of refugees and people granted humanitarian protection in the UK.[582] However, since 9 July 2012 the requirement has been set out in Appendix FM of the Immigration Rules. On 1 December 2013 this requirement was extended to the spouses and partners of members of the Armed Forces.

5.33. The challenge to the English language requirement's legality and compatibility with Article 8 finally reached the Supreme Court in the case of *Ali and Bibi*.[583] The Supreme Court found that the measure had a legitimate aim, and that the interference was proportionate to the aim being pursued, but it also held that the Home Office guidance on seeking exemption in exceptional circumstances was too narrow in scope, and was not compatible with Article 8. In doing so the Court had regard to the fact that the Home

[580] Securing the UK Border: Our vision and strategy for the future (March 2007); Marriage Visas: Pre-Entry English Requirement for Spouses (December, 2007, para 1.11, key objectives.
[581] Cm7944, paragraphs 281, 284, 290, 293, 295A AND 295D.
[582] HC863, paras 319L and 319O.
[583] *R (on application of Ali and Bibi) v Secretary of State for the Home Department* [2015] UKSC 68.

Office's approved test centres were not available in every country in the world at that time, and the Home Office even suggested that travelling to another country to undertake the test was reasonable at the sponsor's expense. The court invited written submissions from both parties on the issue of whether an incompatibility declaration should be made against the guidance or not. The Home Office later issued revised guidance addressing the concerns raised by the court which avoided the need to declare the previous guidance incompatible with Article 8. This development was a partial but significant success for the applicants.

5.34. The Certificate of Approval Scheme was a precursor of the present referral and investigation mechanism introduced in the 2014 Act. The Certificate of Approval Scheme was established by Section 19 of the Asylum and Immigration (Treatment of Claimants Etc) Act 2004. The scheme required certain couples to obtain the Secretary of State's approval before they could marry or enter into a civil partnership. It covered everyone subject to immigration control unless they had been given entry clearance for the purpose of marrying. The scheme required those subject to immigration control to seek written permission from the Secretary of State for the Home Department by paying the prescribed fee of £295. The House of Lords found the scheme in violation of Article 12 of the ECHR. The court accepted that there was a margin of appreciation available to the government in regulating qualified rights, but rejected the measure, the Certificate of Approval Scheme, which impaired the essence of the right[584]. The court held that the scheme imposed a blanket prohibition on the exercise of the right to marry by all in the specified categories, irrespective of whether their proposed marriages were marriages of convenience or not. That was found to be a disproportionate interference with the exercise of right to marry under Article 12. It was not the 2005 regulations made under the Act which created illegality in this case; rather, it was the Immigration Directorates' Instructions which did so. Furthermore, none of the conditions in the scheme were relevant to the genuineness of a proposed marriage, which is the only relevant criterion in deciding whether permission should be given to an applicant who is qualified under national law to enter into a valid marriage. Essentially, the right guaranteed under Article 12, the right to marry, prohibits arbitrary restrictions against the right to form family life. Thus, the challenge indirectly relates to Article 8 where the state had failed in its positive obligation in letting family life form and develop. Subsequently, the government introduced a strict legal regime regulating the registration of marriages under the Immigration Act 2014 as was discussed in Chapter 2.

5.35. The Home Office amended the Immigration Rules on 27 November 2008 to increase the marriageable age from 18 to 21 years for foreign spouses and their sponsors[585]. The Supreme Court considered the compatibility of this rule with Article 8 in *Quila.*[586] In this

[584] *R (Baiai & others) v Secretary of State for the Home Department* [2008] UKHL 53.
[585] HC1113, paras 277, 289AA and 295AA.
[586] *R (on the application of Aquilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45.

case, the Secretary of State's primary objective in introducing the measure was not to control immigration; instead, the stated objective was to deter forced marriages. The Secretary of State had previously increased the minimum age of a sponsor to marry from 16 to 18 years in April 2003. Likewise, an applicant's age was raised from 16 to 18 years in December 2004. The Secretary of State contented that a blanket ban on the admission of spouses under the age of 21 did not even engage Article 8. The court held the principle to be unexceptionable and a fact sensitive analysis is required of whether the state's obstruction of that choice is justified under Article 8(2). It was held that *Abdulaziz* should not be followed as authority for the proposition that the exclusion of a non-citizen spouse would not interfere with the right to respect for family life if the couple could establish their family life in another country. The court ruled that forcing a married couple to choose between living separately for three years to meet the age requirement then set in the Immigration Rules or the British citizen spouse leaving the UK amounts to a 'colossal interference' with the right protected by Article 8 and it requires powerful justification[587]. The court found the rule to be incompatible with Article 8 obligations.

5.36. Christopher Rowe's[588] article provides an interesting analogy of *MM (Lebanon)*[589] with *Quila*[590]. It is an important piece of literature which is relevant to this thesis. The author's argument, to some extent, '*falling into line*', is overstated in the immigration context and his analysis is focused on domestic jurisprudence. The ECtHR is the guardian of the Convention rights and has supervisory jurisdiction. The court ruled in *Unuane* that the UK's current legal regime concerning Article 8 has a degree of flexibility and it does not preclude national authorities from having regard of Strasbourg jurisprudence.[591] *Quila* was a challenge to an inflexible rule imposing a minimum age limit to marry foreign spouses and banning a cohort from marrying before the age of 21. The rule had no exception to the age limit. Thus, the court found the rule to be a '*colossal interference*' with the right protected by Article 8. Before *Quila* the House of Lords had decided *Baiai*[592] and held that the certificate of approval scheme's blanket prohibition on the exercise of right to marry was contrary to Article 12 of the ECHR.

5.37. Around six years later, the case of *MM (Lebanon)* was a challenge to the minimum income requirement (MIR). The MIR was accepted as a legitimate measure by Strasbourg in *Konstatinov*[593], and the case was considered by the Supreme Court in *MM (Lebanon)*. The MIR has certain exceptions and sponsoring spouses in receipt of disability benefits, carer allowance, and third party support from credible sources are exempt from the requirement. That degree of flexibility, in particular in cases involving children relying on third party support, makes the rules compatible with Article 8 consideration. It is worth

[587] *Quila* para 32 and 72, also Speech of Sedly LJ in *Quila v SSHD* [2011] EWCA Civ 183.
[588] Christopher Rowe: *Falling into Line? The Hostile Environment and the Legend of the 'Judges' Revolt'. Modern Law Review 2022 85 (1)* pp.105-132.
[589] *MM (Lebanon) v SSHD* [2017] UKSC 11.
[590] *R (on the application of Aquilar Quila) v SSHD* [2011] UKSC 45.
[591] *Case of Unuane v the United Kingdom* (Application No.80343/17.
[592] *R (Baiai & others) v SSHD* [2008] UKHL 53.
[593] *Konstatinov v Netherlands* (16351/03 [2007] 2.F.C.R. 194, Also see paras 80-87 of MM (Lebanon).

reminding ourselves that in *MM (Lebanon)* the court declared the rules and instructions concerning children incompatible[594]. After 9 July 2012, there was a proliferation of phrases interpreting immigration rules and the public interest considerations introduced by Part 5A of the Immigration Act 2014. The UK's domestic jurisprudence evolved through that phase, and courts are doing fact-sensitive analysis. In *Jeunesse*, the court elaborated on the importance of precarious immigration status and took a narrow approach. Since the introduction of statutory directions to the courts and tribunals, the Supreme Court has provided authoritative interpretations of both precarious immigration status and insurmountable obstacles in *Agyarko* and *Rhuppiah*, respectively. In general, the present domestic approach towards Article 8 shows no significant departure from *EB (Kosovo)*, *Razgar*, *Huang*, *Chikwamba*, *ZH(Tanzania*), *VW(Uganda)* and *Beoku-Betts.* Thus, the variation in judicial view is because of each case's factual matrix, not because of conceding more margin of appreciation or showing undue deference to the executive.

5.38. The next phase will explain the government's objectives in including Article 8 considerations within the immigration rules and courts' interpretations of the immigration rules.

UK law following the 2012 rules changes – phase three

5.39. The preceding section discussed specific measures restricting family migration, whereas this section explains further domestic measures which brought changes to the Immigration Rules, focusing specifically on the interpretation and application of Article 8 of the ECHR. As Chapter 3 noted, the authority for making the Immigration Rules is section 3(2) of the Immigration Act 1971 which empowers the Secretary of State for the Home Department to make rules regulating the entry into, and stay of, persons in the United Kingdom. The Secretary of State is obliged to lay before Parliament statements of the Rules, or any changes in the Rules, prescribing the practice to be followed in the administration of the 1971 Act. Parliament is therefore usually given an explanation for the reasons justifying any new rules.

5.40. The government consulted on proposed reforms to family migration in July 2011[595]. A practical approach to the qualified nature of Article 8, the right to private and family life, within the immigration law was also part of that consultation. The consultation paper refers to all of the important case law relevant to Article 8 in both the UK's domestic and the Strasbourg jurisprudence, and proposed to include Article 8 considerations within the Immigration Rules.[596] The consultation proposed the inclusion of Article 8 considerations

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[594] *MM (Lebanon*) para 92.

[595] Securing Our Border, Controlling Migration, Family Migration, A Consultation, July 2011; https://webarchive.nationalarchives.gov.uk/20111004131055/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/consultation.pdf?view=Binary

[596] At page 61 onwards of the consultation paper.

both in relation to exclusion and deportation. A speech by Damian Green[597], then Minister of Immigration, on 15 September 2011 gave detailed reasons for amending the Immigration Rules. The speech was a policy statement on how the new Conservative / Liberal Democrat coalition government intended to control immigration in future.

5.41. The government published a statement of intent in June 2012[598] indicating that it would spell out in the Immigration Rules the factors which could weigh for or against an Article 8 claim. The proposed amendments were only applicable to non-EEA spouses seeking entry and leave to remain in the UK under the spouse settlement route. Prior to the rules, private and family life applications were considered by the Home Office first under the rules and, if the application did not meet the requirements of the rules, the decision-maker would then consider whether rejecting the application would be compatible with Article 8. If the primary decision-maker or the court finds that to be the case,[599] then leave would be granted outside the rules. The statement of intent contended that this practice had detracted from clear, consistent, predictable, and transparent decision-making. The statement of intent further contended that the new Immigration Rules would unify considerations under the Rules and Article 8, by defining the basis upon which a person can enter or remain in the UK on the basis of their family or private life.[600] The primary objective of including Article 8 considerations within the Rules was to guide judicial discretion.

5.42. The then-Secretary of State for the Home Department, Theresa May, tabled the following motion in the House of Commons:

> "*That this House supports the Government in recognising that the right to respect for family or private life in Article 8 of the European Convention on Human Rights is a qualified right and agrees that the conditions for migrants to enter or remain in the UK on the basis of their family or private life should be those contained in the Immigration Rules.*[601]

5.43. The central objective of the then-Home Secretary's motion in the Commons was to set out Parliament's view on how the right to family and private life in Article 8 of the ECHR should interact with the UK's immigration policy. The Secretary of State justified the inevitability of debating the motion by saying that since the enactment of Human Rights Act 1998, Parliament had never been afforded the opportunity to state its own view as to

[597] https://www.gov.uk/government/speeches/immigration-damian-greens-speech-on-family-migration
[598]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/257359/soi-fam-mig.pdf; p.9 onwards for Article 8 considerations.
[599] Para 29 of the statement on intent.
[600] Para 31 of the statement of intent.
[601] 19 June 2012, Column 763.

how and to what extent interference in a qualified right would be justified[602]. The Secretary of State argued that the motion was a public interest statement, in the Article 8 context, from the elected legislature, and that the judiciary should defer to it. It was further argued that once they were endorsed by the House, the new immigration rules would become part of the decision-making that Parliament considers compatible with Article 8, on which the courts can therefore place greater weight as a public interest statement[603].

5.44. The Secretary of State thus sent a clear signal to the judiciary, and the motion was an attempt to achieve a larger goal which would require primary or secondary legislation. It was rightly pointed out by the then-Shadow Home Secretary, Yvette Cooper, that the motion's status was neither akin to primary nor secondary legislation, and that it was therefore incapable of giving clear directions to the courts.[604]

5.45. The Rules make provisions for applications for leave to remain on the grounds of private life[605], applications for entry and stay based on family life[606], and for Article 8 claims involving deportation[607]. The Immigration Rules were more prescriptive than ever. The Rules do specify matters which the Secretary of State regards as weighty factors in relation to public interest considerations. However, references in them to 'exceptional circumstances' or 'insurmountable obstacles' are legal requirements within the Rules. These phrases are not derived from the text of Article 8 or the Article 8 case law, but immigration officers are expected to apply rules in the process of primary decision-making. So, in cases of conflict between the immigration rules and what Article 8 jurisprudence requires, immigration officers are pulled in two directions and are under a legal obligation to consider the Article 8 claim outside the immigration rules[608].

Immigration rules-family life exceptions- non deportation cases

5.46. Appendix FM of the Immigration Rules lists exceptions, and the general requirements of the Rules do not apply where those exceptions apply. These exceptions are as follows: "EX.1. This paragraph applies if

1. *(a)*

(i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and

[602] 19 June 2012, Column 760.
[603] 19 June 2012, Column 765.
[604] 19 June 2012; Column 773 & 774.
[605] Paras 276ADE-276DH.
[606] Appendix FM of the Immigration Rules.
[607] Paras 398-399B of the Immigration Rules.
[608] *Secretary of State for the Home Department v Izuazu* [2013] UKUT 45 (IAC), para 41.

(ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or
(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave, or humanitarian protection, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), and there are insurmountable obstacles to family life with that partner continuing outside the UK.
EX.2. For the purposes of paragraph EX.1.(b)"insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner".

These exceptions were interpreted by the UK's Supreme Court in the case of *Agyarko*[609] and provide residual discretion to the decision-maker to take the fact-sensitive approach which proportionality assessment requires. The ECtHR confirmed in *Unuane*[610] that the UK's current legal regime does not preclude decision-makers from having regard of ECtHR jurisprudence, and provides a degree of flexibility to take exceptional circumstances into account. A further discussion of this topic is provided later in this chapter.

Deportation of foreign offenders - immigration rules

5.47. Part 13 of the Immigration Rules makes detailed provisions in relation to Article 8 claims resisting deportation. It may assist the present reader to reproduce a few paragraphs from Part 13 of the rules. Paragraph A362 applies these rules from 28 July 2014 regardless of the date of notice of intention to deport. It states that:

"*A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served".*

5.48. Paragraph 397 confirms the instances where a deportation order will not be made and sets out a threshold which states:

"*A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed".*

5.49. Paragraph A398 sets out the requirement to request revocation of the deportation order:

609 *R (on application of Agyarko) v SSHD* [2017] UKSC 11.
610 *Case of Unuane v the United Kingdom* (Application No. 80343/17.

“Deportation and Article 8: A398. These rules apply where:(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom’s obligations under Article 8 of the Human Rights Convention;(b) a foreign criminal applies for a deportation order made against him to be revoked”.

5.50. Paragraph 399 of the rules provides a description of the circumstances in which the deportation of a foreign offender would be deemed unlawful under Article 8 of the ECHR. However, this paragraphs applies a higher threshold than EX.1 Appendix FM of the Immigration Rules. It states that:

“399. This paragraph applies where paragraph 398 (b) or (c) applies if –
(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
(i) the child is a British Citizen; or
(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported”.

5.51. Paragraph 399A sets out the requirements related to a private life claim, stating:

“399A. This paragraph applies where paragraph 398(b) or (c) applies if – (a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported”.

Non-deportation article 8 private life claims within the immigration rules

5.52. Paragraph 276ADE sets out the requirements of private life claims, other than for foreign offenders,[611] as follows:

> "*Requirements to be met by an applicant for leave to remain on the grounds of private life*
> *276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:*
> *(i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and*
> *(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and*
> *(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or*
> *(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or*
> *(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or*
> *(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.*
> *276ADE (2). Sub-paragraph (1)(vi) does not apply, and may not be relied upon, in circumstances in which it is proposed to return a person to a third country pursuant to Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004".*

The threshold for private life claims is much higher in paragraph 399A of the Rules than in 276ADE, non-deportation cases. I now provide an explanation of the judicial treatment of these immigration rules.

5.53. The Secretary of State for the Home Department introduced Article 8 considerations within the Rules, claiming the Rules to be conclusive of Article 8 assessment, and the government tried to reinforce that claim by debating a motion in Parliament. However, the court refused to treat the Rules as conclusive of Article 8 assessment and held instead that the correct approach is to assess an Article 8 claim first under the Rules, then under Article 8. Although the Home Office provided extensive guidance for the immigration officers, navigating through the Rules and applying them as per the guidance is not a simple exercise. There was no significant improvement in the primary decision-making

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[611] https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-7-other-categories

after the Immigration Rules came into force. The decision-makers extensively quote from the rules, but the rest of the assessment structure has not changed[612].

Judicial treatment of the immigration rules introduced on 09 July 2012

i- Reconciling case law with the rules

5.54. Contrasting the period of relative legal certainty that followed the House of Lords' decisions in *Huang*, *Chikwamba* and *EB (Kosovo)*, the new Rules and primary legislation has given rise to significant controversy as to the precise scope and application of Article 8 in the immigration control context. Since 2012 there have been a series of judgements from the Upper Tribunal and higher courts, applying different judicial approaches. This body of law has been characterised as a 'proliferation of phrases' which have all simultaneously attempted to define threshold and legal tests for the application of Article 8[613]. In the recent past, a few decisions from the Supreme Court have explained the application of the new Rules.

ii- The difference between the government's and the judiciary's positions on immigration rules

5.55. The government position was that the new Rules had unified Article 8 considerations and so there was no need for a decision-maker to separately assess a claim, in any case one involving private or family life, regarding what the requirements of Article 8 were after they had applied the test set out in the Rules [614]. In other words, if the test set out in the rules was applied, then the requirements of Article 8 would have been satisfied. These Rules were considered for the first time by the Upper Tribunal in *MF*[615] and it was held that where the Rules apply, an Article 8 claim should first be considered under these Rules. But, where the requirements of the Rules are not met, it is necessary to make an assessment of Article 8 by applying the criteria established by case law. This conclusion is contrary to the government's position and the Upper Tribunal emphatically confirmed the relevance of Strasbourg and domestic jurisprudence in relation to Article 8.

5.56. *MF* was a deportation case and the Tribunal considered paras 398, 399, and 399A of the new Rules which were introduced on 9 July 2012. The Rules provided a set of criteria

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[612] I have processed dozens of Article 8 private and family life claims myself, and the above observation is based on my own practical experience.
[613]Macdonald, Ian A QC, *Macdonald's Immigration Law and Practice*, 9th Edition Vol 1, p.617.
[614] Home Office 'Statement of Intent: Family Migration, June 2012.
[615] *MF(Article 8 – new rules) Nigeria* [2012] UKUT 393 (IAC).

with which to assess the impact of deportation involving criminal cases under Article 8. Paragraph 398 of the Rules provides that in assessing a claim, the Home Office would consider whether paragraph 399 or 399A applied and if they did not, it would be only in exceptional circumstances that the public interest in deportation would be outweighed by other factors. The Secretary of State appealed the Upper Tribunal's findings on the basis that the Upper Tribunal had erred in law in considering there to be a need, or justification, for separate consideration of Article 8 outside of the Rules. The Court of Appeal upheld the Upper Tribunal's decision, and stated that the difference of opinion was one of form, not substance because the court endorsed the Upper Tribunal's approach to considering an Article 8 claim first within the Immigration Rules and then outside the Rules under Article 8.[616] In MF, the Court of Appeal observed that para 398 of the Immigration Rules expressly contemplated a weighing of 'other factors' against the public interest in the deportation of foreign criminals, and acknowledged the margin of appreciation available to the state in weighing public interest against the family life claim of a foreign criminal. The court opined that the new Rules do not seek to restore the exceptionality test, and that although these Rules were not a perfect mirror of the Strasbourg jurisprudence, they were to be interpreted consistently with it. It was explained that the reference to exceptional circumstances served the purpose of emphasising that in the balancing exercise, great weight had to be given to the public interest in deporting foreign criminals who did not satisfy paras 398 and 399 or 399A. It would only be in exceptional cases that such foreign criminals would succeed in showing that their rights under Article 8 outweigh the public interest in their deportation.[617] The Court further interpreted the phrase '*very compelling reasons'*, as where paras 399 and 399A did not apply, very compelling reasons would be required to outweigh the public interest in deportation. Those compelling reasons were the exceptional circumstances. The Court of Appeal accepted that the new Rules, in relation to deportation cases, were a complete code[618].

5.57. A challenge to the legality of the new Rules was also considered in *Nagre*[619]*,* where Sales J opined that a claimant must have a good arguable case to succeed under the Rules. *Nagre* was later considered by the Court of Appeal in *MM (Lebanon)*[620]*,* where Aikens LJ opined that *Nagre* did not add anything to the debate save for the statement that if a particular person is outside the Rules then he has to demonstrate, as a preliminary to a consideration outside the Rules, that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules, and the Court did not see much utility in imposing an intermediary test of a 'good arguable case' test. The Court of Appeal judgement in *MM (Lebanon)* was overturned in the Supreme Court, and the Home

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[616] *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, para 50.
[617] MF (Nigeria) paras 38-40.
[618] *MF (Nigeria)* paras 43-44, 50.
[619] *R (on the application of Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin), paras 35-36.
[620] *R (on the application of MM (Lebanon) v Secretary of State for the Home Department* [2014] EWCA 985, para 129.

Office's Presenting Officers continue to rely on the preliminary test of 'good arguable test, set in *Nagre* before the tribunal.

5.58. In *Izuazu*[621], the Secretary of State made the following submission as to the status of the Immigration Rules:

"*However, while the Rules do not bind the Courts, in the same way as primary legislation, they are a clear, democratically endorsed, statement of public policy which must now be taken into account by the courts when assessing proportionality. The Secretary of State would expect the Court to defer to the view endorsed by Parliament on how, broadly, public policy considerations are weighed against individual family and private life rights, when assessing Article 8 in any individual case. That is, save in a narrow group of cases where it is found that the consequences of the immigration decision are exceptional….".*

Furthermore, it was submitted on behalf of the Secretary of State that:

"*In summary, the Government can interfere in the exercise of Article 8 rights where in the public interest it is necessary and proportionate to do so, including to safeguard the UK's economic wellbeing by controlling immigration and to protect the public, by deterring foreign criminals and removing them from the UK. Following the recent changes, the new rules now properly reflect the view of the Government and Parliament as to how the balance should be struck between that public interest and individual's rights under Article 8 the Government expect the Courts to have regard to that view in reaching their decisions."*

5.59. In *Izuazu*[622] the Upper Tribunal opined that the criteria in the Rules do not accord with the criteria for an Article 8 assessment established by the existing case law, and that there can be no presumption that the Rules will normally be conclusive of Article 8 assessment or that a fact-sensitive inquiry is not needed.[623] The more the new Rules restrict otherwise relevant and weighty considerations from being taken into account, the less regard they will receive in the assessment of proportionality.[624] The Home Office's position in relation to the Parliament's supra motion was criticised by the Upper Tribunal[625]:

"First, the reference to Parliament's approval of HC 194 seems an attempt to approximate the rules to a statutory assessment of the balance between competing interests such as that considered by the House of Lords in Kay v Lambeth Borough

[621] Para 27, *Izuazu*.
[622] *Secretary of State for the Home Department v Izuazu* [2013] UKUT 45(IAC), para 41.
[623] *Izuazu* paras 52 and 67.
[624] *Izuazu* para 52.
[625] *Izuazu* paras 48-49.

Council [2006] 2 AC 465 on which the Secretary of State placed reliance in her submissions in the case of Huang (loc cit) see [17]".

The Upper Tribunal then referred to the binding existing Article 8 case law and concluded at para 59 that: "*It is open to Parliament to change the law by primary legislation unless and until it does so these decisions are binding on the Upper Tribunal and will be followed by it".* This statement prompted further legislation and the government inserted public interest considerations by amending the Nationality, Immigration and Asylum Act 2002 through Section 19 of the Immigration Act 2014. These statutory provisions will be discussed in detail below.

5.60. Furthermore, Appendix FM of the Immigration Rules does not reflect the established criteria in relation to the best interests of children[626]. The UK Supreme Court also later found this deficiency in the Appendix FM in *MM (Lebanon)*[627], and this will also be discussed below in the next sub-section.

i- Exceptions within the rules and the best interests of qualifying children

5.61. Ex.1(b) Appendix FM of the Immigration Rules includes the phrase '*insurmountable obstacles*', and Ex.2 of Appendix FM defines this phrase. The insurmountable obstacles test is part of the Strasbourg jurisprudence, and has been subjected to judicial interpretations in the UK. The Supreme Court considered the meanings of '*insurmountable obstacles'* within the Immigration Rules and its correct application in Article 8 context in *Agyarko.*[628] The case involved two overstayers who were originally granted visitor entry clearance. They formed a family life in the UK while having no leave to remain. They had no criminal history and no qualifying child. So, they had a claim only under Ex.1(b) of the Appendix FM. Ex.1(a) relates to Article 8 claims, within the Immigration Rules, involving children. Neither appellant had children, so only Ex.1(b) was in play. An overstayer seeking leave on the basis of a relationship with a qualifying spouse, British citizen, or settled person is required to show the existence of '*insurmountable obstacles'* to continuing their family life outside the United Kingdom, or 'exceptional circumstances' under Article 8.

5.62. In *Agyarko*, the issue before the Court was whether a fair balance had been struck between the interests of the individual and those of the state in upholding its immigration policy. In doing so, the court considered *Huang*[629] and *Jeunesse*[630] and opined that the phrase '*insurmountable obstacles'* meant not only obstacles which made it literally

[626] *Izuazu* para 52.
[627] *MM(Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10.
[628] *R(on application of Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11.
[629] *[2007] UKHL 11.*
[630] *Jeunesse v Netherlands* (12738/10) (2015) 60 E.H.R.R.

impossible for a family to live together in the non-national's country of origin, but was also to be understood in a practical and realistic sense, as a stringent test.[631] It was held that Ex.2 of the Appendix FM correctly defines the phrase '*insurmountable obstacles'* as "*very significant difficulties which could not be overcome or would entail very serious hardship for the applicant or their partner*", and that this definition is consistent with the Strasbourg case law. The court further opined that the Rules and associated instructions represented the Secretary of State's policy which had been endorsed by Parliament and which fell within the margin of appreciation, and that the Rules were designed to be compatible with Article 8 in all but exceptional cases. The court ruled that the test was not incompatible with Article 8, given the possibility that leave could be granted outside the Rules on the basis of "exceptional circumstances".[632] The court took the view that in considering 'exceptional circumstances' and proportionality, precariousness is not a primary hurdle but a relevant factor in the balancing exercise. In *Agyarko*, the Supreme Court ended the debate on whether the inclusion of the insurmountable obstacles test is compatible with Article 8 considerations, and also endorsed the definition of the phrase provided in Ex.2 of the Appendix FM of the Immigration Rules.

ii- The legality of a minimum income requirement for spouses

5.63. *MM (Lebanon)*[633] was a challenge to the minimum income requirements for non-EEA citizen spouses. This requirement was introduced in Appendix FM of the Immigration Rules. The new entry requirements for non-EEA applicants seeking to join their spouses or civil partners or unmarried partners in the United Kingdom included a requirement that the sponsoring spouse or civil partner or unmarried partner have an income of at least £18,600 per annum to support their spouse or partner, as well as additional sums for any dependent children. The Supreme Court opined that the minimum income requirement was not open to challenge. The Court applied *Quila* and reaffirmed that the main focus should be on whether the measures struck a fair balance between the individual's rights and the community's interests. The Court considered *Konstatinov v Netherlands*[634] in the context of the minimum income requirement and concluded that there was a rational connection between the stated aim, not to have recourse to welfare, and the threshold chosen, and further decided that the minimum income requirement in principle is an acceptable measure[635]. In relation to the best interests of children, the Supreme Court considered the guidance provided in *Jeunesse v Netherlands*[636] and opined that the Rules had left a gap which was not adequately filled by the instructions to entry clearance officers because those instructions did not treat children's best interests as a primary

[631] *Agyarko* paras 40-41.
[632] *Agyarko* paras 16, 43-48.
[633] *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10.
[634] (16351/03) [2007] 2 F.C.R. 194.
[635] *MM (Lebanon)* paras 80-87.
[636] (12738/10) (2015) 60 E.H.R.R. 17.

consideration, and the Appendix FM wrongly stated that the duty to children had been taken into account in the Rules. In that context, the Court declared the Rules and relevant guidance to be unlawful, and a declaration of incompatibility was made[637].

5.64. The third issue addressed in *MM (Lebanon)* was that of the alternative funding sources to meet the minimum income requirement. This is commonly known as third party support. The Home Office had adopted a stricter approach to third party support because of the practical difficulties in verifying the reliability of such sources of funding. The court duly weighed the reason cited by the Home Office in the common law sense, but concluded that the restrictive approach was much more difficult to justify outside the Rules under the Human Rights Act 1998. Thus, the restrictive approach on third party support was found to be inconsistent with the evaluative exercise which Article 8 requires. The court stressed the need to include such requirements within the Rules, and that there should be clear guidance for decision-makers in identifying the circumstances giving rise to a positive duty under Article 8[638]. Following *MM (Lebanon)* the Home Office amended the Rules, and guidance to caseworkers was also revised.

Article 8 considerations within the Immigration Rules

5.65. Chapter 4 provided insight into the Article 8 jurisprudence before the Human Rights Act 1998 and explained the reasons for including Article 8 considerations within the Immigration Rules since 9 July 2012. Chapter 3 also explained the statutory directions to the courts and tribunals under ss.117A-117C of the Nationality, Immigration and Asylum Act 2002, including public interest considerations. The above details provide an overview of the legislative developments in the UK pertaining to Article 8 of the Convention in the immigration context. This part will expand on the judicial treatment of the immigration rules, focusing on paragraphs 276ADE of the Immigration Rules and Ex.1 (a) and (b) of Appendix FM. This chapter will later expand on ss.117A-117C of the 2002 Act.

i. Domestic judicial approach to Article 8 on the right to a private life within the Immigration Rules

5.66. We have discussed the judicial response to the Immigration Rules prescribing Article 8 considerations above. We now turn to the judicial interpretation of the exceptions provided within the Rules. Understanding the scope of private and family life within the Rules is essential in comprehending the practical application of the Rules exceptions.

[637] *MM (Lebanon)* paras 91-92.
[638] *MM (Lebanon)* paras 99-100.

Paragraph 276ADE of the rules include the private life considerations of Article 8 of the Convention. These provisions are detailed below, and the reproduction of this paragraph will help the reader to understand what amounts to private life according to the Rules.

5.67. The Rules prescribe four different criteria for different age groups, and within each category the time spent in the UK is a crucial factor. The minimum residence threshold in each category indicates the existence of a private life. Conversely, the rules do not conceive of the existence of private life worthy of protection under Article 8 other than the criteria prescribed above, except in exceptional circumstances, which is within the scope of residual discretion of the Secretary of State. In other words, paragraph 276ADE sets out the circumstances in which the Secretary of State will grant leave to remain in the UK on the ground of the right to a private life. The rules do not cover every conceivable aspect of a private life claim. The rules were originally introduced on 9 July 2012, and further changes were made on 28 July 2014[639] to give effect to specific provisions of the Immigration Act 2014.[640]

5.68. An applicant who does not meet the length of residency required for any of paragraphs (iii) to (vi) of the rule can only granted leave to remain if s/he can demonstrate that there will be '*very significant obstacles to the applicant's integration into the country'* to which s/he will be returned. It is a difficult test to satisfy, particularly following the interpretation of 'ties' by the Upper Tribunal in *Ogundimu*[641]. The term '*very significant obstacles*' closely resembles the terminology 'insurmountable obstacles' which appears in section EX.1 (the human rights exception) of Appendix FM of the Immigration Rules. This provision has been the subject of judicial debate, and has been subject to a new definition as of 28 July 2014. Statement of Changes HC 532 introduces a new EX.2. in the following terms:

> *"EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."*

The relevance of the Ex.1 and 2 in the family life context will be discussed later in this chapter but claims often involve private and family life considerations under Article 8, and fewer cases in the immigration context exclusively deal with private life claims. The family life claims under Appendix FM of the Rules will be considered later.

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[639] The Statement of Changes in Immigration Rules HC 532

[640] Commencement Order for the Immigration Act 2014 (Immigration Act 2014 (Commencement No. 1, Transitory and Saving Provisions) Order 2014 (SI 2014/1820).

[641] Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC)

5.69. The approach to Article 8 varies on a case-to-case basis in both domestic and Strasbourg jurisprudence. In *Ogundimu,* the Upper Tribunal followed Strasbourg's principle approach, as held in *Maslov*[642]. In the private and family life context, the tribunal concluded that the immigration rules introduced on 9 July 2012 do not seek a change in the assessment criteria contemplated by the ECtHR when considering a claim under Article 8 of the Convention, and that very serious reasons are required to justify the expulsion of a settled migrant who has spent all or the major part of his childhood in the UK. Paragraph 399A of the Immigration Rules provides exceptions to deportation for private life Article 8 claims. In the above case, the tribunal interpreted the meaning of word "ties" as it appears in paragraph 399A of the Rules and concluded that:

> *"the word 'ties'… imports a concept involving something more than merely remote or abstract links to the country of proposed deportation or removal. It involves there being a connection to life in that country. Consideration of whether a person has 'no ties' to such a country must involve a rounded assessment of all of the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances".*

The court further stated that paragraph 276ADE does not reflect the language used in paragraph 399A of the Rules. The Court considered a range of other factors, e.g. the length of time a person has spent in the country to which s/he would have to go if s/he were required to leave the United Kingdom, the age at which the person left that country, the exposure that the person has had to the cultural norms of that country, whether the person speaks the language of the country, the extent of the family and friends that the person has in the country to which s/he is being deported or removed, and the quality of the relationships that person has with those friends and family members, as relevant in Article 8's private life assessment.[643] The above factors mirror the Strasbourg approach.

5.70. *Bossadi*[644] was decided a few years after *Ogundimu.* It further interprets the amended paragraph 276ADE of the Rules, and the amended part includes the suitability provision, which is as follows: "*276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:*

(i) *does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM*".

The suitability requirement provisions of S-LTR in Appendix FM says*: "S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.7. apply".*

[642] *Maslov v Austria* [2008] ECHR 546.
[643] Ogundimu see para 122-126.
[644] *Bossadi (paragraph 276ADE; suitability; ties)* [2015] UKUT 00042 (IAC), also see the Statement of Changes to the Immigration Rules HC 803. Para 276ADE was amended on 28 July 2014.

The Upper Tribunal stated that being able to meet the requirements of paragraph 276ADE of the Immigration Rules requires being able to meet the suitability requirements set out in paragraph 276ADE (i), because this subparagraph contains suitability requirements that render it impossible for foreign criminals relying on private life grounds to circumvent the provisions of the Rules dealing with the deportation of foreign criminals[645]. It requires a rounded assessment comprising both subjective and objective considerations of what lies within the claimant's choice to achieve, as to whether a person's familial ties could support him in the event of his return. In two subsequent decisions, the Court of Appeal has approved the Upper Tribunal's interpretation of 'ties' in *Ogundimu*[646].

5.71. In practice, an Article 8 claim can include both private and family life elements, as I mentioned earlier. The Supreme Court[647] considered the scope of paragraph 276ADE (1) (iv) with S.117B (6) of the 2002 Act, which solely relates to the position of a child. The court stated that unlike DP5/96, the Rule does not specifically require the decision-maker to consider the criminality or misconduct of a parent as a balancing factor in the parent's right to remain. The Supreme Court confirmed the Court of Appeal's view in *MA*[648] and explained that there is nothing in s.117B (6) to import a reference to the conduct of the parent, as it is a free-standing provision with the only qualification being that the person relying on it is not liable to deportation. Reference to s.117B(6) here is in the private life context, and judicial interpretation of this provision will be explored later in this chapter.

ii. The two-stage test

5.72. In *Bossade* [649], the Upper Tribunal considered an aspect of private life under paragraph 276ADE and rule 399A. The Court found the deportation of the appellant proportionate, concluding that Part 5A of the Nationality, Immigration and Asylum Act 2002 had not altered the need for a two-stage approach to Article 8 claims. Essentially, the tribunal confirmed what was held in *Izuazu*[650]. However, in *Bossade,* the tribunal considered the application of public interest considerations in relation to the immigration rules introduced by the Immigration Act 2014 by inserting Part 5A in the 2002 Act as a post-*Izuazu* development. It was held that a court or tribunal would first consider an Article 8 claim under the rules without any direct reference to Part 5A considerations. Then, the second stage of analysis would purely be under Article 8, and Part 5A considerations

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[645] *Bossadi*, head note 1 and para 5.
[646] *YM (Uganda) v Secretary of State for the Home Department* [2014] EWCA Civ 1292, para 51-52 Lord Justice Aikens and by Lord Justice Flaux in *SE (Mauritius) & Another v The Secretary of State for the Home Department* [2017] EWCA Civ 2145.
[647] *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53.
[648] *MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber)* [2016] EWCA Civ 705, [2016] 1 WLR 5093 , para 36.
[649] *Bossade (ss.117A-D: Interrelationship with Rules) v SSHD* [2015] UKUT 00415 (IAC).
[650] *Izuazu (Article 8 – new rules) [2013*] UKUT 00045 (IAC).

would be relevant. This implies that public interest considerations are only applicable at the second stage. In doing so, the Court explained that the above methodology does not accord priority to the Rules over primary legislation except in recognising their different functions[651]. The Court found that Part 13 of the rules (immigration rules in relation to the deportation of foreign criminals) was a complete code encompassing both stages of the Article 8 assessment. This finding applies to Article 8 claims involving both private and family life aspects.

5.73. In *Nagre*[652] the High Court approved *MF*[653] and *Izuazu* by adding the qualification that the second stage assessment of an Article 8 claim may not always be necessary, and where the rules and the learning on Article 8 are in harmony the answer given by the Rules might render further inquiry unnecessary unless there are exceptional circumstances. In other words, the court believed that the rules were conclusive of Article 8 assessment except for exceptional circumstances. In *Gulshan*[654], the Upper Tribunal adopted *Nagre's* approach. In *Green*, the Upper Tribunal pointed out that Rule 398 does not refer to persons who commit crime as juveniles in the private life context. The tribunal referred to the Grand Chamber's view in *Maslov v Austria* that "*when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult*." UK domestic courts appear to agree with Strasbourg's view, and the guiding principles have become part of the domestic jurisprudence. In Green[655], the tribunal also pointed out that the Rules do not cover every conceivable private life scenario.

5.74. Likewise, in another two cases the administrative court concluded that private life rules (paras 276ADE-276DH) are not a complete code concerning Article 8's proportionality assessment, but also approved the notion that only the existence of 'compelling circumstances' would justify an assessment of Article 8 outside the rules[656]. In *Haleemudeen*[657], the Court of Appeal approved *Nagre:*

> *"in many cases the main points for considerations in relation to Article 8 will be addressed by decision-makers applying the new rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the rules by reference to Article 8 that it will be necessary for Article 8*

[651] *Bossade* para 45.
[652] *Nagre v SSHD* [2013] EWHC 720.
[653] *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393 (IAC).
[654] *Gulshan (Article 8 – new Rules -correct approach)* [2013] UKUT 640 (IAC).
[655] *Green (Article 8 – new rules)* [2013] UKUT 00254 (IAC).

[656] *R (on the application of Amin) v Secretary of State for the home Department* [2014] EWHC 2322, paras 14, 34; *R (on application of Ganesabalan) v SSHD* [2014] EWHC 2712 Admin, para 10-13, also see *Shahzad (Art 8: legitimate aim) Pakistan* [2014] UKUT 85 (IAC).
[657] *Haleemudeen v Secretary of State for the Home Department* [2014] EWCA Civ 558, paras 44 and 47.

purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave".

In *MM (Lebanon)*, which postdates *Haleemudeen,* the Court of Appeal did not cite *Haleemudeen* and opined that there was little utility in imposing an intermediary test as a preliminary to consideration of Article 8 outside the Rules for a person who fails under the Rules[658]:

> "*There is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations, those threshold circumstances include (a) whether an arguable basis for the exercise of the discretion has been put forward; (b) whether the relevant factors have already been assessed; (c) whether a repeat evaluation is unnecessary".*

5.75. Since 9 July 2012, the Immigration Rules increased the qualifying period for indefinite leave from six to ten years. That is known as the ten-year route within the Immigration Rules, which applies to private life claims, and is broken down into four terms of 30 months each. So, applicants must complete ten years of residence to become eligible for settlement. The Upper Tribunal[659] took the view that it is not unlawful for the Secretary of State to grant leave to remain for 30 months on an application that is decided on or after 9 July 2012 irrespective of when the application was made unless it was made between 9 July 2012 and 6 September 2012. In doing so, the court referred to *Singh and Khalid* v SSHD.[660]

Applying Family life- Exceptions within Appendix FM of the Immigration Rules

i. Scope and threshold of family life exceptions

5.76. Appendix FM, Family Members, was included in the Immigration Rules on 9 July 2012. It is a detailed prescription of rules intending to regulate the entry and residence of various categories of family migrants. It deals with spouses, civil partners, unmarried partners, the children of parents with limited leave, bereaved partners, domestic violence victims, and adult dependent relatives. The first part of Appendix FM makes general provisions. The Appendix prescribes detailed suitability and eligibility criterion for each category in addition to the English language and financial requirements. These provisions

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[658] *MM (Lebanon) v SSHD* [2014] EWCA Civ 985, para 129.

[659] *R (on the application of Patel) v Secretary of State for the Home Department (duration of leave – policy) IJR* [2015] UKUT 00561 (IAC).

[660] *Singh and Khalid v Secretary of State for the Home Department* [2015] EWCA Civ 74, para 56.

resemble Strasbourg's Article 8 considerations, and *Jeunesse*[661] can be cited among one of the recent cases considering Article 8 in family life context. Part three includes exceptions to the rules. These exceptions have been the subject of extensive judicial debate in domestic jurisprudence. Ex.1 describes a criterion, as an exception to the general rules stated in Appendix FM, where leave should be granted in family life claims. Ex.2 was later inserted to define the phrase "insurmountable obstacles" used in Ex 1. These exceptions are important in the Article 8 assessment, and their judicial interpretation in the past few years is a notable feature of the UK's domestic jurisprudence.

5.77. Generally, an individual would be granted leave subject to meeting the criteria set out in paragraph 276ADE of the Immigration Rules in private life cases and Appendix FM of the Rules in cases involving family life claims. The phrase "*very significant obstacles*" in the private life context would be a relevant consideration where someone does not meet the general criteria set in paragraph 276ADE. Likewise, a family life claim can be assessed under EX 1 (a) and (b) where a person does not meet the general requirements of Appendix FM of the rules.

ii. Judicial interpretation of family life exceptions provided within the rules

5.78. It is an established principle in the Strasbourg jurisprudence that less weight will be accorded to family life created while the subject's immigration status was precarious, and that only in exceptional circumstances would the removal of the non-national constitute a violation of Article 8[662]. In this context, the public interest considerations provided in the 2002 Act will be considered later in this chapter. In domestic jurisprudence, the House of Lords explained[663] the correct approach in *Razgar*[664] and stated that the appellate immigration authority does not have to ask itself whether the case meets an exceptionality test. The Supreme Court in *Agyarko*[665] considered the phrase "*insurmountable obstacles"* which appears in Ex.1 of the Appendix FM and approved the definition provided in Ex.2 as "*very significant difficulties which… could not be overcome or would entail very serious hardships for the applicant of their partner*", and confirmed that the definition is consistent with the Strasbourg jurisprudence. The court further explained that the phrase "*insurmountable obstacles"* does not only refer to obstacles that make it literally impossible for a family to live together in the non-national's country of origin but is to be understood practically and realistically, as a stringent test. The court further opined that the rules and relevant policy represent the Secretary of State's policy as endorsed by Parliament and falling within the scope of the margin of appreciation.

[661] *Jeunesse v The Netherlands* (Application No. 12738/10) (2015) 60 E.H.R.R.
[662] *Jeunesse v Netherlands.*
[663] *Huang v SSHD* [2007] UKHL 11.
[664] *Razgar v SSHD* [2004] UKHL 27.
[665] *R (on application of Agyarko) v SSHD* [2017] UKSC 11.

Ex.1 (b): married couples and unmarried partners without children

5.79. *MIK*[666] was a challenge to refusing leave sought under Article 8 of the ECHR. For instance, in line with previous authorities such as *Izuazu*[667], the court found that the decision-maker erred in law by not considering the claim under Article 8 outside the Rules. The court refused to accept the Advocate General's proposition that in any case where a party contracting a marriage has precarious immigration status, an "exceptional circumstance" must be found before any question of Article 8 infringement may arise. In this case, the petitioner had overstayed a visit visa and formed a relationship culminating in marriage when his immigration status was precarious. The Advocate General's reclaiming motion against the Lord Ordinary's interlocutor, reducing the decision subject to challenge, was refused.

5.80. In *GAM*[668] the petitioner had lived in the UK since April 2004, and had overstayed a work visa which had expired in May 2005. He formed a relationship and later married his partner in 2011 after receiving approval from the Home Office sought under the Certificate of Approval Scheme. The petitioner's immigration status was precarious from the outset of commencing family life in the UK. The petitioner's spouse had lived all her life in the UK, was employed as a poorly-remunerated care home assistant, and spoke no Urdu. The case was a challenge to the Home Office decision refusing leave to remain under the Immigration Rules and Article 8. The decision subject to challenge of 19 November 2013 predates the Immigration Act 2014, and there was no right of appeal against the decision because at that time the decision was not within the scope of 'immigration decision' as defined under the old appeal regime in the 2002 Act.

5.81. In that factual matrix, the court's legal analysis expanded on the rights connected to British spouses, an unqualified grant of approval certificate. *Jeunesse* was decided before this case, but the court did not consider *Jeunesse*. The court referred to *Quila*[669] and observed that the right to marry and to found a family is in itself a fundamental right protected by Article 12 of the ECHR. Married couples also have the right to live together subject to qualifications provided in Article 8. The relevance of having a British or settled spouse was considered with reference to AB (Jamaica)[670] in which court held that consideration must be given to the rights of a married couple, as follows:

[666] *MIK (Pakistan) v The Advocate General for Scotland* [2015] CSIH 29.
[667] *Izuazu (Article 8 – new rules)* [2013] UKUT 00045 (IAC).
[668] *GAM v SSHD* [2015] CSIH 28.
[669] *Regina (Aguilar Quila & another) v Secretary of State for the Home Department* [2011] UKSC 45.
[670] *AB (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 1302, para 20.

"In substance, albeit not in form, Mr Brown [the husband] was a party to the proceedings. It was as much his marriage as the claimant's which was in jeopardy, and it was the impact of removal on him rather than on her which, given the lapse of years since the marriage, was now critical. From Strasbourg's point of view, his Convention rights were as fully engaged as hers. He was entitled to something better than the cavalier treatment he received not only from the Home Office but, I regret to say, from the AIT. It cannot be permissible to give less than detailed and anxious consideration to the situation of a British citizen who has lived here all his life before it is held reasonable and proportionate to expect him to emigrate to a foreign country in order to keep his marriage intact. One finds no consideration given to any of these matters by the AIT at either stage".

5.82. The court ruled that it was not open to the Respondent to contend that any interference incompatible with the couple's Article 8 rights could be avoided by relocating to another country. The court extensively quoted *Sanade*[671] and observed that cases "*where the remaining parent not facing removal is either a British citizen or a third-country national will be governed by Art 8 . It is in that context that the nationality of the remaining parent as well as that of the child has relevance"*. In GAM, the court summed up that the decision did not accord proper weight to British citizenship, and whether their indefinite separation can be justified as a proportionate interference with their fundamental right to cohabit. The decision-maker had wrongly proceeded on the assumption that the British spouse must accompany the petitioner to the country of his nationality to save her marriage because there were no insurmountable obstacles, in terms of EX.1 (b), to the British spouse relocating to Pakistan. That decision involves an error of law.

5.83. It was further observed that in an assessment of proportionality, it is not appropriate to apply a test of whether an "insurmountable obstacle" exists to the petitioner's wife joining him in Pakistan. A disproportionate decision or measure in this field is not to be compared with the existence of an "insurmountable obstacle". The decision-maker wrongly assumed that expatriate UK citizens live in Pakistan. The Republic of Pakistan must accord to its nationals a right which the Immigration Rules do not accord to UK nationals, namely an unqualified right to be joined in Pakistan by a non-national spouse. The decision-maker applied the wrong test of whether the refusal of leave would lead to "*unjustifiably harsh consequences*" rather than the correct test of whether the interference with private and family life could be justified as proportionate to achieve the legitimate aim of immigration control. Considering the petitioner's precarious immigration status, the unqualified grant of permission to marry, which did not even require his bride to meet the minimum income requirement, was weighed in favour of the petitioner. The Certificate of Approval Scheme had ended before the minimum income requirement was introduced on 9 July 2012. GAM

[671] *Sanade and Others (British Children – Zambrano – Dereçi)* [2012] Imm.AR 3, para 92.

was decided after s.19 of the 2014 Act came into force on 14 July 2014[672]. But, the judgement does not refer to the statutory directions to courts and tribunals' provided in Part 5A of the 2002 Act in the context of precarious immigration status.

5.84. *MAK*[673] was an appeal against the Immigration Tribunal's decision to uphold the Home Office decision refusing leave sought under Article 8 of the ECHR. The court accorded significant weight to the specialist immigration tribunal by acknowledging the considerable increase in judicial dicta on the subject matter in recent years, none of which is readily reconcilable. The judicial approach to exceptional circumstances must be viewed in the context of the case's factual matrix. In brief, in this case the petitioner entered the UK in January 2011 on a Tier 4 student visa, and his college closed in May 2011 after losing its licence. He did not continue his education, but overstayed contrary to the conditions attached to his leave to remain, and formed a relationship when his immigration status was precarious. The First-tier Tribunal, FtT, considered these facts as part of the proportionality assessment.

5.85. The petitioner's British spouse embraced Islam, and they contracted a religious marriage in December 2011 and registered a civil marriage in January 2012. The petitioner sought to remain in the UK on the basis of family life, which was refused with a right of appeal, unlike *GAM* above. The FtT refused the appeal in March 2014, not finding an insurmountable obstacle to establish family life elsewhere. It was conceded that the appellant did not qualify for leave within the Rules because he could not prove the existence of insurmountable obstacles to continuing family life in Pakistan. The tribunal had to consider whether the appellant ought to have been granted leave to remain outside the Rules on the basis that removal would be a disproportionate interference with the family life of the couple as protected by Article 8. The Upper Tribunal, UT, did not disturb the FtT's findings. The UT decided that the FtT had correctly directed itself on the law, had given adequate reasons, and the FtT decision contained no errors of law. The appeal to the Court of Session was a reassertion of submissions made before the tribunal.

5.86. The Court of Session considered *Jeunesse*[674] and observed that Article 8 could not be seen as imposing on a state a general obligation to respect a married couple's choice of their country of residence or to authorise family reunification in its territory. The court further quoted Strasbourg case law[675] and opined that where the family life is created at a time when the persons involved are aware that the immigration status of one of them is precarious, it is likely to be only in exceptional circumstances that the removal of the non-

[672] **Immigration Act 2014 (Commencement No. 1, Transitory and Saving Provisions) Order 2014/1820.**

[673] *MAK v SSHD* [2016] CSIH 13

[674] *Jeunesse v The Netherlands* para 107.

[675] *Jeunesse v Netherlands* para 108; *Da Silva v Netherlands* para (39); *Butt v Norway* para 78.

national family member will be contrary to Article 8. The court interpreted *GAM*[676] and opined that what appears in para 19 is not part of the *ratio decedendi,* and the court was merely reprising a submission. Furthermore, the Court observed that the Respondent's concession, the Home Office, in *Sanadi* relates to the engagement of Article 8, not to the proportionality assessment. Among other factors, the possibility of practical relocation must be considered in the overall proportionality assessment. The court rejected the contention that one must not demonstrate exceptionality, in a known precarious status, even if exceptionality is not to be elevated into a formal test. In doing so, the court referred to the Court of Appeal's reasoning in *Agyarko.*

5.87. The court in the balancing exercise weighed the short duration of the marriage, the fact that there was no child from the union, no financial dependence of the British spouse on the petitioner and her conversion to Islam, previous residence in Malaysia and ability to adopt life somewhere else, and the possibility of gaining entry clearance from abroad. The appeal was refused, and the outcome was therefore different from *GAM*.

5.88. In case of *Mendirez*[677] the Court of Session, Inner House, considered a challenge to the FtT and UT judgements refusing leave sought under the Rules and Article 8. This case postdates *MAK* and *Agyarko.*[678] This was an appeal to the Court of Session against the Upper Tribunal judgement under s.13(4) of the Tribunals Courts and Enforcement Act 2007. The appellant is a Turkish national and came to the UK in 2007 under the Ankara Agreement. He formed a relationship with a UK citizen in 2009 and later married in 2014. The couple had no children together. The appellant sought leave on the basis of Article 8 family life. The appellant's spouse was self-employed at the time of application, and her income was below the minimum threshold of £18,600. The appellant lost appeals before the FtT and UT. Before the Court of Session, the main issue was that neither the FtT or UT judgements had carried out an analysis of whether the "insurmountable obstacles" test was satisfied or not, and neither tribunals had regard to all relevant factors in the proportionality assessment.

5.89. The appellant's wife was born in Scotland and has lived in Scotland all her life; she has family and friends here. The appellant developed family life in the UK from 2007 onward. The court accepted the appellant's relationship as genuine and subsisting. The FtT Judge's decision was criticised for failing to make no findings on the effects of moving back to Turkey. There were no findings on how easy or difficult it would be for the appellant to go back to Turkey either with or without his British spouse, to find accommodation and employment, and how difficult it would be for them to be absorbed into Turkish society given the appellant is a non-practising Muslim and his wife is a non-Muslim who resents

[676] Para 19 of GAM.
[677] *Mendirez v SSHD* [2018] CSIH 65.
[678] *R (on the application of Agyarko) v SSHD* [2017] UKSC 11.

wearing Hijab. The appellant's craving for remittal to the newly constituted FtT was granted. This decision may be of low significance as judicial dicta; nonetheless, it elaborates the importance of multi-layered judicial oversight. The remittance to the FtT does not suggest that there has been a different approach to assessing insurmountable obstacles or exceptional circumstances compared to what the court had in *MAK*. The distinguishing feature is that the court differentiated between unlawful and precarious immigration status while considering the relevance of public interest considerations under s.117B of the 2002 Act.

5.90. In *SBM*[679] the petitioner had a history of relying on Article 8 since 2002 and nothing material had changed since then. The petitioner's spouse has six children from a previous marriage and maintains only 'letterbox' contact with them. The petitioner made several applications, and his appeals were refused twice before the decision subject to challenge of 2 July 2013. The challenge was to the Secretary of State's refusal to consider the petitioner's claim for failing to apply two-tier assessment, first within the rules, then under Article 8. It was held that the immigration rules do include the Article 8 considerations of an applicant and of a British national spouse. It was acknowledged that states are afforded a margin of appreciation regarding family life created at a time when an applicant's presence in the country is illegal, and the proportionality exercise has to be fact-sensitive to the facts of each case. The public interest considerations introduced by the 2014 Act were not in force at the time of decision. However, the court had regard to *Jeunesse*[680] and stated that the public interest considerations coincide with the Strasbourg jurisprudence, and thus that it was proportionate to give little weight to the family life established in precarious immigration status, as in the present case. Before the Lord Ordinary the petitioner's central submission was that the respondent had not treated the absence of insurmountable obstacles as determinative. In a reclaiming motion, this submission was not pursued, and the court agreed with the Lord Ordinary's findings anyway. The court considered the petitioner's spouse's British nationality and the length of time she had lived in the UK, her lack of ties to Pakistan, language difficulties, and that she would be losing her accommodation in the UK. However, these factors were not considered enough to meet the 'insurmountable obstacle' threshold.

5.91. In the EX.1 context precarious immigration status has become a significant factor, and courts tend to give little weight to family life established in those circumstances. The fact-sensitive approach takes precedence in assessing Article 8 both within and outside the Rules in courts and tribunals. The Home Office treatment of EX.1 varies depending on the quality of decision-making. In a few cases above, such as MAK, the Home Office decision survived judicial scrutiny in various judicial forums. *Jeunesse* is frequently cited in domestic jurisprudence, and it is relevant in the Article 8 assessment within and outside the immigration rules. The Immigration Rules are more prescriptive of Article 8

[679] *SMB v SSHD* [2005] CSIH 2015.
[680] Para 108.

assessment. The difference in Article 8 assessment is more one of form than of substance in the domestic jurisprudence compared with pre 9 July 2012 jurisprudence.

Article 8 assessment in deportation cases:

i. Relevance of Strasbourg jurisprudence

5.92. *Boultif*[681], *Uner*[682] and *Maslov*[683] set the Strasbourg approach to deportation cases. These interpretations have been widely acknowledged in domestic jurisprudence. In Huang[684] Lord Bingham stated that:

"The reported cases are of value in showing where, in many different factual situations, the Strasbourg court, as the ultimate guardian of Convention rights, has drawn the line, thus guiding national authorities in making their own decisions. But the main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. Proportionality is a subject of such importance as to require separate treatment."

[681] [2003] 33 EHRR 1179.
[682] [2006] 3 FCR 229.
[683] [2008] GC ECHR 1638/03.
[684] [2007] UKHL 11, [2007], para 18.

ii. Relevant statutory provisions

5.93. Section 3(5) of the Immigration Act 1971 provides that a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his or her deportation to be conducive to the public good. Section 32(4) and (5) of the UK Borders Act 2007 ("the 2007 Act") provides that, subject to section 33, the Secretary of State must make a deportation order in respect of a "foreign criminal". A foreign criminal is a person who is not a British citizen, and has been convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least 12 months. Section 33 provides that sections 32(4) and (5) do not apply where the foreign criminal's removal in pursuance of the deportation order would breach his or her Convention rights.

Relevant Immigration Rules

5.94. On 9 July 2012, the government for the first time introduced immigration rules incorporating Article 8 considerations for deportation and non-deportation cases. Paragraphs 398 to 399B of Part 13 of the Rules make provisions for deportation cases.

> "*Deportation and Article 8*
>
> *398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years; (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors".*

5.94.1. "399. This paragraph applies where paragraph 398 (b) or (c) applies if – (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and (i) the child is a British Citizen; or (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case (a) it would not be reasonable to expect the child to leave the UK; and (b) there is no other family member who is

able to care for the child in the UK; or (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and (i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and (ii) there are insurmountable obstacles to family life with that partner continuing outside the UK".

Deportation- Article 8 private life claims:

5.95. Paragraphs 399A-399B make provisions for private life cases. These provisions are identical to EX.1 of the Appendix FM and similar to the public interest considerations provided in Sections 117A -117C of the 2002 Act. The public interest considerations will be discussed later in this chapter. Paragraph 399A also resembles paragraph 276ADE of the rules. Where the deportation of a foreign criminal remains conducive to the public good, a previous grant of leave may not tip the balance in favour of granting further leave[685]. Enforcement of a deportation order will be in the public interest where a foreign criminal returns in breach of the order unless there are very exceptional circumstances.

> *"399A. This paragraph applies where paragraph 398(b) or (c) applies if – (a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."*

> *"399B. Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted."*

5.96. The Explanatory Memorandum attached to the Immigration Rules in paragraph 7.2 explains the UK's public policy towards Article 8 considerations as follows:

> *"Approach to ECHR Article 8"*

[685] Paragraph 399C of the Immigration Rules.

"The new Immigration Rules will reform the approach taken as a matter of public policy towards ECHR Article 8 – the right to respect for family and private life – in immigration cases. The Immigration Rules will fully reflect the factors which can weigh for or against an Article 8 claim. The rules will set proportionate requirements that reflect the Government's and Parliament's view of how individuals' Article 8 rights should be qualified in the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public against foreign criminals. This will mean that failure to meet the requirements of the rules will normally mean failure to establish an Article 8 claim to enter or remain in the UK, and no grant of leave on that basis. Outside exceptional cases, it will be proportionate under Article 8 for an applicant who fails to meet the requirement of the rules to be removed from the UK".

5.97. On 13 June 2012, the Home Office issued a compatibility statement[686] which states:

"The intention is that the Rules will state how the balance should be struck between the public interest and individual right, taking into account relevant case law, and thereby provide for a consistent and fair decision-making process. Therefore, if the Rules are proportionate, a decision taken in accordance with the Rules will, other than in exceptional cases, be compatible with A8.[687]"

In the last paragraph, the statement concludes that: "*It is the Department's view that the new Rules on family and private life are compatible with ECHR Article 8"*.

5.98. The Immigration Upper Tribunal considered the first challenge to the immigration rules in *MF (Article 8: New Rules: Nigeria)*[688]. *MF (Nigeria)*[689] was an appeal against the Upper Tribunal's decision where the Court considered the scope and application of the Immigration Rules against the Article 8 claim. In this case, an illegal entrant married a British citizen who had a minor daughter from a previous relationship, and shortly after marriage he was convicted of handling and possessing stolen goods or using a false instrument. At the time of marriage, his immigration status was precarious. He received eighteen months' imprisonment. He sought leave on the basis of family life. The Home Office refused the application, rejected his protection claim, and made a deportation order because the length of the conviction had triggered automatic deportation. The appeal to FtT on human rights and asylum grounds was dismissed, but the Upper Tribunal allowed his appeal. The Secretary of State appealed against the decision to the Court of Appeal.

[686] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/286879/echr-fam-mig.pdf (Accessed 11 March 2022).
[687] Paragraph 20 of the statement.
[688] [2012] UKUT 393 (IAC).
[689] [2013] EWCA Civ 1192.

5.99. The Upper Tribunal (UT) found the immigration rules compatible with Article 8 and observed that the judges and primary decision-makers are bound by section 6 of the Human Rights Act 1998, as public authorities are not to act contrary to the Convention. It was further observed that the rules still leave scope for individual assessment; thus, the rules are not complete code, as argued by the Secretary of State, for the assessment of Article 8 claims[690]. The UT regraded the rules as an index of the enhanced importance the Secretary of State attaches to the public interest in the deportation of foreign criminals by conducting a distinct child's best interest assessment[691]. The appellant had formed family life with full knowledge of his precarious immigration status. He had not reoffended for nearly seven years, and had been assessed at a low risk of reoffending. The Secretary of State tolerated the appellant's presence in the UK for a considerable length of time by not concluding his protection claim, and the decision on the claim could have led to a deportation order. The UT also weighed the bad immigration history of the appellant in the balancing exercise, and the fact that he had failed to meet the requirements of the rules was a very significant consideration. The appellant's deportation was found proportionate in relation to family life with his partner, but the UT reached a different conclusion on the ground of best interest of the stepchild under Section 55 of the Borders, Citizenship and Immigration Act 2009, and so his appeal was allowed[692].

5.100. The Court of Appeal concluded that the rules are a complete code, contrary to the UT's view, because the rules themselves permit the consideration of exceptional circumstances in the balancing exercise of the proportionality assessment as required by the Strasbourg jurisprudence, and differed with the UT's conclusion that the decision-maker is not mandated to take all the relevant Article 8 criteria into account[693]. This difference in approach between the UT and the Court of Appeal was one of form and not substance[694]. The Court of Appeal did not disturb the UT decision, and the Secretary of State's appeal was dismissed. In the deportation context, this case has immense importance, and it is receiving substantial judicial treatment. Both the UT and the Court of Appeal had regard to Strasbourg's guiding principles. There is no suggestion that the Rules seek to establish a different criterion than what appears in the ECtHR jurisprudence. The Rules guide the primary decision-maker and the judiciary on balancing the public interest in maintaining effective immigration control.

5.101. *MF*[695] was reviewed by the Supreme Court in *Ali.*[696] The Court of Appeal in *MF* had described the Immigration Rules in the deportation context as a complete code

[690] Paras 25 & 28; [2012] UKUT 393 (IAC).
[691] Paras 69-70, ibid.
[692] Paras 77-78.
[693] Para 44; [2013] EWCA Civ 1192.
[694] Para 50 ibid.
[695] [2013] EWCA Civ 1192.
[696] *Ali v Secretary of State for the Home Department* [2016] UKSC 60, the case is also known as *HA (Iraq) v SSHD.*

for determining Article 8 claims, and that was misconstrued in a few subsequent cases as meaning that the Rules alone govern appellate decision making[697]. In *Ali,* the court explained that the Rules are not law, even though they are treated as law for the purposes of section 86(3)(a) of the 2002 Act which states that the adjudicator must allow them insofar as he thinks that the decision appealed "was not in accordance with the law (including immigration rules)". Therefore, the Rules alone do not govern the determination of appeals, other than appeals brought on the ground that the decision is not in accordance with the Rules. Other legal requirements must also be considered. It was held that paragraph 398 required the application of a proportionality test in accordance with the Strasbourg jurisprudence, taking into account all the Article 8 criteria and all other factors relevant to the proportionality assessment. The court opined that tribunals should accord respect to the Secretary of State's assessment of the strength of the general public interest in deporting foreign offenders by considering all case-specific factors. In this way, the Supreme Court acknowledged the state's margin of appreciation in maintaining border control, but did not confine the scope of the appellate authority's assessment to the Rules only. It was confirmed that the appellate courts and tribunals could draw their own conclusions after hearing the evidence, but not in disregard of the decision under appeal because where the Secretary of State had adopted a policy based on a general assessment of proportionality, in which case the appellate authority should attach considerable weight to that assessment[698].

5.102. The court ruled that the *Boultif* and *Jeunesse* line of cases is relevant in the proportionality assessment of deporting foreign offenders, whether or not they were settled migrants, and that consideration of the factors mentioned in *Jeunesse* is relevant in assessing claims of non-settled migrants[699]. The court avoided the direct question of whether the balancing of competing interests entailed a positive obligation, to permit an offender to remain, or a negative obligation, if deportation would be a disproportionate interference, and held that the question was essentially the same as whether a fair balance had been struck[700]. It was observed that the Rules[701]had identified particular categories of cases where the Secretary of State would accept countervailing factors outweighing the public interest in deportation and cases within the purview of s.32 of the UK Borders Act 2007 in which the public interest was outweighed, except those cases specified in the Rules, which were likely to be in a very small minority.[702] In *Ali*, the Supreme Court ruled that the Court of Appeal had overstated the significance of the Rules in the context of determining the weight to be accorded to the public interest in deporting foreign offenders, and the case was remitted back to the Upper Tribunal. In *Ali*, the court succinctly defined the scope of the Rules, the ambit of the appellate authority's assessment within and

[697] *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ 1310, para 17; *AJ (Angola) v Secretary of State for the Home Department* [2014] EWCA Civ 1636, para 39.
[698] *Ali v SSHD* paras 45-50.
[699] *Ali v SSHD* paras 33-35.
[700] Para 32 *Ali v SSHD.*
[701] Paragraph 399 and 399A of the rules.
[702] *Ali v SSHD* para 38.

outside the Rules, and the relevance of the Strasbourg jurisprudence in the proportionality assessment of Article 8 claims. *Ali* remains good law, and it continues to receive substantial judicial treatment.[703]

5.103. In the case of *Unuane v UK*[704], the ECtHR considered domestic interpretations of the Immigration Rules in place since 9 July 2012 with the public interest considerations provided in Part 5A of the 2002 Act of an Article 8 claim involving children in the deportation context. The court observed after analysing the relevant domestic jurisprudence that the Immigration Rules and section 117C of the 2002 Act provide scope for all relevant factors to be taken into account in the proportionality assessment, and that in considering whether exceptional or very compelling circumstances exist, the authorities should consider the proportionality test required by the ECtHR[705]. The court considered *Hesham Ali*[706] and opined that it was the duty of the appellate tribunals, as independent judicial bodies, to assess the proportionality of deportation in any particular case based on their own findings as to the facts and their understanding of the relevant law. In *Unuane v UK*, the court ruled that the Immigration Rules do not necessarily preclude domestic courts and tribunals from employing the *Boultif* criteria to assess whether an expulsion measure was necessary and proportionate[707]. In this case, the Upper Tribunal did not conduct a separate balancing exercise as required under the Strasbourg jurisprudence and restricted the assessment's scope to paragraph 398 of the Rules. The court observed that the serious nature of the offence committed by the applicant itself is not determinative of the case; instead, it is just one factor that has to be weighed in the balance according to the *Boultif* and *Uner* criteria.

Conclusions

5.104. There have been significant developments in Article 8 jurisprudence since the Human Rights Act 1998. The Home Office had successive policies in place before the 1998 Act, and some of them were subjected to judicial criticism due to their perceived inflexibility[708]. After *Mahmood*, there has been a dialogue between the government and the judiciary in making domestic law Convention compliant. In that context, the significance of corrective decisions cannot be overstated. It is evident in the domestic jurisprudence that the courts have acknowledged the significance of the Immigration Rules as a source of law, and the

[703] *Assad v Secretary of State for the Home Department* [2017] EWCA Civ 10; *Quarey v Secretary of State for the Home Department* [2017] EWCA Civ 47; *Secretary of State v SU (Pakistan)* [2017] EWCA Civ 1069; *MS (India) v Secretary of State for the Home Department* [2017] EWCA Civ 1190; *Secretary of State for the Home Department v Miller* [2018] EWCA 28.
[704] (Application No. 80343/17).
[705] Para 81 of *Unuane v UK.*
[706] *Ali v Secretary of State for the Home Department* [2016] UKSC 60, at para 82.
[707] Para 83 *Unuane v UK.*
[708] See *Huang, Chikwamba and EB (Kosovo).*

compatibility of the Rules with Article 8 has been assessed on numerous occasions. In doing so, the courts have assisted the government in making these Rules Convention compliant. The current legislative regime, both in terms of primary and secondary legislation, has inbuilt flexibility to consider all the relevant factors to be taken into account in the proportionality exercise. In *Unuane,* the ECtHR held that the UK's current legal regime does not preclude the decision-maker from having regard of the ECtHR's guiding principles, and the Immigration Rules and statutory provisions are flexible in taking a fact-sensitive approach. The flexibility identified by ECtHR makes the Immigration Rules and statutory provisions convention compliant. The corrective decisions[709] emphasise the fact sensitive approach and that flexibility is required in the proportionality assessment.

5.105. Refusals of Article 8 claims were open to frequent challenges because of poor primary decision-making and partly because, in the government's view, the scope had been broadened by the courts[710]. The consultation paper quoted cases related to Article 8 and stressed the need for a practical approach to the qualified nature of the Article 8 rights. The rules introduced on 9 July 2012 prescribed an assessment criterion. Contrary to the government's view, the courts did not consider the rules to be conclusive of Article 8 assessment. The government's attempt to elevate the status of the Rules to equal to statute law did not work, and the courts rejected the government's contention. After considerable litigation, the courts confirmed the two-stage assessment process for Article 8 claims: the claim is first to be assessed under the Rules and then under Article 8. The phrases "*insurmountable obstacle*" and "*exceptional circumstances*" have been subject to extensive judicial interpretation. In *Agyarko*[711] the Supreme Court provided a comprehensive definition of "*insurmountable obstacle*" and in the family life context the ECtHR's view in *Jeunesse*[712] coincides with domestic jurisprudence.

5.106. The minimum income requirement of £18,600 has been declared lawful by the Supreme Court[713], and the jurisprudence related to Article 8 assessments within the Immigration Rules involving private and family life claims has evolved. The Rules prescribe the distinct treatment of Article 8 claims involving foreign offenders, and the Supreme Court reviewed *MF*[714] in *Ali*[715] and held that the Court of Appeal had overstated the significance of the Rules in the context of determining the weight to be accorded to the public interest in deporting foreign offenders. The question of how Article 8 claims should be treated within the Rules is now settled. The government sees Article 8 claims as a

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[709] *Huang, Chikwamba and EB (Kosovo).*

[710] Securing Our Border, Controlling Migration, Family Migration, A Consultation, July 2011; https://webarchive.nationalarchives.gov.uk/20111004131055/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/consultation.pdf?view=Binary (Accessed on 11 March 2022).

[711] *R (On the application of Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11.

[712] *Jeunesse v Netherlands (12738/10) (2015) 60 E.H.R.R.*

[713] *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10.

[714] *MF v SSHD* [2013] EWCA Civ 1192.

[715] *Ali v Secretary of State for the Home Department* [2016] UKSC 60.

frustrating part of the problem in managing family migration. Its frustration did not end there, and it felt the need to introduce statutory directions to the courts and tribunals. The Immigration Act 2014 inserted Part 5A in the Nationality, Immigration Asylum Act 2002, and its contents are known as public interest considerations. These considerations will be discussed in the next chapter.

Chapter 6: UK Law on Article 8 after the Immigration Act 2014 - phase four

6. Introduction

6.1. The first part of this chapter explains the legislative objectives of introducing public interest considerations, and it explains the UK government's rationale behind introducing instructions to courts and tribunals in the form of statutory provisions. The public interest considerations are also reproduced for ease of reference. Then, it explains how the court should have regard to the public interest considerations with reference to the Human Rights Act 1998 and existing learning relevant to the Article 8 proportionality assessment. It further expands on the judicial interpretations of Part 5A of the 2002 Act. The application of public interest considerations in deportation cases is separately discussed with reference to the relevant Immigration Rules. The judicial approach towards the child-centred exception under sections 117B (6) is explained. Then, the judicial interpretations of public interest considerations are set out in detail.

Background

6.2. The new Rules introduced on 9th July 2012 were not found conclusive of the Article 8 assessment, and the coalition government thought it appropriate to introduce new statutory provisions directing courts and tribunals as to how public interest should be interpreted in Article 8 claims. The government published an Impact Assessment of Reforming Immigration Rights on 1 Oct 2013[716]. The Impact Assessment expands on the policy objectives and on the overall rationale of reforms to the appeal process. The appeal reforms are not within the scope of this chapter and have already been discussed in Chapter 4.

6.3. The objectives of the Immigration Bill 2013 were described by the then-Immigration Minister in Commons as follows: "*The Immigration Bill will stop migrants abusing public services to which they are not entitled, reduce the pull factors which draw illegal immigrants to the UK and make it easier to remove people who should not be here*".[717] A further objective of the primary legislation was to provide statutory force to the Article 8 assessment criteria introduced in the 2012 Immigration Rules. The Upper Tribunal had already concluded in *MF* and *Izuazu* that the Immigration Rules are not conclusive of Article 8 assessment, and the existing learning, including caselaw, was found relevant in the context of proportionality assessment. The tribunal also ruled that the Immigration Rules are not equivalent to statutory provisions.

[716] Impact Assessment of Reforming Immigration Appeal Rights, IA: HO0096.
[717] https://www.gov.uk/government/organisations/home-office/series/immigration-bill

6.4. The Home Secretary Theresa May, as she then was, said during the second reading of the bill which later became the Immigration Act 2014 that:

> *"The public are fed up with cases where foreign criminals are allowed to stay, because of an overly generous interpretation of Article 8 - the right to respect for family and private life - by the courts. Under the current system the winners are foreign criminals and immigration lawyers and the losers are the victims of those crimes and the law-abiding public. The Government first sought to address this issue by changing the Immigration Rules in July 2012, with the intention of shifting the weight the courts give to the public interest. This House debated and approved the new Rules which set out the factors in favour of deportation and the factors against. The courts accept that the new Rules provide a complete code for considering Article 8, where we are deporting foreign criminals. However, some judges have still chosen to ignore the will of Parliament and go on putting the law on the side of foreign criminals instead of the public. So I am sending a very clear message to those judges – Parliament wants the law on the people's side, the public wants the law on the people's side, and this government will put the law on the people's side once and for all. This Bill will require the courts to put the public interest at the heart of their decisions."*

6.5. The government published an overview of the Immigration Bill 2014[718] and among other objectives stated that the Bill will end the abuse of Article 8, the right to respect for private and family life. The overview further stated that the Bill will make it easier to remove and deport illegal immigrants by ensuring, *inter alia,* that the courts have regard to Parliament's view of what the public interest is when considering Article 8 in immigration cases.

Objectives of introducing Part 5A

6.6. The primary objective of Part 5A is to produce a straightforward set of rules, and in particular to narrow rather than widen the residual area of discretionary judgment open to the court or tribunal to take account of public interest or other factors not directly reflected in the wording of the statute. Section 19 inserted a new Part 5A into the 2002 Act, consisting of ss 117A to 117D. These provisions commenced on 28 July 2014[719]. The Immigration Rules were amended to align with the new statutory provisions. Paragraph A362 was inserted into the Immigration Rules and sets out that any Article 8 claim considered on or after 28 July 2014, regardless of when it was made, must be considered under the amended rules[720]. Paragraph 398 prescribes a 'criminality threshold' in relation to public interest considerations. Paragraphs 399b and 399c set out provisions for granting leave to remain where an Article 8 claim succeeds. Chapters 8 and 13, containing the criminality guidance

[718] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/249251/Overview_Immigration_Bill_Factsheet.pdf

[719] Immigration Act 2014 (Commencement No. 1, Transitory and Savings Provisions) Order 2014, SI 2014/1820, Article 3.

[720] Statement of Changes in the Immigration Rules HC 532 and HC 693; https://www.gov.uk/government/uploads/attachement_data/file/36437l/hc-693

of the Immigration Directorate Instructions, now include amended guidance to caseworkers in relation to the new framework.

i. *Article 8 and public interest considerations*

6.7. For ease of reference, it is convenient to reproduce these provisions:

"*PART 5A*

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals
(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where—
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7)The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.
117D Interpretation of this Part
(1) In this Part—
- *"Article 8" means Article 8 of the European Convention on Human Rights;*
- *"qualifying child" means a person who is under the age of 18 and who—*
  (a) is a British citizen, or
  (b) has lived in the United Kingdom for a continuous period of seven years or more;
- *"qualifying partner" means a partner who—*
  (a) is a British citizen, or
  (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, "foreign criminal" means a person—
(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c) who—
(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender.
(3)For the purposes of subsection (2)(b), a person subject to an order under—
(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
(c)Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),
has not been convicted of an offence.
(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—
(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;
(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and
(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.
(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

An overview of Part 5A of the 2002 Act

6.8. Section 19 of the 2014 Act inserted Part 5A into the 2002 Act. The objective of Part 5A was to set Parliament's view on the public interest question while considering Article 8 claims. Sections 117A-117D present a combination of statements and instructions to the courts and tribunal to consider the public interest while considering an Article 8 claim. Section 117A (1) explains where public interest considerations apply, 117A (2) requires the court to have regard to the considerations mentioned in sections 117B-117C while considering the public interest question, and section 117C (3) defines the public interest question. Section 117B lists the considerations applicable in all cases, and Section 117C lists additional considerations concerning Article 8 claims involving foreign criminals. The government's intention was to give clear instructions to courts and tribunals on how to consider Article 8 claims, with the objective of curtailing judicial discretion. However, judicial analysis of these provisions reveals that the instructions are not clear, and still leave courts and officials with significant discretion.

6.9.S.117A (1) (a) and (b) describe the application of this part where the tribunal or court must determine the engagement and breach of the rights protected by Article 8 of the ECHR. S.117A (b) sets the threshold where interference would be perceived as unlawful under s.6[721] of the Human Rights Act 1998. S.117A (2) requires the courts to "have regard to", in all cases, the considerations listed in s.117B and in cases involving only foreign criminals to the considerations listed in s.117C. S.117A (c) defines the public interest question as

[721] s.6 (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right--, Human Rights Act 1998

follows: "*public interest question" means the question of whether an interference with the person's right to respect for private and family life is justified under Article 8 (2)*". Paragraphs 398-399A of the Immigration Rules have similar provisions to Section 117D, but the exceptions provided in paragraph 399 pose greater hurdles to deportees. However, in the context of section 117B (6), Parliament's view must prevail over that of the Secretary of State for the Home Department.

6.10. Section 117B (4) and (5) make distinct directions in the context of family and private life. 117B (4) directs courts and tribunals to give little weight to private life or a relationship formed with a qualifying partner by a person residing in the UK unlawfully. Section 117B (5) directs courts and tribunals to give little weight to a private life established by a person at a time when the person's immigration status was precarious. In the section 117B context the word 'precarious' is broader in scope than 'unlawful'. The UK Supreme Court in *Rhuppiah*[722] confirmed the Upper Tribunal's interpretation[723] of the word 'precarious' used in 117B (5) which interprets that anyone in the UK with leave to remain and enter, except British citizens and those with indefinite leave to remain, have a precarious immigration status.

6.11. The public interest question itself does not in any way qualify UK courts' discretion in determining the proportionality of interference in the rights protected by Article 8 (1). The main question is thus what it means to "have regard to" these statutory considerations. Section 2(1)[724] of the Human Rights Act 1998 uses the phrase "must take into account". This question was answered by Lord Bingham in *Ullah*[725]. The mirror principle was discussed above in Chapter 3.

6.12. The UK's domestic courts have developed their Article 8 jurisprudence in accordance with s.6 of the Human Rights Act 1998 and, as discussed earlier in Chapter 4, the majority of those decisions were corrective in nature. Hence, the caselaw which predates Part 5A of the Nationality, Immigration and Asylum Act 2002 remains relevant while considering the "public interest question" under new provisions. A plain reading of statutory public interest considerations does not suggest a departure from the previous jurisprudence either. One may take the view that the public interest considerations entrenched in ss.117B and 117C add nothing to the existing learnings and to the established principles of proportionality assessment; they are simply parliamentary directions to the courts as how to apply the qualifications given in Article 8 (2). A similar view was expressed by Lord Taylor of Holbeach:

> "…*Immigration Rules contain requirements to be met but factors to be considered, in the form of public interest statement... This recognises that there must continue to be*

[722] *Rhuppiah v SSHD* [2018] UKSC 58.
[723] *AM (S.117B: Malawi)* [2015] UKUT 260 (IAC).
[724] A court or tribunal determining a question which has arisen in connection with a Convention right "*must take into account*" section 2 (1) of the HRA 1998.
[725] *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, 350, para 20.

an assessment of the individual facts of each case and that the decision on proportionality under Article 8 continues to lie, ultimately, with the court." [726]

i. *Judicial interpretations of Part 5A:*

i. *Considerations of claims involving children*

6.13. Public interest considerations have been subjected to extensive judicial scrutiny in recent years. There are a number of judgements, including the reported decisions of the Upper Tribunal, interpreting Part 5A of the 2002 Act, but the precise scope of the law was not clear. Eventually, the Supreme Court in the case of *KO*[727] decided how Article 8 claims of "qualifying children" and their parents should be considered under the statutory regime contained in Part 5A of the 2002 Act.

6.14. There were linked appeals in *KO,* and Section 117C applied in *KO*'s case. *KO* was an illegal entrant who had been living in the UK since 1986. At the time of appeal he had a spouse, a step-daughter, and four children with his wife. His four children are British citizens and they were born between 28 August 2005 and 9 August 2013. His step-daughter has indefinite leave to remain in place, and she had turned 18. *KO* was convicted of conspiracy to defraud and sentenced to imprisonment for twenty months. He was therefore a 'foreign criminal' as defined in Section 117D (2) of the 2002 Act.

6.15. The court considered whether the provisions, and exceptions provided in Sections 117B and 117C, required focus only on the position of the child, and not on the parents' conduct, or whether any adverse impact on the child should be balanced against the public interest in deportation. On the other hand, the Respondent, the Secretary of State, argued that both provisions require a balancing exercise, weighing any adverse impact on the child against the public interest in proceeding with the removal or deportation of the parent.

6.16. The Statement of Intent defined the scope of the Rules in relation to a seven year concession as follows: *"The key test for a non-British citizen child remaining on a permanent basis is the length of residence in the UK of the child - which the Immigration Rules will set as at least the last seven years, subject to countervailing factors. The changes are designed to bring consistency and transparency to decision making."*[728] It was observed that in paragraph 276ADE(1)(iv) of the Immigration Rules, the seven year criterion and the reasonableness tests appear identical to those of Section 117B (6) in the context of the definition of a 'qualifying child' for the purpose of Article 8 assessment. The 'seven year' concession was part of the Home Office policy known as DP5/96.[729] It is worth noting that the 'reasonableness' test was not part of the policy, but the criminal behaviour of parents

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[726] 05 March 2014, col 1401.

[727] *KO v Secretary of State for the Home Department* [2018] UKSC 53.

[728] Statement of Intent: Family Migration (June 2012), para 56.

[729] *PD (Sri Lanka) v Secretary of State for the Home Department* [2016] UKUT 108.

was included in the relevant factors to be considered in Article 8 claims. However, in the context of Section 117B (6), the present Immigration Directorate Instructions are that:

> "*The consideration of the child's best interests must not be affected by the conduct or immigration history of the parent(s) or primary carer, but these will be relevant to the assessment of the public interest, including in maintaining effective immigration control; whether this outweighs the child's best interests; and whether, in the round, it is reasonable to expect the child to leave the UK*."[730]

6.17. The Supreme Court took the unanimous view that there is nothing in 117B (6) to import a reference to the conduct of the parent. The court noted other factors to be considered in the provision, and opined that the criminality is not one of them. It was concluded that sub-section 117B (6) is a free-standing provision, the only qualification being that a person seeking to rely on it must not be liable to deportation. In considering whether it would be 'reasonable' for the child to leave, the court opined that it is relevant to consider where the parents were expected to be, and to that extent, the parents' record could become indirectly material, if it led to their having to leave. It could only be if, even on that hypothesis, it would not be reasonable for the child to leave, that the provision could give the parents a right to remain[731].

ii. Judicial Interpretations of Section 117B (4) and (5)

6.18. In *Rhuppiah*,[732] the Supreme Court considered s.117B (5) of the 2002 Act. This case was decided after *KO*, discussed earlier. The court considered in particular the meaning of the word 'precarious', and in doing so, the Upper Tribunal's decision in *AM*[733] was approved where it was held, for the purpose of s.117B (5), that anyone, except citizens of the UK, who was present in the UK with leave to remain other than for an indefinite period, had a precarious immigration status. The court further opined that s.117B (5) was only concerned with the private life of an applicant, rather than with family life. In doing so, the court had in mind the difference between the ECtHR's and Parliament's approach[734]. The court further observed the difference between ss.117B[4] and 117B (5) and concluded that the concept of precarious immigration status under s117B (5) does not include the situation of a person present in the UK unlawfully. Parliament had drawn a clear distinction between unlawful presence and a precarious immigration status by referring to 'unlawfully' only in s.117B(4)[735].

6.19. The court further observed the direction given in s.117A(2)(a) which requires the court or tribunal to have regard to the considerations in s.117B. Section 117B(5) requires the

[730] Family Migration: Appendix FM section 1.0b. Family Life (as a Partner or Parent) and Private Life: Ten Year Routes, p 76).
[731] *KO v SSHD,* para 16-18.
[732] *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58.
[733] *AM (S. 117B: Malawi)* [2015] UKUT 260 (IAC).
[734] *Rhuppiah*, paras 24, 2, 34, 37, 42, 45 and 48.
[735] *Rhuppiah*, para 46.

court or tribunal to give 'little weight' to a private life established by a person at a time when their immigration status is precarious. It was held that the provisions of s.117B could not put the decision-maker in a straitjacket which forced them to determine claims in a way which is inconsistent with Article 8 itself. A small degree of flexibility was built into the concept of 'little weight' which meant that applicants who relied on their private life under Article 8 could occasionally succeed[736]. The court considered *Butt v Norway*[737] and concluded that in certain circumstances a person's status may be considered precarious even if he or she has settled status. The court was referred to settled status obtained by false or misleading information. However, in *Butt v Norway* the ECtHR found a breach of Article 8. Although the court considered the view taken in *Butt v Norway* to be partially correct, given the factual matrix of *Rhuppiah* the court did not approve *AM's*[738] findings that the immigration status of someone with indefinite leave to remain could be precarious.[739] After these *Rhuppiah* findings, the court hoped that decision-makers would no longer need to wrestle with degrees of precariousness.

6.20. There are difficulties in reconciling the domestic interpretation of 'precarious' with that of the Strasbourg court. It is evident from Lord Wilson's analysis in *Rhuppiah* that the court's primary focus was on s.117B, and there was little comparison with the Strasbourg Court's interpretation of the word 'precarious'. Strasbourg has used the term 'precarious', in contrast to the term 'settled' in family life claims with no lawful right of residence or when someone was granted temporary admission whilst awaiting the outcome of a pending application[740]. Arguably, the ECtHR has not applied such an approach to lawfully resident migrants who have been accepted by a host state on a potential route to settlement.[741] This analysis is not within the scope of the present part and will be considered later in this thesis.

Deportation - public interest considerations

Scope of public interest considerations within the present legal regime

6.21. Section 19 of the Immigration Act 2014 inserted Part 5A into the Nationality, Immigration and Asylum Act 2002 on 25 July 2014. These provisions were set out earlier in the chapter. In *NA (Pakistan)*[742] the court considered the legislative schemes before and after the coming into force of the Immigration Act 2014 in the context of assessing Article 8 claims against the deportation of foreign offenders. It was considered that since 9 July 2012, the Immigration Rules provide detailed guidance on Article 8 claims. The rules divide foreign offenders into two categories: a) those who have received a custodial sentence of between one and four years, known as medium offenders, and b) those

[736] *Rhuppiah*, para 49.
[737] *Rhuppiah*, para 33, *Butt v Norway* (Application No 47017/09), see paras 79 and 90.
[738] *AM (S.117B: Malawi)* [2015] UKUT 260.
[739] *Rhuppiah*, para 47.
[740] *Antwi and others v Norway*, EHRR (Application No. 26940/10; *Nunez v Norway* (Application No 55597/09; *Butt v Norway* etc.
[741] Warren, Richard: Supreme Court decides that the UK is a precarious home for migrants: a critical look at the case of *Rhuppiah*.
[742] *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662.

sentenced to four years or more, who are serious offenders. The Immigration Rules provide safety nets to escape deportation for medium offenders, which include considerations of family life as a parent and partner under paragraph 399 of the Rules and private life considerations under paragraph 399A of the Rules. Otherwise, medium offenders have to prove the existence of "*exceptional circumstances*" under paragraph 398 of the Rules. This paragraph provides a sort of residual discretion to undertake a proportionality assessment within the Rules. The court summarised that serious offenders could only escape deportation by relying on "*exceptional circumstances*" under para 398. It was reiterated that paras 398 to 399B constituted a complete code in relation to Article 8 defences as concluded in MF.[743] The phrase *"exceptional circumstances"* as mentioned in para 398 requires something very compelling to outweigh the public interest in deporting foreign offenders. A person resisting deportation could rely on matters of the kind referred to in paras 399 and 399A, but his/her Article 8 claim must be based on a strong factual matrix, and the court applied the ratio of *JZ (Zambia)*.[744] In the statutory context, s.32 (4) of the UK Borders Act 2007 provides that the deportation of a foreign person convicted with a twelve-month custodial sentence is conducive to the public good, and the Secretary of State is required to make a deportation order under s.32(5) of the Act subject to certain exceptions provided in s.33 of the Act[745].

6.22. In considering the public interest question in cases concerning the deportation of foreign criminals, the courts and tribunal must have regard to the section 117B considerations and the considerations listed in section 117C. The relevance of public interest considerations to removal cases will be discussed later in this chapter. The Upper Tribunal held that the list of considerations in sections 117B and 117C is not exhaustive[746] and pointed to the parenthesised "*in particular*" which is part of the statutory provisions. However, considerations other than those listed in ss.117B-117C or any other additional factors are considered relevant, in the sense that they properly bear on the "public interest question"[747]. In the context of 117B, the court opined that the public interest in maintaining effective immigration control is not diminished where an Article 8 claimant has never been a financial burden on the state, or is self-sufficient, or is likely to remain so indefinitely, and the significance of these factors is that in their absence the public interest is fortified[748].

6.23. In *NA (Pakistan)* the court expanded on the scope of the public interest considerations provided in Part 5A of the 2002 Act and found that the general scheme is similar to the Immigration Rules since 2014 in relation to foreign offenders resisting deportation on Article 8 grounds. Furthermore, Exceptions 1 and 2 provided in s.117C (4) and (5) respectively are "safety nets" identical to the Immigration Rules. Serious offenders cannot make use of Exceptions 1 and 2, but s.117C(6) provides that they can resist deportation if

[743] *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192.
[744] *Secretary of State for the Home Department v JZ (Zambia)* [2016] EWCA Civ 116.
[745] *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550.
[746] *Forman (ss 117-C considerations – United States* [2015] UKUT 00412 (IAC).
[747] *Forman* para 17.
[748] *Forman* para 15.

there are "*very compelling circumstances, over and above those described in Exception 1 and 2"*. It was also confirmed that there is no "*exceptionality*" requirement, but cases in which the circumstances are sufficiently compelling to outweigh the public interest in deportation will be rare, and our domestic courts must have regard to the Strasbourg jurisprudence when applying the tests set out in domestic legislation.[749]

i. *Relevant criminal conduct*

6.24. In *Rexha*[750] the Upper Tribunal considered the scope of Section 117C (7) which provides that: *"(7)The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted*". The court had to consider whether the phrase "*has been sentenced*" in the context of s. 117C (6) and (7) limits consideration of the individual's criminal past immediately prior to prompting a deportation decision. It was held that the expression does not limit the public interest considerations in deporting a foreign offender to his/her most recent episode of criminal behaviour, and that all criminal convictions providing a reason for the deportation decision are within the scope of s.117C.[751] An examination of a decision by the appellate authority is required to identify which parts of the criminal's history provided the basis for the decision to deport. It was held that it would be a matter for the Secretary of State to, in each case, rely on a particular part of the criminal past of an individual in support of a deportation order, but there might be cases where some of the person's criminal past could not properly be relied upon[752]. It was confirmed that section 117C (7) requires the careful scrutiny of an individual's whole criminal record and of those offences which could provide a reason for a decision to deport. In the instant case, the court held that the Secretary of State was not precluded from relying on a conviction recorded in the man's criminal record in 2002[753]. Proper reliance can be placed on past convictions to prove someone to be a persistent offender.

ii. *Judicial interpretation of "unduly harsh"*

6.25. The Upper Tribunal had previously considered the phrase "unduly harsh" which appears in s.117B (5) in *MK*[754], and the Upper Tribunal's President McCloskey defined the phrase "unduly harsh" as follows:

> *"By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something*

[749] *NA (Pakistan*) para 11-39.
[750] *Rexha (S.117C: Earlier Offences)* [2016] UKUT 335 (IAC).
[751] *Rexha* para 14.
[752] *Rexha* para 15.
[753] *Rexha* para 18.
[754] *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), para 46.

severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

6.26. *MK* is a case where the appellant was given a five-year custodial sentence, and none of the exceptions provided in paragraph 399A, 399(a) and 399(b) applied. The public interest required the appellant's deportation unless there were very compelling circumstances, over and above those described in exceptions s.117C (4) and (5) of the 2002 Act. The appellant's circumstances were found to meet the highest threshold, very compelling circumstances, over and above those described in the statutory exceptions above, which outweighed the public interest in deportation under Article 8 taken together with section 55 of the 2009 Act. Precarious immigration status is a more significant factor in cases involving private and family life with qualifying partners than qualifying children. The appellant's genuine and subsisting parental relationship with qualifying children outweighed the public interest in deportation, not his relationship with his partner. Each case requires a fact-sensitive approach to be taken, and the facts of this case can assist an informed reader in understanding what would constitute very compelling circumstances, over and above those described in section 117C (4) and (5).

6.27. The appellant in *MK* accompanied his mother, a citizen of Sierra Leone, to the UK at the age of three in 1986. His mother's asylum claim was refused. They were granted indefinite leave to remain in 2000. The appellant received five years' imprisonment in 2002 for four counts of robbery, three counts of having an imitation firearm with intent to commit indictable offences, and handling the weapon. The Secretary of State decided to deport the appellant on 13 September 2013 relying on offences committed in 2002. In the intervening period, the appellant had established a family life, and was living with his partner and three-year-old child. He was also maintaining contact with his six-year-old child from a previous relationship, and was paying £150 to his child's mother. The First-tier Tribunal (FtT) allowed the appellant's appeal but the Upper Tribunal set aside the FtT's decision and granted the permission to appeal sought by the Secretary of State to consider it *de novo*.

6.28. Based on the above factual matrix of *MK,* the Upper Tribunal opined as follows:

"*…we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less than cruel.*"[755]

The tribunal took a structured approach in considering public interest considerations and confirmed that the burden of proof, on the civil standard of the balance of probabilities, rests on the appellant where a breach of the duty imposed by s.55[756] has been alleged.[757]

[755] *MK* para 46.
[756] Borders, Citizenship and Immigration Act 2009.
[757] Ss.117A to 117C of the 2002 Act.

An overlap between s.55[758] and ss.117B (6) and 117C (5) of Part 5A of the 2002 Act was identified in cases involving Article 8 proportionality assessment.

6.29. In the context of *MK*[759], section 117A requires the tribunal to assess the impact of deportation on each family member alleging a breach of private and family life protected by Article 8 of ECHR, and whether such a decision is contrary to section 6 of the Human Rights Act 1998 while considering the public interest question. The public interest question relates to whether interference with a person's right to respect for their private and family life is justified under Article 8 (2). In considering the public interest question, the tribunal has to have regard to the considerations, depending on the factual matrix of each case, specified in section 117B and section 117C. In the section 117B context, the appellant was found to be a person who could speak English and who was financially independent. Section 117B (4) requires that little weight should be attributed to private life or a relationship formed with a qualifying partner when the person is unlawfully present in the UK. Section 117B (4) consideration was not relevant because the appellant had indefinite leave to remain since September 2000. The court applied the same assessment to the requirement to give little weight to a private life established at the time of precarious immigration status. The appellant had indefinite leave to remain thirteen years prior to the deportation order, so his precarious immigration status had little relevance. The court found that it would not be "unduly harsh" for the appellant's partner under section 117C (5) because the phrase requires something beyond the usual consequences and there was no evidence before the tribunal to reach such a conclusion. However, in relation to the appellant's seven-year-old daughter and stepson of the same age, the court reached a different conclusion under section 117C (5) and found that the appellant's deportation would be unduly harsh. As was mentioned earlier, the appellant had received five years' imprisonment and the court had to apply the most rigorous test under section 117C (6), i.e. to show the existence of very compelling and exceptional circumstances, over and above those described in Exception 2 in section 117C (5). The court found the appellant's circumstances very compelling after having regard of all relevant factors and found that the public interest did not require the deportation of certain foreign criminals, and that Parliament has not decreed the blanket exile of the entire cohort.

6.30. The court considered that a difficult question was whether s.117C allowed any further room for balancing the relative seriousness of the offence beyond the difference between those sentenced to four years or more and those sentenced to less than that. The court confirmed that Exception 1, 117C (4) leaves no room for further balancing, that Exception 2 appears to be self-contained, 117C (5), and that there is nothing to suggest that 'unduly' refers back to the issue of relative seriousness of an offence introduced in s.117C (2). Thereafter, the 'unduly' harsh test introduced a higher hurdle than that of 'reasonableness' referred to in s.117B (6). It has been confirmed that 'unduly' implied that there was a level of harshness that was acceptable in the relevant context, and that the relevant context is the

[758] 2009 Act.

[759] *MK (Sierra Leone) v SSHD* [2015] UKUT 223 (IAC).

public interest in deporting 'foreign criminals', and so decision-makers do not require a balancing of relative levels of severity of the parent's offence, other than the inherent distinction already drawn regarding the length of sentence[760].

6.31. In *MAB*[761] the Upper Tribunal considered the meaning of the phrase of "*unduly harsh*" in paragraph 399 of the Immigration Rules and in section 117C (5), and held that the phrase does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual; it only requires an evaluation of the consequences and impact upon the individual concerned. The Court of Appeal considered and overruled *MAB* in *KMO.*[762] In *KMO* the issue was whether the seriousness of the offence was relevant when deciding if deportation was "*unduly harsh*" and and whether the Upper Tribunal in *MAB* was correct to find that the phrase did not import a balancing exercise between the public interest in deportation and the effect on the child and partner and that the focus should be exclusively on the effect of the innocent child and partner.

6.32. In *KMO* the court followed *LC (China)*[763] and reaffirmed the Immigration Rules as complete code for an Article 8 claim assessment resisting deportation. In considering the meaning of the phrase "*unduly harsh*" provided in section 117C (5) and paragraph 399 of the Immigration Rules, the court ruled that the phrase has the same meaning in a particular context. In that context, the statutory directions require considerations of (a) the public interest in the removal of foreign criminals, and (b) the need for an Article 8 proportionality assessment on the basis that the more serious the offence committed by a foreign criminal, the greater the public interest in their deportation. The relevant circumstances in the proportionality assessment include the deportee's criminal and immigration history, and in that context, the Upper Tribunal had wrongly decided *MAB*.

iii. *The relevance of parents' conduct*

6.33. In *Zoumbas,*[764] the Supreme Court summarised the seven principles to be borne in mind when considering the best interests of children to be as follows:

"*(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR; (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration; (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant; (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right*

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[760] *KO v SSHD* para 20-28.
[761] *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 (IAC).
[762] *KMO (section 117: Unduly Harsh: Nigeria)* [2016] EWCA Civ 617.
[763] *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ 1310.
[764] *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, para 10.

questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play; (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations; (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent".

6.34. *ZH (Tanzania*)[765] and *Zoumbas* were decided before the Immigration Act 2014 which inserted Part 5A into the 2002 Act. In *Kaur*[766] Mr Justice McCloskey, then President of the Tribunal, considered the impact of public interest considerations on the seven legal principles laid down by the Supreme Court in *Zoumbas,* and placed particular focus on the seventh principle. These seven principles were derived from three decisions that were part of domestic jurisprudence.[767] The Upper Tribunal observed that:

"*Part 5A of the 2002 Act reflects the ever increasing prescription in Article 8 cases which has become one of the stand out features of the modern immigration law, in both primary legislation and the Rules. It is evident that both Parliament and the executive have focused intensely on the Article 8 jurisprudence in their attempts to establish maximum codification. As the recent decision of the Supreme Court in Ali v Secretary of State for the Home Department [2016] UKSC 60 makes clear, the notion that a complete Article 8 code has been thus established is fallacious: per Lord Reed at [51-[53] and Lord Wilson at [80]. The significance in the present context of Part 5A of the 2002 Act and section 117B (6) in particular is that Parliament, in enacting the new regime, focused special attention on children and, in doing so, had the opportunity to make explicit provision for the weight to be attached to the parental immigration misconduct issue embedded in the seventh of the principles compromising the <u>Zoumbas</u> code: it did not do so"*[768].

6.35. The Upper Tribunal in *Kaur* held that an outcome for a family which has a prejudicial impact upon a child member is not incompatible with the seventh principle of the *Zoumbas* code, that a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent. Where a conclusion reached after the assessment of parental immigration misconduct as part of the balancing exercise requiring the departure of the entire family unit from the United Kingdom does not amount to blaming the children, it was held that the "*sins of the parents*" principle acknowledged by the Supreme Court is not disturbed by the public interest considerations introduced in Part 5A of the 2002 Act.

[765] *ZH (Tanzania)* [2011] UKSC 4.
[766] *Kaur (children's best interests / public interest interface)* [2017] UKUT 00014 (IAC).

[767] *ZH (Tanzania)* (above), *H v Lord Advocate* 2012 SC (UKSC) 308 and *H(H) v Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338.
[768] *Kaur (Children's best interests*) para 31.

6.36. The *KO*[769] was an appeal against *KMO* where the Supreme Court had to consider the treatment of qualifying children, defined as those who were British citizens, or who had lived continuously in the UK for seven years with their parents under Part 5A of the Nationality, Immigration and Asylum Act 2002. Before the Supreme Court, the complex proposition was whether s.117C allowed further room for balancing the relative seriousness of the offence other than the length of a custodial sentence, those who were sentenced to four years or more, and those who sentenced to less than four years. It was held that Exception 1 in s.117C (4) leaves no room for a further balancing exercise excluding the seriousness of the offence. It was observed that "*unduly*" in s.117C(5) does not refer back to the issue of relative seriousness mentioned in s.117C(2), but rather that the phrase "*unduly harsh*" introduces a higher hurdle than that of "*reasonableness*" under s.117B(6). The court held that the word "*unduly*" connotes a level of harshness that was acceptable in the relevant context, and the relevant context was the public interest in deporting foreign criminals. One would expect a degree of harshness going beyond what would necessarily be involved for any child faced with a parent's deportation. Such a decision did not require a balancing of the relative levels of severity of the parent's offence, other than was inherent in the distinction drawn regarding the length of their sentence[770].

6.37. In *KO*, the court further considered the relevance of parents' conduct in the context of paragraph 276ADE (1)(iv) of the immigration rules and s.117B(6) of the 2002 Act. It was held that paragraph 276ADE(1)(iv) only concerns the child's position, and it contains no requirement to have regard of a parent's criminality or misconduct as a balancing factor. Furthermore, s.117B(6) incorporated the substance of paragraph 276ADE(1)(iv) without material change, but in the context of the right of the parent to remain in the UK, and it was intended to have the same effect. The subsection makes no reference to the parent's conduct. In the context of section 117B(6) it was relevant to consider where the parents were expected to be, and it usually would be reasonable to expect their child to be with them. In that regard, the parents' records of immigration history and criminality could become indirectly material, if they led to their having to leave. Even on that hypothesis, it was only if it would not be reasonable for the child to leave that the provision could give the parents a right to remain.[771]

[769] *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53.
[770] *KO v SSHD* paras 20-23.
[771] *KO v SSHD* paras 16-18.

iv. *Other relevant considerations*

6.38. In *AA (Nigeria)*[772] the Court of Appeal stressed the need to follow clear and consistent authorities on sections 117C(5) and (6)[773]. The court followed *KO* and *HA*[774] as authoritative guidance on "*unduly harsh"*. It explained that the phrase connotes a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent, without an objectively measurable standard of severity, setting a more elevated standard than mere undesirability, but not as high as the "*very compelling circumstances*" test[775]. It further observed that someone could rely on s.117C exceptions but have to show features of their case, making their Article 8 claim very strong[776]. On behalf of the respondent, it was argued that rehabilitation could never be a factor of significant weight in considering "*very compelling circumstances"*. The court ruled that where a tribunal was able to assess the risk of reoffending, that was a factor that could carry some weight when considering very compelling circumstances, although it would not carry great weight on its own. This approach is consistent with *HA (Iraq)*.[777]

6.39. In *HA (Iraq)* the court considered an application of s.117C in conjoined appeals, and both appeals were remitted to the Upper Tribunal for different reasons. It was ruled that the harshness for the deportees involved of having to relocate to Iraq as a consequence of deportation, and the harshness to their family members of staying in the UK without them were relevant considerations under paragraph 399a of the Immigration Rules. The court stated that there was no indication of how primary consideration had been given to the children's best interests in the Upper Tribunal's decision, and it was not explained how the effective termination of their relationships with their fathers was outweighed by the public interest in his deportation[778]. It was held that the deportees' children's British citizenship should have been one of the weighty and significant factors in the UT proportionality assessment. The Upper Tribunal also failed to have regard to country guidance cases. It was made clear that rehabilitation while in prison was not generally a factor carrying great weight, and the court applied *Danso.*[779]

6.40. In *Wilson*[780] the Upper Tribunal has recently explained the scope of the phrase "*caused serious harm*" used in s.117D (2)(b)(ii) of the 2002 Act, and ruled that it was for the judge

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[772] *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296.
[773] *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, *R. (on the application of Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42, *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 and *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, [2020].
[774] *HA (Iraq) v SSHD* [2020] EWCA Civ 1176.
[775] *KO (Nigeria)* paras 10-12.
[776] *KO (Nigeria)* paras 13-14.
[777] *HA (Iraq) v SSHD* [2020] EWCA Civ 1176.
[778] *HA (Iraq) v SSHD* paras 74-78, 80-84, 90-96, 161.
[779] *Danso v Secretary of State for the Home Department* [2015] EWCA Civ 596.
[780] *Wilson (NIAA Part 5A; deportation decisions)* [2020] UKUT 00350(IAC).

to decide whether an offence that has allegedly caused serious harm falls within the scope of 117D(2)(c) (ii). There will be no error of law in the judge's conclusion, provided the judge has considered all the relevant factors bearing on that question; has not had regard to irrelevant factors; and has not reached a perverse decision. In determining the relevant or irrelevant factors it should be borne in mind that a) the Secretary of State's view of whether the offence has caused serious harm is a starting point; b) the sentencing remarks should be carefully considered, not least in what may be said about the offence having caused "*serious harm*" as categorised in the Sentencing Council Guidelines, and a victim's statement adduced in the criminal proceedings should also be considered; c) it is for the Secretary of State to prove that the offence has caused serious harm, but he/she does not need to adduce evidence from the victim before the First-tier Tribunal; d) the appellant's own evidence as to the seriousness of the offence should be treated with caution; e) the scope of serious may extend to physical, emotional, or economic harm, and does not need to be limited to an individual and the mere potential for harm is irrelevant; and f) the fact that a particular type of offence contributes to a serious or widespread problem is not sufficient, and there must be some evidence showing that the actual offence has caused serious harm.

Section 117B - interpretations of "precarious" and "little weight"

6.41. In *Rhuppiah*[781] the Supreme Court interpreted s.117B(5) of the Nationality, Immigration and Asylum Act 2002 and confirmed the bright-line interpretation of the Upper Tribunal in AM (s.117B: Malawi)[782] which held that anyone except British citizens who was present in the UK and who had leave to reside there other than indefinite leave to remain and enter, had a precarious immigration status. That implies that the claimant's private life, which was predominantly established in the UK when she had leave as a student, had been established at a time when her immigration status was precarious[783].

6.42. In *GM (Sri Lanka)*[784] the Court of Appeal considered the scope and application of s.117B (4) and (5) which provides that little weight should be given to the private life or relationships formed with a qualifying partner by a person who was in the UK without immigration status, or to private life where a person's status was precarious. It was held that s.117B(4) did not apply when family life was created during a precarious but lawful residence. So, the difference between unlawful and precarious immigration status in the context of s.117B (4) must be borne in mind. Section 117B(5) is relevant to private life, and there is no mention of unlawful immigration status. The court opined that the consideration of precarious immigration status is applicable only in the private life context of s.117B (5). This means that the public interest provision under s.117B (5) does not apply when family life has been created during a precarious but lawful residence. In doing so, the court followed *Rhuppiah*[785].

[781] *Rhuppiah v SSHD* [2018] UKSC 58.
[782] *AM (S. 117B: Malawi)* [2015] UKUT 260 (IAC).
[783] *Rhuppiah* paras 24, 32, 34, 37, 42-45, 48.
[784] *GM (Sri Lanka) v SSHD* [2019] EWCA Civ 1630.
[785] *GM (Sri Lanka)* paras 33-40, 44, 51-53, 55.

6.43. In *AB (Jamaica)*[786] the court considered the application of s.117B (6)(b) and rejected the Secretary of State's submission to construe that s.117B(6)(b) only applies where a tribunal finds that, based on particular facts, the child would be expected to leave the UK if the person concerned was removed by applying JG (S.117B(6): "Reasonable to Leave" UK (Rev 1)[787]. It was held that the 2002 Act required to be addressed whether it was reasonable to expect the child to leave the UK. Even if the answer to that question is obvious because it is common ground that the child would not be expected to leave the UK, that still does not mean that the question does not have to be asked. It merely means that the answer is "no". In doing so, the court approved the ratio of SR (Subsisting Parental Relationship - 117B (6) (Pakistan).[788] In SR, the Upper Tribunal had concluded that the question of whether or not it would be reasonable to expect a child to leave the UK, within the purview of s.117B(6) of the 2002 Act, does not necessarily require a consideration of whether the child will in fact or practice leave the UK. Rather, it poses a straightforward question: would it be reasonable "to expect" the child to leave the UK?[789]

6.44. Making the argument in an Article 8 claim that there is no public interest in removal because entry clearance will be granted after leaving the UK requires, in all cases, addressing the relevant considerations provided in Part 5A of the 2002 Act. In particular, s.117B(1) which provides that the maintenance of effective immigration controls is in public interest, and reliance on *Chikwamba*[790] does not avert the need to do so[791]. Section 117B (6)(b) of the 2002 Act requires the tribunal to assume that the child in question will leave the UK[792]. However, once that assumption has been made, the court or tribunal must move from the hypothetical to the real life scenario[793] because the length of time a child is likely to be outside the UK is part of the real world factual circumstances in which a child will find him or herself, and is relevant to decide, for the purpose of section 117B(6)(b), whether it would be unreasonable to expect the child to leave the UK[794]. In terms of Article 20 TFEU, the assessment of whether a child, as a consequence of forced removal from the EU territory, will be deprived of his or her genuine enjoyment of rights in accordance with *Ruiz Zambrano*[795] must be assessed by considering the actual facts rather than the theoretical possibilities[796].

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[786] *Secretary of State for the Home Department v AB (Jamaica)* [2019] EWCA Civ 661.
[787] *JG (S.117B (6): "Reasonable to Leave" UK (Rev 1)* [2019] UKUT 72 (IAC).
[788] [2018] UKUT 334 (IAC); see paras 61-66, 72-75, 103.
[789] *SR* headnote 2.
[790] *Chikwamba v SSHD* [2008] UKHL 40.
[791] *Younas (section 117B(6)(b); Chikwamba; Zambrano*) [2020] UKUT 00129 (IAC).
[792] *Secretary of State for the Home Department v AB (Jamaica) & Anor* [2019] EWCA Civ 661 and *JG (s 117B(6): "reasonable to leave" UK) Turkey* [2019] UKUT 00072 (IAC).
[793] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, paragraph 19 of the judgement.
[794] *Younas (section 117B(6)(b); Chikwamba; Zambrano*) [2020] UKUT 00129 (IAC).
[795] *Ruiz Zambrano v Office national de l'emploi (Case C-34/09).*
[796] *Younas* [2020] UKUT 00129 (IAC).

6.45. For the purpose of s.117B(6), it is unlikely but not impossible that a non-biological parent caring for a child would take on a parent's role when the biological parents continue to be involved in the child's life as parents[797]. The existence of such a parental relationship would depend on all the circumstances of the case. Whether a very young child who has not yet started school or who has only recently done so could accompany their parents abroad is a relevant consideration in the context of Article 8 and s.117B (6). The Upper Tribunal held that it would be difficult to establish an infringement of Article 8's right to private and family life where the child is too young and has not started school or has only started full-time education recently. However, it was acknowledged that position might change over time and that assessment of the child's best interests must adopt a wider focus of which formal education should be considered an important part[798].

6.46. In *Treebhawon*[799] the Upper Tribunal formulated and considered the issue that:

> "*in a case where a Court or Tribunal decides that a person who is not liable to deportation has a genuine and subsisting parental relationship with a qualifying child, as defined in Part 5A of the Nationality, Immigration and Asylum Act 2002, as amended, and it would not be reasonable to expect such child to leave the United Kingdom, with the result that the two conditions enshrined in section 117B(6) are satisfied, is this determinative of the "public interest question", namely the issue of proportionality under Article 8(2) ECHR?."*

It was held that when properly construed, sections 117B (4) and (5) are not parliamentary statements of the public interest. They are, rather, instructions to the courts and tribunals to be applied in the balancing exercise. So, where they arise, the court or tribunal must give little weight, not simply have regard of these factors.

6.47. In *Treebhawon*, the tribunal found no correlation between sections 117B (1), (2) (3) and s.117B (6). It was held that s.117B (6) is not expressed to be *"without prejudice to*" or "*subject to*"; rather, it is formulated in unqualified terms which imply that where conditions set in the three siblings' provisions are satisfied, then the public interest does not require the removal of the person. Section 117B (6) is formulated to protect children, the most vulnerable cohort of society, and it is a free-standing provision to keep children within a stable and secure family unit. The court concluded that where the three conditions set in s.117B (6) are satisfied then the public interest identified in s. 117B(1)-(3) do not apply, and also the "*little weight*" provisions of s.117B (4)-(5) are of no application.[800] *Miah*[801]

[797] *Ortega (remittal; bias; parental relationship)* [2018] UKUT 00298 (IAC).
[798] *MT and ET (child's best interests; ex tempore pilot) Nigeria* [2018] UKUT 00088(IAC).
[799] *Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test)* [2017] UKUT 00013 (IAC), para 14.

[800] *Treebhawon* paras 20-21.
[801] *Miah (section 117B NIAA 2002 – children)* [2016] UKUT 00131(IAC), see head notes.

was another case where McCloskey J considered the scope of 117B and opined that the provision made no distinction between child and adult migrants. Thus, the factors set out in s.117B (1)–(5) apply to all regardless of age, and other relevant factors must also be weighed in the balance. The instructions to judges in s.117B (4) and (5) do not amount to a constitutionally impermissible encroachment on the independent adjudicative functions of the judiciary[802].

6.48. In *RK*[803]the Upper Tribunal opined that an individual does not need to have *"parental responsibility"* in law to claim a parental relationship. Furthermore, whether one has stepped into a parent's shoes would depend on the individual's circumstances. An actual and *de facto* step-parent may exist in split families where the former relationships or marriages between parents have broken down. It was made clear that relationships between a child and a professional, family friend, or voluntary carer are not "*parental relationships*" for the purpose of s.117B (6).

Conclusion

6.49. The UK's courts did not endorse the government's view that the Immigration Rules introduced on 9 July 2012 alone were conclusive of Article 8 assessment and maintained the two-stage assessment approach. In that context, the government introduced primary legislation to reinforce the Immigration Rules by inserting Part 5A into the 2002 Act. In that way, the Immigration Rules and primary legislation have become prescriptive of Article 8 assessment. The government and Parliament have attempted to codify the Article 8 assessment process, but the codification is still not exhaustive as it does not cover every conceivable aspect of Article 8 proportionality assessment[804]. The then-Home Secretary, Theresa May's frustration was obvious in her speech quoted earlier in this chapter. After the formation of the coalition government in 2010 immigration had become a political issue, and for the new government it was not only a matter of managing migration. There was tension between the judiciary and the government on the practical application of Article 8. The government responded by introducing statutory instructions to courts and tribunals.

6.50. The instructions to the courts and tribunals included in Part 5A of the 2002 Act were intended to guide judicial discretion as to how Article 8 should be assessed. The legislative regime concerning Article 8 considerations has since become more complex. There has been an extensive judicial interpretation of Part 5A of the 2002 Act in the recent past. A close analysis of the judicial interpretation of Part 5A and the Immigration Rules reveals no significant shift in the assessment of Article 8 claims in domestic jurisprudence. There has been considerable litigation related to the interpretation of Part 5A. The public interest

[802] *Deelah and others (section 117B – ambit)* [2015] UKUT 00515 (IAC).

[803] *R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship") IJR* [2016] UKUT 00031 (IAC).

[804] *Ali v Secretary of State for the Home Department* [2016] UKSC 60.

question defined in Section 117A (3) is broad in scope and refers to all qualifications provided in Article 8 (2). Section 117B mainly reflects the qualifications stated in Article 8 (2), but the wording of the section tries to extend the scope of the qualifications. In the deportation context, there have been extensive interpretations of Section 117C. There is no significant change in the assessment process after comparing the domestic Article 8 jurisprudence before July 2012 with the jurisprudence from July 2012 onwards. The next chapter examines the usefulness of the existing legislative regime and includes summary conclusions.

Chapter 7: Conclusions

7. Introduction

7.1 Chapter 2 of this thesis discussed the historical developments in Immigration and Nationality law. Before the retreat of the British Empire, nationality law was generous, and Commonwealth citizens had UK residence rights. The Status of Aliens Act 1914 applied across the empire, and the concept of "subject" was broad and inclusive. The term "*British subject*" became less common after the retreat of the empire. The common badge of nationality eroded in value after the self-governing dominions[805] introduced their own nationality laws. Geo-political changes were inevitable consequences when independent nation states started to emerge from the former empire, and there were ideological and cultural differences. For these reasons, native discomfort in the UK against migration from Caribbean and Asian countries attracted political attention in the 1960s because Commonwealth citizens had retained the right of abode in the UK. The independence of the East African nations triggered an influx of migrants in 1968, and the UK government promptly introduced the Commonwealth Immigrants Act 1968, which made Commonwealth citizens' right to enter and reside subject to an ancestral link. Later Acts of Parliament concerning nationality law continued to tighten immigration controls, and nationality law was among those valuable tools. The Immigration Act 1971 further restricted the scope of the right of abode and introduced five categories of people who had the right of abode. These categories were mentioned in Chapter 2. The British Nationality Act 1981 reduced these five categories to three, and the new scheme adopted in the Act was based on the strength of the connection to the UK. The 1981 Act abolished the right of citizenship by birth, and children born in the UK will only acquire citizenship by birth if one of their parents is a British citizen or settled in the UK prior to the child's birth. This was a significant shift from before, when all persons born within the dominions of the Crown of England were natural-born subjects. Thus, nationality law continued to reflect an exclusive approach. In the recent past, an exception to the exclusive approach was the introduction of a generous new immigration route for about 5.4 million Hong Kong residents in response to the Chinese government's national security law. Since the 1970s, primary and secondary legislation has been used for effective immigration control, as will be discussed later in this chapter.

7.2 Immigration has caused resentment for various reasons. For centuries, immigration legislation was focused on controlling aliens' migration, and the Aliens Order 1953 was the last legislation to hinder the migration of non-Commonwealth citizens. The Immigration Act 1971 repealed the Aliens Order 1953, before the Treaty of Rome and the Immigration Act 1971 came into force on 1 January 1973. The Treaty of Rome provided free movement rights to European Economic Community (EEC) member states. The 1971 Act placed EEC

[805] Australia, Canada, and New Zealand.

nationals in a better position than many Commonwealth citizens. There were various motives behind the policy shift, including public opinion, decolonisation, a lower perceived need for foreign workers, and cultural concerns.

The legal status of the Immigration Rules and the relevance of Strasbourg jurisprudence

7.6. This thesis focuses on Article 8 of ECHR in the immigration context, and the Immigration Rules were amended in 2012 to include Article 8 considerations. Thus, it is important to remind ourselves of the relevance of the rules. The Immigration Act 1971 prescribes what the immigration rules must contain.[806] We know that the Immigration Rules are detailed statements by a minister of the Crown about how the Crown proposes to exercise its executive power to control immigration[807]. They have the status of quasi-law[808]. Neither section 1 (4) nor 3(2) purports to be the source of the power to make Immigration Rules. The 1971 Act regulates rather than authorises the making and changing of the rules.[809] So, the Rules are not statutory in origin[810]. But, the government has unsuccessfully attempted to equate the rules with primary legislation by debating a motion in the House of Commons. That strategy did not work, and the court suggested the need for primary legislation to achieve the government's stated objective. Section 6 (1) of the Human Rights Act 1998 makes it unlawful for public authorities to act in a way which is incompatible with a right protected by the ECHR, which means the Rules are subject to the Human Rights Act 1998. The Immigration Rules are immensely important in primary decision-making, but have been criticised[811] for their complexity, poor drafting, and over-prescriptive. The Law Commission Report[812] has made detailed recommendations to simplify the Rules. The Rules remain a very important source of law in controlling migration, and the Article 8 considerations are a part of the Rules. However, the Rules alone are not conclusive of Article 8 assessment, and the residual discretion allowing considerations of particular circumstances are what make them Article 8 compliant.

7.7. The Immigration Rules require the application of the proportionality test in accordance with Strasbourg jurisprudence.[813] In *Hesham Ali*[814] the UK Supreme Court considered *MF (Nigeria)* [2014] 1 WLR 544 where the Court of Appeal had described the Immigration Rules introduced on 9 July 2012 as "*a complete code*" for Article 8 claims on the basis that the outcome should be the same irrespective of whether the proportionality assessment was carried out within or outside the Rules introduced on 9 July 2012, and it was a sterile

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[806] Section 1(4) of the Immigration Act 1971.
[807] *Odelola v Secretary of State for the Home Department* [2009] UKHL. 25.
[808] *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719.
[809] *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719.
[810] *Odelola v SSHD* para 45.
[811] Simplification of the Immigration Rules: Report, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf
[812] Simplification of the Immigration Rules: Report, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf
[813] *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, para 51.
[814] Ibid fn 7, paras 44 and 55.

question whether it was required by the rules or by the general law.[815] In *Hesham Ali*, the Supreme Court observed that the Court of Appeal's concept of "a complete code" that the Rules, and the Rules alone, govern the appellate decision-making had been misinterpreted in some later cases[816]. In *Unuane v UK*[817] the ECtHR considered domestic interpretations of the Immigration Rules which had been in place since 9 July 2012 together with the public interest considerations provided in Part 5A of the 2002 Act and concluded that the domestic immigration rules do not preclude the Courts and tribunals from carrying out proportionality assessment in compliance with Strasbourg case law[818]. The Immigration Rules prescriptive of the proportionality assessment are not conclusive, and the relevance of domestic and Strasbourg jurisprudence on Article 8 has not diminished. The Rules have not simplified the assessment process of Article 8 claims, and a fact-sensitive approach is still required. The primary assessment process of Article 8 claims remains the same under the Rules, except that it is more difficult to navigate the complex cross-referencing provided in decision letters.

Immigration control: EEA citizens and refugees

7.8. The policy of an ever-closer union with mainland Europe continued until the divisive Brexit referendum held on 23 June 2016. UK citizens' free movement rights ended after the UK's exit from the EU on 31 January 2020. Since the withdrawal, EEA/EU citizens are subject to immigration control like non-EEA/EU nationals. This change takes EEA citizens back to the 1971 position, and now the same immigration control applies to the Commonwealth, the EEA, and all other migrants. The current immigration control is the most robust since the retreat from empire.

7.9. In the early 1990s, the focus of immigration control was shifted to refugees. Chapter 3 discussed the various statutory measures targeting refugees. Strict visa controls on Commonwealth citizens and sanctions against transport carriers were imposed. These measures were part of the pan-European exclusionary policy to control refugee migration from the poorer countries of the world. The instability in North African countries[819] across the Mediterranean Sea has trigged an influx of migrants in recent years. Like the UK, other European nations are considering further measures to control refugee migration. The recent Nationality and Borders Bill 2021 has completed all stages in the House of Commons[820]. Part 2 of the Bill makes detailed provisions regarding refugees and their family members. Part 3 proposes new immigration offences. The objective of the Bill is to make the asylum system more efficient and workable. The government's stance is that new legislation is

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[815] *MF (Nigeria)* [2014] 1 WLR 544, para 45.
[816] *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ para 17; *AJ (Angola) v Secretary of State for the Home Department* [2014] EWCA Civ 1636, para 39.
[817] (Application no. 80343/17).
[818] *Unuane v UK* (Application no. 80343/17) paras 79-90. and in particular para 81.
[819] https://www.gov.uk/government/consultations/new-plan-for-immigration/new-plan-for-immigration-policy-statement-accessible (see chart provided- Accessed on 25/02/2022).
[820] https://bills.parliament.uk/publications/44307/documents/1132 (Accessed on 25/02/2022).

required to deal with emerging global migration challenges. However, various bodies have expressed reservations regarding the legality of the proposed legislation[821].

Immigration control in the UK and the ECHR

7.10. The UK is a state party to the European Convention of Human Rights (ECHR). The principal objectives of the Convention are to maintain and further realise human rights and fundamental freedoms in order to ensure the effective recognition and observance of the rights described in the Universal Declaration of Human Rights 1948. The UK accepted the right of individual petition in 1966 and the compulsory jurisdiction of the ECtHR on 1 November 1998. These developments have been discussed in Chapters 2 and 3. Successive governments in the UK have seen the rights guaranteed by the ECHR as part of the problem in controlling migration. Since 2012, the Conservative-led coalition government took various procedural and legal measures restricting the access to, and scope of, Article 8 family and private life claims in the immigration context. The introduction of Immigration Rules with Article 8 considerations and the Immigration Act 2014 are the main examples of how the government dealt with what they saw as the family life problem.

The Human Rights Act 1998 and the ECHR

7.11. The UK took a dualist approach to international law by enacting the Human Rights Act 1998 and enforcing these rights in its domestic courts. The Act's purpose was to make these rights more accessible to the British people. The 1998 Act does this in several ways, and the details have been discussed in Chapters 3 and 4. The Act imposes an interpretative obligation on the courts to interpret all legislation compatibly with the Convention; where it is not possible to do so, the superior courts may make a declaration of incompatibility. The Convention rights are frequently invoked in asylum and human rights claims to resist administrative removal and deportation. Thus, the ECHR has significant relevance in shaping immigration law and policy. The primary legislation and the Rules now include specific directions on how Article 8 of the Convention should be taken into account[822]. The Home Office as a public authority is responsible for maintaining effective immigration control, and has an obligation to act compatibly with Convention rights. The Human Rights Act 1998 has had a profound impact in shaping present immigration control. Furthermore, the UK's courts have developed a more nuanced approach to the mirror principle. Chapter 3 discussed the most recent jurisprudence related to that principle.

Post-Human Rights Act 1998 legislative measures

7.12. The UK government passed fourteen Acts from 1999 to 2016 covering various aspects of asylum and immigration. These statutory developments have curtailed the scope of

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[821] https://www.unhcr.org/uk/uk-immigration-and-asylum-plans-some-questions-answered-by-unhcr.html (accessed on 25.02.2022); https://binghamcentre.biicl.org/publications (Accessed on 25.02.2022).
[822] See HC 194 and Part 5A of the Immigration Act 2014.

appeal rights, which are now limited to human rights and protection claims, subject to certification. A detailed discussion on the impact of certification has been presented in Chapter 3. The Immigration and Asylum Act 1999 introduced provisions to regulate marriages, entry, residence, and the removal of foreign spouses, illegal entrants, and overstayers. The primary objective of the provisions mentioned above was to minimise the abuse[823] of family migration where foreign spouses contract sham marriages to gain an immigration advantage[824]. These provisions arguably created an unnecessarily hostile environment for family migrants[825].

7.13. The UK government abolished all the appeal rights of family visitors with effect from 25 June 2013[826], further curtailing the scope of family-based migration. At present there is no right of appeal against the refusal of a family visit application. At the same time, there is no evidence of an improvement in primary decision-making. There is a growing trend of Entry Clearance Officers withdrawing their refusal after the service of pre-action letters in Scotland and issuing another refusal with identical reasoning – a practice which arguably amounts to abuse of process. In Scotland, applicants can access legal aid for judicial review, subject to satisfying means and merits requirements, while in other UK's jurisdictions access to legal aid is limited. The Court of Appeal has ruled that family visit refusals do not engage Article 8, and appeals to the Immigration Tribunals on the basis of human right claim refusal should not be accepted for listing.[827] The government withdrew family visitors appeals to save on cost, and the other reason was the embarrassingly high success rate of appeals. The present thesis's discussions are focused on the provisions impacting on establishing and exercising the right of private and family life under Article 8 of the ECHR.

The significance of the ECtHR guiding principles in domestic jurisprudence

7.14. Chapter 4 discussed the ECtHR's guiding principles and their application in general. *Boultif,*[828] *Uner*[829]and *Maslov*[830] provided guiding principles that have helped in developing clear and consistent jurisprudence on Article 8 proportionality assessment.[831]

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[823] Explanatory Notes: Immigration Act 2014 Chapter 22, at p.6; The implementation of the 2014 'hostile environment' provisions for tackling sham marriage. August to September 2016: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577880/Sham_Marriage_report.pdf last accessed on 5 July 2021.
[824] Sections 24 and 24A of the Immigration and Asylum Act 1999.
[825] See report: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577880/Sham_Marriage_report.pdf
[826] S.52 of the Crime and Courts Act 2013 amending s. 88A of the Nationality, Immigration and Asylum Act 2002; Crime and Courts Act 2013 (Commencement No.1 and Transitional and Savings Provisions) Order 2013, SI 2013/1042.
[827] *Secretary of State for the Home Department v Onuorah* [2017] EWCA Civ 1757; *Entry Clearance Officer, Sierra Leone v Kopoi* [2017] EWCA Civ 1511
[828] *Boultif v Switzerland* (2001) 33 EHRR 1179, para 48.
[829] *Uner v Netherlands* (Application No.46410/99), (2006) 45 EHRR 421, para 58.
[830] *Maslov v Austria 9Application No*. 1638/03 (2007) paras 71-72.
[831] *Amrollahi v Denmark* (56811/00) (11 July 2002); *Yildez v Austria* (2003) 36 EHRR 2; *Mokrani v France* (52206/99) (2003); *Udeh v Switzerland* (2013) Application 12020/09; *Jeunesse v The Netherlands* (Application No. 12738/10 (03 October 2014)

Section 2 (1) of the Human Rights Act 1998 requires courts and tribunals to have regard for ECtHR jurisprudence. Section 6 of the 1998 Act provides that it is unlawful for a public authority to act incompatibly with a Convention right. The ECtHR's guiding principles are part of the UK's domestic jurisprudence and are frequently cited in the judgements of the senior judiciary[832]. The Human Rights Act 1998 came into force in October 2000, marking the beginning of an era of a narrower approach towards ECHR rights in domestic jurisprudence, which is discussed in the following paragraphs.

An era of a narrow approach towards Article 8 in UK domestic courts from 2001 to 2008

7.15. Chapter 4 discussed *Mahmood*[833] where the Court of Appeal considered a decision refusing an Article 8 family life claim involving a British spouse and a minor British child. The applicant was an illegal entrant, and the immigration rules in place did not permit in country application under the spouse settlement route. The Secretary of State took the view that any concerns there may be about a family's welfare are outweighed by the public interest in maintaining an effective system of immigration control[834]. The Court of Appeal endorsed the Secretary of State's assessment of the Article 8 family life claim and provided the famous six-point guidance in paragraph 55 of the judgement. The court took the view that some applicants should not get preferential treatment by skipping the queue, and absent of exceptional circumstances, an applicant has to return abroad to obtain entry clearance when required to do so under the Immigration Rules. Mahmood's Court of Appeal guidance has been reproduced above in Chapter 4. The court's verdict in Mahmood created the general presumption that in the absence of "insurmountable obstacles" in establishing or continuing family life outside the United Kingdom, the removal or exclusion of a family member would not breach Article 8. *Mahmood* marked the beginning of a departure from the Strasbourg jurisprudence, a direction which was followed in subsequent decisions of domestic courts[835], and the difference in approach between the UK's domestic courts and Strasbourg became evident in the Court of Appeal's judgement in *Huang*[836] where Laws LJ stated: "*Boultif and Sen, however, provide in our judgment an insufficient basis for concluding without more that the adjudicator's task in our municipal jurisdiction is to conduct a full merits appeal. The judgments contain no patent reasoning to support that approach, although the court adopted it in practice.*" Then, *Huang*[837] reinforced *Mahmood's* approach by holding that there will be no breach of Article 8 if a decision is made in accordance with the Immigration Rules unless there are truly exceptional

[832] *Hesham Ali (Iraq) v SSHD* [2016] UKSC 60, paras 26-33, 35; *Huang v SSHD* [2007] UKHL 11, para 7; *Razgar v SSHD* [2004] UKHL 27, paras 3-6, 9.
[833] *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] WLR 840.
[834] *Mahmood v SSHD* [2001] WLR 840, para 40.
[835] *R (on application of Ekinci) v Secretary of State for the Home Department* [2003] EWCA Civ 765; *Janjanin and Musanovic v Secretary of State for the Home Department* [2004] EWCA Civ 448; *Huang v SSHD* [2005] EWCA Civ 105; *Secretary of State for the Home Department v G (Somalia)* [2003] UKIAT 175; *Secretary of State for the Home Department v Vujnovic* [2003] EWCA Civ 1843; *Kugathas (Navaratnam) v Immigration Appeal Tribunal* [2003] EWCA Civ 31.
[836] *Huang v SSHD* [2005] EWCA Civ 105, para 48.
[837] *Huang v SSHD* [2005] EWCA Civ 105.

circumstances. In *Mahmood*[838] and *Huang*[839] the approach is visible in the Immigration Rules introduced by the Secretary of State on 9 July 2012, seeking to reintroduce the conservative approach ended by the successive corrective decisions to be discussed later in this part.

Corrective decisions and their significance

7.16. *Huang*[840], *Chikwamba*[841], *EB (Kosovo)*[842], *ZH (Tanzania)*[843], and *Quila*[844] were corrective decisions. The legal analysis of these corrective decisions is given above in Chapter 4. Here, the focus is on the significance of these decisions. The House of Lords decided *Huang* nearly fifteen months before *Chikwamba*. Among other things, *Huang*[845] rejected the proposition that the Immigration Rules, in the generality of cases, should be deemed to have struck an appropriate balance.

7.17. The House of Lords disapproved *Mahmood* in *Chikwamba*[846]. Judgements in the cases of *EB (Kosovo)* and *Chikwamba* were delivered on the same day, 25 June 2008. *Chikwamba* refers to *EB (Kosovo)* at paragraph 42. In *EB (Kosovo)* the House of Lords, contrary to *Mahmood,* had regard of Strasbourg guiding principles[847] and took a different approach to the proportionality assessment of Article 8 claims. Lord Bingham stated that the appellate authority must make its own judgement by taking a fact-sensitive approach having regard of Strasburg jurisprudence in terms of assessing the relevance of facts, and that the removal of a spouse or a parent with a genuine bond with the other spouse or child who cannot reasonably be expected to accompany the removed spouse or parent would be disproportionate[848].This approach is akin to that of Strasbourg, and is corrective in effect and broader in scope than *Mahmood. EB (Kosovo)* is one of the important judgements reversing the UK domestic courts' conservative approach towards Article 8 claims, and it remains good law. Present immigration rules and statutory directions focus on insurmountable obstacles, exceptional circumstances, and the consideration of precarious or unlawful immigration status. But, there is no change to the basic analysis contemplated by Lord Bingham.

7.18. *Quila*[849] was a challenge to paragraph 277 of the Immigration Rule increasing the minimum age to contract marriage for foreign spouses from 18 to 21 years. Chapter 5 gave a judicial analysis of *Quila*. Thus, contrary to the age of consent in the UK, a British person

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[838] *Mahmood v SSHD* [2001] WLR 840.
[839] *Huang v SSHD* [2005] EWCA Civ 105.
[840] *Huang v Secretary of State for the Home Department* [2007] UKHL 11.
[841] *R (on application of Chikwamba) v SSHD* [2008] UKHL 40.
[842] *EB (Kosovo) v SSHD* [2008] UKHL 41.
[843] *ZH (Tanzania) v SSHD* [2011] UKSC 4.
[844] *R (on application of Aguilar Quila) v SSHD* [2011] UKSC 45.
[845] *Huang v SSHD* [2008] UKHL 11, Paras 6 and 17.
[846] See Paras 40-42, 46 of the judgement.
[847] *EB (Kosovo) v SSHD* [2008] UKHL 41, paras 7,15.
[848] *EB (Kosovo)* para 12.
[849] *R (on application of Aguilar Quila) v SSHD* [2011] UKSC 45.

has to be at least 21 years old to sponsor a foreign national spouse. The government's aim was to stop forced marriages, and the reasons were published in a consultation paper justifying the need for the measure[850]. Lord Wilson gave the lead judgement and regarded the measure as colossal interference with the rights of the spouse to respect for their family life.[851] The court took a view[852] that there was no clear and consistent ECtHR jurisprudence on the given proposition, and declined to follow *Abdulaziz*[853] because in that case, the positive obligation was asserted. Later, the ECtHR recognised that the distinction between the positive and negative obligation should not, in this context, give a different outcome. The court further realised that the area of engagement of Article 8 had increased, and identified the legitimate aim to be the protection of the rights and freedoms of others, in particular those who might otherwise be forced into marriage, and recognised that the measure was in accordance with the law. However, the court did not accept that the measure was necessary in a democratic society, and for that reason, the majority refused the Secretary of State's appeal. Lord Brown[854] gave a well-reasoned dissenting judgement.

7.19. *Quila* was the continuation of an open approach towards the scope of Article 8, and it was a corrective decision-taking case-sensitive approach to the proportionality assessment. The court's careful analysis of Rule 277 leaves the possibility that on occasions, a well-reasoned and legitimate measure could be unjustified and disproportionate due to inflexibility.

7.20. *ZH (Tanzania*[855]*)* was an appeal against the Court of Appeal decision agreeing with the Asylum and Immigration Tribunal that both the appellant's British children could reasonably be expected to follow her on removal to Tanzania by the Secretary of State, the Respondent. The Supreme Court allowed the appeal. The court interpreted the best interests of the child as "broadly meant the well-being of the child"[856]. The well-being of the child requires consideration of, among other factors, whether it would be reasonable to expect the child to live in another country. It was ruled that the nationality of the child is not a trump card, nor should the intrinsic importance of citizenship be played down. The court held that the best interests of the child must be a primary consideration, which meant that it had to be considered first. It was ruled that the child's own views are relevant in assessing the best interests[857].

7.21. *Mahmood* predates the Border, Immigration and Citizenship Act 2009, so section 55 of that Act did not exist at that time. However, the UK ratified the UN Convention on the Rights of the Child on 16 December 1991, and it came into force on 15 January 1992. Article 3 of the Convention provides that: *"In all actions concerning children, whether*

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[850] See paras 10, 27, 28-29 of *Quila.*
[851] *Quila* para 32.
[852] *Quila* para 43.
[853] *Abdulaziz v United Kingdom* (1985) 7 EHRR 471.
[854] *Quila* 81-97.
[855] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.
[856] *ZH (Tanzania) v SSHD* [2011] UKSC 4.
[857] *ZH (Tanzania) v SSHD* [2011], para 34-37.

undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". In Mahmood, two British children were part of the family unit and the court considered their Article 8 claim. The disparity in weighing the best interests of children as a primary consideration is obvious compared with the judicial approach taken in *Mahmood* with *ZH (Tanzania)*. *ZH (Tanzania)* has greater significance as a corrective decision for cases involving children.

Impact of corrective decisions on domestic Article 8 jurisprudence

7.22. The cumulative impact of these corrective decisions was that the UK's domestic courts started to undertake case-sensitive proportionality assessments. In my view, these decisions did not curtail the scope of the margin of appreciation available to the states parties in terms of assessing their obligations under qualified rights, in the context of Article 8 of the Convention. In these decisions, the interpretations of exceptional circumstances and insurmountable obstacles are consistent with the Strasbourg jurisprudence. As a whole, these decisions assisted in developing a clear and consistent Article 8 UK jurisprudence.

7.23. Chapters 4 and 5 discussed the inclusion of Article 8 considerations within the Immigration Rules. The judicial response to these Rules was in a particular context, and a summary background will assist the reader in understanding the judicial interpretation of the Rules.

The government's approach to Article 8

7.24. The UK government felt the need to include Article 8 assessment considerations in the Immigration Rules. The government's intention was to make the Immigration Rules alone conclusive of Article 8 assessment.[858] In the above context, the Statement of Intent indicated that Parliament would be invited to debate and approve the government's approach to Article 8 and the weight the new Immigration Rules attach to the public interest under Article 8(2). The stated objective of the Parliamentary debate was to provide the courts with the clearest possible statement of public policy.[859]

7.25. The Secretary of State for the Home Department stated that since the enforcement of the Human Rights Act 1998, Parliament had never been afforded the opportunity to state its own view as to how and to what extent interference in a qualified right would be justified. A motion was debated in Parliament and the government hope to give the Rules status akin to that of primary legislation by debating the motion. In *Izuazu* the Upper

[858] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/257359/soi-fam-mig.pdf; Statement of Intent, see paras 29-30 and 34.
[859] Statement of Intent, para 34.

Tribunal disagreed with the government's view and upheld the two-stage assessment method[860].The Secretary of State tried to send a clear signal to the judiciary.[861]The Shadow Home Secretary had expressed a view similar to that of the Upper Tribunal.[862]

7.26. In *Izuazu*[863] a three-member bench comprising Mr Justice Blake, Lord Bannatyne, and Upper Tribunal Judge Storey considered the second challenge to the Immigration Rules introduced on 9 July 2012 in line with the statement of intent published in June 2012, and the above motion debated in Parliament on 19 June 2012. In *MF (Article 8 - new rules) Nigeria*[864] the Upper Tribunal had already decided that where the claimant does not meet the requirements of the rules, it will be necessary to assess Article 8 by applying the criteria established by law. In domestic Article 8 jurisprudence, the corrective decisions, as discussed above, are part of the law where the UK's higher courts have repeatedly emphasised a fact-sensitive approach. The Upper Tribunal decision in *MF* was contrary to the government's interpretation of the Immigration Rules. In *Izuazu*[865], the Upper Tribunal endorsed *MF* to apply a two-stage assessment of Article 8 claims and went further by concluding that the government has overstated the significance of the Immigration Rules in the Article 8 context. It was held that there could be no presumption that the rules will generally be conclusive of the Article 8 assessment, or that a fact-sensitive inquiry is not needed[866]. The tribunal held that the Article 8 considerations included in the immigration rules have not altered the duty of the appellate authority[867].

7.27. In *Izuazu*, the Upper Tribunal, after reiterating the legal significance of the corrective decisions, ruled that it is up to Parliament to change the law by bringing primary legislation, and that unless and until it does so, the earlier decisions are binding on the Upper Tribunal[868]. This is the statement which prompted the government to introduce primary legislation, and that culminated in the enactment of the Immigration Act 2014. Section 19 of the 2014 Act inserted Part 5A into the Nationality, Immigration and Asylum Act 2002, and these are known as the public interest considerations.

Whether public interest considerations have achieved the stated objective

7.28. The objective of public interest considerations was to guide judicial discretion. The public interest question seeks considerations of the qualification provided in Article 8 (2). Further instructions reiterate qualifications similar to Article 8 (2). However, the direction to attach "little weight" is limited in scope.

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[860] 19 June 2012, Column 760.
[861] 19 June 2012, Column 763.
[862] Column 773-774.
[863] *Izuazu (Article 8 – new rules)* [2013] UKUT 00045 (IAC).
[864] [2012] 00393 (IAC).
[865] *Izuazu* paras 40-41.
[866] *Izuazu* para 67.
[867] *Izuazu* head note 2.
[868] *Izuazu* paras 58-59

7.29. The Joint Committee on Human Rights expressed concerns about the Section 117B (4) and (5) weight provisions in their legislative scrutiny reports[869]. The Committee considered the "little weight" provision as unprecedented trespass by the legislature into the judicial function. The Committee recommended the retention of the relevant consideration, expressed as *"whether a private life or a relationship were established at a time when the person was in the UK unlawfully or when their immigration status was precarious, but without seeking to prescribe the weight to be given by courts to the person's private life or relationship".* In the Committee's view, the "little weight" provisions do not seek to guide the courts about the public interest considerations to be taken into account in deciding whether an interference with private and family life is justified, but rather seek to influence the amount of weight given to the right itself in particular types of cases. Contrary to the Committee's view, Parliament inserted the 'little weight' provisions in the Act. The Home Secretary had expressed her frustration against the Upper Tribunal's decision in *Izuazu*, as discussed in the paragraphs above, and the objective of the public interest considerations was to curtail judicial discretion in the proportionality assessment in Article 8 claims.

7.30. In *Deelah*[870] Mr Justice McCloskey decided that sections 117B (4) and (5), which contain the "little weight provision", do not give rise to a constitutionally impermissible encroachment on the independent adjudicative functions of the judiciary[871]. The public interest considerations were framed to steer judicial discretion as to how Parliament wishes the judicial balancing exercise to be carried out in the majority of cases. Instead, the statutory instructions have created further complexity in the method of judicial analysis. In *KO*[872]Lord Carnwath commented that: "*It is profoundly unsatisfactory that a set of provisions which was intended to provide clear guideline to limit scope of judicial evaluation should have led to such disagreement among some of the most experienced Upper Tribunal and Court of Appeal judges*".

7.31. Section 117B (2) provides that it is in the public interest and in the interest of the economic well-being of the UK that persons who seek to enter and remain in the UK are able to speak English, because those who speak English are less of a burden on taxpayers, and better able to integrate into society. If an individual cannot speak English, then the public interest in removing the subject is strengthened. A person who speaks English will be considered a neutral factor in the balance against the removal.[873]

7.32. Section 117B (3) stipulates financial independence for those who seek to enter and remain in the UK. The Supreme Court interpreted financial independence as independent of the state, i.e., the person is not receiving public funds. Like the ability to speak English,

[869] See para 55-60 of First Report and para 109 of the Second Report: HC No (Parliament.uk) last accessed on 8 January 2022.
[870] *Deelah and others (section 117B – ambit)* [2015] UKUT 00515 (IAC).
[871] *Deelah and others (section 117B – ambit)* [2015] UKUT 00515 (IAC), para 24.
[872] *KO v Secretary of State for the Home Department* [2018] UKSC 53, para 14.
[873] *Rhuppiah v SSHD* [2018] UKSC 58, para 57.

financial independence is a neutral factor. Conversely, a lack of financial independence is a factor in favour of removal.[874]

7.33. Section 117A (2) (a) provides that "*In considering the public interest question, the court or tribunal must (in particular) have regard*". The phrase "*have regard*" to provides the required degree of flexibility or residual discretion in attaching "*little weight*" to the private and family life established by a person when their immigration status was precarious or unlawful. Lord Wilson quoted the following passage from Sales LJ's Court of Appeal judgement subject to appeal:

> *"… common ground that the starting point for consideration of the proper construction of Part 5A of the 2002 Act is that sections 117A-117D… are intended to provide for a structured approach to the application of article 8 which produces in all cases a final result which is compatible with, and not in violation of, article 8."*

In *Rhuppiah*[875] Lord Wilson found that the provisions of Section 117B cannot put decision-makers in a straitjacket which constrains them to determine claims under Article 8 inconsistently with the Article 8 itself. His Lordship identified that Section 117A (2) (a) provides the limited degree of flexibility recognised to be necessary for determining Article 8 claims.

7.34. The degree of flexibility identified by the Supreme Court in *Rhuppiah* allows courts and tribunals, in appropriate cases, to deviate from the usual position of attributing little weight to private and family life. Section 117A (2) reflects the case-sensitive approach emphasised by ECtHR and domestic UK Article 8 jurisprudence. The Supreme Court's interpretation of Section 117A (2) in *Rhuppiah* is akin to Lord Bingham's view expressed in EB (Kosovo)[876] where His Lordship found that: "*the search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the evaluative exercise which article 8 requires*". Likewise, in *Huang*[877] the House of Lords defined the ambit of appellate immigration authority.

7.35. *Huang* provides explicit judicial acknowledgement that only a very small minority of Article 8 claims would succeed outside of the Immigration Rules. Considering the judicial position in *Huang*, there was no legal gap that required to be bridged with primary legislation guiding judicial discretion. Part 5A of the 2002 Act was designed to counter judicial reluctance to treat the Rules as conclusive of Article 8 assessment. The appellate immigration authority is entitled to take account of all relevant considerations in favour of refusal while considering an Article 8 claim. Thus, the courts and tribunals can have regard to any relevant consideration, and the scope of the appellate authority's assessment is broader than just public interest considerations. Arguably, the public interest considerations

[874] *Rhuppiah* paras 56-57.
[875] Para 49.
[876] *EB (Kosovo) v SSHD* [2008] UKHL 41, para 12.
[877] *Huang (FC) v SSHD* [2007] UKHL 11, para 20.

have directed but not curtailed the residual discretion of the appellate immigration authority.

7.36. Chapter 4 provided a detailed analysis of the proportionality principle, both in theory and practice, and covered the dialectical evolution of Strasbourg and the UK's domestic courts concerning Article 8. Then, from paragraphs 4.28 to 4.85 the chapter provided a detailed account of the Article 8 claims assessment procedure within the Immigration Rules introduced on 9 July 2012 with reference to Strasbourg and domestic case law. Chapter 5 explained the scope of public interest considerations in practice. Thus, there is no need to repeat those details in this chapter.

7.37. As discussed above in paragraphs 6.21 to 6.27, the government could not achieve its desired result through the Immigration Rules, so it decided to state Parliament's view by introducing the public interest considerations into primary legislation. The objective of Part 5A was to provide statutory backing to the Immigration Rules and to dilute the impact of corrective decisions, as discussed in paragraphs 6.15 to 6.20 here. It follows that the extensive codification of Article 8 through primary and secondary legislation has neither curtailed the scope of judicial assessment nor amended the method of proportionality assessment. Consequently, the legislative developments intended to curtail the scope of Article 8 do not present a significant change in assessing Article 8 claims within or outside the Immigration Rules. Furthermore, the Immigration Rules and public interest considerations do not fully reflect the *Boultif* and *Uner* criteria. However, the Immigration Rules and Part 5A of the 2002 Act do not preclude the public authority from considering all relevant factors in the proportionality assessment, including the criteria contemplated by the ECtHR in *Boultif* and *Uner.* The ECtHR ruled in *Unuane v United Kingdom*[878] that the Immigration Rules do not necessarily preclude the domestic courts and tribunals from having regard of the *Boultif* criteria to assess whether an expulsion measure was necessary and proportionate. The inbuilt degree of flexibility within the Rules and public interest considerations make the United Kingdom's present Article 8 related legal regime compliant with the ECHR and section 6 of the Human Rights Act 1998.

7.38. Chapters 4 and 5 respectively discussed the UK Immigration Rules and public interest considerations, expanding on the judicial interpretation of the Immigration Rules and statutory provisions related to Article 8. The whole legislative exercise of including Article 8 considerations within the Immigration Rules and directing judicial discretion through primary legislation may have achieved political objectives. However, it has lower legal significance in changing the assessment method of claims involving Article 8 of the ECHR. Those decisions are significant in understanding the practical application of the new domestic Article 8 legal regime. Otherwise, the First-tier Tribunal and Upper Tribunal make passing reference to public interest considerations in practice unless a case involves an issue related to interpretation.

[878] Para 83, *Unuane v UK.*

7.39. The government could have achieved better results by focusing on the quality of primary decision-making. Most assailable decisions lack clarity, an open-ended approach, and consistency, which is why they remain susceptible to judicial scrutiny. Thus, as has been emphasised in Strasbourg and in the UK's domestic jurisprudence, a case-sensitive approach remains the conspicuous feature of the Article 8 assessment criteria.

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