



GRESHAM COLLEGE
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Human Rights: The Law Transcript

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5 November 2014

Human Rights: The Law

Professor Geoffrey Nice QC

As explained by Professor Sir Geoffrey Nice QC in the video recording of his lecture, he was unable to present the lecture in person at Barnard's Inn Hall on 5 November 2014, due to the fact that while he was in Gaza on 3 November, the crossing was closed. As a result, Sir Geoffrey delivered his lecture by means of a live Skype connection, in the end, from Jerusalem. He was assisted, at the Gresham College venue, by Miss Sarah Clarke, a barrister of Inner Temple and Serjeants' Inn Chambers who is a well-known specialist in financial and regulatory legal issues, as well as an experienced advocacy trainer. Miss Clarke facilitated the interaction with Sir Geoffrey and the discussion and debate in Barnard's Inn Hall.

In my last lecture I hope to have persuaded you that if Human Rights exist at all as a special or separate category of human entitlements, they have come to be identified through a long perhaps historic process – of hundreds or thousands of years – and that since WWII the UK has been involved in the creation and development of the UDHR and ECHR (both the Convention and the Court).

In the absence of many contributions from the audience I have guessed that two areas of concern to UK citizens thought to be rooted in ECHR law are the rights of prisoners to vote and aspects of immigration, deportation and extradition law and practice.

I will also assume that even if the audience in this hall – and maybe the audience on the internet – are likely to include some of a liberal persuasion, even they may find concern with these issues. It is not inconceivable that a Guardian reader here or there will actually think immigration has gone too far, that extradition of foreign villains has not gone far enough and that, along with the preposterous thought that prisoners should be allowed to vote, this is all down to 'Europe'.

Let me take extradition and immigration first.

I must, of course, find a mischievous way to start.

Imagine poor Lear who was master of all he surveyed – until he split it up and sent his children to their own lands from which he would find himself banished. What might he think of an enshrined freedom of movement?

Or that intelligent Martian gliding by our planet without stopping for fear of being farmed and eaten were it to land but possessed of the power of seeing our millions of years of development as a minute or so of galactic history; it might murmur to its co-pilot that it was strange how the family of these intelligent humans grew out of Africa extending their single family around the world but – once free from mother Africa and changing their colour en route – the children of Africa carved up the world and banned the parent race from entering.

Well, as a television programme might put it – 'whose world is it anyway?'

Why is Peru not mine as much as the rolling hills of England is or is not the Peruvian's? And whose oil and underground resources are whose? And so on.

But we start with the nation states that are dogs in the manger when it comes to territorial freedom of movement or the right to stay put once you have arrived.

What should we know in order to start considering these issues and how Europe has made them topics of complaint?

Deportation powers are used for cases where the person's departure from the UK is deemed to be "conducive to the public good" (often following criminal behaviour), or where a court has recommended that a person should be deported following conviction of an offence punishable by imprisonment.

The administrative removal process is used to enforce departures in other types of case (illegal entrants and persons refused leave to enter the UK, and persons who have overstayed their leave, breached the conditions attached to their leave, or obtained their leave by deception).

Decision-making in deportation cases has long required consideration of factors counting in favour of and against a person's deportation from the UK, as reflected by the "conducive to the public good" provisions within the Immigration Act 1971. ^[1]

Article 13 UDHR

1 **Everyone has the right to freedom of movement and residence within the borders of each state.**

2 Everyone has **the right to leave any country, including his own and to return to his country**

Article 14

1 Everyone has **the right to seek and to enjoy in other countries asylum and freedom from persecution**

2 This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations

Article 8 of the ECHR

Article 8 - Right to respect for private and family life

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

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

Article 2 of Fourth Protocol of ECHR:

Article 2 - Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have **the right to liberty of movement and freedom to choose his residence.**

2. Everyone shall **be free to leave any country, including his own.**

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

But the UK has signed but not ratified this Protocol

Directive 2004/38/EC

Chapter VI of Directive 2004/38/EC is the key section: **RESTRICTIONS ON THE RIGHT OF ENTRY AND THE RIGHT OF RESIDENCE ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY OR PUBLIC HEALTH**

Article 27 - General principles

1. Subject to the provisions of this Chapter, Member States **may restrict the freedom of movement and residence** of Union citizens and their family members, irrespective of nationality, **on grounds of public policy, public security or public health**. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of **proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.**

The personal conduct of the individual concerned must **represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society**. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.^[2]

Thus the ECHR does not guarantee the right of an alien to enter or to reside in a particular country and Contracting States have the power to expel an alien convicted of criminal offences in order to maintain public order and protect society.

However, if such decisions interfere with the rights in Article 8, they must be in accordance with the law and justified under Art 8(2) as necessary and proportionate to the legitimate aim pursued.

Article 8 does not contain an absolute right for any category of alien not to be expelled, but there are circumstances where the expulsion of an alien will give rise to a violation of Art 8.

To assess whether an expulsion is justified under Art 8(2) the ECtHR will consider factors including:

- the nature and seriousness of the offence and time elapsed since it was committed.

- the length of time in the country and the solidity of social, cultural and family ties with the host country and with the country of destination.

- the spouse and if there are any children, their ages, best interests and wellbeing. The seriousness of the difficulties which they are likely to encounter in the destination country.

Not all such migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy "family life" there within the meaning of Article 8. However, there can be circumstances where the expulsion of a settled migrant may constitute an interference with their right to respect for "private life" under Art 8 that encompasses the social ties between settled migrants and the community in which they are living.

Principles established in domestic courts include that when deportation or removal is resisted on Art 8 grounds, what has to be considered is the family life of the family unit as a whole. Baroness Hale pointed out, "a child is

not to be held responsible for the moral failures of either of his parents”.

Where a person who is not a British citizen commits one of a number of very serious crimes, Art 8(2) considerations will include the public policy need to express society’s revulsion at the seriousness of the criminality and an element of deterrence so that non-British citizens understand that one of the consequences of serious crime may well be deportation.

The seriousness of an offence and the public interest are factors of “considerable importance” when carrying out the balancing exercise in Article 8.

It will rarely be proportionate under Article 8 to uphold an order for removal of an individual who has a close and genuine bond with their spouse and the latter cannot reasonably be expected to follow the removed person 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 need a careful and informed evaluation of the facts. The search for hard-edged or bright-line rules is incompatible with the “difficult evaluative exercise which Article 8 requires”.

“In considering the position of family members in deportation [and] removal cases the material question is not whether there is an ‘insuperable obstacle’ to their following the applicant to the country of removal but whether they ‘cannot reasonably be expected’ to follow him there. However, it is possible in a case of sufficiently serious offending that the factors in favour of deportation will be strong enough to render deportation proportionate even if [it] does have the effect of severing established family relationships.”

The best interests of children had to be a primary consideration when considering whether removal of a parent was proportionate under Article 8. A child’s British nationality was of particular importance. It was not enough to say that a young child might readily adapt to life in another country, particularly when they had lived in Britain all their lives and were being expected to move to a country they did not know. The children had rights which they would not be able to exercise if they moved to another country.

The UK Borders Act 2007 introduced provisions for the automatic consideration of deportation of foreign national offenders in certain circumstances. Section 32 of the 2007 Act provides that the Home Secretary “must” make a deportation order in respect of a “foreign criminal” if they have been convicted of an offence and sentenced to at least 12 months imprisonment. The 2007 Act specifies that in these circumstances, the deportation of persons will be “conducive to the public good” for the purposes of the Immigration Act 1971.

Section 33 of the 2007 Act sets out the exceptions to these automatic deportation provisions. These include where a person’s deportation would breach their rights under the ECHR or the 1951 Geneva Convention Relating to the Status of Refugees.^[3]

That Convention provides *inter alia*:

Article 32 expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33 prohibition of expulsion or return (“refoulement”)

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Previous versions of the Immigration Rules included a paragraph (395C) which confirmed that no-one may be removed from the UK if to do so would contravene the UK’s obligations under the Geneva Convention on Refugees or the ECHR. It set out a range of factors which the UKBA must consider before making a decision to remove a person from the UK, which reflected the considerations necessary for assessing compatibility with Article 8 ECHR. These included the person’s length of residence in the UK, strength of connections with the UK, personal history, character and conduct, domestic circumstances and previous criminal record.

Section 55 of the Borders, Citizenship and Immigration Act 2009 introduced a duty on the Home Secretary (and her officials) to ensure that immigration decisions are taken with regard to the need to safeguard and promote the welfare of children in the UK. This includes cases where a decision is taken to remove a parent from the UK. If in consequence their child would also have to leave the UK, consideration must be given to whether this would be in the child’s best interests.

In recent years the application of Article 8 considerations in immigration and asylum cases has been the subject of considerable controversy, particularly in relation to the foreign national ex-offender cases liable to deportation or removal. The grounds on which EEA national ex-offenders can be deported are based on European law, and are more restrictive than those for non-EEA nationals

Efforts have been made in recent years to strengthen the scope for deporting non-EEA foreign national ex-offenders in recent years.^[4]

The significance of TORTURE

The UK willingly signed up to UDHR Article 5 and ECHR Article 3:

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

Deportation of criminals

Under section 15 of the Immigration Act 1971, the Home Secretary has a very broad power to deport any foreign national whose removal from the UK he or she believes would be 'conducive to the public good'^[5], primarily exercised where a foreign national is engaged in criminal activity or where a foreign national is deemed to be a threat to the national security of the UK.

[Deportation became a major plank of the government's counter-terrorism policy following the 7/7 bombings when the government made clear its intention to pursue deportation of suspected terrorists wherever possible.

Governments repeatedly expressed frustration with the existing rules governing deportation to countries where torture is practised]

The 1996 decision of the ECtHR in *Chahal v United Kingdom* concerned the UK government's attempt to deport Mr Chahal, an Indian national of Sikh origin, to India on the grounds that his alleged involvement in Sikh separatist

activities constituted a threat to the national security of the UK.

Mr Chahal complained to the court that, if he was sent back to India, he would face torture at the hands of the Indian authorities. Mr Chahal also argued that the procedures governing his appeal against deportation on national security grounds were unfair: in particular, he had no opportunity to view or challenge the evidence against him. Instead, his only avenue for appeal against deportation was to an internal Home Office review committee, known informally as the 'Three Wise Men'. The committee had the power to examine the secret evidence upon which the Home Secretary had based his decision. It could also make recommendations to the Home Secretary. However, the committee did not operate like a court and the Home Secretary was under no obligation to follow its recommendations.

The ECtHR upheld Mr Chahal's complaint on both grounds. First, it affirmed that the prohibition against torture under Article 3 of the European Convention on Human Rights (ECHR) prohibited returning any person to a country where they faced a real risk of torture, even if that person was deemed to pose a threat to national security.

Secondly, the court held that the lack of procedures allowing Mr Chahal to challenge the evidence breached his right to liberty under Article 5(4) ECHR (because he had been detained pending his deportation) and his right to an effective remedy under Article 13 ECHR. The court said, 'there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice'.⁴

The Chahal decision led Parliament to pass legislation in 1997 replacing the internal Home Office review panel with an appeal in national security cases to an independent judicial trial, the Special Immigration Appeals Commission or 'SIAC' and introducing the use of special security-cleared advocates appointed to represent an appellant in 'closed' hearings, involving intelligence material which the Home Secretary is unwilling to disclose to the appellant and his or her lawyers. Special advocates act on behalf of appellants in closed hearings but are forbidden from discussing the closed evidence with them, which means that they effectively act for the most part without proper instructions from their client.

Because Article 3 ECHR cannot be derogated from, even in times of emergency, the rule in Chahal prevented the government from deporting foreign nationals it suspected of involvement in Al-Qaeda-related terrorism back to countries where they faced a real risk of torture.

The government was able to derogate from the right to liberty under Article 5(1)(f) ECHR, in order to detain indefinitely the suspects in the UK under Part 4 of the Anti-Terrorism Crime and Security Act 2001.

In December 2004, however, the House of Lords in *A and others v Secretary of State for the Home Department*⁵ held that the government's derogation from Article 5 ECHR was unlawful, because there were less restrictive measures that could be taken in respect of foreign terrorist suspects, and because the use of indefinite detention against foreign nationals was discriminatory (because UK nationals who were suspects were not subject to any restriction). This judgment, in turn, led the government to introduce the use of control orders (which apply to UK nationals and foreign nationals alike) under the Prevention of Terrorism Act 2005.

Since the 7/7 2005 bombings, the government announced a renewed determination to use deportation as a counter-terrorism measure. By securing diplomatic assurances from these countries, the government hoped that it would be able to convince SIAC that suspects deported under such assurances will not face a real risk of torture or other ill-treatment contrary to Article 3 ECHR. It concluded memoranda of understanding with Jordan and Libya and has been in negotiations with Algeria and Morocco.⁶

But in the 2003 case of *Agiza v Sweden*, the UN Committee Against Torture found that the Swedish government was in breach of its obligations under the 1984 UN Convention against Torture when it returned two asylum seekers to Egypt on the basis of assurances that they would not be tortured and it subsequently emerged that those assurances were breached.

As the UN Special Rapporteur against Torture has noted, governments such as Algeria, Libya and Jordan have all signed the Convention against Torture and yet there is ample evidence to show that these governments continue to engage in torture. If such governments cannot honour their obligations under international conventions, what reason is there to believe that they will honour bilateral agreements with the UK? In any event, the memoranda of understanding offer no safeguards or mechanisms that protect the rights of individuals who are returned and then are subsequently tortured.

The government has also taken various steps to broaden the category of people who may be subject to deportation. This includes consulting on the kinds of activities which the government considers to be 'non-conducive' to the public good (eg 'glorifying' terrorism). Under section 56 of the Immigration, Asylum and Nationality Act 2006, it has also greatly expanded the power of the Home Secretary to strip dual nationals of their UK citizenship, which would leave them open to being deported.

The government maintains that deportation is an effective way of disrupting the activities of suspected terrorists in the UK. However, the committee of Privy Counsellors appointed to review the Anti-Terrorism Crime and Security Act 2001 noted that: 'Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism. If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British police, intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally'.

Dominic Raab, in Strasbourg in the Dock: Prisoner Voting, Human Rights & the Case for Democracy makes the critical case against some of the present provisions^[71]

The **Strasbourg Court has further legislated to extend the ban on torture and inhuman treatment, making it much more difficult for governments to deport people who pose a threat to national security or public safety.** This goes well beyond the list of rights set out in either the United Nations Refugee Convention or the United Nations Convention against Torture, both of which were specifically designed to address the difficult and delicate issue of deporting individuals who might be mistreated if returned home.

In *Chahal-v- UK* (1996), the government sought to deport Mr Chahal, a Sikh separatist, to India, on the basis of his conduct in the UK which gave rise to a suspicion of involvement in terrorism and other criminal conduct. Mr Chahal had previously been arrested, but not charged, with conspiracy to assassinate the Indian Prime Minister on a visit to Britain. The Strasbourg Court barred Mr Chahal's deportation, concluding he would face a real risk of torture at the hands of rogue elements in the Punjab police.

However, deportation is not merely blocked when there is a specific risk of torture or inhuman treatment by the state or its officials on return. In another Strasbourg case, a convicted armed robber managed to prevent his deportation to Somalia because of the risk that he would be caught up in the civil war there, rather than any fear of persecution by the government. In another UK case, a woman was able to block her return to Uganda because the risk that she would not be able to find decent housing or employment rendered her vulnerable to being drawn into a life of prostitution.

Recent developments are cause for further concern. In a string of new cases, Article 8—containing the right to family life—has been stretched to defeat deportation proceedings. In October 2008, the House of Lords allowed a novel claim under Article 8 to quash a deportation order, based on the risk that a mother might be separated from her son in custodial proceedings under Shari'a law, if returned to Lebanon. In a subsequent House of Lords case in February 2009, the House of Lords recognised that UK courts were extending human rights law to defeat deportation orders beyond what has been required by the Strasbourg case-law. Lord Hope stated that he could find no Strasbourg case where deportation had been overruled on human rights grounds other than under Articles 2 or 3.³² Yet, he acknowledged that the House of Lords had extended Article 8 to defeat deportation proceedings and accepted, in principle, that the risk of violations to Article 5 (right to liberty) or Article 6 (right to fair trial) could justify quashing deportation orders. The reasoning of the Law Lords appears at least in part based on an attempt to predict and pre-empt the extension of the Strasbourg case-law, rather than constrain it.

Having been given a green light by the UK courts operating under the Human Rights Act, in 2009 and 2010 the Strasbourg Court subsequently followed British precedent, by allowing a convicted heroin dealer and a sex offender to rely on Article 8 to quash their deportation orders.

Following these rulings, the UK courts have gone even further. In May 2010, in the *Gurung* case, the Immigration Tribunal held that a homicide offence is not serious enough to warrant automatic deportation under the UK Borders Act 2007. A gang chased and killed a young Nepalese man in London, dumping his body in the river Thames. In a novel ruling, one of the culprits successfully claimed the right to family life to trump deportation back to Nepal, despite being an adult with no dependents. It is one thing to block deportation to prevent returning an individual into the arms of a torturing state. It is another moral leap to frustrate deportation proceedings against convicted criminals or suspected terrorists because it might disrupt their family ties.

Quantitatively as well as qualitatively, the Article 8 cases mark a fork in the road. According to the UK Border Agency, hundreds of foreign national prisoners are defeating deportation orders each year, on human rights grounds, and the majority of the claims are now based on Article 8.

The expansion of human rights to frustrate deportation proceedings has had unintended consequences. Control Orders were introduced in Britain, following the *Belmarsh* judgment in 2004, in large part because of the increasing fetters on Britain's ability to deport terrorist suspects. As a result of judicial legislation, Britain has lost a degree of control over its borders, which inevitably means we are importing more risk. Although difficult to quantify, this has contributed to the growing terrorist threat and pressure on MI5 and counter-terrorism police. The last government responded to these pressures with a series of draconian measures, from Control Orders to proposals to increase detention without charge. Ironically, the expansion of human rights to defeat deportation proceedings has imposed additional pressures on traditional British liberties, including the ancient right of habeas corpus.

Liberal Democrat peer Lord Carlile has criticised this aspect of the impact of current human rights law on deportation in his role as statutory reviewer of counter-terrorism:

The effect is to make the UK a safe haven for some individuals whose determination is to damage the UK and its citizens, hardly a satisfactory situation save for the purist.

Immigration and Asylum cases

Article 8 of ECHR

Prior to 9 July 2012 what are now Article 8 issues were raised in the course of an application for asylum in the UK, or be the basis for a stand-alone application for leave to remain in the UK, but without the Immigration Rules specifying in detail the grounds on which leave to remain on the basis of Article 8. The UK Border Agency (UKBA - as then was) could grant 'Discretionary Leave to Remain' 'outside the Immigration Rules' if it considered that removal would breach a person's Article 8 rights.

Article 8 may also be raised in the context of an appeal against deportation or removal from the UK. Immigration legislation provides for rights of appeal on human rights grounds,

In considering such appeals, Immigration Judges must first consider whether the decision was in accordance with the Immigration Rules, and then whether it is in accordance with a person's Article 8 rights.

Briefing Paper - Home Affairs Section - Deportation of Individuals Who May Face a Risk of Torture

The Strasbourg Court considered a series of issues raised by Abu Qatada's lawyers. In their ruling, delivered on 17 January 2012, the European Court of Human Rights concluded that Qatada could not be returned to Jordan. The court upheld the MOU which had been negotiated with Jordan indicating that Qatada's rights under Article 3 of the ECHR would not be violated since the agreement between the two Governments was specific and comprehensive. The court considered that the assurances had been given in good faith and that bilateral ties between the UK and Jordan had historically been strong.

Nonetheless, the court refused to allow Qatada's deportation, on the basis that the use of evidence obtained by torture during a criminal trial would amount to a flagrant denial of justice. The court found that the use of torture was widespread in Jordan and that two of the claimant's co-defendants had complained of torture. The court considered that there was a high probability that incriminating evidence from these co-defendants would be admitted at the claimant's re-trial and that it could be of decisive importance. In the absence of any assurance by Jordan that the torture evidence would not be used, the court concluded that his deportation to Jordan would give rise to a breach of Article 6 of the ECHR. It acknowledged that this was the first time that an expulsion would be in violation of Article 6 (which reflects an "international consensus that the use of evidence obtained through torture makes a fair trial impossible.")

Qatada's case returned to SIAC, where evidence was presented that the Jordanian constitution had been changed to ban evidence obtained by torturing witnesses. The Government also argued that it had obtained assurances about the quality of legal processes that would be followed throughout any trial in Jordan. On 12 November 2012 SIAC ruled that while the Jordanian judiciary, like their executive counterparts, were determined to ensure that Abu Qatada received a fair trial, there was still a real risk that evidence adduced by torture could still be adduced at the trial. The case was complex and focused amongst other things on the minutiae of the Jordanian legal system. SIAC concluded that unless or until a change was made to the Jordanian code of criminal procedure, or an authoritative ruling was made by the Jordanian constitutional court to establish that such statements could not be adduced (or that it was for the public prosecutor to prove to a high standard that they were not procured by torture) the real risk would remain and Qatada could not be deported.⁴⁸ This decision was subsequently upheld by the Court of Appeal.⁴⁹

In March 2013 the Government agreed a new treaty with Jordan guaranteeing a fair trial for anyone deported from either country.

On 27 June 2013 the Home Secretary issued a fresh deportation decision, and a further decision to certify any appeal that Abu Qatada might have made on human rights grounds as "clearly unfounded".⁵¹ Qatada was deported on 7 July 2013 and, on arrival in Amman, arrested and charged with the two offences of which he had previously been found guilty in absentia.

In a statement to Parliament the following day, the Home Secretary explained the Government's plans to address the concerns raised by the delays and costs involved in dealing with the case:

First, on legal fees and benefits, in the case of Abu Qatada £220,000 of his legal fees were funded from his own accounts, which were frozen by the authorities, but the rest—some £430,000—was funded by the taxpayer, and in many other cases foreign nationals we ought to be able to remove have their legal costs paid in full by the public. That is something my right hon. Friend the Justice Secretary is addressing in his reforms to the legal aid system and I can also tell the House that my right hon. Friend the Secretary of State for Work and Pensions is considering how we can curtail the benefits claims made by terror suspects and extremists whose behaviour is not conducive to the public good.

Secondly, we need to do something about appeal rights. Through the Crime and Courts Act 2013, the Government have already legislated for the principle that in national security cases individuals should be able to appeal only following deportation to their home country, except in cases where there is a risk of serious, irreversible harm. But we will do more, and that is why I will introduce the immigration Bill later this year. That Bill will stop illegal immigrants accessing services to which they are not entitled; it will make it easier to remove

foreign nationals; it will make it harder for them to prolong their stay with spurious appeals; and it will make clear to the courts once and for all that foreign nationals who commit serious crimes shall, other than in exceptional circumstances, be deported. I hope hon. and right hon. Members from all parties will give their support to that Bill.

I can also tell the House that my right hon. Friend the Justice Secretary is considering ways to speed up the pace at which the courts hear national security cases, but those reforms can achieve only so much until we make sense of our human rights laws. The Government are already taking action to address the misinterpretation of article 8 of the European convention on human rights—the right to a private and family life—and we achieved reforms to the way in which the European Court works in the Brighton declaration.

The problems caused by the Human Rights Act and the European Court in Strasbourg remain and we should remember that Qatada would have been deported long ago had the European Court not moved the goalposts by establishing new, unprecedented legal grounds on which it blocked his deportation. I have made clear my view that in the end the Human Rights Act must be scrapped. We must also consider our relationship with the European Court very carefully, and I believe that all options—including withdrawing from the convention altogether—should remain on the table, but those are issues that will have to wait for the general election. Today we should take quiet satisfaction that a dangerous man has been deported to face justice in his home country.

UK / ECHR - Prisoner Voting Rights and Immigration / Deportation

Prisoners' Voting Rights:

1. Dominic Raab, Strasbourg in the Dock: Prisoner Voting, Human Rights & the Case for Democracy<http://www.civitas.org.uk/pdf/StrasbourgInTheDock.pdf>

a. The ruling in *Hirst v United Kingdom* (2005) was a recent example of judicial legislation by the European Court of Human Rights (Strasbourg Court). There is no right to prisoner voting in the European Convention on Human Rights (ECHR). It was fabricated by judicial innovation, contrary to the express terms of the ECHR and the intentions of its architects, who specifically agreed to retain national restrictions on eligibility to vote.

b. The *Hirst* case joins a long list of examples of judicial legislation from the Strasbourg Court and, increasingly since the Human Rights Act 1998, the UK courts. One of the more serious examples is the expansion of human rights—especially the right to family life under Article 8 of the ECHR—to frustrate deportation orders. In one recent UK case, a man convicted of killing a young waiter from Esher avoided deportation, because the court ruled that the homicide offence was not serious enough to merit automatic deportation. The judge ruled that the per-petrator, an adult with no dependents, could claim the right to family life to trump the public interest in his deportation.

c. Senior members of the UK judiciary, including the President of the Supreme Court and the Lord Chief Justice, are expressing growing concern about the micro-management of UK human rights law from Strasbourg. In addition to judicial concern, **in February 2011, the House of Commons voted by a majority of over 200 to reject the *Hirst* ruling and retain the current ban on prisoner voting. In response, the Coalition government has indicated its intention to submit the *Hirst* ruling back to the Strasbourg Court for re-consideration.**

d. The Strasbourg Court now risks triggering a constitutional crisis by attacking the will of the UK's elected law-makers, expressed through a 'free vote', in order to further its campaign towards the

enfranchisement of all prisoners—a political rather than judicial agenda, that defies the terms of the ECHR and undermines the rule of law, the separation of powers and the basic principle of democratic accountability.

- e. The government is right to challenge the *Hirst* ruling. It can refuse to implement the judgment without sanction or significant repercussions, such as being forced to pay compensation to prisoners.
- f. However, the UK needs to pursue broader reforms to address the fundamental threat posed by judicial legislation. Whilst a UK Bill of Rights, to replace the Human Rights Act, could serve that end, such radical reform appears unlikely to command consensus amongst the Coalition parties in government. Therefore, in the short term, the Coalition should institute a series of bespoke reforms, tailored to strengthen the UK's democratic accountability and address the growing threat of expanding human rights law to Britain's ability to deport convicted criminals and terrorist suspects
- g. It is, therefore, clear that Britain did not sign up to giving prisoners a right to vote. In fact, British negotiators successfully precluded such a right from the inclusion in the text of the ECHR. If there were any doubt as to whether or not Article 3 of Protocol 1 gave prisoners a right to vote, the Strasbourg Court would have been entitled under customary international law to consult the negotiating record, or *travaux préparatoires*, to clarify the point. In *Hirst*, the Strasbourg Court ignored the normal rules of treaty interpretation and defied the fundamental democratic principle that states are only bound by the international treaty obligations they freely assume. The majority were not interpreting or applying the ECHR, but rather seeking to expand it—to create a new human right, granting prisoners the vote.
- h. The *Hirst* case is one in a long list of examples of the Strasbourg Court engaging in judicial legislation.
- i. The judges have assumed a legislative function, fully aware that there are limited means for elected governments subject to their rulings to exercise any meaningful democratic oversight over them. This judicial coup represents a naked usurpation, by a judicial body, of the legislative power that properly belongs to democratically-elected law makers. As one Strasbourg judge has recognised:
- j. *I also concede that the Convention organs have in this way, on occasion, reached the limits of what can be regarded as treaty interpretation in the legal sense. At times they have perhaps even crossed the boundary and entered territory which is no longer that of treaty interpretation but is actually legal policy-making. But this, as I understand it, is not for a court to do; on the contrary, policy-making is a task for the legislature or the Contracting States themselves, as the case may be.*

2. Prison Votes and the Constitutional Crisis in the United Kingdom

<http://jurist.org/forum/2011/04/prison-votes-in-the-united-kingdom.php>

The Consequences of Hirst

Two consequences followed as a result of the Grand Chamber's judgment in *Hirst*. First, the UK government came under an obligation under international law to implement the judgment (Article 46 ECHR). Not surprisingly in the intervening years the then Labour administration showed little enthusiasm to do so. In fact by the time that Labour left office in 2010 it had simply carried out a protracted two-stage review of the issue (one consultation in 2006 and the other in 2009). Remarkably as part of this review process the government canvassed the option of retaining the blanket ban, the very policy found wanting in Strasbourg. However, five years after the Grand Chamber's final ruling the incompatible law remains in identical form on the statute book. By the end of the consultation and review process the Committee of Ministers was evidently losing patience with the UK authorities, adopting an interim resolution which expressed its serious concern that the forthcoming general election (2010) would be conducted under the same unaltered laws that the European Court had found wanting in *Hirst* (Interim Resolution CM/ResDH(2009)1601). This concern and disappointment was subsequently reiterated as the UK failed to take any steps to implement the judgment. (See Decision 18, 1086th DH meeting - 3 June 2010. Decision 6, 1092nd DH meeting - 15 September 2010).

Second, the European Court affirmed its decision in *Hirst* in a series of cases: *Frodl v. Austria* [2010] ECHR 20201/04, *Scoppola (No 3) v Italy* [2011] ECHR 126/05 and *Greens v. UK* [2010] ECHR 60041/08. As the European court noted in *Frodl* any penal sentence that disenfranchised a prisoner had to taken as a matter of discretion by the trial judge on the basis of the particular circumstances of the offence. (paras 34-35) By 2011 the principles set forth in *Hirst* had come to represent the clear and consistent doctrine of the European Court. Domestically, the judgment in *Hirst* has been considered in a number of cases (E.g. *Smith v. Scott* 2007 SLT 137,

Chester v. Secretary of State for Justice [2009] EWHC 2923 (Admin)). But British Courts, while now declaring the section incompatible, have quite correctly concluded that it is for Parliament to change the law.

The UK finds itself in something of a bind. On the one hand the Council of Europe is pressing for the UK to implement the judgment of the European Court. And on the other, members of Parliament show little appetite to do so. On 10 February 2011 the House of Commons debated prisoner disenfranchisement, ostensibly to show to the European Court that Parliament had fully considered the issue. However, the debate showed not only the naked hostility of many members to European institutions but also an depressing degree of ignorance that many members possess on elemental constitutional matters. Despite the pleas of the Attorney General that MPs focus on the problem of how to adjust the voting rights of prisoners, members instead chose to use the debate as an opportunity question the legitimacy of the European Court - shamefully dubbed a 'kangaroo court' by one MP - and in some cases to argue for withdrawal from the Council of Europe. Speaker after speaker argued that it was for Parliament to make the law, and not for unelected judges ignoring the reality that this is in fact their job under both the ECHR and the HRA. Many MPs were happy to argue that prisoners were in fact a class of second-class citizens who consequently enjoy fewer human rights.

However, the issue that particularly vexed most MPs during the debate was the interpretative doctrine employed by the European Court that treats the Convention as a "living instrument". MPs viewed this doctrine as little more than a conceptual ramp through which the court is illegitimately extending its jurisdiction and authority as little more than a naked act of judicial imperium. Of course anyone with familiar with human rights law would know what arrant nonsense this is. To begin with the idea is not a new one. And it did not originate in the European Court. In English law it finds its most eloquent exposition in the advice of the Privy Council in *Edwards v. The Attorney General of Canada* [1929] UKPC 86. At issue in *Edwards* was the question of whether 'persons' who might be summoned by the Governor-General to the Senate included women. Before *Edwards*' Case the Canadian constitution had been interpreted as applying to men only. Lord Sankey LC famously disagreed and interpreted "persons" as including women: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits ... The object of the Act was to grant a Constitution to Canada ... Like all written constitutions it has been subject to development through usage and convention ... Their Lordships do not conceive it to be the duty of this Board - it is certainly not their desire - to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation." The interpretative process employed by the European Court is identical. The provisions of the ECHR are to be interpreted generously, not only in light of contemporary society but also with reference in the penal context to developments and commonly accepted standards in the other contracting states of the Council of Europe.

Immigration

ECHR cases against the UK Government

Iraq ECHR cases:

1.) Case of Al-Jedda v. The United Kingdom, Judgment, App. No. 27021/08, 7 July 2013

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{\"dmdocnumber\":\[\"887954\"\],\"itemid\":\[\"001-105612\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{\)

- The ECHR held that (1) Mr. Al-Jedda's detention was attributable to and within the jurisdiction of the UK, and (2) as the UK had no obligation under a UN Security Council resolution to detain preventively and without judicial review, Art. 103 of the UN Charter was not at play, and that therefore Mr. Al-Jedda was detained unlawfully under Art. 5(1) ECHR. The Court awarded damages and costs.
 - Commentary on Judgment: <http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/>

2.) Case of Al-Skeini and Others v. The United Kingdom, Judgment, App. No.55721/07, 7 July 2011

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"dmdocnumber":\["887952"\],"itemid":\["001-105606"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{)

- The ECHR held that (1) all of the applicants were within the UK's Art. 1 ECHR jurisdiction and (2) that the UK has not held an Art. 2-compliant investigation in five of the cases, all but that of Baha Mousa where there is an ongoing public inquiry. The Court awarded damages and costs.
 - Commentary of Judgment: <http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/>

Article about Al-Skeini and Al-Jedda:

3. Marko Milanovic, Al-Skeini and Al-Jedda in Strasbourg, The European Journal of International Law Vol. 23 no. 1

<http://ejil.oxfordjournals.org/content/23/1/121.full.pdf+html>

Implications of Al-Skeini

This judgment needs to be read very carefully by the legal advisors in all European foreign ministries, particularly those which send their troops or agents abroad with some frequency. Bearing in mind that there could be many, many people in a similar situation to those of the applicants, the financial implications for the UK are by no means negligible. But it is also important to note that the picture is not all rosy. While the Court's approach to extraterritorial application is now more expansive than in *Bankovic* and than the English courts allowed in *Al-Skeini*, *Bankovic* has still not been overruled. For example, under *Al-Skeini* the current bombing of Libya by a number of European states could *not* fall under Article 1 ECHR. Note also how the limitation on the application of the personal conception of jurisdiction is entirely arbitrary. Why is one killing under the scope of the ECHR and the other not, merely because the state concerned exercises some vaguely framed 'public powers'? Note also how the fact that *Al-Skeini* was limited to the *procedural* component of Article 2 allowed the Court to say nothing about how Article 2 would *substantively* apply in an occupation context, e.g., how the ECHR would interact with IHL and its targeting rules.

Implications of Al-Jedda

An interpretative presumption, particularly one this strong, can prove to be a key tool for securing human rights compliance with respect to UN SC decisions. Its main purpose is to foster accountability. If the Council now truly wishes to release states from their human rights obligations, it will have to do so through clear and unambiguous language - language that does not get used very often in its chambers - and its members will have to take political responsibility for their actions. But note also what the Court did *not* say. It did not at all examine the fundamental question whether resolution 1546 *could have* prevailed over the ECHR even if it *did* satisfy the presumption. Perhaps that argument can be taken as implicitly accepted, but I think the Court's silence speaks volumes; it is not easy for it to accept that the SC can displace the ECHR, the 'constitutional instrument of European public order', of which it is the ultimate guardian. The Court also did not address the issue of whether authorizations are capable of being covered by Article 103.82 The Article 103 issue thus remains open for a sequel, whilst bearing in mind the strong presumption that the Court has created. That sequel may come sooner rather than later, say in the *Nada v. Switzerland* case currently pending before the Court.

Conclusion

In both cases the Court awarded substantial damages and costs; the financial and policy implications of the two cases are immense - just consider the number of people detained, killed, or otherwise affected in UK or multi-national operations in Iraq or Afghanistan.⁸⁴ Despite its flaws *Al-Skeini* will be of particular importance for those European states, such as the UK or France, which engage in overseas military action with relative frequency. On the other hand, *Al-Jedda* is likely to produce ripple effects in all situations involving SC sanctions that may have an adverse impact on human rights, and we will soon see just how far the ECtHR - and other European courts - will

be prepared to take the *Al-Jedda* presumption.

Clearly, in both judgments the Court articulated some very important principles; these will be leading cases on the various issues for many years to come. Importantly for their precedential value, the Court was unanimous or near-unanimous in both cases. Whether the Court's reasoning is persuasive on all counts will undoubtedly be a matter of some controversy, but it is fair to say that, at least in terms of legal craftsmanship and quality of analysis, the *Al-Skeini* and *Al-Jedda* Court absorbed some lessons from *Bankovic* and *Behrami*. However, despite some improvements the Court's jurisprudence on the extraterritorial application of the ECHR still rests on shaky ground; the Court's incorporation into the personal model of jurisdiction of the nebulous *Bankovic* reference to 'public powers' is particularly unfortunate, and the resulting uncertainty will be likely to prove to be unsustainable in the long term.

Immigration / Deportation ECHR cases:

3.) Case of Othman (Abu Qatada) v. The United Kingdom, Judgment, App. No. 8139/09, 17 July 2012

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108629#{"itemid":\["001-108629"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108629#{)

- The ECHR found that Abu Qatada's "deportation to Jordan would be in violation of Article 6 of the Convention on account of the real risk of the admission at the applicant's retrial of evidence obtained by torture of third persons."

4.) Case of Abdi v. The United Kingdom, Judgment, App. no. 27770/08, 9 April 2013

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-118335#{"itemid":\["001-118335"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-118335#{)

- The ECHR found that Mustafa Abdi was unlawfully detained for two and a half years while waiting deportation. He had been jailed for 8 years for rape and other offences, and held 2.5 years after serving his sentence because no "carrier" was willing to take him back to Somalia. The ECHR specifically found that "the complaint concerning Article 5 § 1 [is] admissible and the remainder of the application [is] inadmissible;" ... "there has been a violation of Article 5 § 1 of the Convention in relation to the applicant's detention from 3 December 2004 until his release in mid-April 2007" ... and " it is not necessary to examine the complaint under Article 5 § 1 of the Convention regarding the length of the applicant's detention during the said period." The ECHR awarded damages and costs.

5.) Case of Chahal v. The United Kingdom, Judgment, App. no. 22414/93, 15 November 1996

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004#{"itemid":\["001-58004"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004#{)

- Chahal claimed that his deportation to India (after being arrested for his political activity in the UK and suspicion of conspiracy to kill the Indian PM) would result in a real risk of torture, inhuman or degrading treatment which would violate article 3 of the European Convention, and he also claimed a violation of his right to freedom of liberty guaranteed by article 5. The ECHR found a violation of Art 3 and Art 5(4) and 5(13); but not Art. 5(1) and 5(4). The ECHR specifically found that Art 3 contained a guarantee in expulsion cases so the UK could not rely on its national security interest to justify the deportation and because Chahal would face a real risk of ill treatment if deported to India.

[1] Immigration Rules (HC 395 of 1993-4 as amended), paragraph 2 2 Nationality, Immigration and Asylum Act 2002, s84(1)(c) 3 Immigration Act 1971, s3(5)(a) and s3(6) (as amended) 4 Immigration Act 1971, Schedule 2 (as amended) and Immigration and Asylum Act 1999, s10 (as amended)

[2] See: by SI 2006/1003 (as amended) r19;r21; r24; r26 6 UK Borders Act 2007, s33(2)

[3] The 'Human Rights Futures Project' at the London School of Economics has produced a briefing on Deportation and the right to respect for private and family life under Article 8 which provides a summary of case law (as at February 2013).

[4] House of Commons Library standard note SN03979 Deportation of foreign national ex-offenders

[5] In *Secretary of State for the Home Department v Rehman*,¹ Lord Slynn said that 'there is no definition or limitation of what can be 'conducive to the public good' and the matter is plainly in the first instance and primarily one for the discretion of the Secretary of State

[6] <http://www.justice.org.uk/pages/deportation-on-grounds-of-national-security.html>

[7] <http://www.civitas.org.uk/pdf/StrasbourgInTheDock.pdf>