Undesirable, unreturnable and no effective remedy

Abstract

The Immigration Act 2014's measures respecting foreign criminals and those unlawfully present on UK territory represent a fundamental attack on the rule of law. The Act declares[1] that the deportation of foreign criminals 'is' in the public interest, presaging revocations of leave and new refusals for those previously granted leave after their criminal convictions. Such would arguably amount to the imposition of retrospective criminal penalties in breach of art 7 ECHR and/or denial of a fair trial in breach of art 6 ECHR. Section 17[2] removes appeal rights against deportation for foreigners convicted (or suspected) of criminal conduct until they have left the UK, unless they would face 'a real risk of serious irreversible harm'. However, many migrants, lawfully or unlawfully present, cannot obtain national documents and are therefore unable to leave the UK. Unless removal is 'simply impossible' (the 'Hale threshold', as set out in *Khadir)*[3] such people will remain indefinitely on temporary admission. To be unable to leave the country to exercise a right of appeal accessible only from outside the UK amounts to a denial of an effective remedy under art 13 ECHR. Similarly, to be unable to leave the UK but have no access to accommodation, support, work, benefits or healthcare unless meeting legally-demanding tests must be challengeable. The exclusion of immigration law from the scope of Arts 6 and 7, confirmed by *Maaouia*[4] and barely challenged since, rested on an acceptance that immigration control is a purely administrative matter, amenable only to public law challenge: and on there being other remedies for those facing expulsion. Both the changing legal character of immigration control, and the diminishing access to other remedies, demand a detailed review of that judgment.

---

[1] In s19, introducing a new s117 into the Nationality, Immigration and Asylum Act (NIAA) 2002

[2] introducing a new s94B Nationality, Asylum and Immigration Act (NIAA)2002

[3] *Khadir, R v Secretary of State for the Home Department* [2005] UKHL 39, [2006] 1 AC 207 [4].

[4] *Maaouia v France* 39652/98 [2000] ECHR 455 (5 October 2000) 33 EHRR 42, [2000] ECHR 455, 9 BHRC 205, (2001) 33 EHRR 42

1. Introduction

This paper analyses potential legal challenges in respect of the 'undesirable' – those with a 'criminal history' whether or not meeting the formal definition of a 'foreign criminal'; and the 'unreturnable' - those who cannot practicably be removed from the UK. The paper will first consider the 'undesirable', and examines whether ancient common law remedies, either alone or along with the ECHR, could be used to protect them. Looking at the traditional disapproval of retrospective measures, and the common law principles of *res judicata, autrefois convict* and *autrefois acquit*, I argue that for a second decision to deport to be made where the public interest has already been considered, contrary to the principles of double jeopardy and *res judicata,* must amount to a breach of art 7. Then, looking critically at *Maaouia* and using Operation Alliance, Operation Nexus and EU 'abuse of rights' cases as examples, I consider whether deportation and removal can still be regarded as falling outside the protection of art 6 ECHR, or alternatively not be a criminal penalty under art 7. I argue that where a person's alleged criminal conduct is the basis for deportation or removal, the determination of an appeal on the facts must amount to a determination of a criminal charge. I further argue that, for those who cannot return home, the denial of an in-country right of appeal, and even requiring such applicants to meet the 'Hale threshold', must amount to the denial of an effective remedy.

I then review the discussions on immigration and civil rights, again reviewing *Maaouia*, and, summing up the legal position on removability,[5] briefly review how the 'hostile environment' brought in by the Immigration Act 2014 and proposed in the Immigration Bill, will bear on the 'unreturnable' - those who cannot practicably leave the UK. I consider whether those 'hostile environment' measures amount to a denial of civil rights so as to bring art 6 ECHR into play.

2. What is new in relation to foreign criminals and unlawful migrants?

Life has always been harsh for foreigners who commit crimes in the UK. Historically, 'aliens' whether criminal or not could be deported by royal

[5] Dealt with in detail in my article *Revisiting removability in the 'hostile environment,* Birkbeck Law Review Volume 3 Issue 2, December 2015

prerogative. The 1919 introduction of the 'conducive to the public good' test amounted to a limiting of that prerogative power. But until 1969 there was no right of appeal, and few benefited until 1999 when legal aid became available for representation in immigration appeals.[6] The specific issue of 'foreign criminals' attracted little judicial or political attention until the 2006 'foreign national prisoners' debacle,[7] following which the UK Borders Act (UKBA) 2007 introduced 'automatic deportation' for those sentenced to at least 12 months in prison. Since then the 'foreign national criminals' issue has driven much of the political discussion, legislative and policy changes and litigation over the role of article 8 ECHR in immigration control.

What is entirely new is the political determination to root out all 'foreign criminals' regardless of circumstances. The declaration that deportation of a foreign criminal 'is' in the public interest purportedly permits a new decision to deport to be made regardless of time elapsed since conviction or even previous judicial consideration. I conclude that these recent and proposed changes in law and Home Office policy amount to a more general attack on fundamental common law principles such as legal certainty and finality, and a weakening of the standard of proof of criminality.

Also new is the explicit abandonment of attempts to enforce removal[8] of 'failed asylum-seekers' and others unlawfully overstaying, and instead effectively to starve and freeze them out.[9] Measures in the Immigration Act 2014 bore out Home Secretary Theresa May's stated intention of creating a 'hostile environment' for unlawful migrants.[10] The Act denies the right to a bank account or a driving licence to those unlawfully present, and created a 'right to rent', precluding unlawful migrants from either holding a private tenancy or living in the home of a private tenant – even their spouse. Access to

---

[6] Following the Immigration Act 1971 the UK Immigration Advisory Service was set up to provide representation on the day to immigration appellants, but this did not include any case preparation.

[7] *How the deportation story emerged* BBC 9 October 2006, accessed 5 January 2016

[8] The most recent Home Office statistics show total enforced removals per year falling from 21,425 in 2004 down to 12,627 in 2014. https://www.gov.uk/government/publications/immigration-statistics-july-to-september-2015/list-of-tables#removals-and-voluntary-departures accessed 5 January 2016

[9] Not mere rhetoric! See, for example, Joint Committee on Human Rights, *Tenth Report* (2006-7) paras 67, 120, 121. <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/8102.htm> accessed 5 January 2016; Mayor of London, *Destitution by Design* (Greater London Authority 2004) <http://legacy.london.gov.uk/mayor/refugees/docs/destitution_by_design.pdf> accessed 6 August 2015.

[10] http://www.theguardian.com/politics/2013/oct/10/immigration-bill-theresa-may-hostile-environment accessed 5 January 2016

health care is also curtailed. The current Immigration Bill[11] goes further, criminalising the letting of property occupied by a person with no 'right to rent', with fast-track eviction powers; criminalising working without permission, providing for the sequestration of wages so earned and of funds in unlawful migrants' bank accounts, and of any car being driven by such a person. At the time of writing, schedule 9 of the Bill provides under specific circumstances for accommodation and subsistence to a family with a minor child and for a 'former relevant child'. Otherwise the Bill makes no provision for accommodation or subsistence, and barely offers temporary protection from the 'hostile environment' measures, even for those who have an outstanding formal application to stay in the UK, or an outstanding appeal against refusal.[12] Finally, the bill also proposes to restrict asylum support to current asylum-seekers and only those 'failed asylum-seekers' who cannot return home, without right of appeal against refusal. Recent reviews[13] of asylum support tribunal determinations on this issue show the high percentage of Home Office refusals which are overturned, indicating how difficult it will be to obtain the new support with no right of appeal. I explore whether that denial of access to the necessities of life to those unable to leave the UK would amount to a denial of a civil right, and may breach the threshold of art 3 harm, as discussed in *Limbuela.*[14]

---

[11] Bill 79, 2015-16 http://www.publications.parliament.uk/pa/bills/lbill/2015-2016/0079/15079.pdf accessed 5 January 2016

[12] The Guild of Residential Landlords provides a link to the Home Office Landlord Checking Service https://eforms.homeoffice.gov.uk/outreach/lcs-application.ofml (accessed 5 January 2016) to check whether an occupier has an outstanding application or appeal or administrative review, or an application for an EEA residence card within the last 6 months, or permission to occupy premises has been granted by the Home Office under IA2014 s21(3). Despite diligent searching, the author can find no information on how a migrant should apply for such permission. Neither can the author find any reference to regulations or guidance stating that the above categories are exempted from the right to rent requirements. I have made an FOI request, response due 5/2/2016.

[13] Asylum Support Appeals Project (ASAP), 'The Next Reasonable Step: Recommended Changes to Home Office Policy and Practice for Section 4 Support Granted under Reg 3(2)(a)' (September 2014) <http://www.asaproject.org/wp-content/uploads/2014/11/The-Next-Reasonable-Step-September-2014.pdf> accessed 5 January 2016; ASAP, 'Unreasonably Destitute?' (2008) < http://www.asaproject.org/wp-content/uploads/2013/03/unreasonably_destitute.pdf> accessed 5 January 2016. Further research on asylum support appeals under way in Kent Law Clinic supports ASAP's conclusions .

[14] *Limbuela (Adam, R (on the application of) v. Secretary of State for the Home Department* [2005] UKHL 66 [2006] AC 396 concerned the denial of asylum support to those who had not claimed asylum 'as soon as reasonably practicable' under s55 NIAA2002. The court decided that support had to be provided to prevent a breach of art 3 ECHR. The claimants in *Limbuela* had a lawful right to remain in the UK to prosecute their asylum claim, whereas the Immigration Bill is dealing with *failed* asylum-seekers. However the same reasoning might apply where people not otherwise eligible for any support are not foreseeably removable from the UK.

3. Immigration issues and determination of a criminal charge

a. Retrospective measures

Retrospective measures, though permissible in a parliamentary democracy, are generally deprecated as unfair and eroding of respect for the law. In *Reilly (no 2),*[15] concerning retrospective enforcement of benefits regulations, Mrs Justice Laing notes the 'longstanding objections to retrospective legislation' as based on 'no more than simple fairness'. She notes that the retrospective creation of criminal offences and heavier penalties is prohibited by Art. 7 ECHR. There is little detailed reasoning on the issue in relation to immigration law. The case of *AT (Pakistan),*[16] on the transitional provision for automatic deportation under the UK Borders Act (UKBA) 2007, decided in passing that 'aliens' who are 'foreign prisoners' may be subject to retrospective measures. The court referred to art 7 ECHR and then considered whether automatic deportation constituted a 'penalty' for the purposes of that article:

> 25. ... the fact that automatic deportation will prevent re-offending by a foreign criminal in this country suggests that the measure can properly be categorised as preventive rather than punitive for the purposes of Article 7.
>
> 26. In any event I have little doubt that the ECtHR if faced with the issue in this case would reach the same conclusion as the Commission did in *Moustaquim,* namely that "a measure of this kind taken in pursuance, not of the criminal law but of the law on aliens is not in itself penal in character."

Unlike the automatic deportation provisions, the IA 2014 declaration[17] that deportation of foreign criminals 'is' in the public interest is not limited in its retrospective effect. Now, anyone with a previous conviction, however long ago, whose case file crosses an immigration officer's desk,[18] faces a *de novo* consideration of whether to deport him. A current client, in the UK for 38 years, and leave to remain granted after a previous conviction, has just

---

[15] *Reilly (No. 2) & Anor, R (on the application of) v Secretary of State for Work and Pensions* [2014] EWHC 2182 (Admin) (04 July 2014), 2015] 2 WLR 309, [51-54]

[16] *AT Pakistan & Ors* [2010] EWCA Civ 567 [25,26] NB the reference to *Moustaquim* is difficult to follow up, since the Commission hearing is only available in French, and the full report only available in the printed copy from the Court registry. This has been ordered from the Court.

[17] [redacted]

[18] For example, on an application for a biometric residence card to confirm indefinite leave to remain, to satisfy the updated requirements for employers to check specified documents.

received a peremptory 'request' from Capita to 'leave the country within 5 days'.

b. *autrefois convict, autrefois acquit* and *res judicata*

The criminal pleas of *autrefois acquit* or *autrefois convict,* often collectively referred to as 'double jeopardy', protect an accused from being tried twice for the same offence.[19] In everyday language, a person facing deportation now because of a criminal conviction of some years ago, not previously acted upon by the Home Office, is clearly facing a second penalty for that offence – a penalty which may be far more severe than the original prison sentence. Given that a recommendation for deportation can always be made as part of the criminal sentence of a foreign criminal, the making of such a recommendation, or its not being made, must have some bearing on whether a later decision to deport amounts to a 'penalty'. The CPS Guidelines[20] state:

> In the case of non-EU citizens, the only question to be addressed is whether the offender's continued presence in the UK is contrary to the public interest.

The legal textbook *Res Judicata*[21] notes that what is *res judicata* is the offence itself, and a person may lawfully be prosecuted for other offences arising out of the same or some of the same set of facts. But the punishments on any further convictions must carefully reflect the harm done and not punish twice for the same conduct.[22] By analogy, a later decision to deport where a recommendation was not made must amount to the imposition of a further punishment for the same conduct.

There is some judicial support for this proposition. In his concurring opinion in *Maaouia,*[23] suggesting that there are circumstances in which deportation would involve 'the determination of a criminal charge' for the purposes of art 6 ECHR, Sir Nicholas Bratza wrote:

---

[19] No longer absolute: and a person can be tried more than once for different offences arising out of the same facts.

[20] CPS – sentencing and ancillary orders http://www.cps.gov.uk/legal/s_to_u/sentencing_and_ancillary_orders_applications/#a61 accessed 5 January 2016

[21] *Res Judicata,* Spencer, Bower and Handley, 4th edition, Lexis Nexis 23.01

[22] Ibid 23.10

[23] *Maaouia v France* (n 4)

> ... if the order for deportation were made by a court following a conviction for a criminal offence and formed an integral part of the proceedings resulting in the conviction ... the procedural guarantees of Article 6 would clearly apply to the criminal proceedings as a whole, whether or not the deportation order which resulted was to be regarded as a penalty or as having an exclusively preventative function. ..

So where no such recommendation was made, that should surely be the end of the matter.

Alternatively, relying on the different doctrine of *autrefois acquit,* the absence of a recommendation for deportation as part of the criminal sentence could be treated as analogous to an acquittal. In *Res Judicata*[24] the authors note that the plea is a defence against a second prosecution for the same offence, and note as in relation to *autrefois convict* that there has to be an acquittal on the merits, not simply a withdrawal of prosecution. So where a sentencing judge set out consideration of a recommendation for deportation, including reference to the public interest, and decided not to impose such, a subsequent decision to deport must be tantamount to double jeopardy, and a retrospective imposition of criminal penalties.

Certainly, where the offender has subsequently applied for and been granted leave to remain by the Home Office, a decision to deport made now is tantamount to double jeopardy. Otherwise, the Home Office would be relying on its own previous failure to consider the public interest, or attempting retrospectively to apply a purported new view of the public interest.

c. *Res judicata* in immigration caselaw

A *res judicata* is a decision pronounced by a judicial tribunal with jurisdiction over the causes of action and the parties, which disposes once and for all of the fundamental matters decided, so that, except on appeal, they cannot be re-litigated between persons bound by the judgment. The decision must be on the merits.[25] The doctrine has been barely considered and rejected in immigration cases. In *Cheema*[26] the Court of Appeal (Lord Lane) noted in passing that 'in this field of administrative action on questions of immigration,

---

[24] *Res Judicata* (n 49) 14.01
[25] *ibid* 1.01
[26] *R v IAT ex p Cheema* [1982] Imm AR 124

the specialised doctrine of *res judicata* has no place'.[27] However, no reasons or references are given. The textbook *Res Judicata* shows that statutory tribunals covering legal areas including planning, social security, employment, and also the Boundary Commissioners, medical tribunals and others, have been considered 'judicial' for the purposes of *res judicata*. Departments of State are subject to the doctrine, and immigration is nowhere excluded.[28]

V[29] was a young man who had lived in the UK since he was a child, and all of whose family except him were either British citizens or had indefinite leave to remain in the UK. He had applied for leave to remain and been refused, with a decision to deport. Among other allegations of criminal conduct, the Home Office noted that he had been tried and acquitted of murder, and cited the victim impact statement from the criminal trial as evidence of the public interest in deporting V. V challenged the immigration tribunal's refusal to rule out reference to the murder. He argued that his acquittal was *res judicata.* Hickinbottom J relied on the *DPP v Humphreys* dictum that *res judicata* cannot apply, because an acquittal by a jury cannot be 'presumed ... to have been irrevocably decided in his favour as between himself and the Crown'.[30] However, at V's murder trial, the identity of the perpetrator had become clear to the criminal court – it was one of the prosecution witnesses – so Mr V's acquittal clearly was 'irrevocably decided' as on the merits. Hickinbottom J also decided that the parties are not the same, on the basis that in the criminal trial, V faced the Crown Prosecution Service, while in the Asylum and Immigration Tribunal he faced the Home Office. However, the authors of *Res Judicata* state that all departments of State are emanations of the Crown and so are the same party.[31] So, even if only by analogy, the doctrine of *res judicata* can surely be applied to relevant immigration decisions. Consider a foreign national lawfully present in the UK, subsequently convicted, sentenced and issued with a decision to deport, against which an appeal is allowed on human rights grounds and who is subsequently granted leave to remain. If a new

---

[27] *Ibid* [page 9]

[28] The only reference to immigration is a citation of an immigration case without comment as part of a discussion about interlocutory injunctions (*Res Judicata* ([redacted]) 5.32 (note 11)

[29] *V (R on the application of) v Asylum and Immigration Tribunal & Anor* [2009] EWHC 1902 (Admin); also *R (V) v AIT* [2010] EWCA Civ 491

[30] *DPP v Humphreys* [1976] 2 WLR 857 [1977] A.C. 1 [page 43]

[31] *Res Judicata* ([redacted]) 9.24-9.26

decision to deport were to be made on the basis that 'deportation of a foreign criminal 'is' in the public interest', then, unless the appellant's circumstances have changed, that previous judicial determination must constitute *res judicata* in respect of the issue at stake. There is no element of the doctrine of *res judicata* not present. It can hardly be argued that the public interest in deportation of foreign criminals has significantly changed. What has changed is the Home Office determination to pursue all foreign criminals – but that cannot displace a final judgment of a tribunal.

d. Weakening of burden and standard of proof in criminal cases

A decision to deport on conducive grounds has always been able to rely on issues of 'bad character' even where there are few or no criminal convictions. However the question of what evidence can be relied on raises basic issues of fairness. It has been argued[32] that art 6 ECHR must be engaged where a decision to deport relies on evidence of criminal involvement short of conviction, since the tribunal is effectively determining a criminal matter. And a fair trial in this context must mean a trial with criminal standards of evidence and proof.

Two deportation appellants dealt with by the writer, *V*[33] and *XX* (unreported), were being dealt with under Operation Alliance, a police operation which aimed to tackle gang membership in London. Their appeals demonstrated that even where there has been a previous determination in a criminal court, the appellant is effectively facing a criminal trial where there is no jury, no right to cross-examine witnesses, and the facts are decided on the civil standard of balance of probabilities. Two recent reported cases, *Bah* and *Farquharson,* show the impact on appellants.

Bah[34] had not been prosecuted for any crime, but the tribunal relied on police evidence from anonymous witnesses and found that he probably had

---

[32] *Strategic Legal Fund: Operation Nexus: Briefing paper* Luqmani Thompson & Partners 1 September 2014

[33] The same V as [redacted] above. Following the Court of Appeal judgment on the unsupported evidence, V's immigration tribunal hearing was listed, though the decision was withdrawn the day before the hearing, apparently to prevent the Home Office having to reveal details of Operation Alliance. V was granted discretionary leave, and then eventually, after another judicial review, indefinite leave to remain.

[34] *Bah (EO Turkey) – liability to deport* [2012] UKUT 00196 (IAC)

committed the offences. His deportation appeal was dismissed. On the standard and burden of proof, the tribunal said this:[35]

> '....However, relying upon the judgments of Lords Slynn and Steyn, [in *Rehman*, SY] we consider that any specific acts that have already occurred in the past must be proven by the Secretary of State, and proven to the civil standard of a balance of probability. **The civil standard is flexible according to the nature of the allegations made** ... and a Tribunal judge should be astute to ensure that proof of a proposition is not degraded into speculation of the possibility of its accuracy. (Writer's emphasis)

The headnote of *Farquharson,*[36] a man facing removal on conducive grounds as having been suspected of several rapes, stipulates that if police CRIS reports[37] are to be relied upon the appellant must be given time to consider and respond to them. Against Mr Farquharson there were corroborating statements from a complainant, and *on the balance of probabilities* the tribunal findings look irreproachable. However Mr Farquharson was effectively found guilty and subsequently deported without sight of witness statements or any cross-examination.

That tribunal was concerned about the accuracy and quality of the evidence, and also about the good faith of the Secretary of State and the police:

> 89. First, the UKBA must consider carefully what allegations of conduct it wishes to rely on in the absence of a conviction or other authoritative finding of fact. In our judgement the agency should not allege conduct that it is not prepared to prove to the appropriate civil standard. ... If intelligence is so sensitive that a sufficient gist of it cannot be disclosed, then it should not be raised in the appeal. Mere assertion will not be enough.
>
> 90. Second, ... [police] material must fairly reflect the strengths and weaknesses of any assessment and should not be cherry picked to present one side only if there is material that exculpates as well as inculpates. ...
>
> 91. Third, material is likely to be considered the more cogent, the greater the extent to which it is supported by other relevant documents. In the present case we have searched for data relating to the incidents independent of the complainant's narrative. ... This will not always be necessary, and the Tribunal is not conducting a re-trial, but it may well prove helpful. ...

---

[35] *Ibid* [63]

[36] *Farquharson (removal – proof of conduct)* [2013] UKUT 00146 (IAC)

[37] CRIS (Crime reporting information system) reports are reports kept by the police on each crime. See this FOI disclosure by the Metropolitan Police: http://www.met.police.uk/foi/pdfs/disclosure_2012/november_2012/2012100000249.pdf accessed 5 January 2016

Such exhortations did not prevent assertions of guilt by association in *XX*'s case (though his tribunal found the assertions insufficient to support a deportation decision). And Home Office allegations of an applicant's criminal involvement, whether in decision letters, bail summaries or otherwise, are often not accurate. *V's* judicial review decided that an immigration tribunal is competent to assess and weigh evidence however unsupported or prejudicial. But Mr V and Mr XX both had legal aid, which is no longer available for deportation appeals. All the more reason why none of the tribunal's safeguards proposed above can substitute for the protections afforded by a criminal trial.

e. Operation Nexus

Operation Nexus[38] is a joint operation launched in 2012 between the immigration authorities and the police to identify and remove from the UK 'high harm' foreign national offenders. These are described as those involved in 'murder, attempted murder, GBH, rape, other sexual offences, possession of firearms, knives and other offensive weapons and robbery',[39] but the reach of Operation Nexus is not confined to such candidates. There is no formal definition of 'high harm',[40] and the press release includes those who are 'victims or witness to violent crimes but refused to cooperate with the police'. A young failed asylum-seeker client was referred to Operation Nexus having committed only minor juvenile offences, but who had been acquitted of affray in which another lad died, and having been the victim of two serious crimes and a witness of another. The decision to remove, the Detention Reviews and bail summaries contained different sets of allegations, none mentioning the acquittal or the crimes committed against him. Only an injunction kept him from being removed to Kabul.[41]

f. Reg 21(B) 'abuse of right' by EU nationals

---

[38] Operation Nexus Launches 10 November 2012, Metropolitan Police http://content.met.police.uk/News/Operation-Nexus-launches/1400012909227/1257246741786 accessed 5 January 2016

[39] Mayor of London/Metropolitan Police Total Policing: *High Harm offenders removed* 4 December 2014 http://content.met.police.uk/News/High-harm-offenders-removed/1400028251740/1257246741786 accessed 65 January 2016

[40] *An inspection of Immigration enforcement activity in London and the West Midlands ('Operation Nexus') March-June 2014* Chief Inspector of Borders and Immigration, December 2014. One of the main recommendations is that a single definition of 'high harm' is arrived at (Summary of recommendations no.5).

[41] Without ever revealing the evidence for his referral into Operation Nexus and with barely any reference to his 'criminal conduct', the Home Office finally recorded a fresh claim for asylum and refused it with an in-country right of appeal.

Despite there being stronger protections against removal or deportation for EEA nationals, under recent EEA regulations[42] EEA nationals can effectively be prosecuted and removed for 'abuse of rights'. A young Polish client contracted a sham marriage, in circumstances that arguably amounted to trafficking, and faces an appeal against removal from the UK with her small child. Contracting a sham marriage could be prosecuted as a criminal offence, and the Home Office and the police have considered prosecution in this case. However, in her immigration appeal she faces the penalty of removal without the procedural safeguards of a criminal trial, and without the formal defence of duress being open to her, only the lesser protection of a consideration of proportionality under Reg 21B(2) by an immigration tribunal, without benefit of legal aid.

I conclude that immigration proceedings based on unsupported and unprosecuted criminal allegations are clearly 'determining a criminal charge', and the ensuing deportation or removal is certainly a 'penalty'. Now that future subjects of deportation decisions may not be able to exercise any right of appeal from within the UK, and others may simply be removed without any right of appeal at all,[43] we must seek to argue that art 6 is engaged, whether directly or because there is otherwise no effective remedy.[44]

4. Immigration issues and determination of a civil right

a. The *Maaouia* position

Mr Maaouia had applied for a rescission of an expulsion order, and had raised art 6 to complain about the length of time it had taken for his case to come to court. Art 6(1) states:

---

[42] Reg 21B Abuse of rights or fraud, Immigration (European Economic Area) (Amendment ((No. 2) Regulations 2013 SI 2013 No. 3032

[43] Section 1 Immigration Act 2014

[44] Now that the residence test for legal aid has been found to be lawful, few of those facing deportation will have practicable access to judicial review: see [illegible]81 below.

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent tribunal established by law...

The ECtHR had not previously considered the application of this article in cases of expulsion of aliens. It noted that the Commission had previously considered the matter (giving references for examples) and had 'consistently' decided that (immigration decisions) do not entail any determination of civil rights or of any criminal charge. However little discussion is to be found of this very significant conclusion. The oldest relevant case traceable from the examples referred to in *Maaouia* is *Agee v UK,*[45] decided in 1977, which says [28]:

> ... the Commission observes that the right of an alien to reside in a particular country is a matter governed by public law. It considers that where the public authorities of a State decide to deport an alien on grounds of security, this constitutes an act of state falling within the public sphere and that it does not constitute a determination of his civil rights or obligations within the meaning of art 6. Accordingly, even though the decision to deport the applicant may have consequences in relation to his civil rights, in particular his reputation, the State is not required in such cases to grant a hearing confirming to the requirements of art 6(1).

Mr Agee was an ex-CIA agent living in the UK who faced deportation on the grounds of security. However, while a decision to deport made on security grounds is arguably 'an act of state falling within the public sphere', it is less clear why no other immigration or asylum decision constitutes a determination of civil rights. And there is no reasoning in any of the *Maaouia* examples,[46] all but one of which are merely admissibility applications. *Uppal & Singh v UK* says:

> The Commission has considered, in the context of previous cases brought before it, the question of the applicability of Article 6 .1 of the Convention to deportation

---

[45] *Agee v UK* Application no 7729/76

[46] Besides *Uppal and Singh v. the United Kingdom*, 8244/78, Commission decision of 2 May 1979, Decisions and Reports (DR) 17, p. 149, *Maaouia* [redacted] [35] refers to:

- Urrutikoetxea v. France, 31113/96, Commission decision of 5 December 1996, DR 87-B, p. 151. This says (para 4) *Lastly, in so far as the applicant invokes Article 6 of the Convention, the Commission recalls that expulsion proceedings do not entail any determination of an applicant's civil rights and applications or of any criminal charge against him (see No 9990/82, Dec 15 5 4, DR 19 p 119)* ...;
- Case 9990/82 is *Bozano v. France*, Commission decision of 15 May 1984, DR 39, p. 119. This case merely declares the art 6 claim inadmissable ratione materiae with respect to Article 6, i.e. simply because of its subject matter.
- Kareem v. Sweden, 32025/96, Commission decision of 25 October 1996, DR 87-A, p. 173) does likewise, referring to No.13162/87, P. v. the United Kingdom, Dec. 9.11.87, D.R. 54 p. 211. That case does likewise, referring to Agee v UK 7729/76.

> matters. The Commission has held in these cases that a decision as to whether an alien should be allowed to stay in a country is a discretionary act by a public authority. ... They did not therefore involve as such the determination of civil rights within the meaning of Article 6 .1 of the Convention ...

But the 'previous cases' are not referenced. In fact, the cases mentioned in *Maaouia* simply refer to each other, or to other cases which merely state that conclusion, which begins to look like 'the emperor's new clothes'.[47] Only in *Agee* does the conclusion appear to rest on his specific facts.

Especially without any fully-reasoned judgment or Commission opinion to which to refer, it is surely hard to maintain the inapplicability of art 6 to immigration matters after decades of intense formalisation and judicialisation of immigration control, including the changing character of immigration decision-making itself. Even if the 'autonomous' meaning of 'civil rights' in art 6 ECHR would not change because of changes in the character of UK immigration decisions and determinations, those changes justify a challenge *within the UK* to the idea that the immigration jurisdiction belongs to a separate sphere of 'administrative justice' in which neither civil nor criminal rules and standards consistently apply. The bare principles teased out from the *Maaouia* references are now further examined.

b. The discretionary legal nature of immigration control?

The recent changes in government policy and court rulings could be seen simply as a return to an earlier more harsh regime, when 'aliens' were 'rightless' and UK immigration law described in parliament as 'illiberal' and 'arbitrary'.[48] However, not just the Human Rights Act 1998 but the previous 25 years of bringing 'aliens' into the tribunal system, and, through legal aid, their

---

[47] A similar example of an important legal edifice being built on very slender legal reasoning by the ECtHR can be seen in the reliance placed on the 2008 case of *K.R.S. v. United Kingdom*, Application no. 32733/08. This was the admissibility decision (reportedly taken without the applicants' lawyers being notified of the hearing) which decided that there was an irrebuttable presumption that EU Member States would implement the EU Directive on reception conditions for asylum-seekers, and so no complaint could be brought against Greece for its treatment of asylum-seekers (overturned in *M.S.S. v. BELGIUM AND GREECE - 30696/09* [2011] ECHR 1 31 BHRC 313, (2011) 53 EHRR 2, [2011] INLR 533, [2011] ECHR 108.

[48] Statutes, 32 Mod. L. Rev. 668 1969; and in the 1969 Lords debate on the Bill to introduce an appellate system, Baroness Gaitskell quotes Quintin Hogg, Shadow Home Secretary (later Lord Hailsham) as describing the UK immigration system since 1905 as 'one of the most illiberal, arbitrary systems of immigration law in the civilised world'. HL Deb 27 March 1969 vol 300 cc1418-55

increasing, effective access to higher appellate courts and judicial review, have brought immigration squarely within the rule of law. Aliens had always had access to the common law remedies of habeas corpus[49] and judicial review. But after the Immigration and Asylum Act (IAA) 1969 and the Immigration Act (IA) 1971 immigration decision-making became explicitly subject to a formal appellate system, and recourse to judicial review increased exponentially.[50]

The immigration and asylum decision-making and tribunal system has been widely theorised as a form of 'administrative justice',[51] distinct from both civil and criminal justice as subject to strategic political considerations as well as considerations of cost, turnover and throughput.[52] However the introduction of a statutory appeals system, legal aid and significant access to public law remedies have all led to a reasonable expectation (if not a strictly legitimate expectation) both to migrants and to wider society that migrants would be dealt with in accordance with principles of good administration.[53] The principal legal and procedural underpinnings of this 'reasonable expectation', in relation to immigration control, have been:

- *Greater transparency*: published rules and guidance; applicants' access to their own Home Office files;
- *Procedural fairness*: giving reasons for decisions, providing statutory rights of appeal and accessible public law procedures, with legal aid for advice and representation;
- *Certainty*: e.g. 'routes' to settlement and family reunion
- *Finality*: treating the determination of an appeal as determinative, and not imposing retrospective measures.

---

[49] An early *Maslov*-style case was *R v Inspector of Leman St Police Stn... ex p Venicoff* [1920] 3 KB 72, in which a writ of habeas corpus was applied for to prevent the deportation of a Russian criminal who had lived in the UK 'since he was quite a lad'.

[50] In the 70's there were a few hundred judicial reviews each year. In 2013 there were over 10,000, and 77% concerned immigration. *Immigration judicial reviews,* Robert Thomas, UK Constitutional Law Association blogpost 13 September 2013

[51] See for example *Administrative Justice and Asylum Appeals: a study of tribunal adjudication* Robert Thomas, Hart Publishing 2011 ISBN 978-1-84113-936-4

[52] For example, in 2005, Prime Minister Tony Blair took personal charge of the cabinet committee dealing with immigration and asylum, which covered the whole asylum system, from immigration officers through to the tribunal system and legal aid expenditure – see The Independent 25 May 2005, accessed 18 August 2015 but no longer available 7 January 2016 (pdf available from the author)

[53] This is certainly accepted by the courts: *Fayed, R (on the application of) v Secretary Of State for Home Department* [1996] EWCA Civ 946, [1997] 1 All ER 228. (Judgment of the Master of the Rolls).

Despite now being under attack,[54] these developments arguably amount to the state's formal relinquishing of absolute control over its borders, acknowledging that the status of migrants in the legal system is no longer so sharply different from that of citizens.

Sir Nicholas Bratza in his concurring opinion in *Maaouia* stated that there is too much discretion in immigration decision-making for there to be a 'civil right' in play. Even if true in 2000 when *Maaouia* was decided, this position is difficult to maintain. The introduction from 2007 of the points-based system for students and workers, and the 2012 introduction of detailed specific requirements for rules-based applications, including setting out '... how, under Article 8 of the Human Rights Convention, the balance will be struck...'[55] show a conscious Home Office effort to reduce discretion in immigration decision-making. This has been recognised by the courts. In 2012 *Alvi*[56] decided:

> 32 ...The powers of control that are vested in the Secretary of State in the case of all those who require leave to enter or to remain are now entirely the creature of statute. That includes the power to make rules of the kind referred to in the 1971 Act...
>
> 33 ...The obligation under section 3(2) of the 1971 Act to lay statements of the rules, and any changes in the rules, cannot be modified or qualified in any way by reference to the common law prerogative. It excludes the possibility of exercising prerogative powers to restrict or control immigration in ways that are not disclosed by the rules...
>
> 42 ...The introduction of the points-based system has created an entirely different means of immigration control. The emphasis now is on certainty in place of discretion, on detail rather than broad guidance...

In relation to article 8 family and private life, a recent foreign criminal case, *Chege*[57] made it clear how little discretion remains to the Secretary of State. The headnote says:

---

[54] For example, note how judicial attitudes on 'abuse of process' have moved from *Rashid* (*R (Rashid) v Secretary of State for the Home Department* [2005] EWCA 744, [2005] Imm AR 608) to the recent Supreme Court dismissal (not to say trouncing) of *Rashid* in *TN & MA* [2015] UKSC 40.

[55] Immigration Rules Appendix FM Gen 1.1

[56] *Alvi, R (on the application of) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] WLR(D) 211, [2012] 1 WLR 2208

[57] *Chege (section 117D - Article 8 - approach : Kenya)* [2015] UKUT 165 (IAC). It is not known whether this has been appealed.

> *...paragraph 397 provides the respondent with a residual discretion to grant leave to remain in exceptional circumstances where an appellant cannot succeed by invoking rights protected by Article 8 of the ECHR.*

This residual discretion was exercised in favour of a man with severe mental illness.

c. 'civil rights' as private law rights only

Returning to *Maaouia,* that judgment and its subsequent interpretation relies on defining civil rights as concerning private law issues only. Two dissenting judges[58] criticised that interpretation by the Commission and the Court and, by implication, the lack of judicial attention paid to the issue. Those judges seek to define 'civil' as simply 'non-criminal'. They note that claims for social security and social assistance have been accepted by the ECtHR as involving the determination of a civil right, despite the fact that such claims are matters of public administration. From the standpoint of 'administrative justice' theory, and certainly in the UK, there is little structural difference between the social security system and that of immigration and asylum. Both are bureaucratic systems dealing with large volumes of individual decisions involving issues of entitlement (including civil and criminal sanctions for non-compliance) where decision-making follows rules and published policies including elements of discretion, with access to the highest courts via statutory appeals in the same tribunal structure, and via judicial review. Determinations in each of the relevant Upper Tribunals are persuasive in the other Tribunal jurisdictions. Clearly the subject-matter is generally different (though social security decisions do often involve determinations of immigration status) but the difference in subject matter is not what was relied on in *Maaouia*. And to distinguish the two systems on the basis that one concerns 'aliens' is surely circular.

The case of *MK (Iran)*[59] concerned delay in dealing with an asylum application. The applicant argued that the EU Qualification Directive had transformed the legal status of an asylum claim to an individual right, and therefore art 6 was engaged. The court decided to follow *Maaouia* and reject this. However the

---

[58] Loucaides and Traja, *Maaouia,* [redacted]

[59] *R (on the application of MK (Iran)) v. Secretary of State for the Home Department*, [2010] EWCA Civ 115

court undertook a detailed discussion and noted the lack of consensus or coherence on what aspect of immigration control excluded it. The applicant's submissions referred to Lady Hale's comment on recent case law:[60]

> "The question whether the claim concerned the determination of the applicant's civil rights was not disputed. This was not surprising, as the case fell within the mainstream of cases where the issue was one as to the entitlement to an amount of benefit that was not in the discretion of the public authority....[Recent cases]... indicate that article 6(1) is likely to be engaged when the applicant has public law rights which are of a personal and economic nature and do not involve any large measure of official discretion. As the court put in Salesi v Italy, para 19, the applicant was claiming an individual, economic right flowing from specific rules laid down in a statute. In Mennitto v Italy, para 23, the court said that the outcome of the proceedings must be directly decisive for the right in question." [59]

The court referred to an Immigration Appeal Tribunal decision[61] in which Collins J suggests that discretion cannot be the reason for excluding immigration matters from art 6, but rather the fact that it is an administrative act and so any rights found in public law. However Collins J describes *Maaouia* as having based its decision on the distinction between public and private law rights, which, respectfully, is not at all clear. And Collins J notes, as does Lady Hale in *MK (Iran),* that the case of *Salesi v Italy* establishes that social security issues engage art 6.

In *MK (Iran)* Sedley LJ expresses 'considerable reluctance' to follow *Maaouia*. Besides noting that since art 6 had been applied to social security, 'the autonomous meaning of civil rights has no very clear boundary', he is concerned that following *Maaouia* requires the assimilation of asylum claims to deportation and removal proceedings without reasoning. On discretion, he says:

> 73. So long as, in the UK's dualist constitution, asylum was no more than a treaty obligation, no right at all could be said to exist. **So long as its application was an administrative function, its grant could be categorised as discretionary; though with the introduction of a judicial appeal system this has long since ceased to be a sufficient description.** ...

---

[60] In *R(A) v Croydon LBC* [2009] UKSC 8 [ ]
[61] *MNM v Secretary of State* [2002] UKIAT 00005 [11]

But the judges' misgivings about following *Maaouia* were reasoned away by deciding that 'against this consistent line of Strasbourg authority ... [it would not] be appropriate to develop a distinct jurisprudence' [64].

d. 'the nature of the proceedings'?

Armstrong[62] discusses the bizarre effect of *Maaouia*. Ancillary issues affecting migrants, such as their detention and bail,[63] and their entitlement to asylum support,[64] are held to engage art 6, while their substantive immigration issue not. Lord Hoffman, in *RB (Algeria),*[65] takes a stern line. He refers to cases concerning control orders and detention, noting that those issues engage art 6, and says:

> If the proceedings had been an action in tort for a breach or threatened breach of article 3, they would certainly be asserting a civil right and article 6 would be engaged: ... As I have said, it is the nature of the proceedings which decides whether article 6 is engaged or not.

Armstrong refers to *Orsus v Croatia,* a 2008 case concerning the right of Roma children to be placed in regular primary schools, which accepts that art 6 is engaged despite education being a public law matter. The court refers to an earlier case which states: 'where a State confers a right which can be enforced by means of a judicial remedy, these can, in principle, be regarded as civil rights within the meaning of art 6(1)'.[66] Armstrong also refers to *Tariq v Home Office,*[67] dealing with closed evidence in employment tribunal proceedings, in which the Supreme Court says:

> It seems to me that there is no principled basis on which to draw a distinction between the essence of the right to a fair trial based on the nature of the claim that is made. A fair trial in any context demands that certain indispensable features are present to enable a true adversarial contest to take place.

Clearly there is judicial disagreement on the issue.

---

[62] Nick Armstrong (2013) *LASPO, Immigration and Maaouia v UK (sic)* Judicial Review 18:2
[63] See *BB* [2011] EWHC 336 (Admin) [40] where Richards LJ said: '...it is an unattractive but inevitable consequence of applying the minimum art 5(4) standard to the bail proceedings when it did not apply to the substantive appeal'
[64] Stanley Burnton J in *Husain v ASA* [2001] EWHC 852 Admin, decided that asylum support issues engage article 6. In *S,T, P v LB Brent* [2002] EWCA Civ 693 his analysis was described as 'impressively reasoned'.
[65] *RB Algeria* [2009] UKHL 10 [173] paras 168-179
[66] *Orsus v Croatia* (2011) 52 EHRR 7 [104, 105]
[67] *Tariq v Home Office* [2011] UKSC 35 [134]

e. The 'guarantees' in art 1 Protocol 7?

The court in *Maaouia*[68] also determined that art 6 cannot have been intended to apply, since an expellee had recourse to the *'guarantees specifically concerning proceedings for the expulsion of aliens'* contained in Article 1 of Protocol No. 7. These 'guarantees' were the protections given in art.s 3 and 8 ECHR and the art 13 right to an effective remedy. However, this Protocol was not adopted until 1984. The dissenting judges argued that a Convention right could not interpreted by reference to a later instrument, especially since it had not (and still has not) been ratified by major EU Member States including the UK. In *Maaouia* the court noted that it had been ratified by France, the respondent State. Could the court have relied on it if the UK had been the respondent?

Art 1 of Protocol 7 applies only to those 'lawfully resident' on the territory. Under UK law, a decision to deport or remove includes curtailing any extant leave, thereby removing access to those 'guarantees' and so leaving those migrants without any formal protection under the ECHR. In any event, recent reductions in appeal rights have reduced such 'guarantees' to such an extent that excluding foreign criminals' claims from art 6 can no longer be justified on that basis.

In conclusion, immigration law has been brought out of the purely administrative, discretionary world into the same judicialised world as other public law matters (social security, education, planning, tax regulation, etc) and all private law rights. Whether by direct challenge to *Maaouia* or by recourse to common law principles, legal challenges can be made to attempts to put 'aliens' back into the 'rightlessness' box.

5. Unreturnability

a. The law[69]

---

[68] *Maaouia* [redacted] [37]

[69] The following analysis is from my article *Revisiting removability in the 'hostile environment'* Birkbeck Law Review [redacted]

To claim not to be able to return home is generally the last, despairing cry of the failed asylum-seeker or long-term illegal overstayer. However, the legal position has for some time been abundantly clear. From *Khadir,*[70] the power to keep someone on temporary admission is without limit of time, but, if it becomes 'simply impossible' to remove someone, 'it may be irrational' not to grant leave (the 'Hale threshold'). From *MA (Ethiopia)*[71] (and *Lazarevic* and *Bradshaw* before that),[72] an applicant must take all reasonable steps in good faith to establish her nationality, in relation to any and all potential countries of nationality; and the test of inability to return is to be proved on the balance of probabilities. During the *Khadir* litigation, Section 67 NIAA 2002 was passed, sanctioning the indefinite use of temporary admission so long as the Home Office maintained an intention to remove. From the writer's case of *MS, AR & FW,*[73] the 'practical difficulties' referred to in Section 67(2)(b) comprise any and all problems an applicant may face in attempting to establish her nationality, obtain documents and return home; and 'some prospect' of removal does not mean 'some realistic prospect' (but, arguably, must mean a more than fanciful prospect).[74] *MS, AR and FW* remains the only case in which a Court suggested that, in particular factual circumstances, it may 'not be inconceivable' that the 'Hale threshold' has been reached.

The above cases and others decided since show the importance of the specific factual matrix—not just the details of the steps taken to obtain documentation and the objective evidence about the difficulties of obtaining documentation, but also the applicant's own history, and the credibility of the applicant, both in relation to the steps taken, but also in general. In *MS, AR & FW*, the applicant AR's appeal was dismissed despite its being accepted that he was from the West Bank of the Occupied Territories, and despite detailed objective evidence about the difficulties of returning there. He had not been found credible in his own asylum claim, and so the Court would not believe there was no one in the West Bank who could help him obtain a travel document.[75] In

---

[70] *Khadir* [redacted]

[71] *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289.

[72] *Lazarevic (Adan, Nooh, Lazarevic and Radivojevic) v Secretary of State for the Home Department* [1997] 1 WLR 1107, 1126); *Bradshaw* [1994] Imm AR 359.

[73] *MS, AR & FW v SSHD* [2009] EWCA Civ 1310.

[74] In *Rabah & Others v SSHD* [2009] EWHC 1044 (Admin) [53].

[75] Practitioners with Palestinian clients will know the real 'practical difficulties' of obtaining a travel document from the Palestinian Authority (PA) in Ramallah. There is great suspicion there of those who have fled abroad.

MA (Ethiopia) the appellant MA's claim that she would be deprived of her Ethiopian citizenship was not accepted, since she had, in the view of the authorities, effectively stymied her own application by telling the Ethiopian Embassy that she was Eritrean. In *BM (Iran)*[76] the objective evidence showed that voluntary return to Iran had always been possible. BM's asylum tribunal had also found as a fact that he had family in Iran and that he would be able to contact them.

Such a demanding credibility threshold is likely to exclude a great many migrants from ever being able to challenge temporary admission, since, as with a fresh claim for asylum, only cogent new evidence can displace such findings. On the other hand, the Home Office is famously reluctant to accept that removal is impossible when it manifestly is. For example, the appellant MS in *MS, AR & FW* presented letters from both the Egyptian and Saudi Embassies stating categorically that they would not admit him to their territory: the Home Office told the Court of Appeal that 'they had written asking the Embassies to change their minds'.

b. Unreturnability in other legal contexts: statelessness; asylum support

This means that any application based on a claim not to be able to return is unlikely to be accepted. This is clear from experience of testing these types of facts and arguments in other legal contexts. Applications for leave to remain as a stateless person under part 14 of the Immigration Rules, a procedure introduced in 2013, have an extremely low success rate. Liverpool Law Clinic, specialising in statelessness applications, recently told the Guardian that out of 700 applications in the first two years, only 20 people have been recognised as stateless.[77] Applications by 'failed asylum-seekers' for section 4 support on the basis that they cannot return home[78] face an uphill struggle, despite there

---

A client of the writer sent his brother to do this for him, and the brother was detained by the PA for two weeks and then told to get out of his village. The brother was then homeless and destitute with his family—and still no travel document was obtained.

[76] *BM (Iran)* [2015] EWCA Civ 491.

[77] Guardian 28/12/2015, accessed 7 January 2016

[78] s4 IAA 1999 and reg 3(2)(a) of the The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 SI 2005 No. 930: 'he is taking all reasonable steps to leave the UK or place himself in a position in which he is able to leave the UK, which may include complying with attempts to obtain a travel document to facilitate his departure'

being many difficulties in redocumentation being beyond their control. The 2014 report of the Asylum Support Appeal Project (ASAP)[79] examined over 50 Regulation 3(2)(a) asylum support appeals. Over 75% of decisions to discontinue support were overturned or reconsidered, of which over 82% were from the top 3 nationalities applying under this criterion: Iran, Palestine and Somalia. ASAP recommended that applicants should receive tailored advice from the Home Office on what would be reasonable steps for them, and that applicants should not be penalised for not carrying out a 'step' which cannot work. Kent Law Clinic's current examination of a further 92 'reasonable steps' appeals supports ASAP's conclusions.

The Immigration Bill proposes that only those with current international protection claims, and only those failed asylum-seekers with a 'genuine obstacle' to leaving the UK, the definition of such to be left to the Home Office in regulations, will be entitled to support. The Bill abolishes the right of appeal against a refusal of support. The Home Office response to consultation on this issue stated that 'the existence or not of such an obstacle [to return] will generally be a straightforward matter of fact, for which a statutory right of appeal is not required'.[80] That view cannot be justified given the proportion of appeals allowed on these grounds. Anyone attempting to argue non-returnability will face the same obstacles as now both from the law and from the Home Office 'culture of disbelief', with only judicial review to fall back on. It should be straightforward to rely on art 6 since asylum support has been accepted as a 'civil right', but with no legal aid[81] few applicants will know to argue this.

c. *Limbuela*; a return to National Assistance Act litigation?

Limbuela[82] set a high point in declaring that a denial of support for asylum-seekers, rendering them destitute and homeless, may breach art 3 ECHR.

---

[79] See n 5

[80] Home Office: Reforming Support for Failed Asylum Seekers and Other Illegal Migrants: Response to Consultation November 2013; Immigration Bill 2015/15 Factsheet, Home Office December 2015

[81] The residence test, now approved in court in *Public Law Project v The Lord Chancellor & Anor* [2015] EWCA Civ 1193, will deprive such applicants of access to legal aid.

[82] *Limbuela* n 4

However that case concerned asylum seekers, who had an international law right to remain until such application was finally determined, for whom a denial of support could amount to *refoulement*. In relation to failed asylum-seekers and unlawful overstayers, it will be argued that they have an alternative – to return home. *For those who are failed asylum-seekers* with an arguable claim that they are not returnable, with no right of appeal against refusal of support, an injunction is likely to be needed to compel support.

However, long-term overstayers and those with curtailed or withdrawn leave, facing removal or deportation on grounds of 'criminal history' whether or not reaching the definition of 'foreign prisoner', will only exceptionally be eligible for support. In that recent response the Home Office says:[83]

> There is no general obligation on local authorities to accommodate illegal migrants who intentionally make themselves destitute by refusing to leave the UK when it is clear they are able to. Schedule 3 to the 2002 Act already provides that, across the UK, a range of local authority social care is unavailable to failed asylum seekers and others who remain in the UK unlawfully, except where, following what can be a complex and burdensome assessment process, the local authority decides that the provision of such support is necessary to avoid a breach of human rights or on the basis of other exceptions for which Schedule 3 provides.

The ensuing discussion makes no specific proposals, and, pointedly, makes no reference to those 'illegal migrants' who have an outstanding application or an outstanding appeal (though in an earlier section summarising the consultees' concerns, the Home Office nods to local authority concern about Home Office and tribunal delays).[84] Recourse will therefore only be, as now, an application to a local authority for support on the basis of 'destitution-plus',[85] providing evidence not only of care needs but also of non-returnability. Undoubtedly, with diminishing resources available to local authority social services departments, such applications will be resisted, and because of the residence test, injunction applications will not be legally aidable.

---

[83] ibid para. 2.6.6

[84] Though see the comment on the Guild of Residential Landlord advice at [redacted] above

[85] The shorthand term applying to those accepted as needing 'care and attention' under s21 National Assistance Act 1948 that does not arise solely from destitution ascribable to their immigration status: see for example *SL v Westminster* [2013] UKSC 27 at [44]

So what of the non-returnable without children under 18 or 'destitution-plus' care needs? Apart from the difficulty of meeting the 'Hale threshold' of removability, such applicants would face a number of 'hostile environment' measures against which there would be no feasible challenge. For example, an applicant with leave to remain curtailed because of a new decision to deport them would cease to have the 'right to rent' and therefore lose his accommodation. But he cannot litigate to force his landlord to continue to accommodate him while he proves that he is not returnable, then successfully obtains an in-country right of appeal, and then waits for that appeal to be listed, heard and finally determined. New guidance on the s94 power to certify an out-of-country right of appeal against deportation provides for discretion to be exercised if the person is not currently removable,[86] but proving non-returnability in this context will be no easier than for any other purpose.

6. conclusion

The Asylum and Immigration Act 1996 had the effect of depriving single asylum-seekers of access to housing or benefits. Their only hope was to apply for 'care and attention' under s21 National Assistance Act 1948, a little-used measure which had replaced antiquated poor law provision. A series of injunctions were granted,[87] which eventually led to the setting up of the National Asylum Support Service in 2000. I conclude that present-day 'undesirable' and 'unreturnable' applicants would once more have to have recourse to this provision. They will have to wait until they became street homeless and ill before applying , since such help is forbidden under sch3 NIAA 2002 unless to prevent a breach of Convention rights: and hard-pressed local authorities are likely to resist. A successful argument that the denial of an in-country right of appeal amounted to a denial of an effective remedy might support an injunction. And a successful argument that a deportation appeal did engage art 6 might support claims against the tribunal service arising out of the delays in listing and hearing immigration appeals. But we would probably have to wait until enough such injunctions were granted, and tales of people with

[86] *Home Office Section 94B of the Nationality, Immigration and Asylum Act 2002 Version 5* para 3.28, 30 October 2015

[87] following the Collins J judgment in the High Court in 1996 then referred to as *MPA&X,* which led to *R oao A,* [1997] EWCA Civ 1032

valid appeals eating out of dustbins reached the national media, for a realistic approach to the issue of returnability, and the provision of a humane system of support.

Sheona York
Kent Law Clinic solicitor and Reader in Law
University of Kent

January 2016