Using the ECHR to Supplement the Refugee Convention

This paper was presented at Blackstone Chambers' Asylum law seminar, 31March 2009

By Monica Carss-Frisk QC

Introduction

1. The most obvious way in which the ECHR can provide an alternative route to protection, where the Refugee Convention cannot assist, is through reliance on Article 3 ECHR. Article 3 may, for example, come into play where the Refugee Convention would not, because anticipated ill-treatment will not be persecution for one of the Refugee Convention reasons, such as race, religion, or nationality.

Using provisions other than Article 3: *EM(Lebanon)*

2. But one of the most significant recent developments in this area has been the clear recognition by the House of Lords that other provisions of the ECHR than Article 3 can have a real role to play in preventing the return of a person to their home country. This was signalled by the House of Lords' decision in July 2008 in *EM(Lebanon) v SSHD* [2008] UKHL 64. The case was unusual for many reasons, but one of them was that the Appellate Committee felt it appropriate to announce its decision that the Appellant had won her case almost immediately after the hearing, in July 2008, although it did not give its reasons until October.

3. This case represents the latest major development in the line of domestic cases that have grappled with the idea that was first developed in *Soering v United Kingdom* (1989) 11 EHRR 439, that the ECHR could apply not only to control the treatment of persons by a state within the state's borders, but also to prevent the removal of a person to another state where he or she feared ill-treatment of some

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44 020 7583 1770 Fax: +44 020 7822 7350 Email: clerks@blackstonechambers.com

June 2009

kind. Traditionally this principle had been thought to apply only to ill-treatment that reached a level of severity to engage Article 3 (the prohibition on torture and inhuman and degrading treatment or punishment), although there had been some hints in the Strasbourg case law that it might extend also to "flagrant" breaches of Article 6 and possibly Article 5.

4. The issue had remained unresolved by the ECtHR but fell to be tackled head on by the English Courts in *R(Ullah) v Special Adjudicator* [2004] UKHL 26. In that case the appellants sought to rely on Article 9 ECHR to argue that they should not be removed to Pakistan and Vietnam respectively, as their rights to freedom of religion would be flagrantly violated in those countries. The Court of Appeal had accepted the Secretary of State's argument that Article 9 could not come into play at all in such a case, as the *Soering* principle only extended to cases involving ill-treatment of a seriousness that engaged Article 3. The House of Lords disagreed. It held that it was possible in principle to rely on other rights of the ECHR, including the qualified rights such as Article 9, to resist expulsion to a country where a right would be flagrantly breached. But the gravity of the breach that would need to be anticipated was emphasised. Lord Bingham endorsed the formulation of the test by the IAT in *Devaseelan v SSHD* [2003] Imm AR 1, which referred (at para 111) to the right being *"completely denied or nullified in the destination country"*.

5. This set the scene for the arguments in *EM (Lebanon)*. That case concerned a Lebanese woman who, with her son, had escaped a violent husband and the effects of Sharia law in her home country. If she were to be returned to Lebanon, she would face the automatic removal of her son into the custody of her husband. The son had never known his father or any members of the father's family. The mother invoked Articles 8 and 14, arguing that she would suffer a flagrant denial of her right to respect for family life in Lebanon, taking Article 8 alone or together with Article 14. The Court of Appeal had rejected her claim on the basis that it could not be said that her family life with her son would be

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44 020 7583 1770 Fax: +44 020 7822 7350 Email: clerks@blackstonechambers.com

completely destroyed in Lebanon, as she was likely to be permitted some contact with him.

6. The question for the House of Lords was the meaning and application of the concept of "flagrant" breach in this context. As to the formulation of the test, everyone agreed that this could be taken from the joint partly dissenting opinion of Judges Bratza, Bonello and Hedigan in *Mamatkulov v Turkey* (2005) 41 EHRR 494, where they had said that:

   "In our view, what the word 'flagrant' is intended to convey is a breach of the principles of fair trial guaranteed by article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article." (para O-III14).

7. This, it was held, was another way of formulating what the House of Lords had intended to convey in *Ullah*. This made clear that there could be a flagrant breach even if some aspect of the right in question would remain protected. But when will the test be satisfied? The House of Lords was unanimous that it was satisfied in *EM(Lebanon)* but stressed that this would only be so in exceptional cases. Lord Hope, in particular, emphasised the idea of exceptionality, observing that:

   "in the absence of very exceptional circumstances, aliens cannot claim any entitlement under the Convention to remain here to escape from the discriminatory effects of the system of family law in their country of origin" (para 7).

8. Lords Carswell and Brown also stressed the very exceptional facts of the case. But it is not entirely clear precisely what it was that rendered this appellant's case so exceptional, compared to other cases where a woman may rely on the fact that she will be discriminated against in relation to her family life with her child if returned to her home country. It seems that the most influential factor was the fact that the Appellant's son had never enjoyed any family life at all with his father or members of the father's family, so that removal to Lebanon would have

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44 020 7583 1770 Fax: +44 020 7822 7350 Email: clerks@blackstonechambers.com

resulted in the destruction of the only family life that he had ever known (with his mother). The position of the son was of considerable importance, being taken into account as one aspect of a single family life, in accordance with the approach that had been adopted by the House of Lords in *Beoku-Betts v SSHD* [2008] UKHL 39.

9. This case clearly signals the realistic possibility of relying on Articles of the ECHR other than Article 3 to resist removal. But the notion of exceptionality as a criterion seems to have re-appeared in the context of "foreign" cases and "flagrant breach", although it was laid to rest by the House of Lords in *Huang v SSHD* [2007] UKHL 11 in relation to reliance on Article 8 in "domestic" cases. Although exceptionality is not said to be part of the test, it is clear that a flagrant breach will not be established in this context simply by pointing to the fact that the legal system in a woman's home country is flagrantly discriminatory. What additional factors may suffice for the test to be satisfied will have to be worked out on a case by case basis.

Recent developments concerning Article 3

10. So far as Article 3 ECHR is concerned, the ECtHR has recently made it crystal clear that there is no scope for carrying out any sort of balancing exercise in relation to the application of Article 3 in expulsion cases. In *Saadi v Italy*, judgment of 28 February 2008, the Grand Chamber emphatically rejected the argument by the UK government that Article 3 is less than absolute in this context.

11. In that case, the applicant, who had been prosecuted for terrorist offences in Italy, was subject to a deportation order to Tunisia. He argued that he suffered a real risk of being subjected to torture if removed to that country. Both the Italian and the UK governments argued that there was scope for taking into account the applicant's conduct in the application of Article 3. The Court disagreed,

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44 020 7583 1770 Fax: +44 020 7822 7350 Email: clerks@blackstonechambers.com

reaffirming the position it had adopted in *Chahal v United Kingdom* , judgment of 15 November 1996, saying that:

"As the prohibition of torture and of inhuman and degrading treatment or punishment is absolute, irrespective of the victim's conduct (see Chahal…), the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3…" (para 127).

12. The ECtHR noted that all states face immense difficulties in modern times in protecting their communities from terrorist violence, but considered that this must not call into question the absolute nature of Article 3 (para 137). It was not possible, said the Court, to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a state is engaged under Article 3, even where such treatment is inflicted by another state (para 138). As the Court also observed, the ECHR is different from the Refugee Convention in that respect:

"…the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Article 32 and 33 of the [Refugee Convention]." (para 138)[1].

13. The Court upheld Mr Saadi's complaint that deportation to Tunisia would involve a breach of Article 3. The issue of diplomatic assurances was briefly referred to, although the Tunisian government had not actually provided any such assurances. The ECtHR pointed out that if such assurances had been provided, the Court would have had to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant

[1] Article 32(1) of the Refugee Convention provides: "The contracting states shall not expel a refugee lawfully in their territory save on grounds of national security or public order." Article 33(2) provides that 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, may not claim the benefit of Article 33(1), which prohibits the "refoulement" of a refugee.

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44 020 7583 1770 Fax: +44 020 7822 7350 Email: clerks@blackstonechambers.com

would be protected against the risk of ill-treatment. The weight to be given to such assurances from the receiving state would depend in each case on the circumstances obtaining at the material time (para 148).

14. The issue of diplomatic assurances was one of several important issues examined by the House of Lords in *RB (Algeria)(FC) v SSHD; OO (Jordan) v SSHD* [2009] UKHL 10. The Appellate Committee endorsed the possibility of relying on such assurances to enable the expulsion of foreign nationals who would otherwise be able to rely on Article 3. The starting point was the test set out in (among other cases) *Chahal* of whether there are substantial grounds for believing that the person in question would face a real risk of being subjected to Article 3 ill-treatment (Lord Phillips, para 112). There was no principle that assurances must eliminate all risk of inhuman treatment before they can be relied on. But it is obvious, said Lord Phillips, that if a state seeks to rely on assurances that are given by a country with a record for disregarding fundamental human rights it will need to show that there is good reason to treat the assurances as providing a reliable guarantee that the deportee will not be subjected to such treatment (para 114).

15. The House of Lords considered that the fact that an appeal from SIAC lay only on a point of law meant that SIAC's conclusions as to the reliability of the particular assurances relied on by the government in that case (from the Algerian and Jordan governments), could only be challenged on grounds of irrationality (para 117). Applying that very strict test, the Appellate Committee concluded that SIAC had been entitled to find that the assurances had the effect of preventing a breach of Article 3 if the appellants were expelled.

16. The notion of a "flagrant breach" also came up in that case, this time in relation to the guarantee of a fair trial in Article 6 ECHR. The House of Lords considered that in this context, a flagrant breach would be established where there were *"substantial grounds for believing that there is a real risk (i) that there will be a*

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44 020 7583 1770 Fax: +44 020 7822 7350 Email: clerks@blackstonechambers.com

fundamental breach of the principles of a fair trial guaranteed by article 6 and (ii) that this failure will lead to a miscarriage of justice that itself constitutes a flagrant violation of the victim's fundamental rights" (Lord Phillips at para 141). Applying this test, SIAC had committed no error of law in concluding that Mr Othman would not face a flagrant breach of his right to a fair trial in Jordan. The Committee was not impressed by the notion (adopted by Buxton LJ in the Court of Appeal) that the fundamental prohibition of the admission of evidence obtained by torture meant that a high degree of assurance was required that evidence obtained by torture would not be used in the proceedings in Jordan (para 153).

17. Lord Brown specifically commented on Lord Phillips' formulation of what was required to establish the risk of a flagrant breach of Article 6, saying that:

"Lord Phillips must surely be right…in supposing that only where a prospectively unfair trial would be likely to lead to a serious violation of some substantive human right – for example, an unjust conviction involving grave consequences such as capital punishment or a substantial deprivation of liberty – would article 6 fall for consideration in a foreign case." (para 259).

18. It remains to be seen whether this apparent additional requirement for establishing a flagrant breach of Article 6 will find favour with the ECtHR.

Detention and Article 5(i)(f)

19. The scope of the power to detain asylum seekers was recently considered by the Strasbourg Court in *Saadi v United Kingdom*, judgment of 29 January 2008. Here, the applicant was an Iraqi Kurd who claimed that his detention at Oakington had been in violation of his right to liberty and security of person under Article 5(i) ECHR. The government's primary argument was that he was lawfully detained "to prevent his effecting an unauthorised entry into the country" within the first limb of Article 5(i)(f). This was the first case in which that aspect of Article 5(i)(f) had been considered by the ECtHR.

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44 020 7583 1770 Fax: +44 020 7822 7350 Email: clerks@blackstonechambers.com

20. The Grand Chamber agreed with the English Courts that it was a necessary adjunct of the states' right to control the entry and residence of aliens that they should be able to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not (para 64). Until a state has authorised entry to the country, any entry is "unauthorised" for the purposes of Article 5(i)(f). The Court did not accept the applicant's argument that, as soon as an asylum seeker has surrendered himself to the immigration authorities, he is seeking to effect an "authorised" entry, with the result that detention cannot be justified under the first limb of Article 5(i)(f) (para 65). The Court emphasised that such detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and to ensure that non-one shall be dispossessed of his or her liberty in an arbitrary fashion (para 66).

21. But the notion of arbitrariness was given a more narrow scope in this context than would apply in relation to the other sub-paragraphs of Article 5, which include an assessment as to whether detention is "necessary" to achieve the stated aim. Following its approach in *Chahal* to the second limb of Article 5(i)(f) ("a person against whom action is being taken with a view to deportation or extradition"), the principle of proportionality applies only to a limited extent. Summarising the position, the Court said that:

    "To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that 'the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country'…; and the length of detention should not exceed that reasonably required for the purpose pursued." (para 74).

22. Applying these criteria, the Court held that it was not incompatible with Article 5(i)(f) to detain the applicant for seven days at Oakington *"in suitable conditions"* to enable his claim to asylum to be processed speedily (para 80).

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44 020 7583 1770 Fax: +44 020 7822 7350 Email: clerks@blackstonechambers.com

23. The powerful joint partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann, and Hirvela should be noted. They referred to the *"increasingly worrying situation"* regarding the detention of asylum seekers, and noted that the majority attached no importance to the fact that the applicant had sought asylum on arrival at Heathrow, assimilating the situation of asylum seekers to that of ordinary immigrants. The dissenters considered that the majority approach sits uncomfortably with the principle that asylum seekers who have presented a claim for international protection are ipso facto lawfully within the territory of a state, in particular for the purposes of Article 12 of the ICCPR. They also questioned the compatibility of the majority judgment with the approach of the EU organs. In conclusion, they posed the stark question:

"Ultimately, are we now also to accept that Article 5 of the Convention, which has played a major role in ensuring controls of arbitrary detention, should afford a lower level of protection as regards asylum and immigration which, in social and human terms, are the most crucial issues facing us in the years to come? Is it a crime to be a foreigner? We do not think so."

24. Very recently, the Strasbourg Court revisited Article 5(i)(f) in *A and Others v United Kingdom*, judgment of 19 February 2009 (Grand Chamber). This time the issue was whether the government was able to rely on the second limb of Article 5(i)(f), arguing that the applicants were lawfully detained as persons "against whom action is being taken with a view to deportation or extradition". The Court stressed that sub-paragraphs (a) to (f) of Article 5(i) contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty (para 163). Applying its approach in *Chahal*, the Court said that Article 5(i)(f) does not demand that detention be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. But any deprivation of liberty will be justified only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible (para 164). The

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44 020 7583 1770 Fax: +44 020 7822 7350 Email: clerks@blackstonechambers.com

Court re-iterated that detention must not be "arbitrary", but this meant no more than (as per *Saadi*) it must be carried out in good faith; it must be closely connected to the ground of detention relied on; the place and conditions of detention must be appropriate; and the length of detention must not exceed that reasonably required for the purpose pursued (para 164).

25. In this case, not surprisingly given the fact that the UK had lodged a derogation under Article 15, the Strasbourg Court concluded that the majority of the applicants were detained in breach of Article 5, as their detention did not fall within the second limb of Article 5(i)(f). Those applicants *"were certified and detained because they were suspected of being international terrorists and because it was believed their presence at liberty in the United Kingdom gave rise to a threat to national security."* (para 171).

26. Importantly, the Court also rejected the government's argument that Article 5(i) permits any balance to be struck between the individual's right to liberty and the state's interest in protecting its population from terrorist threat. The Court said that:

"If detention does not fit within the confines of the paragraphs [of Article 5(i)] as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainees." (para 171).

Article 3 and welfare provision

27. Although Article 3 will mainly be engaged in relation to a proposed removal, it may also have a role to play in relation to the support of asylum seekers in the UK. This was clearly recognised by the House of Lords in *R(Limbuela) v SSHD* [2005] UKHL 66. That case concerned the Secretary of State's powers and duties to provide or arrange for the provision of support to asylum seekers where he

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44 020 7583 1770 Fax: +44 020 7822 7350 Email: clerks@blackstonechambers.com

was not satisfied that an asylum claim had been made as soon as reasonably practicable after the person's arrival in the United Kingdom.

28. The House of Lords concluded that Article 3 was capable of being engaged in such a case. The statutory regime imposed on late applicants was held to be "treatment" within the meaning of Article 3. Treatment would be inhuman or degrading *"if, to a seriously detrimental extent, it denies the most basic needs of any human being"*. But a general public duty to house the homeless or provide for the destitute cannot be spelled out of Article 3 (Lord Bingham, para 7). Importantly, as Lord Hope made clear, because the state was directly responsible for the treatment of asylum seekers caught by the statutory provisions, the Article 3 prohibition was absolute and there was no scope for a proportionality balancing exercise (paras 48 and 55). No single test was formulated for when Article 3 would come into play in such a case. According to Lord Bingham:

"if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed." (para 9).

Conclusion

29. The ECHR continues to be a significant means of supplementing the Refugee Convention. Some of the recent case law has strengthened its role in this respect, the most important developments being: (1) the recognition that articles other than Article 3 can be relied on to prevent removal; (2) the rejection of the idea that Articles 3 or 5(i)(f) permit any form of balancing act, taking into account the interests of the state; and (3) the acknowledgment that Article 3 has a role to play in relation to welfare support for asylum seekers. On the other hand, the majority view in *Saadi v UK* gives limited scope for reliance on Article 5 by asylum seekers, and the decision of the House of Lords in *RB (Algeria)(FC) v SSHD; OO (Jordan) v SSHD* limits the scope for challenging the acceptance of

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44 020 7583 1770 Fax: +44 020 7822 7350 Email: clerks@blackstonechambers.com

diplomatic assurances in relation to Article 3, and sets up a high hurdle for showing a flagrant breach of Article 6 in a "foreign case".

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44 020 7583 1770 Fax: +44 020 7822 7350 Email: clerks@blackstonechambers.com