

# Article 8 Flow & Ebb?



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# Presenter

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**Article 8 has become increasingly contended terrain, to borrow a phrase from Sir Stephen Sedley, ‘has it now been reduced to island dots in a sea of rules or does it still remain an ocean of opportunity?’**



# Knife, Stone, Paper – Sir Stephen Sedley LRB 2021

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“It was the 19th century which saw the shift from statutes as islands in the ocean of common law to a sea of legislation dotted with common law islands.”

- Have we seen a similar shift in the availability of article 8 as a freestanding right and the availability of its protection?
  - The protected rights within the scope of article 8 are expansive, and expanding, but they are qualified.
  - The nature of that qualification has developed.
  - All too often we fail to take full advantage of the full scope of article 8.

# The structure of Article 8

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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 wellbeing 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.

# Razgar[2004] UKHL 27

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- (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
- (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
- (3) If so, is such interference in accordance with the law?
- (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
- (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

# Balancing Competing Interests

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AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801 (31 July 2007)

- while an interference with private or family life must be real if it is to engage art. 8(1), the threshold of engagement (the "minimum level") is not a specially high one. Once the article is engaged, the focus moves, as Lord Bingham's remaining questions indicate, to the process of justification under art. 8(2). It is this which, in all cases which engage article 8(1), will determine whether there has been a breach of the article.

Patel v Secretary of State for the Home Department [2013] UKSC 72.

- It is important to remember that article 8 is not a general dispensing power, It does not cover a "near miss" or provide a "sliding scale".

# Huang v Secretary of State for the Home Department [2005] EWCA Civ 105 (01 March 2005)

## Merits review

- [48] *Boultif and Sen*, however, provide in our judgment an insufficient basis for concluding without more that the adjudicator's task in our municipal jurisdiction is to conduct a full merits appeal.

## Intensity of review

- [51] because the first decision maker, the Secretary of State, acts for the elected government, the court should accord him that margin of discretion

- truly exceptional



# Huang v Secretary of State for the Home Department [2007] UKHL 11 (21 March 2007)

## A Watershed

- General administrative desirability of applying known rules for a workable, predictable, consistent system and fair as between one applicant and another

## Merits review

- The appellate immigration authority, deciding an appeal .... is not reviewing the decision of another decision-maker. It is deciding whether or not it is unlawful to refuse leave to enter or remain, and it is doing so on the basis of up to date facts.
- The first task of the appellate immigration authority is to establish the relevant facts.
- Human beings are social animals. They depend on others.
- Article 8 imposes on member states not only a negative duty to refrain from unjustified interference with a person's right to respect for his or her family but also a positive duty to show respect for it.

## Proportionality – an overriding requirement

- A need to balance the interests of society with those of individuals and groups.
- It is not necessary that the court need ask in addition whether the case meets a test of exceptionality.

EB (Kosovo), Beoku-Betts, Chikwamba, EM (Lebanon).

# Merits review

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R (Begum) v Special Immigration Appeals Commission & Anor [2021] UKSC 7 (26 February 2021)

- European Court of Human Rights has accepted that an arbitrary denial or deprivation of citizenship may, ..... raise an issue under article 8. ...In determining arbitrariness, the Court considers whether the deprivation was in accordance with the law, whether the authorities acted diligently and swiftly, and whether the person deprived of citizenship was afforded the procedural safeguards required by article 8... [it] is not a secondary, reviewing, function dependent on establishing that the Secretary of State misdirected himself or acted irrationally, but that SIAC must decide for itself whether the impugned decision is lawful.

Director of Public Prosecutions v Ziegler [2021] UKSC 23 (25 June 2021)

- Convention rights are free-standing rights enacted by Parliament to be policed by the courts, that they are in the form of rights which are enforced by the European Court of Human Rights on a substantive basis rather than purely as a matter of review according to a rationality standard, and that the question whether a measure is proportionate or not involves a more searching investigation than application of the rationality test. Thus, in relation to the test of proportionality *stricto sensu*, even if the relevant decision-maker has had regard to all relevant factors and has reached a decision which cannot be said to be irrational, it remains open to the court to conclude that the measure in question fails to strike a fair balance and is disproportionate.

# Rules and the Margin of Appreciation

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- Article 8 is couched in open textured language. It was memorably described by Stanley Burnton J at [60] as "the least defined and most unruly" of the Convention rights R (Wright) v Secretary of State for Health [2006] EWCH 2886 (Admin).
- On the one hand there is the individual or group right to respect for private and family life, home and correspondence, and on the other...
- that national authorities enjoy a certain margin of appreciation when assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued.

# Rules and the Margin of Appreciation

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HC 194 June 2012

- The Immigration Rules will fully reflect the factors which can weigh for or against an Article 8 claim. The rules will set proportionate requirements that reflect the Government's and Parliament's view of how individuals' Article 8 rights should be qualified in the public interest to safeguard the economic well-being of the UK ... This will mean that failure to meet the requirements of the rules will normally mean failure to establish an Article 8 claim to enter or remain in the UK, and no grant of leave on that basis. Outside exceptional cases, it will be proportionate under Article 8 for an applicant who fails to meet the requirements of the rules to be removed from the UK.

MF (Article 8 - new rules) Nigeria [2012] UKUT 393 (IAC) (31 October 2012)

- The (new) rules cannot be construed as providing a complete code for Article 8 claims.
- Nevertheless exceptional circumstances are required.

MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192

- We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence.

Immigration Act 2014 s 19 introduced s117 into the 2002 Act - codification through statute.



# Rules and the Margin of Appreciation

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Hesham Ali v SSHD [2016] 1 W.L.R. 4799 - a gradual watershed

- Where an appellate court or tribunal has to reach its own decision, after hearing evidence, it does not, in general, simply start afresh and disregard the decision under appeal....
- The special feature ...is that the decision under review has involved the application of rules which have been made by the Secretary of State in the exercise of a responsibility entrusted to her by Parliament, and which Parliament has approved. It is the duty of appellate tribunals, ...to make their own assessment of the proportionality .....on the basis of their own findings as to the facts and their understanding of the relevant law. But, where the Secretary of State has adopted a policy based on a general assessment of proportionality... they should attach considerable weight to that assessment.
- Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender.
- Very compelling circumstances
- The idea that the new rules comprise a complete code appears to have been mistakenly interpreted in some later cases as meaning that the Rules, and the Rules alone, govern appellate decision-making.

# Rules and the Margin of Appreciation

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Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 (14 November 2018)

- So, when a person claims to resist removal by reference to article 8 outside the rules, the Home Secretary is entitled, and a court hearing an appeal against his determination is required, to weigh in the balance against the claim the fact that it could not have succeeded under the rules: see the judgment of Lord Reed in R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11, [2017] 1 WLR 823, at paras 46 and 47.

TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109

- where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed.

Remi Akinyemi v SSHD (No 2) [2019] EWCA Civ 2098

- at [39 ] The correct approach to be taken to the 'public interest' in the balance to be undertaken ... is to recognise that the public interest ....has a moveable rather than fixed quality. It is necessary to approach the public interest flexibly.

# Bright lines

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Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 (27 November 2013)

- the decision-maker is required to assess the proportionality of the interference with private and family life in the particular circumstances in which the decision is made. The evaluative exercise in assessing the proportionality of a measure under article 8 ECHR excludes any "hard-edged or bright-line rule to be applied to the generality of cases": *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159, per Lord Bingham at para 12.

R (MM (Lebanon)) v Secretary of State and another [2017] UKSC 10 (22 February 2017)

- A third misconception is the implication that article 8 considerations could be fitted into a rigid template provided by the rules, so as in effect to exclude consideration by the tribunal of special cases outside the rules. As is now common ground, this would be a negation of the evaluative exercise required in assessing the proportionality of a measure under article 8 of the Convention which excludes any "hard-edged or bright-line rule to be applied to the generality of cases"

Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 (14 November 2018)

- The bright-line interpretation of the word "precarious" in section 117B(5), commended by the specialist tribunal with the maximum weight of its authority, is linguistically and teleologically legitimate; and, for that matter, it is consistent with the way in which the ECtHR expressed itself in the *Jeunesse* case (see para 34 above) and in which this court expressed itself in the *Agyarko* case (see para 35 above).



# Scope and ambit

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- ❁ Private life is a broad concept incapable of exhaustive definition (Niemi v. Germany, § 29; Pretty v. the United Kingdom, - similarly with family life.
- ❁ Moreover, the generous approach to the definition of personal interests has allowed the case-law to develop in line with social and technological developments.
- ❁ Article 8 protects the right to personal development, whether in terms of personality or of personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees. It encompasses the right for each individual to approach others in order to establish and develop relationships with them and with the outside world, that is, the right to a “private social life” (Bărbulescu v. Romania [GC], § 71; Botta v. Italy, § 32).

# Scope and ambit

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- ❁ The essential ingredient of family life is the right to live together so that family relationships may develop normally (Marckx v. Belgium, § 31) and members of the family may enjoy each other's company (Olsson v. Sweden (no. 1), § 59).
- ❁ Respect for family life encompasses regard for family unity and for family reunification in the event of separation.
- ❁ Family life is an autonomous concept (Marckx v. Belgium, § 31). And so, whether “family life” exists is a question of fact.

# Scope and ambit

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- While Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and ensure due respect for the interests safeguarded by Article 8 (*Fernández Martínez v. Spain* [GC], § 147)., *M.S. v. Ukraine*, § 70
- The right to an effective remedy for breaches of the substantive Convention rights is generally recognised in the HRA 1998 (*Brown v Stott* (Procurator Fiscal, Dunfermline) [2003] 1 AC 681
- Procedural requirements of article 8, more fully considered in *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42
- The State's procedural obligations under Article 8 are also relevant in determining the margin of appreciation afforded to the member State. The ECtHR's analysis includes whether the procedural safeguards available to the individual, when fixing the regulatory framework, mean that the State remained within its margin of appreciation. (*Buckley v. the United Kingdom*, § 76; *Tanda Muzinga v. France*, § 68;).
- An effective procedure requires in particular, that the applicant be involved in that process (*Lazoriva v. Ukraine*, § 63).

# Scope and ambit

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Jeunesse v The Netherlands (2015) 60 EHRR 17

- Positive and negative obligations different – but the principles are, nonetheless, similar
- Where children are involved, their best interests must be taken into account in all decisions concerning children, their best interests are of paramount importance
- Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight.  
(Hoti v. Croatia [2018] ECHR 373 at §122, sometimes both positive and negative obligations arise.)
- Private life is a broad concept incapable of exhaustive definition (Niemietz v. Germany, § 29; Pretty v. the United Kingdom, - the same applies to family life
- Moreover, the generous approach to the definition of personal interests has allowed the case-law to develop in line with social and technological developments.
- Article 8 protects the right to personal development, whether in terms of personality or of personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees. It encompasses the right for each individual to approach others in order to establish and develop relationships with them and with the outside world, that is, the right to a “private social life” (Bărbulescu v. Romania [GC], § 71; Botta v. Italy, § 32)

# Scope and ambit

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R (Joint Council for The Welfare of Immigrants) v SSHD [2020] EWCA Civ 542

- ✿ It is clear from the Strasbourg authorities that the "ambit" of article 8 is not restricted to its "scope"
- ✿ if circumstances fall within the scope of article 8 then they also fall within its ambit. Therefore, where there is violation of article 8, in the sense that there is an interference with rights falling within the scope of article 8(1) which is not justified, that is also a violation of article 14 if it is discriminatory on the basis of a relevant status
- ✿ However, where a state takes positive action which, whilst not required by article 8 (in the sense that a failure to take such action would not have constituted an interference with rights within the scope of article 8(1)), ...this will fall within the ambit of article 8. Therefore, where the state granted parental leave allowance to mothers and not fathers, whilst that did not fall within the scope of article 8, the ECtHR held that it fell within its ambit for the purposes of article 14 (Petrovic). Indeed, as Sir Terence Etherton MR said in *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916; [2018] QB 804 at [42].

# Relevant factors

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GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630 at [32]

- the proportionality test is to be applied on the "circumstances of the individual case"..... and the facts must be evaluated in a "real world" sense".
- The list of relevant factors to be considered in a proportionality assessment is "not closed". There is in principle no limit to the factors which might, in a given case, be relevant to an evaluation under Article 8, which is a fact sensitive exercise.

# Living Instrument

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Paposhvili v Belgium [2017] INLR 497

- ✪ It is essential that the Convention is interpreted and applied in a manner which renders its rights practical and effective and not theoretical and illusory.

Dissenting opinions PORMES v. THE NETHERLANDS [2020] ECHR 572

- ✪ why should that State, or any other State with which the applicant has no ties at all, bear more responsibility than the Netherlands, where he has lived nearly his whole life? ..... if there is one country responsible for the upbringing and the criminal behaviour of the applicant, that country must be considered to be the Netherlands. It would be more just for the Netherlands “to keep both the good and the bad immigrants”, at least in a case such as the present one in which it is only by accident that the applicant has not become a Dutch national, whereas if he had had such a legal status, he could have stayed in the country that corresponded to his real home.
- ✪ HA (Iraq) v SSHD [2020] EWCA Civ 1176 [2021] 1 W.L.R. 1327 at [83], reliance upon purported factual precedents was deprecated.

# facts Facts FACTS!!!

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UT (Sri Lanka) v The Secretary of State for the Home Department [2019] EWCA Civ 1095

- The almost endless citation of authority by the parties' representatives, which makes many judges so concerned to be seen to be applying all the relevant dicta that any application of those principles to the particular facts of the case is presented almost as an afterthought. Although here the FTT judge's application of the principles to the facts was adequate, it could have been much clearer. I believe that it would have been, if the parties had relied on fewer authorities and provided more analysis of the balancing exercise on the facts that the judge was being asked to do.

Article 8 looks both ways - forwards and backwards

- Historical injustice *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009).
- The right to forge relationships , but it does not guarantee either the right to found a family
- *R (on the application of AM) v Secretary of State for the Home Department (legal "limbo")* [2021] UKUT 62 (IAC)
- Contribution to the community *Thakrar (Cart JR, Art 8, Value to Community)* [2018] UKUT 336 (IAC)





# Any Questions?

## Thanks for watching!

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