

ARTICLE 8 ECHR –AN OVERVIEW OF RECENT DECISIONS

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HUANG AND ARTICLE 8

Perhaps the single biggest issue in the last year has been the approach that the appellate authorities require to take as a matter of law to the question of proportionality of interferences which engage Article 8.

In *Huang v. Secretary of State for the Home Department* [2005] EWCA Civ 105 the judgment of the Court was delivered by Laws LJ. This is the “big” case on this point . In Huang :-

1. Following the approach of the House of Lords in *Razgar* [2004] UKHL 27 , and in particular the Speech of Lord Bingham of Cornhill, it was not correct to ask as a matter of law whether the Secretary of State was reasonably entitled to come to the decision that an interference with an Article 8 right would be proportionate under Article 8 ;
2. Therefore the correct approach was for the appellate authority to determine the matter of proportionality for itself ;
3. Which meant that earlier decisions of the Court of Appeal in *Edore* [2003] EWCA Civ 716 and related cases and the decision in *M(Croatia)* [2004] UKIAT 00024 of the IAT were wrong in law ;
4. However in determining the question of proportionality, policy was a matter upon which the appellate authorities should defer to the Secretary of State, subject to the Secretary of State requiring if challenged, to provide a substantively reasoned justification for the policy ;

5. By contrast in determining a question of issues other than policy, such as matters of fact, there was no question of deference. Such matters did not lie within the constitutional responsibility of government ;
6. The result of all of this is that the starting point lies with the Immigration Rules, conceived by the Executive and approved by Parliament. The policy of these Rules should not be questioned by the appellate authority. Deference should be shown to them as the appropriate Article 8 balance should in most cases be found in these Rules without more.
7. Although the Court leaves open the possibility that a Rule might still violate Article 8 , in cases which fell outwith the Rules, it was only where the facts were exceptional, could there be a right to remain (or enter) based on Article 8 ;

Huang is good for appellants on one level. The Wednesbury review found in *M(Croatia)* and *Edore et al* are gone. Instead an immigration judge has to determine for themselves the question of the proportionality of removal.

The bad news is that there is still built into that assessment deference for the Immigration Rules and related provisions such as relevant policies and concessions. If a case falls outwith these then only exceptional cases will have any prospect of success.

Huang has been appealed to the House of Lords by the Home Office (as far as I am aware) on the jurisdiction point and by the appellants on the “exceptionality” point. I am not yet aware of the date for the appeal.

Until it is decided the following cases will have to be considered when approaching Article 8 removal, deportation and entry clearance cases. Bear in mind though that *Huang* and the children of *Huang* are not binding on the

appellate authorities when sitting in Scotland or even on a video link reconsideration hearing from London !

Before we leave *Huang* to look at some of the cases decided since *Huang*, I would like to offer my own views as to the correctness of *Huang*. On one issue I can come straight to the point. *Huang* is clearly correct as a matter of law on the question of jurisdiction. The role of the appellate authorities is one of appeal not review. *M(Croatia)* , *Edore et al* were plainly wrong. They imposed restrictive judicial review standards onto an appellate structure without any clear legislative intent to that effect.

On other aspects of *Huang* I have more reservations.

The Court clearly rejected (at para. 48) the proposition that the jurisprudence of the European Court of Human Rights, and in particular, *Boultif v. Switzerland* (2001) 33 EHRR 1179 required the immigration appellate authority to carry out a full merits review of the merits of a removal decision to comply with Article 8 ECHR (para. 48) as opposed to a more limited form of review. This was on the footing that the Immigration Rules were the starting point for the assessment of proportionality. This was so even although the Court had already made the observation that :-

*“ 47. The decision in Boultif is striking. There is no mention of the margin of appreciation. The court determined the case **by reference to its own view of the merits**. It adopted a similar course on very different facts in another Article 8 case to which we were referred, namely Sen v Netherlands. We need not with respect take time with the details. ’’(emphasis added)*

At paragraph 56 of *Huang* the Court held that :

“56. Here, the material policy is given first by the statutory requirement that persons who are not British citizens require leave to enter or remain in the United Kingdom; secondly and more particularly by the Immigration Rules, made by the Secretary of State subject to parliamentary approval. The Rules state the detail of immigration policy, and in doing so prescribe in effect which classes of aliens will in the ordinary way be allowed to enter the United Kingdom and which will not. The adjudicator has no business whatever to question or pass judgment upon the policy given by the Rules. **In our judgment his duty, when faced with an Article 8 case where the would-be immigrant has no claim under the Rules, is and is only to see whether an exceptional case has been made out such that the requirement of proportionality requires a departure from the relevant Rule in the particular circumstances.** If that is right, the importance of maintaining immigration control is a prior axiom of the debate before him. It is not at all the subject of that debate. There is no basis upon which he should defer to the Secretary of State's judgment of the proportionality issue in the individual case unless it were somehow an open question what weight should be given to the policy on the one hand, and what weight should be given to the Article 8 right on the other. In that case, no doubt, the adjudicator would have to address their relative importance. If he had to do that, we apprehend that he would be obliged to accord a considerable degree of "deference" to the Secretary of State's view as to how the balance should be struck. But that is not the position. The adjudicator is not required to address the relative importance of the public policy and the individual right. ” **(Emphasis added).**

59. It might be said that the Immigration Rules constitute for all cases the balance to be struck between private right and public interest, and this is conclusive for any judgment in an Article 8 case as to whether removal or deportation is proportionate and so justified under Article 8(2). But the

Secretary of State rightly does not so contend. If that were the law, our municipal statute need do no more than confer a right of appeal to allow the immigrant to contend that on the true facts he has a good claim under the Rules. However, whatever else may be said about the relation between s.65(1) and paragraph 21(1) of Schedule 4 to the 1999 Act, it is surely plain that the legislature contemplated appeals on Convention grounds, including Article 8, which might succeed even though the appellant had no good claim under the Rules. The true position in our judgment is that the HRA and s.65(1) require the adjudicator to allow an appeal against removal or deportation brought on Article 8 grounds if, but only if, he concludes that the case is so exceptional on its particular facts that the imperative of proportionality demands an outcome in the appellant's favour notwithstanding that he cannot succeed under the Rules.

*60. In such a case the adjudicator is not ignoring or overriding the Rules. On the contrary it is a signal feature of his task that he is bound to respect the balance between public interest and private right struck by the Rules with Parliament's approval. That is why he is only entitled on Article 8 grounds to favour an appellant outside the Rules where the case is truly exceptional. This, not *Wednesbury* or any revision of *Wednesbury*, represents the real restriction which the law imposes on the scope of judgment allowed to the adjudicator. It is not a question of his deferring to the Secretary of State's judgment of proportionality in the individual case. The adjudicator's decision of the question whether the case is truly exceptional is entirely his own. He does defer to the Rules; for this approach recognises that the balance struck by the Rules will generally dispose of proportionality issues arising under Article 8; but they are not exhaustive of all cases. There will be a residue of truly exceptional instances. In our respectful view such an approach is also reflected in Lord Bingham's words in *Razgar*, which we have already cited:*

"Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

In *Boultif*, an Algerian national, had entered Switzerland in December 1992. In March 1993 he married a Swiss citizen. In 1997 he was imprisoned for 2 years for robbery and damage to property committed in 1994. In May 1998 the Swiss authorities refused to review his residence permit. The applicant complained that the action of the authorities would require him to return to Algeria in violation of Article 8. The European Court made a unanimous finding of a violation of Article 8.

Mr Boultif had no right to remain in terms of the relevant domestic Swiss rules when the application for renewal of the residence permit was refused-see para. 47 of the decision. The ultimate question for the Court was whether the decision was “necessary in a democratic society”, that is, was it proportionate. As it explained (at para. 47) :-

“The Court’s task consists in ascertaining whether the refusal to renew the applicant’s residence permit in the circumstances struck a fair balance between the relevant interests, namely the applicant’s right to respect for his family life, on the one hand, and the prevention of disorder and crime, on the other.”

The Court then went on to examine the factors that might be relevant in the assessment of proportionality. It is significant that the Court set out guiding principles in the determination of proportionality at para. 48. Mr Boultif clearly fell outside the Swiss rules on the continuation of residence. His only claim rested on Article 8. The Court did not include in those principles that a case had to be an exceptional one or be exceptionally strong to attract Article 8 protection.

With respect to the Court of Appeal, *Huang* is incorrect for any of the following four reasons. First, and most plainly it imposes an onus on an appellant which Article 8 does not require her to discharge. To require the appellant to show exceptional circumstances is to place a burden on her not required by Article 8. Where an appellant has already shown an established home and family life in the United Kingdom it is for the Home Secretary to demonstrate that the basis for an interference with that right under Article 8(2) is made out as being “necessary in the interests of a democratic society.” If removal constitutes an interference with the Article 8(1) right, it is for the Secretary of State to persuade the appellate authority that there is a pressing social need for removal. It is not for the petitioner to show any reason, much less, that there are “exceptional circumstances” as to why removal should not take place.

Second, there is no “exceptional cases” test in the text of Article 8 or the caselaw of the Strasbourg Court. *Boultif* is a clear statement that the test is simply one of proportionality or fair balance having regard to the facts of a particular case.

Huang and these specific criticisms have yet to be considered by the Scottish courts. However they have been adopted and supported by Mr Alan Caskie, an experienced Immigration Judge, writing extra judicially in *The Journal of the Scottish Legal Action Group*, July 2005, issue 333, page at 158.

Third, *Huang* elevates the Immigration Rules to the level of being, for all practical purposes, unreviewable as an expression of immigration policy. As a matter of logic *Huang* assumes that for most purposes the Rules in themselves are both comprehensive in scope and Article 8 compliant and that they be assumed to be so without further inquiry. Given that basic premise the proposition that only exceptional cases outwith the Rules will be

protected by Article can be understood, if not accepted as conceptually valid. However the Human Rights 1998 recognises that even unambiguous primary legislation is subject to review on Convention grounds given the terms of section 4 of that Act. The starting point of the *Huang* test is therefore flawed. The Rules are not primary legislation, nor are they even subordinate legislation in the proper sense. They are simply extra-statutory administrative rules. At highest, following the approach in *Boultif*, they are one factor in the whole circumstances that fall to be considered by the appellate authority in the proportionality balance. The Court in *Boultif* was clearly aware that Mr Boultif fell outwith the relevant rules adopted by the Switzerland in striking the balance between the rights of applicants for residence and the interests of that country. Nevertheless that did not appear to be a matter which was accorded any significant weight in the determination of proportionality, much less did it cause the Court to apply a requirement that the circumstances had to be exceptional -because Mr Boultif did not meet the rules-before removal became disproportionate. *Huang* is wrong in principle to accord the Rules such status. In any event it is wrong on principle to accord them such weight that the consequence of so doing is that Article 8 will only afford protection to exceptional cases. In effect this approach creates a presumption that if a case falls outwith the Rules, then removal will be proportionate subject to the exceptional cases test. Such a presumption is inconsistent with Article 8. Once Article 8 is engaged, the justification for removal lies on the Home Secretary to show that removal is necessary in a democratic society.

Fourth, the approach in *Huang* may carry the danger of simply re-incorporating, by a different route (and quite unintentionally), a *Wednesbury* approach to Article 8 cases, an approach which the Court of Appeal had already stated was not a permissible in *Huang* when over-ruling *M(Croatia)*. As the Court recognised at paras. 43-46, the *Wednesbury* approach is not applicable in the consideration of Article 8 issues. At para. 43 the Court

noted that in *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493 at para. 138, the *Wednesbury* test :-

“was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicant’s rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court’s analysis of complaints under Article 8 of the Convention.”

The Article 8 protection for persons outwith the Rules is to be pitched at the level that only exceptional cases will be protected. Under the *Wednesbury* test followed in *M(Croatia)* it was only where the Home Secretary could not reasonably conclude that removal would be proportionate that a violation of Article 8 would arise. As is well known the reasonableness test is pitched at a high level such that a decision would only be stigmatised as unreasonable if it was one where the decision maker had “taken leave of his senses”, “defied logic” or “outraged accepted moral standards.” To require that only exceptional cases will be met with Article 8 protection is to re-introduce a very high threshold for protection consistent with a *Wednesbury* level of review. That is wrong in law. The test is whether removal would be proportionate, not whether it would be exceptionally disproportionate.

Enough of my rabble rousing! *Huang* is the reality which has to be confronted in the meantime. How then have the appellate authorities been approaching *Huang* ?

In *MB (Croatia)* (*Huang-proportionality-Bulletins*) [2005] UKIAT 00092 at paras 29-37. A decision of the IAT, legal panel, chaired by Ouseley J, the Tribunal set out the following points which flow from *Huang* :-

1. The Immigration Rules are the starting point. If there is no substantive case within the Rules it would be a truly exceptional case on particular facts before removal would be disproportionate.

2. If the person falls outwith the Rules for only procedural reasons, the same applies, except where as in *Shala* [2003] EWCA Civ 233 the procedural failing is on the part of the Home Secretary-more on *Shala* later !

3. Policies and extra-statutory concessions were relevant matters to be considered by an adjudicator in ascertaining whether the Rules provided proportionate response. It follows from that, that if you do not qualify under a further concession or policy then success in an Article 8 case will be even harder.

4. Where an individual falls outwith a Rule or concession but these provide for the situation in question eg marriage, study, treatment, that is a very clear indication that removal is proportionate.

5. Where a case is not covered by the Rules or concessions the person may not rationally seek greater protection under Article 8 than someone who was covered in principle by the Rules/concession but who did not meet the detailed requirements.

6. The starting point for proportionality are the Rules/concessions. Where an exception is to be made very clear reasons for making it must be given.

7. Article 8 is not a provision which can be used to over-ride immigration control on compassionate grounds. Article 8 creates well defined rights and

exceptions to those rights and in only truly powerful and exceptional circumstances could they ever prevail over the Rules/ concessions.

8. *Shala* and *Edore* continue, on their facts, to exemplify the truly exceptional case. The facts of *Huang* and the other cases heard along with it were not exceptional.

9. Although *Huang* held that following *Razgar* in the House of Lords the *M(Croatia)* reasonableness approach was wrong in law, it would be a complete misreading of *Huang* to read it as an approach which was significantly different in its likely effect on individual cases from the old law in *M(Croatia)*.

What then are exceptional cases? Here are a few offerings going in a number of directions.

NS (Sri Lanka) (Relevance of children to removal-Article 8) [2005] UKIAT 00081 reported was not an exceptional case. The appellant had 2 daughters in the UK, one a refugee, aged 19 the other with ILR. The refugee daughter could not return. The other daughter was well settled here. They had all lived together in Sri Lanka. The appellant had other close family here and some in Sri Lanka. Her husband was believed to be alive in Sri Lanka but his whereabouts were unknown. She came here in 2001.

The appellant argued that the adjudicator (Prof Rebecca Wallace) had failed to consider the closeness the appellant had to her daughters and the anguish that would be caused if they had to part. Argument was presented under reference to *Sen v. Netherlands* (2003) 36 EHHR 7. The IAT held that there was nothing more than the usual bonds of dependency and affection between mother and daughters.

In looking at proportionality it was important to consider the family unit as a whole under reference to *AC* [2003] EWHC 389 Admin, Jack J. That was a section 65, 1999 Act appeal.

NS was a section 84(1)(g) 2002 Act case. However the approach remained the same as in *AC*. The real question was whether the removal breached the Article 8 rights of the mother on removal and not the Article 8 rights of the daughters. Regard could be had to the distress on her of removal from her daughters. However the rights of the daughters themselves were not a matter which had to be taken in to account on appeal.

That approach was endorsed by the Court of Appeal in *Betts* [2005] EWCA Civ 828. In some cases though eg *CA* [2004] EWCA Civ 165, it would not be possible to separate out the interests of the child from that of the mother- there a very young child. This was not such a case.

Shrimpton [2005] EWCA Civ 1381 was a case where an appeal against the allowance of a Home Office appeal by the IAT was made.

Shrimpton had a record for very serious drugs offences and was recommended by the sentencing judge to deportation to South Africa. He got married when he knew he could be deported. On the other hand his wife has ME and could experience severe difficulties if sent to South Africa. He had also rehabilitated himself. So there were factors on both sides. Whilst expressing reservations as to the merits, the Court allowed the appeal and remitted the matter back to the tribunal to reconsider whether this was, as the adjudicator had found, an exceptional case.

MG (Assessing interference with private life) Serbia and Montenegro [2005] UKIAT 00113, reported, again reminds us that compassion is not enough for an exceptional case to be made out.

The appellant had significant visual disabilities caused as a result of an exploding hand grenade when he was aged 10. He had lost three fingers. He had been in the UK for around 4½ years. He had studied and gained qualifications and made a personal life here. He had partial sight restored in Kosovo and came here 10 years after the injury.

The adjudicator held the case was exceptional. Not so the IAT. There was provision under the Rules for a right to remain but this had not been considered by the adjudicator. The appeal had dealt only with Article 8. Article 8 was not engaged.

Sympathy for and admiration of an individual do not as such enhance or otherwise affect rights under Article 8 private life. It is an error of law for a fact finder not to address the second question of the five questions posed by Lord Bingham in *Razgar* ie the interference was not of such gravity as to potentially engage Article 8, much less render it disproportionate.

Senanayake [2005] EWCA Civ 1530 was a family reunion case. Rule 317 provided that a child under 18 years and living outside the UK might be allowed to join parents settled here if there were “exceptional compassionate circumstances.” The ECO and adjudicator held that the test was not made out. The family reunion policy document could be read to be more generous than the Rule. The appellant argued that she should have been given the benefit of this. The Court held that the policy added nothing material to her case.

Of more help to an appellant is the next case-*GS (Article 8-public interest not a fixity) Serbia and Montenegro* [2005] UKIAT 00121.

This was a Home Office appeal. The argument was that the adjudicator had been wrong to hold that the case was truly exceptional.

The adjudicator had held this to be so on the basis that the appellant had been in the UK for 5 years, had made positive contributions since being here and that he had no family or other ties if returned to Kosovo. He had arrived as an unaccompanied minor and had made an asylum claim. There had been delay of nearly 2 years by the Home Office in determining the asylum application. Delay had not been the decisive factor as that would have been an error of law following *MB(Huang –proportionality-Bulletins) (Croatia)* –see later in this paper. He had stayed here lawfully. His reasons for coming here were genuine. He may not, as a 15 year old, have understood he had no right to remain. He had developed ties to foster parents.

One might think that on one view these facts were not “truly exceptional”. However following *CW (Jamaica)* and in turn *Razgar* and *CA* , the issue was whether the decision was one which was reasonably open to the adjudicator. On these facts it was.

Moreover contrary to the Home Office submission, the public interest in immigration control under the Rules was not a fixity and fixed weight did not have to be accorded to it under the test in *Huang*. Consideration of appeals on a case by case basis as envisaged by *Razgar* would be meaningless if, irrespective of the facts of a particular case, the interests of the state were always a “trump card” because of a fixed weight attributed to them.

The proposition that the public interest had fixed weight was also rejected by the Court of Appeal in *Akaeke* [2005] EWCA Civ 947. There unreasonable delay by the Home Office was a matter which went to the proportionality of removal under *Huang*. It was not necessary to show specific prejudice by delay. The delay had been described by Mr Freeman as a “public disgrace.” *Akaeke* also contains a note of caution. At para. 30, after a review of a series of cases which emphasised the need for the Courts to not be quick to interfere in specialist tribunal decision making, Carnwath LJ giving the judgment of the Court, observed that on questions of proportionality, and within the *Huang* parameters, the tribunal was in a far better position to assess proportionality than the Court.

Delay and Article 8 was also considered in *Strbac and another* [2005] EWCA Civ 848, the well known delay case of *Shala* was considered further and confined to the facts of that case. Unreasonable delay in processing an asylum claim where, if that claim had been processed earlier would have been likely to have succeeded, could not as a matter of principle generate an Article 8 family life right to remain. Delay was a relevant but not a decisive factor in the determination of the proportionality of removal. The whole facts were not exceptional in the *Huang* sense.

What has been the Scottish response to *Huang*? In *CW (Jamaica) (Deportation-Article 8)* [2005] UKIAT 00110 reported, an appeal from a Scottish adjudicator hearing, Mungo Bovey QC appeared before the IAT, a legal panel which included the President.

CW got indefinite leave to remain after his marriage to a UK citizen in 1995. He later committed rape, and was jailed. There were 2 children of the marriage. About 4 years later he formed a new subsisting relationship. He kept in touch with his children and developed links to the family of his new

girlfriend. In March 2003 he was convicted of Class A drugs offences and given 4 months and a recommendation for deportation to Jamaica. The IAT remitted the case to another adjudicator for reconsideration of proportionality on the facts.

Mr Bovey had argued that *Huang* was persuasive only in Scotland and should not be followed. He also argued that proportionality was a matter of law for the IAT to determine. Rationality was traditionally a matter of law so why not proportionality?

However the IAT declined to adopt a different approach because the case was Scottish. *Huang* was followed. It also rejected the proposition that all decisions on proportionality were matters of law upon which the error of law jurisdiction could be founded. It did accept the argument had force though and had some support on one reading of the Strasbourg caselaw, including *Boultif*. However according to the IAT, in essence the decision of an adjudicator on proportionality was a matter of assessment of facts and the weight to be given to them. If that assessment does not involve an error of law according to the modified *Wednesbury* standards of *Huang*, there is no breach of section 6 of the Human Rights Act.

The IAT made some further observations on proportionality and *Huang*, particularly in the context of deportation. Along the way it again repeated what had been said in *MB(Croatia)* about the meaning of *Huang*. Similar comments were made in *CM (Jamaica) (Deportation-Article 8)* [2005] UKIAT 00103, reported. Again a panel presided over by the President.

In particular it would only be necessary to address Article 8 if the case did not fall under the Immigration Rules—here Rule 364, deportation. Again in general terms, the Rules would be usually exhaustive of the Article 8 issues.

The IAT noted the limited differences between Article 8 and Rule 364 were considered at paras. 34-38. In some ways the Rule is broader than Article 8. For example the Rule looks at the impact on the family of the deportee, whereas the focus of Article 8 is on the family life of the deportee. The Rule has compassionate circumstances built in. Under Article 8 these only kick in if one can show family or private life.

The *Huang* approach applies to the decision under Article 8. It does not apply to the decision under the Rules. Even so it would remain the case that it would be difficult to see how a case which failed under the Rules would succeed under Article 8.

There has been no real discussion of Article 8 in the Court of Session in recent times. The *Huang* debate has passed us by at least in that jurisdiction. Challenges to *Huang* “exceptionality” have featured in a number of appeals to the Inner House. In *Saber*, an LSA Iraqi case, an attack was mounted but the Home Office conceded the appeal in January 2006 on the back of the *Rashid* decision in the Court of Appeal. The arguments were never tested.

The advent of statutory review on the papers means that, in general, it is difficult to know what arguments are being presented in petitions. This is compounded by the fact that with almost no exception, the judges do not publish decisions on the Scottish Court Website.

However even under the old system of judicial review, few challenges were brought. Those that were brought-as far as I am aware-all failed, with the exception of a case from 1998! That was before Article 8 was part of our law.

They were determined in light of the law as explained in the earlier Court of Appeal decision of *Mahmood* [2001] Imm AR 229. So in *Aslam*, 9 March 2004, Lord McEwan rejected a challenge in relation to the return of a man to Pakistan who had acquired a British wife and who already had children. The case did not fall under DP3/96. The difficulties for foreign wives in Pakistan were prayed in aid in support of the Article 8 case. Lord McEwan followed *Mahmood*.

Lord McEwan was also concerned that some of the material now prayed in aid had not been before the adjudicator and could not now be relied on at judicial review stage. *Boultif* fell to be distinguished. It was not an immigration case. It was a case of deportation of a man who until the deportation order had not been the subject of precarious immigration status. The test for a breach of Article 8 was lower.

Contrast this with the older and pre-Article 8 case of *Salah Abdadou v. Home Secretary*, 1998 SC 504.

There Lord Eassie did have regard to material and considerations not before the original decision-maker, there in a case where the return of the petitioner to Algeria would have adversely affected his Scottish wife, since at that time Foreign Office advice was that no British citizen should travel to Algeria.

Lord Eassie also considered it to be disproportionate to require the Algerian husband to return to Algeria just to make a marriage application to join his wife in Scotland, an application which would almost certainly be granted. That was because at the relevant time there was no British consular presence in Algeria and the petitioner would have had to apply from Tunisia.

It has been suggested (by for example Aidan O'Neill QC) that *Abdadou* gives a more restrictive approach to the margin open to the Home Secretary than the trend of Strasbourg cases might, on one view, suggest. However Scottish courts are not bound by what Strasbourg does as section 2 of the Human Rights Act only obliges them to “take account” of Strasbourg caselaw.

Paradoxically Mrs Abdadou and her husband received greater protection under old style *Wednesbury* reasonableness than the supposedly stricter Article 8 proportionality that was applied in *Aslam*.

Abdadou only receives brief comment in *Aslam*. Lord McEwan expressed doubts as to the correctness of the approach taken by Lord Eassie. *Abdadou* has never been considered again as far as I am aware. Perhaps it needs to be.

HEALTH CASES AND ARTICLE 8

There have been a few cases over the last year. Again the outlook is not positive for those seeking to rely on health reasons to remain in the UK.

Suicide on the point of removal has been an issue that has now been considered, at least in England and Wales.

In *J* [2005] EWCA Civ 629 the Court of Appeal considered the question of suicide risk where the risk was said to crystallize at the point of return. The issue of a breach of Article 3 and 8 arose. The Court held that the IAT were entitled to infer that the Home Secretary would take all reasonable steps under section 6 of the Human Rights Act and provide appropriately qualified escorts. There was also family support in the home state. There was access to medical treatment in the home state. The subjective fear of ill treatment on

return was not objectively well founded. As always the risk of suicide had to be real.

J was applied in *DE (Suicide-psychiatric treatment-J applied) Turkey* [2005] UKAIT 00148, reported. There was no Article 3 issue and Article 8 could not assist as although the case was sad, it was not “truly exceptional” in terms of *Huang*.

Health also arose in *ZT* [2005] EWCA Civ 1421. This was an AIDS case decided post *N v. Home Secretary* [2005] 2 AC 296. The home state was Zimbabwe, in *N* it had been Uganda. The argument here was that the grounds of appeal by the Home Secretary disclosed no error of law. The adjudicator had allowed the appeal (having sat before *N* was decided) and the Home Secretary appealed to the IAT. It allowed the appeal. *ZT* then appealed to the Court of Appeal. She argued that the IAT had no jurisdiction to disturb the findings of the adjudicator and in any event had not correctly applied Articles 3 and 8.

The jurisdictional point failed. On a fair reading of the grounds a point of law could be found. On the Article 3 issue it was argued for the appellant that this was an exceptional case of the kind contemplated in *N*. The Court doubted if questions of degree in the assessment of what was exceptional amounted to errors of law caught by an appeal on a point of law.

It was also argued that unlike Uganda, health care in Zimbabwe was poor due to the politically motivated and discriminatory practices of the Mugabe regime. *N* could therefore be distinguished as the Ugandan government was making genuine efforts to provide health care on a fair basis. On the other hand in Zimbabwe poor health care was due to the clear fault of the government. Under reference to *Soering v. UK* (1989) 11 EHRR 439 it was argued that an independent basis of Article 3 liability could be found where it

could be shown that the lack of health care could be attributed to the fault of the home state. There the fault of the American authorities caused the death row phenomenon.

That argument was also rejected. *N* laid down the law in health cases. *Soering* was a very different case.

That being said the Court observed that the situation in Zimbabwe had got a lot worse since the IAT appeal. If a case could be made out of humiliation on return, ostracism, deprivation of basic rights and combined with the burden of being HIV positive that could potentially engage Article 3 as being the kind of case contemplated by *N*.

In relation to Article 8, ZT had arrived in the UK and had only become aware of her condition once in the UK and had been given temporary leave to remain as a visitor. The appellant in *N* arrived in the UK ill although she was unaware of her HIV status.

It was argued that removal would be disproportionate. Here the Immigration Rules in force at the time of arrival, it was argued, suggested that ZT should have been allowed to remain. The case was exceptional.

However the Court held that the Article 8 point also failed. The facts did not disclose an exceptional case such that removal would be disproportionate in *Huang* terms.

There is pending before the Inner House one AIDS case that I am aware of. The prospects must be less than good.

Apart from that there has, as far as I am aware, only been one Article 8 health case in the Scottish courts in the last year. Argued towards the end of December 2004, the Opinion was not issued until December 2005. That was the case of *Hasani* [2005] CSOH 168.

There an asylum seeker claimed that to return him to Macedonia would violate Article 8. He was diagnosed as depressed with thoughts of self harm. The risk of actual self harm would increase if returned. His appeal to an adjudicator was refused on the basis that medical treatment was available in Macedonia. He contended the evidence did not show that treatment was available. He sought judicial review of the refusal of leave to appeal to the Immigration Appeal Tribunal.

The petition was refused. The Article 8 case had not been focussed in the terms relied on before either the Home Secretary or the adjudicator and the relatively limited medical material before the adjudicator it was difficult to criticise the decision. The situation in Macedonia had improved since the medical report was written. There was, in the absence of any contrary material, sufficient to show that mental health services were available in Macedonia. As a whole the case did not approach the high standard set out in the House of Lords in *Razgar* for Article 8 to be engaged.